Date and Time: Monday, October 23, 2023 11:58:00 AM CST

Job Number: 208661777

Documents (100)

1. [United States v. H&R Block, Inc., 833 F. Supp. 2d 36]

Client/Matter: -None-

Search Terms: "antitrust law"

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

2. [Johnson Bros. Liquor Co. v. Bacardi U.S.A., Inc., 830 F. Supp. 2d 697]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

3. [State v. MaineHealth, 2011 ME 115]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

4. [Church & Dwight Co. v. Mayer Labs., Inc., 2011 U.S. Dist. LEXIS 133540]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

5. [Church & Dwight Co. v. Mayer Labs., Inc., 2011 U.S. Dist. LEXIS 133762]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

6. *Am. Airlines, Inc. v. Travelport Ltd., 2011 U.S. Dist. LEXIS 166373*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

7. *In re Wellbutrin SR Antitrust Litig., 2011 U.S. Dist. LEXIS 158833*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

8. *NAR Apts. LLC v Ippolito, 2011 N.Y. Misc. LEXIS 5575*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

9. *Apple iPod iTunes Antitrust Litig., 2011 U.S. Dist. LEXIS 134836*

Client/Matter: -None-

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Search Type: Natural Language

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

10. *Procongps, Inc. v. Star Sensor LLC, 2011 U.S. Dist. LEXIS 137366*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

11. *Garon v. eBay, Inc., 2011 U.S. Dist. LEXIS 148621*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

12. *Global Truss America LLC v. GLP German Light Prods., 2011 U.S. Dist. LEXIS 168714*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

13. *In re Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

14. *Kyne v. Ritz-Carlton Hotel Co., L.L.C., 835 F. Supp. 2d 914*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

15. *Lynn v. Friedenthal, 2011 U.S. Dist. LEXIS 150811*

Client/Matter: -None-

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16. Lopez v. GMAC Mortg., 2011 U.S. Dist. LEXIS 139436

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

17. New York v. Intel Corp., 2011 U.S. Dist. LEXIS 140329

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

18. New York v. Intel Corp., 2011 U.S. Dist. LEXIS 141186

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

19. Allen v. Dairy Farmers of Am., Inc., 279 F.R.D. 257

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

20. FTC v. Phoebe Putney Health Sys., 663 F.3d 1369

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

21. In re Chocolate Confectionary Antitrust Litig., 2011 U.S. Dist. LEXIS 151516

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

22. *Bridgeport Harbour Place I, LLC v. Ganim, 303 Conn. 205*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

23. *FTC v. Church & Dwight Co., 665 F.3d 1312*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

24. *MYD Marine Distrib. v. Int'l Paint Ltd., 76 So. 3d 42*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

25. *Aguadilla Paint Ctr., Inc. v. Standard Oil, 2011 TSPR 194*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

26. *In re Int'l Air Transp. Surcharge Antitrust Litig., 2011 U.S. Dist. LEXIS 148547*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

27. In re Processed Egg Prods. Antitrust Litig., 836 F. Supp. 2d 290

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

28. Sullivan v. DB Invs., Inc., 667 F.3d 273

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

29. Emery v. Wachovia Bank, N.A., 2011 U.S. Dist. LEXIS 161352

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

30. Havens v. Mobex Network Servs., LLC, 2011 U.S. Dist. LEXIS 148654

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

31. Metro West Ambulance v. Clark County, 2011 U.S. Dist. LEXIS 147590

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

32. Layne Christensen Co. v. Bro-Tech Corp., 836 F. Supp. 2d 1203

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

33. In re Cox Enters., 2011 U.S. Dist. LEXIS 149656

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

34. BanxCorp v. Bankrate Inc., 2011 U.S. Dist. LEXIS 149912

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

35. Deborah Heart & Lung Ctr. v. Penn Presbypyterian Med. Ctr., 2011 U.S. Dist. LEXIS 149664

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

36. Smith v. Ebay Corp., 2012 U.S. Dist. LEXIS 1211

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

37. Johns v. Visa U.S.A., Inc. (In re Credit/Debit Card Tying Cases), 2012 Cal. App. Unpub. LEXIS 147

Client/Matter: -None-

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Search Type: Natural Language

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

38. Marchese v. Cablevision Sys. Corp., 2012 U.S. Dist. LEXIS 2799

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

39. Universal Grading Serv. v. eBay, Inc., 2012 U.S. Dist. LEXIS 2325

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

40. It's My Party, Inc. v. Live Nation, Inc., 2012 U.S. Dist. LEXIS 2728

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

41. Jeske v. Maxim Healthcare Servs., 2012 U.S. Dist. LEXIS 2963

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

42. Editorial Caballero, S.A. de C.V. v. Playboy Enters., 359 S.W.3d 318

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

43. *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

44. *Elec. Contrs., Inc. v. Dep't of Educ., 303 Conn. 402*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

45. *Altman v. PNC Mortg., 850 F. Supp. 2d 1057*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

46. *Cohlmia v. St. John Med. Ctr., 906 F. Supp. 2d 1188*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

47. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 279 F.R.D. 90*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

48. Xilinx, Inc. v. Intellectual Ventures I LLC, 2012 U.S. Dist. LEXIS 9500

Client/Matter: -None-

Search Terms: "antitrust law"

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

49. McCoy v. Gamesa Tech. Corp., 2012 U.S. Dist. LEXIS 9431

Client/Matter: -None-

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Search Type: Natural Language

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

50. Cellco P'ship v. Hope, 2012 U.S. Dist. LEXIS 10621

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

51. In re Ciprofloxin Hydrochloride Antitrust Litig., 2012 U.S. Dist. LEXIS 11600

Client/Matter: -None-

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

52. Lample v. Cal. Physicians' Serv., 2012 Cal. App. Unpub. LEXIS 721

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

53. Retail Imaging Mgmt. Group, LLC v. Fujifilm N. Am. Corp., 841 F. Supp. 2d 1189

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

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

54. Schatz v. Cellco P'ship, 842 F. Supp. 2d 594

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

55. Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.), 667 F.3d 204

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

56. In re Delta/AirTran Baggage Fee Antitrust Litig., 846 F. Supp. 2d 1335

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

57. In re Photochromic Lens Antitrust Litig., 279 F.R.D. 620

Client/Matter: -None-

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Search Type: Natural Language

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58. [Stroh Ranch Dev., LLC v. Cherry Creek S. Metro. Dist. No. 2, 2012 U.S. Dist. LEXIS 14229]

Client/Matter: -None-

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

59. [GMA Cover Corp. v. Saab Barracuda LLC, 2012 U.S. Dist. LEXIS 25543]

Client/Matter: -None-

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

60. [Ross v. Bank of Am., N.A. (USA) (In re Currency Conversion Fee Antitrust Litig.), 2012 U.S. Dist. LEXIS 19760]

Client/Matter: -None-

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

61. [Free Freehand Corp. v. Adobe Sys., 852 F. Supp. 2d 1171]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

62. [Coffee.org, Inc v. Green Mountain Coffee Roasters, Inc., 2012 U.S. Dist. LEXIS 18577]

Client/Matter: -None-

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63. [Gold Refinery, LLC v. Aloha Island Gold, LLC, 2012 U.S. Dist. LEXIS 18898]

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64. [In re TFT-LCD (Flat Panel) Antitrust Litig., 2012 U.S. Dist. LEXIS 21696]

Client/Matter: -None-

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

65. [MGA Entm't, Inc. v. Mattel, Inc., 2012 U.S. Dist. LEXIS 22055]

Client/Matter: -None-

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

66. [VIBO Corp. v. Conway, 669 F.3d 675]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

67. [Dumas Towing, LLC v. DeArmond, 2012 U.S. Dist. LEXIS 24012]

Client/Matter: -None-

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

68. [Guinn v. Mount Carmel Health, 2012 U.S. Dist. LEXIS 24353]

Client/Matter: -None-

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

69. Am. Airlines, Inc. v. Travelport Ltd., 2012 U.S. Dist. LEXIS 191140

Client/Matter: -None-

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Search Type: Natural Language

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

70. Church & Dwight Co. v. Mayer Labs., Inc., 868 F. Supp. 2d 876

Client/Matter: -None-

Search Terms: "antitrust law"

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

71. Shirokov v. Dunlap, Grubb & Weaver PLLC, 2012 U.S. Dist. LEXIS 42787

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

72. White v. Fannie Mae, 2012 U.S. Dist. LEXIS 200102

Client/Matter: -None-

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Search Type: Natural Language

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

73. Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

74. [Select Comfort Corp. v. Sleep Better Store, LLC, 838 F. Supp. 2d 889]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

75. [Asahi Kasei Pharma Corp. v. CoTherix, Inc., 204 Cal. App. 4th 1]

Client/Matter: -None-

Search Terms: "antitrust law"

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

76. [Diaz Aviation Corp. v. P.R. Ports Auth., 2012 U.S. Dist. LEXIS 29625]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

77. [Leonard v. Abbott Labs., Inc., 2012 U.S. Dist. LEXIS 30608]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

78. [Trueposition, Inc. v. LM Ericsson Tel. Co. (Telefonaktiebolaget LM Ericsson), 2012 U.S. Dist. LEXIS 29294]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

79. *In re Del Monte Fresh Pineapple Cases, 2012 Cal. App. Unpub. LEXIS 1777*

Client/Matter: -None-

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

80. *Hightower v. Aramark Corp., 2012 U.S. Dist. LEXIS 31597*

Client/Matter: -None-

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

81. *C-E Minerals, Inc. v. Carbo Ceramics, Inc., 2012 U.S. Dist. LEXIS 198653*

Client/Matter: -None-

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Search Type: Natural Language

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

82. *QSGI, Inc. v. IBM Global Fin., 2012 U.S. Dist. LEXIS 49601*

Client/Matter: -None-

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Search Type: Natural Language

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

83. *Regas Christou v. Beatport, LLC, 849 F. Supp. 2d 1055*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

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84. [Bridgeforth v. Schenectady County Cmty. College, 2012 U.S. Dist. LEXIS 35087]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

85. [Nukote of Ill., Inc. v. Clover Holdings, Inc., 2012 U.S. Dist. LEXIS 201042]

Client/Matter: -None-

Search Terms: "antitrust law"

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

86. [Fiala v. Wasco Sanitary Dist., 2012 U.S. Dist. LEXIS 39534]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
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87. [In re Processed Egg Prods. Antitrust Litig., 851 F. Supp. 2d 867]

Client/Matter: -None-

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

88. [Conn. Ironworkers Emplrs. Assoc. v. New Eng. Reg'l Council of Carpenters, 2012 U.S. Dist. LEXIS 37523]

Client/Matter: -None-

Search Terms: "antitrust law"

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

89. [Cason-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603]

Client/Matter: -None-

Search Terms: "antitrust law"

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

90. *In re Live Concert Antitrust Litig., 863 F. Supp. 2d 966*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

91. *Drivecam, Inc. v. Smartdrive Sys., 2012 U.S. Dist. LEXIS 201198*

Client/Matter: -None-

Search Terms: "antitrust law"

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

92. *McNeary-Calloway v. JP Morgan Chase Bank, N.A., 863 F. Supp. 2d 928*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

93. *Global Reins. Corp.-U.S. Branch v Equitas Ltd., 18 N.Y.3d 722*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

94. *In re Southeastern Milk Antitrust Litig., 2012 U.S. Dist. LEXIS 44221*

Client/Matter: -None-

Search Terms: "antitrust law"

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

95. [Rubloff Dev. Group, Inc. v. SuperValu, Inc., 863 F. Supp. 2d 732]

Client/Matter: -None-

Search Terms: "antitrust law"

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

96. [SanDisk Corp. v. Kingston Tech. Co., 863 F. Supp. 2d 815]

Client/Matter: -None-

Search Terms: "antitrust law"

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

97. [JetAway Aviation, LLC v. Bd. of County Comm'rs of Montrose, 2012 U.S. Dist. LEXIS 42377]

Client/Matter: -None-

Search Terms: "antitrust law"

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

98. [Brantley v. NBC Universal, Inc., 675 F.3d 1192]

Client/Matter: -None-

Search Terms: "antitrust law"

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

99. [Broad. Music, Inc. v. Davis, 2012 U.S. Dist. LEXIS 200002]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

100. *City of Pontiac v. Blue Cross Blue Shield, 2012 U.S. Dist. LEXIS 45082*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

United States v. H&R Block, Inc.

United States District Court for the District of Columbia

November 10, 2011, Decided; November 10, 2011, Filed

Civil Action No. 11-00948 (BAH)

Reporter

833 F. Supp. 2d 36 *; 2011 U.S. Dist. LEXIS 130219 **; 2011-2 Trade Cas. (CCH) P77,678; 2011 WL 5438955

UNITED STATES OF AMERICA, Plaintiff, v. H&R BLOCK, INC., et al., Defendants.

Prior History: *United States v. H&R Block, Inc., 831 F. Supp. 2d 27, 2011 U.S. Dist. LEXIS 147179 (D.D.C., Sept. 6, 2011)*

Core Terms

TaxACT, products, merger, prices, switching, effects, diversion, percent, tax preparation, customers, offerings, relevant market, competitors, redacted, consumers, simulator, pen-and-paper, merging, market share, defendants', preparation, firms, increased price, unilateral, anticompetitive, documents, marketing, Guidelines, coordinated, software

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN1[] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, prohibits a corporation from acquiring the whole or any part of the assets of another corporation engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. The United States is authorized by Section 15 of the Clayton Act, *15 U.S.C.S. § 25*, to seek an injunction to block a pending acquisition. The United States has the ultimate burden of proving a Section 7 violation by a preponderance of the evidence.

Antitrust & Trade Law > Clayton Act > Claims

HN2[] **Clayton Act, Claims**

To establish a violation of Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, the plaintiff must show that a pending acquisition is reasonably likely to cause anticompetitive effects. Congress used the words "may be substantially to lessen competition" to indicate that its concern was with probabilities, not certainties. Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future.

Antitrust & Trade Law > Clayton Act > Claims

HN3[] Clayton Act, Claims

The basic outline of a horizontal acquisition case under Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. To establish this presumption, the government must show that the merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market. Once the government has established this presumption, the burden shifts to the defendants to rebut the presumption by showing that the market-share statistics give an inaccurate account of the merger's probable effects on competition in the relevant market. If the defendant successfully rebuts the presumption of illegality, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times. Ultimately, the Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN4[] Clayton Act, Claims

In an antitrust case under Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, merger analysis begins with defining the relevant product market. Defining the relevant market is critical in an antitrust case because the legality of the proposed merger in question almost always depends upon the market power of the parties involved. Indeed, the relevant market definition is often the key to the ultimate resolution of this type of case because of the relative implications of market power.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN5[] Relevant Market, Geographic Market Definition

In an antitrust case, a relevant market has two components: (1) the relevant product market and (2) the relevant geographic market. The relevant geographic market identifies the geographic area in which the defendants compete in marketing their products or services.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN6[] Relevant Market, Product Market Definition

A "relevant product market" is a term of art in antitrust analysis. The Supreme Court has set forth the general rule for defining a relevant product market: The outer boundaries of a product market are determined by the reasonable interchangeability of use by consumers or the cross-elasticity of demand between the product itself and substitutes for it. In other words, courts look at whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN7[] Relevant Market, Product Market Definition

For purposes of antitrust cases, a broad, overall market may contain smaller markets which themselves constitute product markets for antitrust purposes. The mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes. Traditionally, courts have held that the boundaries of a relevant product market within a broader market may be determined by examining such practical indicia as industry or public recognition of the relevant market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. These "practical indicia" of market boundaries may be viewed as evidentiary proxies for proof of substitutability and cross-elasticities of supply and demand.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN8[] Relevant Market, Product Market Definition

In antitrust cases, an analytical method often used by courts to define a relevant market is to ask hypothetically whether it would be profitable to have a monopoly over a given set of substitutable products. If so, those products may constitute a relevant market. This approach – sometimes called the "hypothetical monopolist test" – is endorsed by the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission. Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines (2010), § 4.1.1. The Merger Guidelines are not binding upon courts, but courts in antitrust cases often look to them as persuasive authority. In the merger context, this inquiry boils down to whether a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products likely would impose at least a small but significant and non-transitory increase in price (SSNIP) on at least one product in the market, including at least one product sold by one of the merging firms. The SSNIP is typically assumed to be five percent or more.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN9[] Relevant Market, Product Market Definition

In antitrust cases, when determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN10[] Relevant Market, Product Market Definition

In antitrust cases, when determining the relevant product market, evidence of industry or public recognition of the submarket as a separate economic unit matters because it is assumed that economic actors usually have accurate perceptions of economic realities.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN11[] **Relevant Market, Product Market Definition**

In antitrust cases, when determining the relevant product market, a product's peculiar characteristics and uses and distinct prices may distinguish a relevant market.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN12[] **Relevant Market, Product Market Definition**

Distinct pricing is a consideration in determining the relevant product market in an antitrust case.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN13[] **Relevant Market, Product Market Definition**

Courts in antitrust cases frequently exclude "self-supply" substitutes from relevant product markets.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN14[] **Relevant Market, Product Market Definition**

For purposes of antitrust cases, a "critical loss" analysis attempts to calculate the largest amount of sales that a monopolist can lose before a price increase becomes unprofitable.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Mergers & Acquisitions Law > Merger Guidelines

HN15[] **Relevant Market, Product Market Definition**

For purposes of antitrust cases, the critical loss analysis is specifically endorsed by the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission as a method for implementing the small but significant and non-transitory increase in price (SSNIP) test and has been accepted by courts as a standard methodology.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN16[] **Clayton Act, Claims**

In an antitrust case, after the relevant market has been defined, the court must next consider the likely effects of the proposed acquisition on competition within that market. The government must make out its prima facie case by showing that the merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market. Such a showing establishes a presumption that the merger will substantially lessen competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN17[] **Regulated Practices, Market Definition**

For purposes of antitrust cases, market concentration, or the lack thereof, is often measured by the Herfindahl-Hirschmann Index (HHI). The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. For example, a market with ten firms having market shares of 20%, 17%, 13%, 12%, 10%, 10%, 8%, 5%, 3% and 2% has an HHI of 1304 (202 + 172 + 132 + 122 + 102 + 102 + 82 + 52 +32 +22). Sufficiently large HHI figures establish the government's prima facie case that a merger is anticompetitive. Under the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission, markets with an HHI above 2500 are considered highly concentrated and mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines (2010), § 5.3.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN18[] **Market Definition, Relevant Market**

For purposes of antitrust cases, a reliable, reasonable, close approximation of relevant market share data is sufficient.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > General Overview

HN19[] **Clayton Act, Claims**

Upon the showing of a prima facie case that a merger violates Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, the burden shifts to the defendants to show that traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition in these markets or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects. The courts have not established a clear standard that the merging parties must meet in order to rebut a prima facie case, other than to advise that the more compelling the prima facie case, the more evidence the defendant must present to rebut the presumption successfully. Even in cases where the government has made a strong prima facie showing, imposing a heavy burden of production on a defendant would be particularly anomalous where it is easy to establish a prima facie case. The government can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics. Thus, ultimately, the Supreme Court has adopted a totality-of-the-circumstances approach, weighing a variety of factors to determine the effects of particular transactions on competition.

Antitrust & Trade Law > Clayton Act > Defenses

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN20[] **Clayton Act, Defenses**

In antitrust cases, courts have held that likely entry or expansion by other competitors can counteract anticompetitive effects that would otherwise be expected from a merger. Entry or expansion must be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern. Determining whether there is ease of entry hinges upon an analysis of barriers to new firms entering the market or existing firms expanding into new regions of the market. Where the government has established its prima facie case, the defendants carry the burden to show that ease of expansion is sufficient to fill the competitive void that will result if defendants are permitted to purchase their acquisition target.

Antitrust & Trade Law > Clayton Act > Defenses

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN21[] **Clayton Act, Defenses**

Merger law rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels. Whether a merger will make coordinated interaction more likely depends on whether market conditions, on the whole, are conducive to reaching terms of coordination and detecting and punishing deviations from those terms. Where the government has established its prima facie case, the burden is on the defendants to produce evidence of structural market barriers to collusion specific to this industry that would defeat the ordinary presumption of collusion that attaches to a merger in a highly concentrated market.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN22[] **Antitrust Statutes, Clayton Act**

Where a merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market, that factor is certainly an important consideration when analyzing possible anti-competitive effects.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN23[] **Antitrust Statutes, Clayton Act**

A merger is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms. The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral effects in a differentiated product market are likely to be profitable under the following conditions: (1) the products must be differentiated; (2) the products controlled by the merging firms must be close substitutes, i.e., a substantial number of the customers of one firm would turn to the other in response to a price increase; (3) other products must be sufficiently different from the products offered by the merging firms that a merger would make a small but significant and non-transitory price increase profitable for the merging firm; and (4) repositioning must be unlikely.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > General Overview

HN24[] **Antitrust Statutes, Clayton Act**

One of the key benefits of a merger to the economy is its potential to generate efficiencies. Merger-generated efficiencies can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. Courts have recognized that a showing of sufficient efficiencies may rebut the government's showing of likely anticompetitive effects. High market concentration levels require proof of extraordinary efficiencies, however, and courts generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case.

Antitrust & Trade Law > Clayton Act > Defenses

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN25[] **Clayton Act, Defenses**

In an antitrust case, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties to a merger in order to ensure that those "efficiencies" represent more than mere speculation and promises about post-merger behavior. Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Efficiencies are inherently difficult to verify and quantify and it is incumbent upon the merging firms to substantiate efficiency claims so that it is possible to verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific. In other words, a cognizable efficiency claim must represent a type of cost saving that could not be achieved without the merger and the estimate of the predicted saving must be reasonably verifiable by an independent party.

Antitrust & Trade Law > Clayton Act > Defenses

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN26[] **Clayton Act, Defenses**

If a company could achieve certain cost savings without any merger at all, then those stand-alone cost savings cannot be credited as merger-specific efficiencies. In an antitrust case, the defendants must show that their efficiencies cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor.

Antitrust & Trade Law > Clayton Act > Defenses

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN27[] **Clayton Act, Defenses**

For purposes of presenting an efficiencies defense in an antitrust case, while reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in a party's cost estimates renders them not cognizable by the court. If this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, because management would be able to present large efficiencies based on its own judgment and the court would be hard pressed to find otherwise. The difficulty in substantiating efficiency claims in a verifiable way is one reason why courts generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case.

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For H&R BLOCK, INC., Defendant: J. Robert Robertson, LEAD ATTORNEY, Corey William Roush, Logan Michael Breed, HOGAN LOVELLS US LLP, Washington, DC; Eric J. Stock, PRO HAC VICE, HOGAN LOVELLS US LLP, New York, NY.

For 2SS HOLDINGS, INC., TA IX L.P., Defendants: J. Robert Robertson, LEAD ATTORNEY, Benjamin F. Holt, Corey William Roush, Logan Michael Breed, HOGAN LOVELLS US LLP, Washington, DC; Eric J. Stock, PRO HAC VICE, HOGAN LOVELLS US LLP, New York, NY.

Judges: BERYL A. HOWELL, United States District Judge.

Opinion by: BERYL A. HOWELL

Opinion

[*42] **MEMORANDUM OPINION**[1]

[1] The Court provided this Memorandum Opinion to the parties in final form on October 31, 2011, but public release was delayed to ensure that no confidential business information that had been submitted under **[**2]** seal was released. Based on input from the parties, confidential business information has been redacted from the opinion, with such redactions reflected by the insertion of the text "{redacted}." In some instances, redacted confidential business information has been replaced by more general language that reflects the same underlying concepts without revealing the confidential business information. Such substitutions are indicated by braces surrounding the substituted text.

Last year, approximately 140 million Americans filed tax returns with the Internal Revenue Service ("IRS"). Paying taxes is a fundamental civic duty in our democracy. Taxes pay for the government to carry out its constitutionally mandated functions and enable the government to give force to the laws and policies adopted by the people of the United States through their elected representatives. Despite the necessity of taxes to fund our government and to sustain services that many citizens depend upon, the task of preparing a tax return brings joy to the hearts of few. Many find it to be a complex and tedious exercise. Fortunately, various businesses offer different products and services designed to assist taxpayers **[**3]** with preparing their returns. These tax preparation businesses principally include accountants, retail tax stores, and digital tax software providers – all of which provide important services to the American taxpayer. In this case, the United States, through the Antitrust Division of the Department of Justice, seeks to enjoin a proposed merger between two companies that offer tax software products – H&R Block and TaxACT – on the grounds that the merger violates the antitrust laws and will lead to an anticompetitive duopoly in which the only substantial providers of digital tax software in the marketplace would be H&R Block and Intuit, the maker of the popular "TurboTax" software program. After carefully considering all of the evidence, including documents and factual and expert testimony, the applicable law, and the arguments before the Court, the Court will enjoin the proposed merger for the reasons explained in detail below.

* * *

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[*43]

I. [**4] BACKGROUND

A. Overview

The United States, through the Antitrust Division of the Department of Justice (the "DOJ," the "government," or the "plaintiff"), filed this action on May 23, 2011. The DOJ seeks to enjoin Defendant H&R Block, Inc. from acquiring Defendant 2SS Holdings, Inc. ("TaxACT"), which sells digital do-it-yourself tax preparation products marketed under the brand name TaxACT. Compl. ¶ 10. H&R Block ("HRB") is a Missouri corporation headquartered in Kansas City, Missouri. *Id.* ¶ 9. 2SS Holdings, or TaxACT, is a Delaware corporation headquartered in Cedar Rapids, Iowa. *Id.* ¶

10. Defendant TA IX, L.P. ("TA"), a Delaware limited partnership headquartered in Boston, Massachusetts, owns a two-thirds interest in TaxACT. *Id.* ¶ 11.

As noted above, approximately 140 million Americans filed tax returns with the IRS in 2010. *Id.* ¶ 1. Broadly speaking, there are three methods for preparing a tax return. The "pen and paper" or "manual" method includes preparation by hand and with free, electronically fillable forms available on the IRS website. A second method, known as "assisted" preparation, involves hiring a tax professional – typically either a certified public accountant ("CPA") or **[**5]** a specialist at a retail tax store. HRB operates the largest retail tax store chain in the United States. Cobb, TT, 9/19/11 a.m., at 37. The companies Jackson-Hewitt and Liberty Tax Service also operate well-known retail tax stores. Finally, many taxpayers now prepare their returns using digital do-it-yourself tax preparation products ("DDIY"), such as the popular software product "TurboTax." DDIY preparation is becoming increasingly popular and an estimated 35 to 40 million taxpayers used DDIY in 2010. GX 19 at 3; *see also* GX 27.[2]

[*44] The three most popular DDIY providers are HRB, TaxACT, and Intuit, the maker of TurboTax. According to IRS data, these three firms accounted for approximately 90 percent of the DDIY-prepared federal returns filed in tax season 2010.[3] GX 27. The next largest firm is TaxHawk, also known **[**6]** as FreeTaxUSA, with 3.2 percent market share, followed by TaxSlayer, with 2.7 percent. *Id.* The remainder of the market is divided among numerous smaller firms. *Id.* Intuit accounted for 62.2 percent of DDIY returns, HRB for 15.6 percent, and TaxACT for 12.8 percent. *Id.* DDIY products are offered to consumers through three channels: (1) online through an internet browser; (2) personal computer software downloaded from a website; and (3) personal computer software installed from a disk, which is either sent directly to the consumer or purchased by the consumer from a third-party retailer. GX 629 at 11. In industry parlance, DDIY products provided through an internet browser are called "online" products, while software applications downloaded onto the user's computer via the web or installed from a disk are referred to as "software" products. *See id.*

The proposed acquisition challenged in this case would combine HRB and TaxACT, the second and third most popular providers of DDIY products, respectively. According to the government, this combination would result in an effective duopoly between HRB and Intuit in the DDIY market, in which the next nearest competitor will have an approximately 3 percent market share, and most other competitors will have less than a 1 percent share. GX 27. The government also alleges that unilateral anticompetitive effects would result from the elimination of head-to-head competition between the merging parties. Compl. ¶ 45.

Thus, the DOJ alleges that because the proposed acquisition would reduce competition in the DDIY industry by eliminating head-to-head competition between the merging parties and by making anticompetitive coordination between the two major remaining market participants substantially more likely, the proposed acquisition violates Section 7 of the Clayton Act, *15 U.S.C. § 18*. *Id.* ¶¶ 40-49. Accordingly, the government seeks a permanent injunction blocking HRB from acquiring TaxACT. *Id.* ¶¶ 53-55.

On July 6, 2011, the Court **[**8]** entered a scheduling order in this case that provided for an expedited schedule of fact and expert discovery and briefing on the government's anticipated motion to enjoin the transaction. Joint Scheduling and Case Mgmt. Order, ECF No. 30. On August 1, 2011, the DOJ filed a motion for preliminary injunction against the merger, which was fully briefed by August 18, 2011. The parties subsequently agreed to forego the preliminary injunction phase and proceed directly to a trial on the merits of this action. TT, 9/6/11 a.m., at 8-9.

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[2] In this opinion, the Court will use the abbreviations "GX", "GTX", "DX", and "DTX" to refer to the government's exhibits, the government's trial exhibits, the defendants' exhibits, and the defendants' trial exhibits, respectively. "TT" refers to trial testimony. "PFF" refers the plaintiff's proposed findings of fact. "DFF" refers to the defendants' proposed findings of fact.

[3] The denomination of different years in the tax industry can be somewhat confusing. Tax returns are typically due in the month of April following the relevant tax year. Thus, each "tax season" refers to the period when returns for the prior "tax year" are generally completed. For example, "tax season 2010" refers to returns filed primarily **[**7]** in early 2010, corresponding to income earned in "tax year 2009."

On September 2, 2011, the Court held a pre-trial conference. On September 6, the Court began a nine-day bench trial that was held on September 6, 7, 8, 9, 12, 13, 15, 19, and 20. Eight fact witnesses and **[*45]** three expert witnesses testified at the hearing. The parties presented testimony from additional witnesses by affidavit and deposition. Each side submitted over 800 exhibits, totaling many thousands of pages. Following the conclusion of the evidentiary phase of the trial, the Court gave the parties approximately two weeks to submit post-trial memoranda and proposed findings of fact, which were filed on September 28, 2011. ECF Nos. 98-99. The Court then heard **[**9]** closing arguments on October 3, 2011.

The government's motion to enjoin HRB's acquisition of TaxACT is presently before the Court. For the reasons explained in this opinion, the Court grants the government's motion.

Before proceeding to a discussion of the relevant legal standards governing this case, the Court will provide additional background regarding the parties, their proposed transaction, and the tax preparation industry in general.

B. The Merging Parties

HRB is a Missouri corporation with its principal place of business in Kansas City, Missouri. Compl. ¶ 9; Defs.' Answer, ECF No. 31, ¶ 9. HRB provides both assisted tax preparation services and DDIY products through separate business units. Bennett, TT, 9/6/11 a.m., at 106. HRB offers its DDIY products for consumers under the brand name "H&R Block At Home" (formerly known as "TaxCut"). GX 629 at 9.

In 2011, HRB's DDIY products generated {significant} revenue. GX 296-2. For the same period, HRB sold approximately 6.69 million DDIY units to consumers. GX 296-2. Separately, in 2011, HRB's assisted tax preparation business generated approximately $2.7 billion in revenue (based on 14,756,000 U.S. tax returns at an average fee of $182.96, **[**10]** as reported in HRB's 2011 Annual Report). GX 532 (Cobb Dep.) at 32; GX 565 at 19.

2SS Holdings, Inc. ("2SS") is a Delaware corporation with its principal place of business in Cedar Rapids, Iowa. Compl. ¶ 10; Defs.' Answer ¶ 10. 2SS owns 2nd Story Software, Inc., which offers DDIY products under the brand name "TaxACT." GX 629 at 8-9.

In the fiscal year ending April 30, 2011, TaxACT products generated approximately {half as much revenue as H&R Block}. GX 151 at 6. In the same year, consumers used TaxACT to electronically file approximately 5 million federal tax returns. GX 151 at 3-4.

TA IX, L.P. ("TA") is a private equity firm organized under the laws of Delaware with its headquarters in Boston, Massachusetts. Compl. ¶ 11; Defs.' Answer ¶ 11. In December of 2004, TA purchased a majority interest in 2SS for $85 million, and as a result TA has majority control of 2SS Holdings and 2nd Story Software. GX 55 (Greif Dep.) at 72-73; GX 28-3.

C. The History Of TaxACT And The Proposed Transaction

TaxACT was founded in 1998 by Lance Dunn and three others, with Mr. Dunn serving as president. Dunn, TT, 9/7/11 p.m., at 49-52. Before founding TaxACT, Mr. Dunn and the other co-founders of the company **[**11]** had worked at Parsons Technology, a software company that had created a DDIY tax preparation product called "Personal Tax Edge." *Id.* at 49-52. In 1994, Intuit acquired Parsons Technology and continued to operate Personal Tax Edge as a separate product for approximately two years before merging it into its TurboTax product line. *Id.* at 51. Mr. Dunn testified that the business objective of founding TaxACT was "to make money selling value tax software which . . . was a category that **[*46]** did not exist at that time" because Intuit's acquisition of Parsons Technology had eliminated Personal Tax Edge, which had previously occupied a value tax software niche. *Id.* at 52. Thus, TaxACT "recreated" the category or "niche that the Personal Tax Edge product line filled when it existed." *Id.*

Over the years, TaxACT has emphasized high-quality free product offerings as part of its business strategy. *Id.* at 53. TaxACT initially offered a DDIY tax preparation product that made it free to prepare and print a federal tax return, but TaxACT charged a fee for electronic filing ("e-filing") or preparation of a state tax return. *Id.* at 54. Thus, from the beginning, TaxACT's business strategy relied on promoting **[**12]** "free" or "freemium" products, in which a basic part of the service is offered for free and add-ons and extra features are sold for a price.[4] As Mr. Dunn put it, "Free is an integral part of the value model. And the beauty of it is it has universal appeal. Everybody likes something for free." *Id.*

Currently, TaxACT's free product offering allows customers to prepare, print, and e-file a federal tax return completely for free. *Id.* at 54; GX 28-10 at 5-7. TaxACT's "Deluxe" edition, which costs $9.95, contains additional features, such as the ability to import data from a return filed the prior year through TaxACT. GX 55-26; Dunn, TT, 9/7/11 p.m., at 91-92; GX 28-10 at 5-7; GX 28 (Dunn. Dep.) at 219. Customers who use TaxACT to prepare a state tax return in addition to a federal return pay either $14.95 for the state return **[**13]** in combination with the free federal product or $17.95 for the state return in combination with the "Deluxe" federal product. GX 55-26; Dunn, TT, 9/8/11 a.m., at 49. TaxACT's prices have generally remained unchanged for the past decade. Dunn, TT, 9/7/11 p.m., at 91.

The parties first began discussing the potential acquisition of TaxACT by HRB in July 2009. Bowen, TT, 9/15/11 p.m., at 14. During the fall of 2009, teams from HRB and TaxACT met to discuss the possibilities for the potential acquisition and HRB performed due diligence on TaxACT. *See* DX 244 at 8-9; Bowen, TT, 9/15/11 p.m., at 19-23, 26; DX 9527 at 35.

Negotiations between the parties stalled in December 2009 and the proposed deal collapsed. Bowen, TT, 9/15/11 p.m., at 33. The CEOs of the two companies continued to discuss a potential acquisition through the spring of 2010, however. *Id.* at 34. Serious merger talks resumed in July 2010. *Id.* at 38-39; DX1005.

In October 2010, the HRB Board of Directors approved a plan for HRB to acquire TaxACT. DX 600 at 12-13; Bowen, TT, 9/15/11 p.m., at 59-60. On October 13, 2010, HRB entered into a merger agreement with 2SS and TA. GX 120 at 1. Under this agreement, HRB would acquire control **[**14]** of 2SS for $287.5 million. GX 120 at 6; GX 119 at 1. HRB's stated post-merger plan is to maintain both the HRB and TaxACT brands – with the HRB-brand focusing on higher priced-products and the TaxACT brand focusing on the lower-priced products. *See* Bennett, TT, 9/6/11 a.m., at 101-102; DX 1005 at 1. HRB plans {redacted} ultimately to rely on TaxACT's current technological platform and intends to give Mr. Dunn responsibility for running the combined firm's **[*47]** entire DDIY business operation from Cedar Rapids, Iowa. Dunn, TT, 9/8/11 p.m. (sealed), at 14-16; *see also* Bennett, TT, 9/6/11 a.m., at 110.

D. Free Products And The Free File Alliance

The evolution of TaxACT's free product offerings and the other free offerings in the DDIY market is important for understanding the claims in this case. The players in the DDIY market offer various "free" tax preparation products, but the features and functionality offered in these free products vary significantly, as do the ways in which these free products are ultimately combined with paid products to earn revenue. While the availability of some types of free product offers has long been a feature of the DDIY market, a spike in free offerings occurred **[**15]** during the last decade in parallel with the growth of e-filing.

As a matter of public policy, the IRS actively promotes e-filing because it has an interest in efficient and accessible tax return preparation and filing. The Internal Revenue Service Restructuring and Reform Act of 1998 set a goal of having eighty percent of individual taxpayers e-filing their returns by 2007. IRS Stip., ECF No. 80, ¶ 2. The IRS is close to achieving that goal and the IRS Oversight Board has recommended that the 80 percent benchmark be achieved by 2012. *Id.* According to stipulated facts attested to by IRS employees, in 2001, the IRS adopted an

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[4] The business model of offering free products and then soliciting customers to purchase additional, related features or services is sometimes referred to as "freemium." *See* GX 130 ("H&R Block Strategic Planning Working Session, April 16 &17, 2010") at 103 ("'Freemium' is a known market dynamic that has arisen in multiple product categories and will continue to grow.").

initiative "to decrease the tax preparation and filing burden of wage earners by providing greater access to free online tax preparation and filing options for a significant number of taxpayers." *Id.* ¶ 4. The IRS also determined that it could save a substantial amount of public money by encouraging filers to switch to e-filing, since e-filed returns are cheaper for the IRS to process. *Id.* ¶ 5.

The IRS determined that the most effective and efficient way to accomplish its goal of promoting access to free online tax preparation and filing options was to partner with **[**16]** a consortium of companies in the electronic tax preparation and filing industry. *Id.* ¶ 6; GX 297-D7 at E-2. In 2002, this consortium of companies formed Free File Alliance, LLC ("FFA") in order to partner with the IRS on this initiative to promote free filing. IRS Stip. ¶ 6; GX 297-D7 at E-2. HRB, TaxACT, and Intuit are all members of the FFA, as are approximately fifteen smaller companies. *See* IRS Stip. ¶ 8; DX 328. On October 30, 2002, the IRS and the FFA entered into a "Free On-Line Electronic Tax Filing Agreement" to provide free online tax return preparation and filing to individual taxpayers. IRS Stip. ¶ 9. Pursuant to this agreement, members of the FFA would offer free, online tax preparation and filing services to taxpayers, and the IRS would provide taxpayers with links to those free services through a web page, hosted at irs.gov and accessible through another government website. *Id.* ¶ 12. HRB, TaxACT, and Intuit were among the original members to make free offers through the FFA. *Id.* ¶ 8.

"In 2003, the first year in which free services were available to taxpayers through the FFA, none of the FFA members offered free services to all taxpayers." *Id.* ¶ 14. Rather, each "member **[**17]** set eligibility criteria. Most members, including H&R Block, TaxACT, and Intuit, used adjusted gross income ('AGI') as a way to define which taxpayers were eligible" for their offers of free federal tax return preparation services. *Id.* "For example, H&R Block offered free services to taxpayers with an AGI of $28,000 or less." *Id.* Some members that offered free federal return **[*48]** preparation services based on AGI also offered free services to taxpayers who met other conditions, such as eligibility to file a Form 1040EZ. *Id.* "Several members did not define eligibility based on AGI. Of the eleven FFA members that offered free services based on AGI, only TaxACT's AGI-based offering was available to individuals with AGI over $33,000." *Id.* Specifically, TaxACT made its free federal services available exclusively to taxpayers who had AGI over $100,000 or were eligible to file a Form 1040EZ. *Id.*

In 2004, the second year in which free services for federal returns were available to taxpayers through the FFA, TaxACT introduced a new offer through the FFA that offered free preparation and e-filing of federal returns for all taxpayers regardless of AGI or other limitations ("free for all"). *See id.* **[**18]** ¶ 15; Dunn, TT, 9/7/11 p.m., at 65, 78. After TaxACT introduced a free-for-all offer through the FFA, other companies followed by introducing federal free-for-all offers of their own. Dunn, TT, 9/7/11 p.m., at 78 ("After we offered free for everyone in 2003, in 2004, a lot of companies offered free for everyone on the FFA.").

According to Mr. Dunn's testimony, after TaxACT made its FFA offer of a free federal product for all taxpayers, without any AGI or other limitations, other companies made efforts to restrict the wide availability of free offers on the FFA. *Id.* at 79. Specifically, according to Mr. Dunn, Intuit proposed that companies in the FFA collude by agreeing to restrict free offers. *Id.* Mr. Dunn and TaxACT opposed Intuit's proposal and believed that it was "probably not legal for that group to restrain trade." *Id.*

Subsequently, HRB, Intuit and others successfully lobbied the IRS to implement restrictions on the number of taxpayers that could be covered by a free offer through the FFA website. GX 28 (Dunn Dep.) at 114-15; GX 28-4; GX 35 at HRB-DOJ-00912870; GX 569 (DuMars Dep.) at 108, 112-113; Ernst, TT, 9/7/11 a.m., 26-27; GX 41 at 4; GX 25 (TaxHawk Decl.) ¶ 16. HRB desired **[**19]** these restrictions because, among other things, it was concerned about how free-for-all offers would affect the pricing structure for the industry and believed that such offers might undermine the company's ability to generate money through the paid side of its DDIY business. Ernst, TT, 9/7/11 a.m., at 26-27; GX 531 (Ciaramitaro Dep.) at 60-62; *see also* GX 41 at 4; GX 25 (TaxHawk Decl.) ¶ 16.

The IRS amended the FFA rules in October 2005 to prevent FFA members from making free-for-all offers. Dunn, TT, 9/7/11 p.m., at 78-79; Ernst, TT, 9/7/11 a.m., at 29; GX 42; GX 25 (TaxHawk Decl.) ¶ 16; GX 29 (Intuit Decl.) ¶ 9. Therefore, TaxACT could no longer make its free-for-all offer through the FFA.

In tax year 2005, in response to restrictions that the IRS imposed on the scope of offers that could be made through the FFA, TaxACT became the first DDIY company to offer all tax payers a free DDIY product for preparation of federal returns directly on its website. Dunn, TT, 9/7/11 p.m., at 79-80; GX 28 (Dunn Dep.) at 122-23. Today, free offers in various forms are an entrenched part of the DDIY market. Dunn, TT, 9/8/11 a.m., 85; Defs.' Opening Stmt., TT, 9/6/11 a.m., at 86-87.

II. [**20] STANDARD OF REVIEW

HN1[] "*Section 7* of the Clayton Act, *15 U.S.C. § 18*, prohibits a corporation from acquiring 'the whole or any part of the assets of another [corporation] engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the **[*49]** effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172, 180 (D.D.C. 2001)* (quoting *15 U.S.C. § 18*). "The United States is authorized by *Section 15* of the Clayton Act to seek an injunction to block a pending acquisition." *Id.* (citing *15 U.S.C. § 25*). "The United States has the ultimate burden of proving a *Section 7* violation by a preponderance of the evidence." *Id.*

HN2[] "To establish a Section 7 violation, plaintiff must show that a pending acquisition is reasonably likely to cause anticompetitive effects." *Id.* (citing *United States v. Penn-Olin Chem. Co., 378 U.S. 158, 171, 84 S. Ct. 1710, 12 L. Ed. 2d 775 (1964)*); *see also United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004)*. "Congress used the words '*may* be substantially to lessen competition' (emphasis supplied), **[**21]** to indicate that its concern was with probabilities, not certainties.'" *FTC v. H.J. Heinz Co., 246 F.3d 708, 713, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)* (*quoting Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*). "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future." *Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986)*.

"As this Circuit explained in *Heinz, 246 F.3d at 715*, the decision in *United States v. Baker Hughes Inc., 908 F.2d 981, 285 U.S. App. D.C. 222 (D.C. Cir. 1990)*, sets forth the analytical approach for establishing a Section 7 violation."[5] *Sungard, 172 F. Supp. 2d at 180*.[6] ***HN3***[] "The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition." *Baker Hughes, 908 F.2d at 982*. To establish this presumption, the government must "show that the merger would produce 'a firm controlling an undue percentage **[**22]** share of the relevant market, and [would] result [ ] in a significant increase in the concentration of firms in that market.'" *Heinz, 246 F.3d at 715* (quoting *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*) (alterations in original). Once the government has established this presumption, the burden shifts to the defendants to rebut the presumption by "show[ing] that the market-share statistics give an inaccurate account of the merger's probable

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[5] Two current Supreme Court justices, in their prior capacities as judges on the Court **[**23]** of Appeals, participated in the D.C. Circuit's ruling in *Baker Hughes.* Then-Judge Clarence Thomas wrote the opinion and then-Judge Ruth Bader Ginsburg joined in it.

[6] In their closing argument, the defendants chided the government for citing Clayton Act Section 7 cases brought by the Federal Trade Commission for the relevant standard to apply in this case rather than citing to *United States v. Baker Hughes Inc., 908 F.2d 981, 982-83, 285 U.S. App. D.C. 222 (D.C. Cir. 1990)*, a case brought by the DOJ. Since this Circuit's FTC precedents themselves rely heavily on the analytical approach set forth in *Baker Hughes,* the defendants' distinction on this point is ultimately of little import. *See FTC v. H.J. Heinz Co., 246 F.3d 708, 715, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)* ("In *United States v. Baker Hughes Inc., 908 F.2d 981, 982-83, 285 U.S. App. D.C. 222 (D.C.Cir.1990)*, we explained the analytical approach by which the government establishes a section 7 violation."). While a lesser showing is required to obtain preliminary relief in an FTC preliminary injunction case, as opposed to a full merits trial like this case, the Court must apply the *Baker Hughes* analytical framework in either type of Section 7 case.

effects on **[*50]** competition in the relevant market." *Heinz, 246 F.3d at 715* (internal quotation omitted). "'If the defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.'" *Id.* (quoting *Baker Hughes, 908 F.2d at 983*). Ultimately, "[t]he Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition." *Baker Hughes, 908 F.2d at 984*.

III. DISCUSSION

A. The Relevant Product Market

HN4[] "Merger **[**24]** analysis begins with defining the relevant product market." *FTC v. Swedish Match, 131 F. Supp. 2d 151, 156 (D.D.C. 2000)* (citing *Brown Shoe, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. "Defining the relevant market is critical in an antitrust case because the legality of the proposed merger[] in question almost always depends upon the market power of the parties involved." *Id.* (quoting *FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 45 (D.D.C. 1998))*. Indeed, the relevant market definition is often "the key to the ultimate resolution of this type of case because of the relative implications of market power."[7] *Id.*

The government argues that the relevant market in this case consists of all DDIY products, but does not include assisted tax preparation or pen-and-paper. Under this view of the market, the acquisition in this case would result in a DDIY market that is dominated by two large players – H&R Block and Intuit – that together control approximately 90 percent of the market share, with the remaining 10 percent of the market divided amongst a plethora of smaller companies. In contrast, the defendants argue for a broader market that includes all tax preparation methods ("all methods"), comprised of DDIY, assisted, and pen-and-paper. Under this view of the market, the market concentration effects of this acquisition would be much smaller and would not lead to a situation in which two firms control 90 percent of the market. This broader view of the market rests primarily on the premise that providers of all methods of tax preparation compete with each other for **[**26]** the patronage of the same pool of customers – U.S. taxpayers. After carefully considering the evidence and arguments presented by all parties, the Court has concluded that the relevant market in this case is, as the DOJ contends, the market for digital do-it-yourself tax preparation products.

HN6[] A "relevant product market" is a term of art in antitrust analysis. The Supreme Court has set forth the general rule for defining a relevant product market: "The outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] **[*51]** or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe, 370 U.S. at 325*; *see also* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. In other words, courts look at "whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other." *FTC v. Staples, Inc., 970 F. Supp. 1066, 1074 (D.D.C. 1997)* (citation omitted); *see also* *Bon-Ton Stores, Inc. v. May Dep't Stores Co., 881 F. Supp. 860, 868 (W.D.N.Y. 1994)* (citing *Hayden Pub. Co. v. Cox Broad. Corp., 730 F.2d 64, 71 (2d Cir. 1984))*.

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[7] ***HN5***[] "A relevant market has two components: (1) the relevant product market and (2) the relevant geographic market. . . . The 'relevant geographic market' identifies the geographic area in which the defendants compete in marketing their products or services." *FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 37 (D.D.C. 2009)*. The parties have stipulated that the relevant geographic market in this case is worldwide. Joint Pre-Hearing Statement ¶ IX, C, 12. DDIY products are provided online and can be used by any individual worldwide – either within the United States or abroad – who needs to prepare **[**25]** and file a U.S. tax return. The products at issue in this case are not used for preparation of foreign tax returns. *See* Pl.'s Mot. For Prelim. Inj. at 29-30. The Court accepts the parties' stipulation as to the relevant geographic market.

HN7[] A broad, **[**27]** overall market may contain smaller markets which themselves "constitute product markets for antitrust purposes."[8] *Brown Shoe, 370 U.S. at 325*. "[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." *Staples, 970 F. Supp. at 1075*. Traditionally, courts have held that the boundaries of a relevant product market within a broader market "may be determined by examining such practical indicia as industry or public recognition of the [relevant market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *FTC v. Whole Foods Market, Inc. 548 F.3d 1028, 1037-38 (D.C. Cir. 2008)* (Brown, J.) (quoting *Brown Shoe, 370 U.S. at 325*).[9] *See also FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 38 (D.D.C. 2009)*. These "practical indicia" of market boundaries may be viewed as evidentiary proxies for proof of substitutability and cross-elasticities of supply and demand. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218, 253 U.S. App. D.C. 142 (D.C. Cir. 1986)*.

HN8[] An analytical method often used by courts to define a relevant market is to ask hypothetically whether it would be profitable to have a monopoly over a given set of substitutable products. If so, those products may constitute a relevant market. *See* 5C PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** (hereinafter, "Areeda & Hovenkamp"), ¶ 530a, at 226 (3d ed. 2007) ("[A] market can be seen as the array of producers of substitute products that could control price if united in a hypothetical cartel or as a hypothetical monopoly."). This approach – sometimes **[*52]** called the "hypothetical monopolist test" – is endorsed by the Horizontal Merger Guidelines issued by the DOJ and Federal Trade Commission. *See Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines* (2010) (hereinafter, "Merger Guidelines"), § 4.1.1.[10] In the merger context, this inquiry boils down to whether "a hypothetical profit-maximizing firm, not subject to price regulation, that **[**30]** was the only present and future seller of those products . . . likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms." *Id.* The "small but significant and non-transitory increase in price," or SSNIP, is typically assumed to be five percent or more. *Id.* § 4.1.2.

Thus, the question here is whether it would be hypothetically useful to have a monopoly over all DDIY tax preparation products because the monopolist could then profitably raise prices for those products by five percent or more; or whether, to the contrary, there would be no reason to monopolize all DDIY tax preparation products because substitution and price competition with other methods of tax preparation would restrain any potential DDIY monopolist from profitably raising prices. In other words, would enough DDIY users switch to the assisted or pen-and-paper methods of tax preparation in response to a five-to-ten **[**31]** percent increase in DDIY prices to make such a price increase unprofitable?

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[8] Courts **[**28]** have sometimes referred to such markets-within-markets as "submarkets." *See Brown Shoe, 370 U.S. at 325*; ***Whole Foods, 548 F.3d at 1037-38 (Brown, J.)***. Other courts and commentators have criticized this "submarket" terminology as unduly confusing, however. *See* 5C PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** ¶ 533, at 251 (3d ed. 2007) ("Courts sometimes describe the closest substitutes as a 'submarket' within a larger 'market' of less-close substitutes. Although degrees of constraint do in fact vary, the 'market' for antitrust purposes is the *one* relevant to the particular legal issue at hand.") (internal citations omitted); *Geneva Pharms. Tech. Corp. v. Barr Labs, Inc., 386 F.3d 485, 496 (2d Cir. 2004)* ("The term 'submarket' is somewhat of a misnomer, since the 'submarket' analysis simply clarifies whether two products are in fact 'reasonable' substitutes and are therefore part of the same market.").

[9] The D.C. Circuit's decision in *Whole Foods* lacked a majority opinion. *See Whole Foods, 548 F.3d at 1061 n.8* (Kavanaugh, J., dissenting). Judges Brown and Tatel filed separate opinions concurring in the judgment to reverse the District Court and Judge Kavanaugh, in dissent, would **[**29]** have affirmed. *See id. at 1032* (Brown, J.); *id. at 1041 (Tatel, J.)*; *id. at 1051 n.1* (Kavanaugh, J., dissenting). Thus, in referring to the opinions in *Whole Foods,* the Court will indicate the name of the Judge whose opinion is cited.

[10] The Merger Guidelines are not binding upon this Court, but courts in antitrust cases often look to them as persuasive authority. *See Staples, 970 F. Supp. at 1081-82*.

In evaluating the relevant product market here, the Court considers business documents from the defendants and others, the testimony of the fact witnesses, and the analyses of the parties' expert economists. This evidence demonstrates that DDIY is the relevant product market in this case.

1. The Defendants' Documents Show That DDIY Is The Relevant Product Market.

HN9[] When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents. *See, e.g., Staples, 970 F. Supp. at 1076*; *CCC Holdings, 605 F. Supp. 2d at 41-42*. The government argues that the defendants' ordinary course of business documents in this case "conclusively demonstrate that competition with other [DDIY] firms drive Defendants' pricing decisions, quality improvements, and corporate strategy" for their own DDIY products—thus supporting the government's view of the relevant market. Pl.'s Post-Trial Mem. at 7. The defendants contend that the government has relied on "select, 'out-of-context' snippets from documents," and that the documents as a whole support the defendants' view that the **[**32]** relevant product market is all methods of tax preparation. Defs.' Post-Trial Mem. at 1. The Court finds that the documentary evidence in this case supports the conclusion that DDIY is the relevant product market.

Internal TaxACT documents establish that TaxACT has viewed DDIY offerings by HRB and TurboTax as its primary competitors, that it has tracked their marketing, product offerings, and pricing, and that it has determined its own pricing and business strategy in relation to those companies' DDIY products. *See* GX 295-16 ("Competitive Analysis" comparing the three companies); GX 102 (email explaining TaxACT is a "direct competitor" with HRB and Intuit's products); GX 55 (Greif Dep.) at 137-38 (describing TaxACT's **[*53]** compilation of a routine, end-of-season competitive analysis that "typically" covers Intuit, HRB, and TaxACT). Confidential memoranda prepared by TaxACT's investment bankers for potential private equity buyers of TaxACT identify HRB and TurboTax as TaxACT's primary competitors in a DDIY market. *See* GX 7 (Greene Holcomb & Fisher "Confidential Memorandum") at 14 ("The Company's major competitors for both desktop and Internet-based income tax software and e-filing services **[**33]** include Intuit (the makers of TurboTax software) and H&R Block (the makers of TaxCut software)."); GX 134 (Deutsche Bank "Confidential Information Memorandum") at 17 ("The Company's two main competitors, Intuit and H&R Block. . ."); *see also* Dunn, TT, 9/7/11 p.m., at 97-104. These documents also recognize that TaxACT's strategy for competing with Intuit and HRB is to offer a lower price for what it deems a superior product. GX 7 at 14 ("Relative to its two major competitors, 2nd Story has positioned its product offerings as being of equal or higher quality, and completely fulfilling the needs of a vast portion of the potential market. It also pursues a pricing strategy that positions its products and services meaningfully below either Intuit or H&R Block, in some instances free.").

While, as defendants point out, parts of these TaxACT documents also discuss the broader tax preparation industry, these documents make clear that TaxACT's own view – and that conveyed by its investment bankers to potential buyers – is that the company primarily competes in a DDIY market against Intuit and HRB and that it develops its pricing and business strategy with that market and those competitors in **[**34]** mind. These documents are strong evidence that DDIY is the relevant product market. *See Whole Foods, 548 F.3d at 1045 (Tatel, J.)* (***HN10***[] "[E]vidence of industry or public recognition of the submarket as a separate economic unit matters because we assume that economic actors usually have accurate perceptions of economic realities.") (internal quotation omitted).

Internal HRB documents also evidence HRB's perception of a discrete DDIY market or market segment. HRB and its outside consultants have tracked its digital competitors' activities, prices, and product offerings. *See* GX 28-19 ("2009 Competitive Price Comparison"); GX 118 (independent analyst's report analyzing digital competitors as one of three separate categories of competitors); GX 61-8 at 1 (slide on competition in "digital market" identifying TurboTax and TaxACT as competitors); GX 199 (HRB "digital strategy update" Powerpoint tracking features and prices for TurboTax and TaxACT); GX 188 (HRB spreadsheet comparing HRB, TurboTax, and TaxACT prices for various product offerings). Documents from HRB's DDIY business have also referred to HRB, TaxACT, and TurboTax as the "Big Three" competitors in the DDIY market. GX 61-3 ("OCS Offsite **[**35]** Competitive Intelligence Review of TS07") at 5; GX 61-4 at 1 (email referencing request for data from consultant regarding "big 3 digital tax prep companies"); *see also* GX 70 (email from head of HRB's digital business stating its "only real direct competitors are turbotax in san diego and taxact in cedar rapids" [sic]); Ernst, TT, 9/7/11 a.m., at 13-14. Finally, the documents show that, in connection with a proposed acquisition of TaxACT, HRB identified the proposed transaction as a way to grow its digital "market share" and has measured TaxACT's market share in a DDIY market. GX 130 at 96-99; GX 21-37 (projections from 2009 for different potential scenarios for acquisition of TaxACT, including their effect on DDIY market share); *see also* Newkirk, TT, 9/7/11 a.m., at 95-96 (explaining GX 21-37). All of these documents **[*54]** also provide evidence that DDIY is a relevant product market.

The defendants acknowledge that "the merging parties certainly have documents that discuss each other and digital competitors generally, and even reference a digital market and the 'Big Three,'" but contend this evidence is insufficient to prove a market. Defs.' Post-Trial Mem. at 9. Rather, the defendants argue **[**36]** that the documents show that the relevant market is all methods of tax preparation, especially in light of documented competition between DDIY providers and assisted providers for the same overall pool of U.S. taxpayers who are potential customers. *See id.* 9-10; *see, e.g.,* DX 78 at 4 (Intuit document explaining 2011 strategic goal of acquiring tax store customers); GX 650 at 41 (Intuit document noting goal of acquiring tax store customers and specifically mentioning HRB). As discussed below, the Court disagrees and finds that the relevant product market is DDIY products.

2. The Relevant Product Market Does Not Include Assisted Tax Preparation Or Manual Preparation.

It is beyond debate – and conceded by the plaintiff – that all methods of tax preparation are, to some degree, in competition. Pl.'s Post-Trial Mem. at 8. All tax preparation methods provide taxpayers with a means to perform the task of completing a tax return, but each method is starkly different. Thus, while providers of all tax preparation methods may compete at some level, this "does not necessarily require that [they] be included in the relevant product market for antitrust purposes." *Staples, 970 F. Supp. at 1075*. DDIY **[**37]** tax preparation products differ from manual tax preparation and assisted tax preparation products in a number of meaningful ways. As compared to manual and assisted methods, DDIY products involve different technology, price, convenience level, time investment, mental effort and type of interaction by the consumer. Taken together, these different attributes make the consumer experience of using DDIY products quite distinct from other methods of tax preparation. *See Whole Foods, 548 F.3d at 1037-38 (Brown, J.)* (noting that ***HN11***[] a "product's peculiar characteristics and uses" and "distinct prices" may distinguish a relevant market) (citing *Brown Shoe, 370 U.S. at 325*); *see also, e.g.,* GX 130 at 140 (HRB internal analysis discussing convenience and price as factors differentiating DDIY and assisted methods for consumers). The question for this court is whether DDIY and other methods of tax preparation are "reasonably interchangeable" so that it would not be profitable to have a monopoly over only DDIY products.

a. Assisted Tax Preparation Is Not In The Relevant Product Market.

Apart from the analysis of their economic expert, the defendants' main argument for inclusion of assisted tax preparation **[**38]** in the relevant market is that DDIY and assisted companies compete for customers.[11] As evidence for this point, the defendants emphasize that Intuit's marketing efforts have targeted HRB's assisted customers. *See* DX 78 at 3 (Intuit document noting strategic goal to "Beat Tax Store[s]"). While the evidence does show that companies in the DDIY and assisted markets all generally compete with each **[*55]** other for the same overall pool of potential customers – U.S. taxpayers – that fact does not necessarily mean that DDIY and assisted must be viewed as part of the same relevant product market. DDIY provides customers with tax preparation services through an entirely different method, technology, and user experience than assisted preparation. As Judge Tatel explained in *Whole Foods:*

> [W]hen the automobile was first invented, competing auto manufacturers obviously took customers primarily from companies selling horses and buggies, not from other auto manufacturers, but that hardly shows that cars

[11] The defendants' primary argument for inclusion of both assisted and pen-and-paper in the relevant market is based upon their economic expert's analysis of data derived from two consumer surveys commissioned by the defendants. The Court will analyze the arguments of the defendants' expert economist separately below.

> and horse-drawn carriages should be treated as the same product market. That Whole Foods and Wild Oats have attracted many customers away from conventional grocery stores by offering extensive selections **[**39]** of natural and organic products thus tells us nothing about whether Whole Foods and Wild Oats should be treated as operating in the same market as conventional grocery stores. Indeed, courts have often found that sufficiently innovative retailers can constitute a distinct product market even when they take customers from existing retailers.

Whole Foods, 548 F.3d at 1048; *see also* *Staples, 970 F. Supp. at 1074-80* (finding a distinct market of office supply superstores despite competition from mail-order catalogues and stores carrying a broader range of merchandise).

The key question for the Court is whether DDIY and assisted products are sufficiently close substitutes to constrain any anticompetitive DDIY pricing after the proposed merger. Evidence of the absence of close price competition between DDIY and assisted products makes clear that the answer to that question is no—and **[**40]** that DDIY is the relevant product market here. *See* *Swedish Match, 131 F. Supp. 2d at 165* (***HN12***[] "Distinct pricing is also a consideration" in determining the relevant product market) (citing *Brown Shoe, 370 U.S. at 325*). Significantly, despite some DDIY efforts to capture tax store customers, none of the major DDIY competitors sets their prices based on consideration of assisted prices. *See, e.g.,* Ernst, TT, 9/7/11 a.m., at 35 (HRB set its digital and assisted prices separately); {redacted} (Dep.) at 183:18-25 (explaining that {redacted} does not consider assisted pricing in setting prices because its prices are already "substantially less than both tax stores and most professionals"). Indeed, there are quite significant price disparities between the average prices of DDIY and assisted products. The average price of TurboTax, the most popular DDIY brand is approximately $55. GX 293 (Intuit Dep.) at 21. The average price of HRB's DDIY products is approximately $25. GX 296-7 at 6. Overall, the DDIY industry average price is $44.13. GX 121 at 57. In contrast, the typical price of an assisted tax return is significantly higher, in the range of $150-200.[12] A 10 percent or even 20 percent price **[**41]** increase in the average price of DDIY would only move the average price up to $48.54 or $52.96, respectively – still substantially below the average price of assisted tax products. The overall lack of evidence of price competition between DDIY and assisted products supports the conclusion that DDIY is a separate relevant product market for evaluating this transaction, despite the fact that DDIY **[*56]** and assisted firms target their marketing efforts at the same pool of customers.

The defendants point to some evidence that HRB sets prices for certain assisted products to compete with DDIY. For example, defendants note that in 2009, HRB "reduced prices on its assisted tax preparation services to $39 for federal 1040EZ preparation and $29 for state tax preparation to compete with and {redacted}" to DDIY. DFF ¶ 77a. These are limited product offerings for which prices **[**42]** appear well below even the 25th percentile price for HRB's assisted products. *See* GX 128 (HRB "TS10 Market Dynamics" presentation) at 38 (noting, for Tax Season 2010, that the 25th percentile for prices at HRB stores was {higher than DDIY}). Relatedly, the defendants' claim that prices for assisted and DDIY products "significantly overlap" is not strongly supported and relies on a comparison of the most limited, low-end assisted products with DDIY products generally. *See* DFF ¶ 78b (citing tax year 2009 data that show that 14 percent of customers using name-brand tax stores paid $50 or less and another 20 percent paid between $51-100); *id.* ¶ 78c-d (quoting prices for Jackson Hewitt's preparation of form 1040EZ, a simplified tax form, at Wal-Mart and for HRB's Second Look service, which actually only double-checks an already completed tax return for errors). In sum, while defendants' have identified isolated instances in which assisted product offerings are priced lower than the average prices for typical assisted products, they do not and cannot demonstrate that this is generally the case.

Testimony from HRB executives further supports treating DDIY as a relevant product market in evaluating **[**43]** this transaction. HRB's DDIY and assisted businesses are run as separate business units. Bennett, TT, 9/6/11 a.m., at 106. Alan Bennett, who was the CEO of HRB in 2010 when the parties reached the proposed merger agreement, testified that "net-net," he did not believe that HRB's DDIY business had impacted its assisted

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[12] *See* GX 128 (HRB "TS10 Market Dynamics" presentation) at 38 {redacted}; *see also id.* {redacted}; GX 293 (Intuit Dep.) at 21:9-14 ("The average price of a tax store is in the range of $200."); Bennett, TT, 9/6/11 p.m., at 100 (estimating $150 range for assisted returns offered at Jackson Hewitt and HRB offices at Wal-Mart locations).

business in terms of taking away customers.[13] *Id.* at 108; *see also* GX 1151 at 4 (HRB internal analysis stating "Online is not growing materially at the expense of assisted."). Mark Ernst, HRB's CEO from 2001 to 2007, also explained that, in his opinion based on research he reviewed while at HRB, the primary reason consumers switched between assisted and DDIY was because of "life events" that led to changes in tax status. Ernst, TT, 9/7/11 a.m., at 34-35.

Finally, defendants argue that their broad relevant market is appropriate because **[**44]** there is "industry movement toward 'hybrid' products that combine some elements of both digital and assisted tax preparation." Defs.' Post-Trial Mem. at 11. Based on the evidence presented at the hearing, however, it would be premature for the Court to identify any trend toward hybrid products. In fact, neither Intuit nor TaxACT presently offers a hybrid product and the defendants openly concede that HRB's current hybrid product has had "somewhat limited success," which defendants attribute to "technical issues" and a "lack of consistent marketing." *Id.* at 11 n.16. {redacted} {T}he Court finds it unlikely that there will be a sufficiently large scale shift into these products in the immediate future to compel the conclusion that DDIY and assisted **[*57]** products make up the same relevant product market.

b. Manual Tax Preparation Is Not In The Relevant Product Market.

The defendants also argue that manual tax preparation, or pen-and-paper, should be included in the relevant product market. At the outset, the Court notes that pen-and-paper is not a "product" at all; it is the task of filling out a tax return by oneself without any interactive assistance. Even so, the defendants argue pen-and-paper **[**45]** should be included in the relevant product market because it acts as a "significant competitive constraint" on DDIY. Defs.' Post-Trial Mem. at 11. The defendants' argument relies primarily on two factors. First, the defendants' cite the results of a 2011 email survey of TaxACT customers. *See id.* For reasons detailed in the following section, the Court declines to rely on this email survey. Second, the defendants point to documents and testimony indicating that TaxACT has considered possible diversion to pen-and-paper in setting its prices. *See id.* at 11-12.

The Court finds that pen-and-paper is not part of the relevant market because it does not believe a sufficient number of consumers would switch to pen-and-paper in response to a small, but significant increase in DDIY prices. The possibility of preparing one's own tax return necessarily constrains the prices of other methods of preparation at some level. For example, if the price of DDIY and assisted products were raised to $1 million per tax return, surely all but the most well-heeled taxpayers would switch to pen-and-paper. Yet, at the more practical price increase levels that trigger antitrust concern – the typical five to ten **[**46]** percent price increase of the SSNIP test – pen-and-paper preparation is unlikely to provide a meaningful restraint for DDIY products, which currently sell for an average price of $44.13. GX 121 at 57.

The government well illustrated the overly broad nature of defendants' proposed relevant market by posing to the defendants' expert the hypothetical question of whether "sitting at home and drinking chicken soup [would be] part of the market for [manufactured] cold remedies?" Meyer, TT, 9/13/11 a.m., at 65. The defendants' expert responded that the real "question is if the price of cold medicines went up sufficiently, would people turn to chicken soup?" *Id.* As an initial matter, in contrast to the defendants' expert, the Court doubts that it would ever be legally appropriate to define a relevant product market that included manufactured cold remedies and ordinary chicken soup. This conclusion flows from the deep functional differences between those products. Setting that issue aside, however, a price has increased "sufficiently" to trigger antitrust concern at the level of a five to ten percent small, but significant non-transitory increase in price. Just as chicken soup is unlikely to **[**47]** constrain the price of manufactured cold remedies sufficiently, the Court concludes that a SSNIP in DDIY would not be constrained by people turning to pen-and-paper. First, the share of returns prepared via pen-and-paper has dwindled over the past decade, as the DDIY market has grown. Bennett, TT, 9/6/11 a.m, at 118; GX 296 (Houseworth Dep.) at 66-68. Second, while pen-and-

[13] By "net-net," Mr. Bennett meant that while there is customer switching between the DDIY and assisted businesses, the total share of customers in each has been relatively stable over the past few years, such that Mr. Bennett could conclude that the two business lines "do not steal customers back and forth net." Bennett, TT, 9/6/11 a.m., at 108.

paper filers have been a net source of new customers for DDIY companies, both HRB and {redacted} executives have testified that they do not believe their DDIY products compete closely with pen-and-paper methods. {redacted} (Dep.) at 37:20-38:10; *see* GX 296 (Houseworth Dep.) 89-90. Third, **HN13**[] courts in antitrust cases frequently exclude similar "self-supply" substitutes from relevant product markets. *See, e.g., FTC v. H.J.* **[*58]** *Heinz Co., 116 F. Supp. 2d 190, 195 (D.D.C. 2000), rev'd on other grounds, 246 F.3d 708, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)* (noting that homemade baby food and breast milk should not be included in the jarred baby food market even though substitution was possible because "the Supreme Court's interchangeability test refers to *products.*"); *CCC Holdings, 605 F. Supp. 2d at 41-42* (excluding books that can be used to perform **[**48]** insurance loss valuations by hand from market for loss valuation software); *United States v. Visa U.S.A. Inc., 163 F. Supp. 2d 322, 338 (S.D.N.Y. 2001)* (excluding cash and checks from general purpose credit card market).

The main case the defendants rely on to show that "self-supply" substitutes should be included in the relevant market involved a consumer market consisting of vertically integrated companies and explicitly distinguished cases, such as this one, involving markets of individual consumers. In *United States v. Sungard Data Systems, Inc.,* Judge Huvelle found that disaster recovery computer systems developed internally by companies were in the same relevant product market as shared data recovery systems provided by outside vendors. *Sungard, 172 F. Supp. 2d at 187-89*. The *Sungard* court, however, distinguished the case before it – which involved vertical integration – from the situation in *Heinz,* the case involving the market for jarred baby food, because "homemade baby food is not an aspect of vertical integration . . . [and] individual consumers cannot vertically integrate by producing a product that they would otherwise have to purchase." *Id. at 187 n.15*. In finding that **[**49]** in-house computer systems were included in its relevant product market, the *Sungard* court cited the following example from Areeda & Hovenkamp ¶ 535e regarding vertical integration:

> If iron ore is the relevant market and if shares are best measured there by sales, then internally used ore—so-called captive output—is part of the ore market even though it is not sold as such.
>
> In measuring the market power of a defendant selling iron ore, the ore used internally by other firms constrains the defendant's ability to profit by raising ore prices to monopoly levels. The higher ore price may induce an integrated firm to expand its ore production—to supply others in direct competition with the alleged monopolist or to expand its own steel production and thereby reduce the demand of other steel makers for ore, or both. Hence, captive output constrains the defendant regardless of whether integrated firms sell their ore to other steel makers previously purchasing from the defendant. In sum, the integrated firm's ore output belongs in the market.

Id. at 186 n.14. This rationale for including "self-supply" in a relevant product market does not appear to apply to the DDIY market in which the consumers **[**50]** are individuals and not also potential traders or producers.

While some diversion from DDIY to manual filing may occur in response to a SSNIP, the Court finds that it would likely be limited and marginal. The functional experience of using a DDIY product is meaningfully different from the self-service task of filling out tax forms independently. Manual completion of a tax return requires different tools, effort, resources, and time investment by a consumer than use of either DDIY or assisted methods. The following discussion from *United States v. Visa U.S.A. Inc.* regarding why cash and checks should not be included in the credit card market is instructive here:

> [A]lthough it is literally true that, in a general sense, cash and checks compete with general purpose cards as an option for payment by consumers and that **[*59]** growth in payments via cards takes share from cash and checks in some instances, cash and checks do not drive many of the means of competition in the general purpose card market. In this respect, [the expert's] analogy of the general purpose card market to that for airplane travel is illustrative. [The expert] argues that while it is true that at the margin there is some competition **[**51]** for customers among planes, trains, cars and buses, the reality is that airplane travel is a distinct product in which airlines are the principal drivers of competition. Any airline that had monopoly power over airline travel could raise prices or limit output without significant concern about competition from other forms of transportation. The same holds true for competition among general purpose credit and charge cards.

Visa U.S.A. Inc., 163 F. Supp. 2d at 338. Here, the same analogy to airplane travel holds true for competition among DDIY providers, who provide a distinct product for completion of tax returns. Indeed, the pen-and-paper method, in which the consumer essentially relies on his or her own labor to prepare a tax return, is perhaps most analogous to walking as opposed to purchasing a ride on any means of transportation. In sum, filling out a tax return manually is not reasonably interchangeable with DDIY products that effectively fill out the tax return with data input provided by the consumer.

Inclusion of all possible methods of tax preparation, including pen-and-paper, in the relevant product market also violates the principle that the relevant product market should **[**52]** ordinarily be defined as the smallest product market that will satisfy the hypothetical monopolist test. *See* Merger Guidelines § 4.1.1 ("When the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test."); *see also* Warren-Boulton, TT, 9/8/11 p.m., at 35-36. Indeed, the defendants' inclusion of pen-and-paper in the relevant market ignores at least one obvious, smaller market possibility that they might have proposed – the combined market of all DDIY and assisted tax preparation products. It is hardly plausible that a monopolist of this market – to which the only alternative would be pen-and-paper – could not impose a SSNIP.

The defendants' proposed relevant market of all methods of tax return preparation is so broadly defined that, as the plaintiff's expert testified, there are no conceivable alternatives besides going to jail, fleeing to Canada, or not earning any taxable income. Warren-Boulton, TT, 9/8/11 p.m., at 35-36. As the plaintiff's expert put it, "if you're talking about the market for all tax preparation, you're talking about a market where, in economist terms, demand is completely [in]elastic. **[**53]** There are no alternatives." *Id.* at 35. In such circumstances, the usual tools of antitrust analysis – such as the hypothetical monopolist test – cease being useful because it is self-evident that a monopolist of all forms of tax preparation, including self-preparation, could impose a small, but significant price increase. Indeed, a monopolist in that situation could essentially name any price since taxpayers would have no alternative but to pay it. As the plaintiff's expert testified, defining a market that broadly

> negates the entire purpose of defining a relevant market in an antitrust case. You want to define a relevant market in an antitrust case so then [you can calculate] shares and the change in shares makes sense. I don't want to go to infinity . . . I want to define a relevant market under . . .the smallest market principle, which is I want to define the **[*60]** relevant market so that if a hypothetical monopolist . . . did manage to control all of those products, they would impose a significant price increase, large enough to be of concern but not so large as to make the whole exercise pointless.

Id. at 35-36. The Court agrees with this assessment and finds the defendants' proposed **[**54]** relevant market to be overbroad.

3. The Economic Expert Testimony Tends To Confirm That DDIY Is The Relevant Product Market.

Both the plaintiff and the defendants presented testimony from expert economists to support their view of the relevant product market.[14] In addition to their testimony at the hearing, these expert witnesses also provided a detailed expert report and an affidavit summarizing their analysis and conclusions.

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[14] The plaintiff presented expert testimony on market definition from Frederick R. Warren-Boulton, an economist at MiCRA, an economics consulting and research firm. GX 121 (Warren-Boulton Rep.) at 1. Dr. Warren-Boulton holds a B.A. from Yale University, a Ph.D. in economics from Princeton University, and formerly served as the chief economist for the Antitrust Division of the U.S. Department of Justice. *Id.* Dr. Warren-Boulton has previously served as an expert witness in other antitrust cases, including cases challenging the possible anticompetitive effects of a merger or acquisition. *Id.* (noting involvement in *FTC v. Staples, Inc., 970 F. Supp. 1066, 1074 (D.D.C. 1997))*.

The defendants presented expert testimony from Christine Siegwarth Meyer, an economist at National **[**55]** Economic Research Associates, Inc., an economics consulting and research firm. DX 17 (Meyer Rep.) at 1. Dr. Meyer holds a B.A. from the United States Military Academy at West Point, a Ph.D. in economics from the Massachusetts Institute of Technology, and has taught economics at the university level. *Id.* Dr. Meyer has not previously provided expert testimony regarding the possible anticompetitive effects of a merger or acquisition. Meyer, TT, 9/13/11 a.m., at 39.

The Court finds that the analysis performed by the plaintiff's expert tends to confirm that DDIY is a relevant product market, although the available data in this case limited the predictive power of the plaintiff's expert's economic models. The Court also finds that it cannot draw any conclusions from defendants' expert's analysis because of severe shortcomings in the underlying consumer survey data upon which the defendants' expert relied.

a. Plaintiff's Expert - Dr. Warren-Boulton

The plaintiff's expert, Dr. Warren-Boulton, found the relevant product market to be DDIY. He determined that a hypothetical monopolist of DDIY products could profitably impose a SSNIP for at least one DDIY product, and that consumer substitution to **[**56]** assisted methods or pen-and-paper would be insufficient to defeat the SSNIP. GX 121 (Warren-Boulton Rep.) at 12.

Dr. Warren-Boulton began his analysis by postulating that DDIY was the relevant product market and then he used two principal analytical tests to confirm the validity of that assumption. He began by testing DDIY as a relevant market for a few reasons. First, he concluded that the parties' DDIY products are substantially similar in terms of functionality. GX 121 (Warren-Boulton Rep.) at 12-18. Second, he concluded from his review of the defendants' business documents that they viewed DDIY as a discrete product market when competing in the ordinary course of business. *Id.* Third, he ruled out including pen-and-paper and assisted products in the relevant product market based on a consideration of various data. *Id.* at 24-32.

Dr. Warren-Boulton's decision to begin the relevant market analysis with DDIY **[*61]** was appropriate. *See* Areeda & Hovenkamp ¶ 536, at 287 ("[T]wo products are provisionally part of the same market [for hypothetical monopolist analysis] when they employ similar technologies and similar costs and customers use them interchangeably. . . In cases of doubt, [products] **[**57]** should generally be excluded from the provisional market, for incorrect exclusions will ultimately be brought into the market via the price increase methodology."). The parties' DDIY products all provide a fundamentally similar service and a similar user experience for the consumer when compared with other methods of tax preparation. The DDIY consumer sits down at a computer and interacts with the DDIY software, which prompts the consumer for information and ultimately completes the consumer's tax return. This experience is qualitatively different than that of hiring a tax professional or figuring out how to complete one's own tax return manually. Various other evidence in the record also supports the fundamental functional similarity of the technology underlying the parties' DDIY products – perhaps most notably the testimony that post-merger, HRB plans to migrate {redacted} onto TaxACT's software "engine" {redacted}. *See* Dunn, TT, 9/8/11 p.m. (sealed), at 16-17.

As discussed in detail above, various documentary evidence suggests that the parties treat DDIY as a distinct product market in the ordinary course of business.

Dr. Warren-Boulton also considered whether the pen-and-paper and **[**58]** assisted methods should be included in the provisional relevant market, as the defendants contend, and concluded that they should not be.

Dr. Warren-Boulton ruled out including pen-and-paper in the relevant product market, concluding instead that historical tax return data reflects "a gradual migration of customers to [DDIY] from more traditional methods like pen-and paper." GX 121 (Warren-Boulton Rep.) at 24. The percentage of returns prepared by pen-and-paper has fallen considerably over the last decade, while the percentage of DDIY has grown. *Id.* Changes in the yearly percentage shares of taxpayers using pen-and-paper do not appear correlated to changes in the yearly average price of DDIY. *Id.* at 27. Finally, based on IRS data, Dr. Warren-Boulton observed that taxpayers who switched from DDIY to pen-and-paper for tax seasons 2008 and 2009 on average experienced a decrease in tax return complexity, suggesting that much switching from DDIY products to pen-and-paper is driven by such complexity decreases.[15]

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[15] Switching, as discussed further below, refers to the switching of consumers between different products for any reason. The IRS categorizes tax returns into one of three complexity **[**59]** categories: Simple, Intermediate, and Complex. Accordingly, the IRS data only reflects complexity changes that are sufficient to result in assignment to a different one of the three categories.

Dr. Warren-Boulton also ruled out including the assisted tax preparation methods in the relevant market based on consideration of several factors. He reviewed HRB documents that conclude that growth in DDIY has not come at the expense of HRB's assisted business. *Id.* at 28. Testimony from HRB employees, including the former CEO, also reinforced the same conclusion. *Id.* at 28-29. He also cited HRB internal studies, which concluded that consumers who have switched from DDIY to assisted are likely to have experienced a change in tax complexity. He found that HRB's internal conclusion was consistent with IRS switching data, which **[*62]** also indicated a correlation between switching from DDIY to assisted and an increase in tax complexity. *Id.* at 29-30. Finally, Dr. Warren-Boulton noted that, based on data from tax years 2004-2009, increases in the relative price of assisted products were not associated with decreases in the relative market share of assisted products and increases in the relative market share **[**60]** of DDIY, as might be expected if DDIY and assisted prices moved in a single, price-responsive market. *Id.* at 32.

Therefore, having determined that the best provisional relevant market is DDIY and not all methods of tax preparation, Dr. Warren-Boulton then performed two economic tests to confirm that a hypothetical monopolist of all DDIY products could profitably impose a SSNIP. If these economic tests indicated that a hypothetical monopolist could not profitably impose a SSNIP, then the tests would call for the relevant market to be expanded. The tests, however, validated the relevant market as DDIY, as detailed below.

The economic tests Dr. Warren-Boulton applied relied heavily upon switching data from the IRS. Switching refers to the number of consumers who switch between different products for any reason. In any given year, many taxpayers switch from the tax preparation method they used in the prior year to a new method. Since the IRS processes all U.S. tax returns each year and tracks data about the methods of tax preparation that taxpayers used, there is ample, reliable data that market analysts can use to see how many taxpayers switched between methods each year. The IRS data, **[**61]** however, provides little direct insight about *why* any given taxpayer switched methods of preparation. The switch could have been for reasons of price, convenience, changes in the consumer's personal situation, an increase or decrease in tax complexity, a loss of confidence in the prior method of preparation, or any other reason.

As opposed to switching, diversion refers to a consumer's response to a measured increase in the price of a product. In other words, diversion measures to what extent consumers of a given product will switch (or be "diverted") to other products in response to a price increase in the given product. The IRS switching data does not directly measure diversion because switching can occur for any number of reasons, many of which may not involve price.

Unfortunately, no direct, reliable data on diversion exists in this case. The plaintiff's expert argues, however, that the IRS switching data can provide at least some estimate of diversion. While this approach is not without its limitations, as discussed further below, the Court finds that the switching data is at least somewhat indicative of likely diversion ratios. Moreover, the IRS data is highly reliable because **[**62]** (1) the sample size is enormous, since it encompasses over 100 million taxpayers, and (2) the data reflects actual historical tax return filing patterns as opposed to predicted behavior.[16]

[*63] The defendant's expert, who criticizes reliance on this switching data, suggests instead that a better analysis can be based upon simulated diversion data derived from consumer surveys commissioned by the defendants. As

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[16] One limitation in the IRS data set is that if a taxpayer uses a DDIY product to prepare the return, but then prints and mails the return instead of e-filing it, the IRS does not attribute the filing to the DDIY provider and instead lists it in a generic "v-coded" pool of returns. At the hearing, the defendants' criticized the IRS switching data set as problematic on these grounds, suggesting that up to 30 million returns may be "v-coded." *See* Warren-Boulton, TT 9/20/11 a.m., at 21-22. As Dr. Warren-Boulton fully addressed in his expert report, however, a "conservative method for dealing with this issue is to drop all v-coded returns from the analysis," which would still leave well over 100 million returns in the IRS data set. *Id.;* GX 121 (Warren-Boulton Rep.) at 47. The defendants did not identify any reason the v-coded data would be likely to skew the data set. Thus, even if the v-coded data is disregarded, the IRS data set remains extensive and reliable. It is also worth noting that the IRS data **[**63]** does not distinguish between the DDIY providers' various products, so only firm-level switching rates are available. GX 121 (Warren-Boulton Rep.) at 47

described more fully below, however, the shortcomings of these survey-derived diversion data are so substantial that the Court cannot rely on them.

i. Critical Loss Analysis

The first economic test Dr. Warren-Boulton performed is known as ***HN14***[] a "critical loss" analysis. This test attempts to calculate "the largest amount of sales that a monopolist can lose before a price increase becomes unprofitable." *Swedish Match, 131 F. Supp. 2d at 160*. Dr. Warren-Boulton calculated that for a 10 percent price increase in DDIY, the price increase would be profitable if the resulting lost sales did not surpass 16.7 percent.[17] GX 121 (Warren-Boulton Rep.) at 34.

Dr. Warren-Boulton then sought to compare this critical loss threshold with "aggregate diversion ratios." The aggregate diversion ratio for any given product represents the proportion of lost sales that are recaptured by all other firms in the proposed market as the result of a price increase. Since these lost sales are recaptured within the proposed market, they are not lost to the hypothetical monopolist. According to Dr. Warren-Boulton, economists have shown that if the aggregate diversion ratio to products inside the proposed relevant market exceeds the critical loss threshold, then the critical loss analysis indicates that a SSNIP at that level would be profitable for a hypothetical monopolist. *Id.* at 34 (citing Michael Katz and Carl Shapiro, *Critical Loss: Let's Tell the Whole Story,* ANTITRUST (Spring 2003) at 49 -56); *see also* Warren-Boulton, TT, 9/9/11 p.m., at 33-34.

Because no diversion data is available, **[**65]** Dr. Warren-Boulton relied instead on IRS switching data to estimate aggregate diversion ratios. *Id.* These data show that of the taxpayers who left HRB's DDIY products between tax year 2007 and 2008,[18] 57 percent went to other DDIY providers. Of those who left TaxACT, 53 percent stayed in DDIY, and for TurboTax, 39 percent stayed in DDIY. *Id.* at 34-35. Since these numbers are all well above the 16.7 percent critical loss threshold, Dr. Warren-Boulton concluded a 10 percent SSNIP in the DDIY market would be profitable for a hypothetical monopolist.

In cross-examining Dr. Warren-Boulton, the defendants suggested that the critical loss test is meaningless because it would seem to validate numerous different candidate markets consisting of various assortments of tax preparation businesses. Warren-Boulton, TT, 9/9/11 p.m., at 20-42. For example, the defendants demonstrated that the test could also validate a market consisting of just HRB and Intuit or a market consisting of just TaxACT and Intuit. *See* DX 9802. Dr. Warren-Boulton **[*64]** noted in his testimony, however, that such markets are "smaller, irrelevant" markets for evaluating **[**66]** the proposed transaction between HRB and TaxACT. Warren-Boulton, TT, 9/9/11 p.m., at 41; *see also* Areeda & Hovenkamp ¶ 533c, at 254 ("[C]ourts correctly search for a 'relevant market' – that is a market relevant to the particular legal issue being litigated."). The fact that critical loss analysis would validate other groupings of businesses does not undermine Dr. Warren-Boulton's reliance on it to validate DDIY as the relevant market in this case.[19] Indeed, rather than urging a smaller relevant market definition, the defendants urged

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[17] The formula for critical loss is L = X/(X + M), where L is the critical loss, X is the percentage price increase, and M is the hypothetical monopolist's gross margin. Assuming a **[**64]** 50 percent margin, which Dr. Warren-Boulton claims is a conservative estimate for firms in the DDIY market, then the critical loss for a 10 percent SSNIP is 16.7 percent. 16.7 percent is the result of applying 10 percent and 50 percent in the formula X/(X+M): .167 = .1/(.1+.5).

[18] These are the last two years for which this data was available.

[19] The defendants also referred obliquely in cross examination to an academic debate surrounding the proper way to perform critical loss analysis. Warren-Boulton, TT, 9/9/11 p.m., at 23. Dr. Warren-Boulton **[**67]** acknowledged his awareness of the existence of this debate and the defendants' counsel did not pursue the topic further. *Id.* The Court has no basis for disputing Dr. Warren-Boulton's application of critical loss analysis based merely on the existence of unspecified academic critiques. The Court notes that***HN15***[] the critical loss analysis is specifically endorsed by the Merger Guidelines as a method for implementing the SSNIP test, *see* Merger Guidelines § 4.1.3, and has been accepted by courts as a standard methodology. *See FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 40 n.16 (D.D.C. 2009)* ("Critical loss analysis is a standard tool used by economists to study potentially relevant markets."). The court in *CCC Holdings* ultimately did not rely on the expert's application of critical loss

the Court to define the market much more broadly. Nonetheless, the Court appreciates the defendants' point that the critical loss test alone cannot answer the relevant market inquiry. While some inappropriate proposed relevant markets would be ruled out by the critical loss test, the fact that the test could still confirm multiple relevant markets means that the Court must rely on additional evidence in reaching the single, appropriate market definition.

ii. Merger Simulation

In addition to the critical loss analysis, Dr. Warren-Boulton also performed an economic simulation of a merger among the HRB, TaxACT, and Intuit. GX 121 (Warren-Boulton Rep.) at 35. **[**68]** This simulation, known as a Bertrand model, predicted that a monopolist of the DDIY products of these three companies would find it profit-maximizing to raise TaxACT's price by 83 percent, HRB's price by 37 percent and TurboTax's price by 11 percent absent efficiencies. *Id.* Dr. Warren Boulton concluded that this simulation also confirms that DDIY is the relevant product market.[20]

iii. Critiques of Dr. Warren-Boulton's Analysis

The defendants' expert, Dr. Meyer, critiques Dr. Warren-Boulton's analysis in numerous ways. Her most fundamental critique is that his reliance on switching data as a proxy for diversion is flawed because switching can occur for any number of reasons and, therefore, it is not necessarily indicative of what products consumers would switch to in response to a price increase. DX 17 (Meyer Rep.) at 59-60. Dr. Meyer is certainly correct in this critique. Dr. Warren-Boulton, however, testified forthrightly about the limitations involved in relying on switching data as a proxy for diversion:

> Using migration [i.e., switching] doesn't really **[**69]** answer, or it doesn't answer the precise question of [the] merger guidelines, **[*65]** which of course is, where would you go if there was a small but significant price increase? It basically asks the question, where did you go? And you could go for a lot of reasons. You could go because the price has changed, you could go because the quality changes, you could go because you changed. Complexity changes. And there's a lot of evidence in the record that people switch because of changes in their own complexity. But using migration percentages, or using those gives you, I think, a reasonable second estimate of diversion ratios, because it's really asking the question, you know, if you went to some — if for some reason you decided to go from HRB to TaxACT, for all those reasons, is that roughly about the same percentages if you went due to a price increase?

Warren-Boulton, TT, 9/9/11 a.m., at 13-14. Thus, switching data does not necessarily indicate diversion for the reasons both experts have identified. In light of all the evidence in the record and the general similarity of DDIY products, the Court credits Dr. Warren-Boulton's conclusion that it was reasonable to use switching data as a proxy **[**70]** for diversion, especially since no more refined historical data apparently exists. Bearing in mind the shortcomings of the switching data, the Court will not treat Dr. Warren-Boulton's hypothetical monopolist analysis as conclusive. The Court will treat it as another data point suggesting that DDIY is the correct relevant market, however.

Another major critique of Dr. Warren-Boulton's hypothetical monopolist analysis – and one that the defendants repeatedly emphasized at the hearing – is that Dr. Warren-Boulton decided "arbitrarily to *exclude* some alternatives that are closer substitutes than the products that he *included.*" DX 17 (Meyer Rep.) at 70; *see* Meyer, TT, 9/12/11 p.m., at 20-22. As Dr. Meyer put it at the hearing, "Dr. Warren-Boulton's relevant market is a miscellaneous set of unconnected links, because it doesn't include . . . the closest substitute to H&R Block [At Home], which is assisted

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analysis due to what the court deemed a "gap" or oversight in the expert's reasoning, but the court nonetheless adopted the same relevant product market that the critical loss analysis had validated. *See* id. at 40-41.

[20] Dr. Warren-Boulton's merger simulation is addressed further below in the Court's discussion of unilateral effects in Section III.B.2.c.

tax preparation. It doesn't include pen and paper, which is the closest substitute to TaxACT." Meyer, TT, 9/12/11 p.m., at 24-25. Dr. Meyer identified the "closest substitutes" to the merging parties' products using simulated diversion data. As discussed below, the Court finds this data **[**71]** unreliable and declines to rely upon it. Dr. Meyer opines, however, that Dr. Warren-Boulton failed to include the closest substitutes for the defendants' products in his market, even if switching data is treated as a proxy for diversion, as Dr. Warren-Boulton suggests. For example, Dr. Meyer states that "11.2% of TaxACT's customers in TY2007 switched to assisted preparation in TY2008, while only 2.7% switched to H&R Block At Home and 9.1% switched to TurboTax." DX 17 (Meyer Rep.) at 72. Thus, the defendants contend Dr. Warren-Boulton violated the following principle from the Merger Guidelines: "When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product." *Id.* at 72 (quoting Merger Guidelines § 4.1.1).

The government persuasively illustrated the key flaw in this critique during the cross-examination of the defendants' expert. *See* Meyer, TT, 9/13/11 a.m., at 90-96. Simply put, when determining the "closest substitutes" for products within **[**72]** the DDIY category, Dr. Meyer looked at diversion to individual DDIY brands, such as TurboTax and H&R Block At Home, **[*66]** but when assessing substitutes outside the DDIY category, Dr. Meyer lumped all products and methods together into large, aggregated market categories, such as "assisted" or "pen-and-paper." *See id.* If, instead, DDIY products are grouped together as an aggregated category, similar to the treatment of assisted and pen-and-paper in Dr. Meyer's analysis, then the IRS switching data would indicate that other DDIY products are the closest substitutes for both the DDIY products of HRB and TaxACT. *See* GTX 15, 16 (illustrating this analysis). For HRB, the numbers show 56.8 percent switching to other DDIY, 36.9 percent to assisted, and 6.3 percent to pen-and-paper. GTX 15. For TaxACT, the numbers show 52.7 percent switching to other DDIY, 40.1 percent to assisted, and 7.3 percent to pen-and-paper. GTX 16.

Some of Dr. Meyer's additional critiques have more merit. For example, one datum Dr. Warren-Boulton relied on in his analysis was the outcome of an advertising study showing that HRB's sales {were affected} in cities where TaxACT pursued an advertising campaign. *See* GX 121 (Warren-Boulton Rep.) at 43. **[**73]** The Court accepts Dr. Meyer's critique that few conclusions can be drawn from this observation because the observed correlation could have been due to other variables – for example, the advertising of a third competitor like TurboTax. *See* DX 17 (Meyer Rep.) at 69. Similarly, Dr. Warren-Boulton's observations that changes in relative market share of DDIY, assisted, and pen-and-paper do not appear correlated to changes in relative price could also have been affected by confounding variables. *Id.* at 67.

b. Defendants' Expert - Dr. Meyer

Dr. Meyer found the relevant product market to be all methods of tax preparation, including DDIY, assisted, and pen-and-paper. Her conclusion rested on various factors, including an analysis of documents and testimony. *See, e.g., id.* at 15. This Court, however, has already discussed its own analysis of the relevant documents and testimony above. Therefore, the Court will focus now on Dr. Meyer's analysis of pricing data and, in particular, her use of and reliance on data derived from customer surveys commissioned by the defendants.

Dr. Meyer found that assisted preparation competes with DDIY in part because the assisted method is the most popular method of **[**74]** tax preparation across all complexity levels. *See id.* at 12-13. Dr. Meyer concedes, however, that "taxpayers with the most complex tax returns are the most likely to use [assisted preparation]." *Id.* Indeed, her data show that this effect is pronounced, with approximately 70 percent of filers of complex returns using assisted and approximately 44 percent of filers of simple returns using assisted. *Id.* DDIY, by contrast, accounts for approximately 37 percent of simple returns and 23 percent of complex returns. *Id.* If anything, these data indicate that assisted products are linked to the needs of consumers with complex returns, suggesting a partially different consumer profile from DDIY products.

Dr. Meyer also noted that the pricing of DDIY and assisted products overlaps, but her analysis of this overlap rests primarily on comparing high-end DDIY products, such as HRB's Best of Both product,[21] **[*67]** with low-end assisted products, such as Jackson Hewitt's offering of limited, simple return preparation at Wal-Mart. *See id.* at 13-14. Dr. Meyer concedes that the median price of assisted is higher than the median DDIY price, *see id.* at 13, and that is the more useful point of comparison.

Apart from these comparisons and her conclusions about how industry participants view the market based on her review of documents and testimony in the record, Dr. Meyer's definition of the relevant market rests primarily on her analysis of simulated diversion data obtained from a "pricing simulator" created for HRB in 2009 and an email survey conducted by TaxACT in 2011. *See id.* at 17-20. These two sources for her conclusions are discussed seriatim below.

i. Pricing Simulator

Dr. Meyer asserts in her report that the pricing simulator "created for HRB in 2009, provides the only direct test of the likely diversion from HRB's [DDIY] products in reaction to a change in price." *Id.* at 17. The simulator itself is a pricing model that runs as a dynamic Excel spreadsheet. *See* Meyer, TT, 9/13/11 a.m., at 42. Dr. Meyer's report in several **[**76]** instances relies upon an internal HRB Powerpoint presentation that reflects the simulator's data output under several different scenarios. *See, e.g.,* DX 17 (Meyer Rep.) at 37 n.155 (citing the Powerpoint). As Dr. Meyer describes, the "simulator was prepared using a discrete choice survey of 6,119 respondents." *Id.* at 17. She explains that "[t]he respondents were shown five pricing scenarios, and the options included online DIY options, software DIY options, assisted tax preparation options, and other DIY options (including pen-and-paper and friends/family)." *Id.* Dr. Meyer further states that the "pricing of the various options changed across scenarios" and a "conjoint analysis was conducted to analyze the effect of a change in the price of each product on its own sales and the sales of the other tax preparation options." *Id.*

Based on the pricing simulator's results, Dr. Meyer calculated diversion ratios for DDIY products. Dr. Meyer found that "the largest diversion from HRB's [DDIY products], in the event of a price increase, is to CPAs and accountants." *Id.* at 18. She found the "second largest diversion from HRB's [DDIY products]" was to pen-and-paper. *Id.* at 19-20. In addition, "the **[**77]** fourth largest diversion is to HRB retail stores." *Id.* at 18. Accordingly, Dr. Meyer concluded that assisted preparation and pen-and-paper were the closest substitutes to HRB's DDIY products and should be included in the relevant market.

There is a critical flaw in the design of the pricing simulator, however, that renders conclusions based on its output unreliable. Despite Dr. Meyer's assertion that the "pricing of the various options changed across [the] scenarios" presented to the survey respondents, not all of the options in the survey underlying the simulator actually had prices associated with them. *See* Meyer, TT, 9/13/11 a.m., at 27-28. Several "non-priced choice options" were available to the survey respondents and these non-priced options included, importantly, "CPA or Accountant," "H&R Block Retail Office," and "Paper & Pencil." DX 9231 (May 2009 Pricing Simulator Powerpoint) at 4. Thus, while the pricing of the various options changed *for some products* across the different scenarios presented in the survey, no prices at all were associated with these critical "non-priced choice options."

The fact that the pricing simulator survey failed to assign any prices to these **[*68]** particular **[**78]** products is, of course, especially significant given Dr. Meyer's findings that the highest diversion from HRB DDIY was to CPAs and then to pen-and-paper. DX 17 (Meyer Rep.) at 18. Indeed, the conclusion that the largest diversion from HRB's DDIY products would be to CPAs is puzzling on its face. This outcome is counterintuitive because CPAs in general tend to be the most expensive form of tax preparation assistance, while DDIY tends to be the least expensive. *See*

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[21] The Best **[**75]** of Both product, as the name implies, actually combines aspects of DDIY and assisted. It enables a return completed on HRB's DDIY product to be reviewed by a tax professional. *See* DX 17 (Meyer Rep.) at 13 n.44. Thus, it is hardly surprising that this "hybrid" product, which features such exhaustive service, is priced more expensively than a typical DDIY product.

GTX 14. The Court finds that these surprising results are most likely due to the fact that the survey did not, in fact, assign any price at all to the CPA option. Due to this flaw in the survey's design, respondents may well have selected the CPA option and the other non-priced options without even attempting to consider price as a factor in their decision. Accordingly, the Court finds that it simply cannot rely on the diversion ratios predicted by the simulator.

Additional problems with the pricing simulator also render its output unreliable. As Dr. Warren-Boulton noted in his rebuttal of Dr. Meyer's report, the compilation of pricing simulator data which Dr. Meyer relied upon to calculate her diversion ratios contains results **[**79]** that appear to violate what is "[p]erhaps the most fundamental principle in economics." *See* GX 665 (Warren-Boulton Reply Rep.) at 9-10. Increasing the price of one HRB DDIY product in the simulation, TaxCut Online Basic, appears to increase the quantity of the product sold, holding other variables constant. *Id.* This anomaly violates the fundamental economic principle that "demand curves almost always slope downward," which holds that, all other things being equal, consumers buy less of a product when the price goes up. *See id.* In another anomalous result, Dr. Warren-Boulton found that, based on the simulator data, cutting the price of TaxCut Online Basic from $29.95 to $14.95 approximately doubles its predicted market share, but cutting the price only to $19.95 greatly reduces its market share.[22] *Id.* Dr. Warren-Boulton also found that analysis of different print outs of simulator data in the HRB Powerpoint may yield inexplicably different results. For example, relying on the data on one page of the simulator Powerpoint, Dr. Meyer determined that the "the diversion rate from HRB to TaxACT is only 1.6 percent." DX 17 (Meyer Rep.) at 37. Yet, Dr. Warren-Boulton applied the same methodology **[**80]** for calculating the diversion rate to the simulator data reflected on another slide of the same Powerpoint purporting to show the same simulator data as applied to a different scenario. This calculation yielded the "wildly different estimate" of a 32.4 percent diversion rate from HRB to TaxACT. *See* GX 665 (Warren-Boulton Reply Rep.) at 10. These inconsistent and anomalous results provide additional reasons to discredit the diversion ratios Dr. Meyer predicted from the simulator data.

ii. 2011 Email Survey

Dr. Meyer's analysis also relied on a 2011 email survey of TaxACT customers commissioned by the defendants.[23] *See* **[*69]** DX 17 (Meyer Rep.) at 20, 38. In April 2011, TaxACT and HRB jointly commissioned this survey "to determine **[**81]** to which products TaxACT's customers would switch if those customers were displeased with TaxACT because of price, quality, or functionality." *Id.* at 20. The survey asked one primary question: "If you had become dissatisfied with TaxACT's price, functionality, or quality, which of these products or services would you have considered using to prepare your federal taxes?" GX 604 (Survey Summary) at 1. The survey then offered the respondents a list of other products or services from which to choose and instructed them to select all applicable options. *Id.* The list of options that respondents were given varied somewhat depending on the respondents' filing status and the payments they had made for their 2011 tax returns.[24] *Id.* A follow-up question asked the respondents to narrow their selections to a single choice. *Id.*

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[22] Dr. Meyer testified at the hearing that these anomalies are not reflected in the underlying simulator Excel data, but rather appear only in the printouts of simulator data contained in the internal HRB Powerpoint. In addition, Dr. Meyer explained that she redid her calculations excluding the anomalous data and came up with the same conclusions. *See* Meyer, TT, 9/12/11 p.m., at 45-47. Dr. Meyer never identified the source or cause of the anomalies, however. *Id.* at 49.

[23] Prior to the hearing in this case, the government filed a motion in limine to exclude this survey from evidence and to limit Dr. Meyer's opinion to the extent it relied on the survey. *See* ECF No. 60. The government argued that the survey's wording and methodology made it inherently unreliable and therefore inadmissible. While the Court noted that the government had identified **[**82]** a number of defects in the methodology and wording of the survey, the Court concluded that these defects did not undermine the survey and the expert's reliance on it so overwhelmingly as to render the survey inadmissible, especially in a bench trial. *See* Memorandum Opinion and Order on Motion in Limine, September 6, 2011, ECF No. 84.

[24] The response options varied among four different categories of filers, which are discussed further below. For example, the list of options presented to filers who completed a free federal tax return and no state return were: "I would prepare myself without help," "TurboTax Free Edition," "H&R Block at Home Free Edition," "Free TaxUSA Free Edition," "Complete Tax Free Basic,"

The research firm conducting the survey initially sent out 46,899 email requests to TaxACT customers inviting them to participate in the survey and then subsequently targeted 24,898 customers who had purchased a federal tax return product but not a state product. *Id.* Survey respondents were also asked screening **[**83]** questions to determine their membership in one of four categories of customers: (1) those who paid to complete both a federal and state tax return; (2) those who completed a free federal return and paid to complete a state return; (3) those who completed a paid federal return but did not complete a state return; and (4) those who completed a free federal return and did not complete a state return. *Id.*

A total of 1,089 customers responded to the survey. *Id.* at 1-3. The response rates for the four categories of customers were: (1) 2.45 percent for paid federal / paid state filing (422); (2) 2.08 percent for free federal / paid state filing (245); (3) 0.6 percent for paid federal / no state filing (182); and (4) 1.7 percent for free federal / no state filing (240). *Id.*

Dr. Meyer opined that "this survey is closer to the concept of a diversion ratio than are data on overall switching between products." DX 17 (Meyer Rep.) at 20 n.85. Based on the survey's results, she concluded that the survey "provides direct evidence that digital DIY products compete with pen-and-paper" because the percentage of TaxACT customers who reported that, if they were dissatisfied with TaxACT, they would switch **[**84]** to pen-and-paper in each group ranged from 27 to 34 percent. DX 17 (Meyer Rep.) at 20. Dr. Meyer also noted that the survey showed that few TaxACT customers would switch to H&R Block At Home, since only 4 to 10 percent of respondents selected that option. *Id.* at 38. Accordingly, Dr. Meyer **[*70]** found this outcome indicative that "HRB is not a particularly close competitor to TaxACT." *Id.*

In response to Dr. Meyer's reliance upon this survey, the government submitted a rebuttal expert report from Dr. Ravi Dhar, a professor of management at Yale University, which credibly critiques the survey on several levels.[25] GX 623 (Dhar Rep.). Most fundamentally, the government points out that the phrasing of the survey question – which asks about dissatisfaction with "TaxACT's price, functionality, or quality" – appears to ask a hypothetical question about *switching,* not diversion based solely on a price change. Since the phrasing of the survey question conflates customer concerns about price, functionality, or quality, the government argues that the survey cannot shed any light on customer reactions to price changes alone. *See id.* at 5. Further, to the extent that the wording of the question addresses **[**85]** price, it does not ask about a change in price, but rather suggests a change in the customer's satisfaction with TaxACT's existing price. *See id.*

At the hearing, Dr. Meyer explained that she viewed the email survey data as "closer to diversion than is pure switching data" because switching could occur for any reason at all, while the survey only asked about potential switching due to dissatisfaction with "price, functionality, or quality." Meyer, TT, 9/13/11 a.m., at 87. Yet the Court finds that almost any reason for switching from a product could be characterized as dissatisfaction with the "functionality" or "quality" offered by the product in some respect. Therefore, the survey question does not come much closer to identifying diversion ratios than pure switching data does. Moreover, since there is extensive IRS data reflecting actual switching behavior in the marketplace – as opposed to the hypothetical switching behavior asked about in the email survey – the Court will not rely on the "diversion ratios" suggested by the 2011 email survey.

Furthermore, additional defects in the 2011 email **[**86]** survey's methodology also render the reliability of its findings questionable. First, the high level of non-response to the defendants' email invitations to participate in the survey could have biased the results. Dr. Dhar explained that the "level of nonresponse . . . is extremely high (more than 98%)" and that the "extremely low response rates makes it difficult to determine whether the results were impacted by a certain segment who were systematically more likely to respond to the survey (e.g., those who were price sensitive or time insensitive) in relation to those who did not respond." GX 623 (Dhar Rep.) at 10. The Court agrees that non-response bias is a potential pitfall of the survey. *See* University of Kansas v. Sinks, No. 06-2341,

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"An Accountant," "I would use a product on FFA [i.e., Free File Alliance]," "TaxSlayer Free Edition," "Jackson Hewitt Free Basic," "Tax$imple Free Basic," and "Other." GX604 at 2.

[25] Dr. Dhar did not testify in person at the hearing, but provided an expert report and affidavit.

2008 U.S. Dist. LEXIS 23763, 2008 WL 755065, at *4 (D. Kan. Mar. 19, 2008) (noting, in trademark case, that a consumer survey response rate of "2.16% appears, by any standard, to be quite low."). Second, by providing survey respondents with a pre-selected list of alternative options, rather than letting respondents respond organically, the survey leads respondents to think about the market for tax preparation services in the same terms that the defendants do, which may have **[**87]** led respondents to select options they otherwise would not have selected. Since the survey's question essentially asks about hypothetical switching, and since the actual IRS switching data in this case reflect a much larger **[*71]** sample size without the methodological deficiencies of the 2011 survey, the Court declines to rely on the purported diversion ratios calculated from the email survey.

On the whole, the Court views Dr. Warren-Boulton's expert analysis as more persuasive than Dr. Meyer's.[26] First, Dr. Warren-Boulton's testimony was generally more credible than Dr. Meyer's.[27] Second, the diversion ratios that Dr. Meyer calculated from the pricing simulator and the 2011 email survey are unreliable, as discussed above. Without these simulated diversion ratios, little remains of Dr. Meyer's expert conclusions apart from her analysis of documents in the record.

Dr. Warren-Boulton's analysis is not without its limitations. The main shortcoming for his approach is that he relied on switching data as a proxy for diversion. Since there is evidence in the record that switching among different products in the broader tax preparation industry occurs for reasons other than price competition, switching cannot serve as a complete proxy for diversion. Even so, the Court credits Dr. Warren-Boulton's conclusion that switching data can provide a "reasonable second estimate" of diversion ratios here. Therefore, the Court finds that Dr. Warren-Boulton's analysis tends to confirm that the relevant market is DDIY, although the Court would not rely on his analysis exclusively. As explained above, however, the full body of evidence in this case makes clear that DDIY is the correct relevant market for evaluating this merger.

B. Likely Effect on Competition

1. The Plaintiff's Prima Facie Case

HN16[] Having defined the relevant market as DDIY tax preparation products, "the Court must next consider the likely effects of the proposed acquisition on competition **[**89]** within that market." *Swedish Match, 131 F. Supp. 2d at 166*. The government must now make out its prima facie case by showing "that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market.'" *Heinz, 246 F.3d at 715* (quoting *Philadelphia Nat'l Bank, 374 U.S. at 363*). "Such a showing establishes a 'presumption' that the merger will substantially lessen competition." *Id.*

HN17[] "Market concentration, or the lack thereof, is often measured by the Herfindahl-Hirschmann Index ('HHI')." *Id. at 716*. "The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. For example, a market with ten firms having market shares of 20%, 17%, 13%, 12%, 10%, 10%, 8%, 5%, 3% and 2% has an HHI of 1304 ($20^2 + 17^2 + 13^2 + 12^2 + 10^2 + 10^2 + 8^2 + 5^2 + 3^2 + 2^2$)." *Id. at 715 n.9*. Sufficiently large HHI figures establish the government's prima facie case that a merger is anticompetitive. *Id.* Under the Horizontal Merger Guidelines, markets with an HHI above 2500 are considered "highly concentrated" and mergers "resulting in highly concentrated markets **[**90]** that involve an increase in the HHI of more than 200 points will be presumed to **[*72]** be likely to enhance market power." Merger Guidelines § 5.3.

In this case, market concentration as measured by HHI is currently 4,291, indicating a highly concentrated market under the Merger Guidelines. GX 121 (Warren-Boulton Rep.) at 38. The most recent measures of market share

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[26] Of course, the Court remains cognizant that the plaintiff bears the burden of proof in demonstrating the relevant market.

[27] For example, Dr. Meyer's description of the pricing simulator survey as one in which the "pricing of the various options changed across scenarios" was inaccurate insofar as several of the most significant products **[**88]** for the purposes of Dr. Meyer's analysis did not have any prices associated with them at all. *See* discussion *supra.*

show Intuit with 62.2 percent of the market, HRB with 15.6 percent, and TaxACT with 12.8 percent. GX 27. These market share calculations are based on data provided by the IRS for federal tax filings for 2010, the most recent data available.

The defendants argue that market share calculations based exclusively on federal filing data are insufficient to meet the plaintiff's burden in establishing its alleged relevant product market, which includes both federal and state filings. Defs.' Post-Trial Mem. at 12-13. The Court rejects this argument. State tax return products are typically sold as add-ons to or in combination with federal return products and the Court finds that there is little reason to conclude that the market share proportions within the state DDIY segment would be significantly different from federal DDIY. *See* GX 600 **[**91]** at 8 (HRB market research study stating that "[t]he desire to file State and Federal taxes together, and, inherently, for ease/convenience overruled all other rationales for the method chosen for State taxes."). While, as defendants point out, many customers of federal tax return DDIY products do not also purchase state returns, that may be because they live in states without income tax or because their state returns are simple enough to prepare very easily without assistance. *See* Dunn, TT, 9/8/11 a.m., at 48-49. ***HN18***[] A reliable, reasonable, close approximation of relevant market share data is sufficient, however. *FTC v. PPG Indus., Inc., 798 F.2d 1500, 1505, 255 U.S. App. D.C. 69 (D.C. Cir. 1986)*. Further, the defendants' own ordinary course of business documents analyze the market based on IRS federal e-file data, without reference to state filings, even though the defendants' clearly sell state tax return products. *See, e.g.,* GX 27.

The proposed acquisition in this case would give the combined firm a 28.4 percent market share and will increase the HHI by approximately 400, resulting in a post-acquisition HHI of 4,691. *Id.* These HHI levels are high enough to create a presumption of anticompetitive effects. *See,* ***[**92]*** *e.g., Heinz, 246 F.3d at 716* (three-firm to two-firm merger that would have increased HHI by 510 points from 4,775 created presumption of anticompetitive effects by a "wide margin"); *Swedish Match, 131 F. Supp. 2d at 166-67* (60 percent market share and 4,733 HHI established presumption). Accordingly, the government has established a prima facie case of anticompetitive effects.

HN19[] "Upon the showing of a *prima facie* case, the burden shifts to defendants to show that traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition in these markets or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects." *CCC Holdings, 605 F. Supp. 2d at 46*. "The courts have not established a clear standard that the merging parties must meet in order to rebut a prima facie case, other than to advise that '[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut [the presumption] successfully.'" *Id. at 46-47* (quoting *Baker Hughes, 908 F.2d at 991*). Even in cases where the government has made a strong prima facie showing:

> [i]mposing **[**93]** a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to **[*73]** establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories.

Baker Hughes, 908 F.2d at 992. Thus, ultimately,"[t]he Supreme Court has adopted a totality-of-the-circumstances approach to the [Clayton Act], weighing a variety of factors to determine the effects of particular transactions on competition." *Id. at 984*. With these observations in mind, the Court will evaluate the parties' evidence and arguments about the likely effect of the transaction on competition in the DDIY market.

2. Defendants' Rebuttal Arguments

a. Barriers to Entry

Defendants argue that the likelihood of expansion by existing DDIY companies besides Intuit, HRB, and TaxACT will offset any potential anticompetitive effects from the merger. ***HN20***[] Courts have held **[**94]** that likely entry or expansion by other competitors can counteract anticompetitive effects that would otherwise be expected. *See* Heinz, 246 F.3d at 717 n.13 ("Barriers to entry are important in evaluating whether market concentration statistics accurately reflect the pre- and likely post-merger competitive picture."); Baker Hughes, 908 F.2d at 987 ("In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time."). According to the Merger Guidelines, entry or expansion must be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." Merger Guidelines § 9; *see also* CCC Holdings, 605 F. Supp. 2d at 47; United States v. Visa USA, Inc., 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001) (entry must be "timely, likely, and [of a] sufficient scale to deter or counteract any anticompetitive restraints"). "Determining whether there is ease of entry hinges upon an analysis of barriers to new firms entering the market or existing firms expanding into new regions of the market." CCC Holdings, 605 F. Supp. 2d at 47 (quoting FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 55 (D.D.C. 1998)). **[**95]** In this case, the parties essentially agree that the proper focus of this inquiry is on the likelihood of expansion by existing competitors rather than new entry into the market.[28] *See* Defs.' Post-Trial Mem. at 21-22. Since the government has established its prima facie case, the defendants carry the burden to show that ease of expansion is sufficient "to fill the competitive void that will result if [defendants are] permitted to purchase" their acquisition target. Swedish Match, 131 F. Supp. 2d at 169.

In **[**96]** describing the competitive landscape, the defendants note there are eighteen companies offering various DDIY products through the FFA. Defs.' Post-Trial Mem. at 22. Most of these companies are very small-time operators, however. **[*74]** The defendants acknowledge this fact, but nevertheless contend that the companies "TaxSlayer and TaxHawk are the two largest and most poised to replicate the scale and strength of TaxACT." *Id.* at 23. Witnesses from TaxSlayer and TaxHawk were the only witnesses from other DDIY companies to testify at the hearing. As such, the Court's ease of expansion analysis will focus on whether these two competitors are poised to expand in a way that is "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract" any potential anticompetitive effects resulting from the merger.

TaxHawk runs five different websites, including FreeTaxUSA.com, that all market the same underlying DDIY product. Kimber, TT, 9/12/11 a.m., at 12, 40. TaxHawk was founded in 2001, three years after TaxACT, although it has a significantly smaller market share of 3.2 percent. *Id.* at 11; GX 27. TaxHawk's vice-president and co-founder, Mr. Dane Kimber, testified that the **[**97]** company has the technical infrastructure to grow by five to seven times the number of customers in any given year. Kimber, TT, 9/12/11 a.m., at 21. TaxHawk's marketing strategy relies substantially on search engine advertising and search term optimization, including by using the FreeTaxUSA.com domain name, which contains the keywords "free" and "tax." *See id.* at 19-27. Despite having been in business for a decade, its products are functionally more limited than those of Intuit, HRB, and TaxACT in various ways. *See* PFF ¶ 185. Although TaxHawk services the forms that cover most taxpayers, its program does not service all federal forms, it excludes two states' forms in their entirety, and it does not service city income tax forms for major cities that have income taxes – notably, New York City. Kimber, TT, 9/12/11 a.m., at 44. In fact, Mr. Kimber testified that the company would likely need another decade before its DDIY products could fully support all the tax forms. *Id.* at 45. The reason is that TaxHawk is what Mr. Kimber "like[s] to call . . . a 'lifestyle' company. We like the lifestyle we have as owners. We want our employees to have a life, if you will. I do feel we have the expertise **[**98]** to [expand functionality] more rapidly, but we choose not to." *Id.* Mr. Kimber also testified that TaxHawk had suddenly experienced an unprecedented growth rate of over 60 percent since April 2011, *id.* at 20-21, but that the company had not done any analysis to attempt to explain this unanticipated (and presumably welcome) growth. *Id.* at 39.

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[28] New entrants to the market would not only face all of the barriers to expansion already faced by the existing small firms offering DDIY products, they would also have to develop their own products, including a software platform and a sufficient level of tax expertise. For entry to be considered timely, it typically must occur within approximately two years post-merger. *See* Commentary on the Horizontal Merger Guidelines (2006) at 45-46 (discussing prior Merger Guidelines § 3.2, which specified that timely entry should occur within two years). It is unlikely that an entirely new entrant to the market could compete meaningfully with the established DDIY firms within that time frame.

TaxHawk's relaxed attitude toward its business stands in stark contrast to the entrepreneurial verve that was apparent throughout the testimony of Mr. Dunn and that has been rewarded by the impressive growth of TaxACT over the years. In short, TaxHawk is a very different company from TaxACT. TaxHawk is a small company that has developed a string of search-engine-optimized DDIY websites, which deliver a sufficient income stream to sustain its owners' comfortable lifestyle, without requiring maximal effort on their part. While TaxHawk's decision to prioritize a relaxed lifestyle over robust competition and innovation is certainly a valid one, expansion from TaxHawk that would allow it to compete "on the same playing field" as the merged company appears unlikely. *Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 430 (5th Cir. 2008)*.

After TaxHawk, **[**99]** TaxSlayer is the next largest DDIY competitor, with a 2.7 percent market share. GX 27. TaxSlayer.com launched in 2003, although the same company started selling a software product to tax professionals several years earlier. Rhodes, TT, 9/12/11 a.m., at 71. TaxSlayer is part of the same corporate family as Rhodes Murphy, a tax firm that provides assisted tax preparation through **[*75]** sixteen retail offices in the Augusta, Georgia area. *Id.* The company is a family business and James Brian Rhodes, the product manager of TaxSlayer and the son of the company's founder, testified at the hearing. *Id.* at 70,73. Mr. Rhodes testified that, in the event of an increase in TaxACT's prices or a decrease in its quality, he "believe[s] that [TaxSlayer is] poised and ready to take those customers who would want to go elsewhere for lower prices." *Id.* at 81. TaxSlayer's marketing strategy relies heavily on sponsorship of sporting events, including the Gator Bowl and NASCAR. *Id.* at 75. TaxSlayer typically invests {a significant amount of its budget in marketing}. Rhodes, TT, 9/12/11 a.m. (sealed), at 86, 92. For example, TaxSlayer plans to spend ${redacted} on marketing in 2012 based on 2011 revenues of ${redacted}. **[**100]** *Id.* at 84, 87. Despite this {high} level of marketing spending, TaxSlayer's DDIY market share has not changed substantially since 2006, despite steady growth in TaxSlayer's revenue and number of units sold. *See id.* at 94-96; GX 21-7 (IRS e-file share data chart showing 2.5 percent share for TaxSlayer in 2006 and 2.7 percent in 2010). Rather, TaxSlayer's growth in unit sales and revenue has come from maintaining the same slice of an expanding pie – the growing DDIY market. *See* GX 21-7.

TaxSlayer's stable market share despite its {significant} marketing expenditure as a proportion of revenue points to what the government considers the key barrier to entry in this market – the importance of reputation and brand in driving consumer behavior in purchasing DDIY products. Simply put, tax returns are highly personal documents that carry significant financial and legal consequences for consumers. Consumers, therefore, must trust and have confidence in their tax service provider. As one of TaxACT's bankers put it a confidential memorandum, "[t]ax filers must have confidence that sensitive data is being handled with care and that returns are processed in a secure, error-free and timely manner." **[**101]** GX 125 at 12.

Building a reputation that a significant number of consumers will trust requires time and money. As HRB's former CEO noted, it takes millions of dollars and lots of time to develop a brand. Bennett, TT, 9/6/11 p.m., at 30. TaxACT's offering memoranda also point to the difficulty in building a brand in the industry as a barrier to competition. *See* GX 28-24 at 2SS-CORPe-2419 (2009 memorandum stating "With over 11 years of building reliable, robust software solutions, 2SS has created a valuable brand within the online tax preparation market which Management believes would take years of competitive investment to replicate."). In the DDIY industry, the Big Three incumbent players spend millions on marketing and advertising each year to build and maintain their brands, dwarfing the combined spending of the smaller companies. For example, in tax year 2009, Intuit, HRB, and TaxACT collectively spent approximately {over $100 million} on marketing and advertising. GX 29 (Intuit Decl.) ¶ 38; GX 61-22 at 3; GX 138 at 37. By contrast, {TaxSlayer and TaxHawk spent a significantly smaller amount}.[29] Rhodes, **[*76]** TT, 9/12/11 a.m. (sealed), at 95; GX 25 (TaxHawk Decl.) ¶ 14.

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[29] The defendants **[**102]** attempt to reframe this disparity by noting that their calculation of TaxSlayer's projected tax season 2015 marketing budget would slightly surpass the amount of TaxACT's actual 2011 marketing budget. Defs.' Post-Trial Mem. at 23. Setting aside the validity of the defendants' aggressive projections of TaxSlayer's 2015 budget, a proper comparison would have to be founded upon a comparable projection of TaxACT's 2015 budget—not TaxACT's actual 2011 numbers, for which the relevant comparison is TaxSlayer's 2011 numbers.

Even TaxACT's successful business strategy has been premised on the notion that it cannot outspend Intuit and HRB on marketing. Dunn, TT, 9/7/11 p.m., at 71-72. The massive marketing expenditures of the two major DDIY firms create high per customer acquisition costs and limit the easy marketing channels that are open to smaller competitors. *See, e.g., id.* at 88-89 (noting that "Web advertising is the most competitive. . . I think [TaxACT is] going to get shut out on Yahoo [the popular web portal]. I think Intuit is going to buy it lock, stock and barrel," and explaining that this outcome would hurt TaxACT's business if it doesn't find effective alternative advertising venues). **[**103]** Rather than attempting to outspend HRB and Intuit, TaxACT's growth strategy has largely depended on providing "great customer service, a great product, and a great customer experience" and then relying on word-of-mouth referrals to spread the awareness of the brand. *Id.* at 71-72. This process is inherently time-consuming and difficult to replicate.

In support of their argument that TaxSlayer and TaxHawk are poised to expand in response to a price increase, the defendants emphasize that these companies "are at about the same position in terms of customer base as TaxACT was in 2002, which was the year before it did the Free For All [offer on] the FFA." Meyer, TT, 9/12/11 p.m., at 130. The government points out, however, that there are two flaws in this comparison, even assuming that TaxSlayer and TaxHawk were TaxACT's competitive equals. First, while these companies may have a similar number of customers to TaxACT in 2002 in absolute terms, TaxACT's market share at 8 percent was already significantly larger than the market shares of these firms today, despite the fact that TaxACT had been in the market for fewer years. *See* GTX 17.

Second, the DDIY market has matured considerably since **[**104]** 2002, in parallel with the general ripening of various online industries during the past decade. Notably, the pool of pen-and-paper customers has dwindled as DDIY preparation has grown. Thus, the "low hanging fruit" of DDIY customer acquisition may have been plucked. *See* GX 296 (Houseworth Dep.) at 66-68 (noting that "there's probably only two or three years of continued mid teens category growth for online" because of the shrinking pool of new potential customers that can be converted from the pen-and-paper method). This trend suggests existing market shares may become further entrenched and that growing market share may be even harder, especially because there are barriers to switching from one DDIY product to another. For example, the hearing evidence showed that it is difficult to import prior-year tax return data across DDIY brands. If a taxpayer uses, say, TurboTax or TaxACT in one year, then when the taxpayer returns the next year, the program can automatically import the prior year's data, which is not only convenient but can also help the taxpayer identify useful tax information, such as carry forwards and available deductions. Dunn, TT, 9/8/11 a.m., at 111-14. Currently, **[**105]** it is not possible to import much of this data if the taxpayer switches to a competitor's product. *Id.* Thus, this feature lends a "stickiness" to each particular DDIY product once a customer has used it.

Upon consideration of all of the evidence relating to barriers to entry or expansion, the Court cannot find that expansion is likely to avert anticompetitive effects from the transaction. The Court will next consider whether the evidence supports a likelihood **[*77]** of coordinated or unilateral anticompetitive effects from the merger.

b. Coordinated Effects

HN21[] Merger law "rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels." *CCC Holdings, 605 F. Supp. 2d at 60* (quoting *Heinz, 246 F.3d at 715*). The government argues that the "elimination of TaxACT, one of the 'Big 3' Digital DIY firms" will facilitate tacit coordination between Intuit and HRB. Pl.'s Post-Trial Mem. at 15. "Whether a merger will make coordinated interaction more likely depends on whether market conditions, on the whole, are conducive to reaching terms of coordination **[**106]** and detecting and punishing deviations from those terms." *CCC Holdings, 605 F. Supp. 2d at 60* (internal quotation omitted). Since the government has established its prima facie case, the burden is on the defendants to produce evidence of "structural market barriers to collusion" specific to this industry that would defeat the "ordinary presumption of collusion" that attaches to a merger in a highly concentrated market. *See* *Heinz, 246 F.3d at 725*.

The defendants argue the primary reason that coordinated effects will be unlikely is that Intuit will have no incentive to compete any less vigorously post-merger. The defendants assert that the competition between Intuit and HRB's retail stores would be "fundamentally nullified if Intuit decided to reduce the competitiveness of TurboTax." Defs.' Post-Trial Mem. at 17. Further, defendants contend that Intuit has no incentive to reduce the competitiveness of its free product because it views its free product as a critical driver of new customers. *Id.* at 17-18 Therefore, the defendants conclude that if HRB does not compete as aggressively as possible with its post-merger products, it will lose customers to Intuit. *Id.* at 18.

The most compelling **[**107]** evidence the defendants marshal in support of these arguments consists of documents and testimony indicating that Intuit engaged in a series of "war games" designed to anticipate and defuse new competitive threats that might emerge from HRB post-merger. *See* GX 293 (Intuit Dep.) at 98-101; DX 84. The documents and testimony do indicate that Intuit and HRB will continue to compete for taxpayers' patronage after the merger—indeed, in the DDIY market, they would be the only major competitors. This conclusion, however, is not necessarily inconsistent with some coordination. As the Merger Guidelines explain, coordinated interaction involves a range of conduct, including unspoken understandings about *how* firms will compete or refrain from competing. *See* Merger Guidelines § 7.

In this case, the government contends that coordination would likely take the form of mutual recognition that neither firm has an interest in an overall "race to free" in which high-quality tax preparation software is provided for free or very low prices. Indeed, the government points to an outline created as part of the Intuit "war games" regarding post-merger competition with HRB that also indicates an Intuit employee's **[**108]** perception that part of HRB's post-merger strategy would be to "not escalate free war: Make free the starting point not the end point for customers." GX 293-13 at INT-DOJ0015942.[30] Since, as defendants point **[*78]** out, DDIY companies have found "free" offers to be a useful marketing tool, it is unlikely that free offers would be eliminated. Rather, the government argues, it is more likely that HRB and Intuit may find it "in their mutual interest to reduce the quality of their free offerings . . . offer a lower quality free product and maintain higher prices for paid products . . . ." PFF ¶ 141.

The government points to a highly persuasive historical act of cooperation between HRB and Intuit that supports this theory. *Cf.* Merger Guidelines § 7.2 ("[M]arket conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion."). After TaxACT launched its free-for-all offer in the FFA, Intuit proposed that the firms in the market limit their free FFA offers, a move which TaxACT opposed and which Mr. Dunn believed was an illegal restraint on trade. Dunn, TT, 9/7/11 p.m., at 79. HRB, Intuit, and others then joined together and successfully lobbied the IRS for limitations on the scope of the free offers through the FFA – limitations that remain in place today. Ernst, TT, 9/7/11 a.m., at 26-27; **[**110]** Warren-Boulton, TT, 9/9/11 p.m., at 78. This action illustrates how the pricing incentives of HRB and Intuit differ from those of TaxACT and it also shows that HRB and Intuit, although otherwise competitors, are capable of acting in concert to protect their common interests.

The defendants also argue that coordinated effects are unlikely because the DDIY market consists of differentiated products and has low price transparency. *See* [CCC Holdings, 605 F. Supp. 2d at 62]() (recognizing the importance of price transparency to the likelihood of coordinated effects). To the contrary, the record clearly demonstrates that the players in the DDIY industry are well aware of the prices and features offered by competitors. Since DDIY products are marketed to a large swath of the American population and available via the Internet, DDIY firms can easily monitor their competitors' offerings and pricing. The fact that competitors may offer various discounts and coupons to some customers via email hardly renders industry pricing "not transparent," as defendants submit. *See* Defs.' Post-Trial Mem. at 21. Moreover, while collusion may, in some instances, be more likely in markets for homogenous

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[30] The government also cites an informal analysis written by Adam Newkirk, an analyst for HRB's DDIY business. Mr. Newkirk's analysis hypothesized that one possible reason for HRB to acquire TaxACT was that HRB and Intuit would jointly control a large DDIY market share post-merger and would "both obviously have great incentive to keep this channel profitable," while other potential purchasers of TaxACT "could decide to cut prices even further . . . ." *See* Newkirk, TT, 9/7/11 a.m., at 100; GX 18. The Court finds that the government overemphasized the importance and relevance of Mr. Newkirk's analysis. **[**109]** The hearing testimony showed that Mr. Newkirk is a data analyst who had no decision-making role or authority in relation to the merger and that his discussion about the rationales for the merger was informal speculation. *See* Newkirk, TT, 9/7/11 p.m., at 42-44. Even so, this reasoning – independently reached by Intuit – is essentially a précis of the government's coordinated effects concern.

products than **[**111]** differentiated products, product differentiation in this market would not necessarily make collusion more difficult. *See* Heinz, 246 F.3d at 716-17, 724-25 (finding likelihood of coordinated effects in product market differentiated by brand); *see also* CCC Holdings, 605 F. Supp. 2d at 65 n.42 ("[T]acit collusion may be easier when products are differentiated.") (quoting Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook,* § 11.2e1, at 635 (2d ed. 2006)).

Other indicia of likely coordination are also present in the DDIY market. Transactions **[*79]** in the market are small, numerous, and spread among a mass of individual consumers, each of whom has low bargaining power; prices can be changed easily; and there are barriers to switching due to the "stickiness" of the DDIY products. *See* CCC Holdings, 605 F. Supp. 2d at 65-66 (discussing these factors as characteristic of markets conducive to coordination); *see also supra* Section III.B.2.a (discussing the difficulty of importing data as a barrier to switching from one DDIY product to another).

Finally, the Court notes that ***HN22***[] the "merger would result in the elimination of a particularly aggressive competitor in a highly **[**112]** concentrated market, a factor which is certainly an important consideration when analyzing possible anti-competitive effects." Staples, 970 F. Supp. at 1083; *see also* FTC v. Libbey, 211 F. Supp. 2d 34, 47 (D.D.C. 2002). The evidence presented at the hearing from all parties demonstrated TaxACT's impressive history of innovation and competition in the DDIY market. Mr. Dunn's trial testimony revealed him to be a dedicated and talented entrepreneur and businessman, with deep knowledge and passion for providing high-quality, low-cost tax solutions. TaxACT's history of expanding the scope of its high-quality, free product offerings has pushed the industry toward lower pricing, even when the two major players were not yet ready to follow – most notably in TaxACT's introduction of free-for-all into the market.

The government presses the argument that TaxACT's role as an aggressive competitor is particularly important by urging this Court to find that TaxACT is a "maverick." *See* Pl.'s Post-Trial Mem. at 18-19. In the context of ***antitrust law***, a maverick has been defined as a particularly aggressive competitor that "plays a disruptive role in the market to the benefit of customers." Merger Guidelines **[**113]** § 2.1.5. The most recent revision of the Merger Guidelines endorses this concept and gives a few examples of firms that may be industry mavericks, such as where "one of the merging firms may have the incentive to take the lead in price cutting or . . . a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition." *Id.*

The parties have spilled substantial ink debating TaxACT's maverick status. The arguments over whether TaxACT is or is not a "maverick" – or whether perhaps it once was a maverick but has not been a maverick recently – have not been particularly helpful to the Court's analysis. The government even put forward as supposed evidence a TaxACT promotional press release in which the company described itself as a "maverick." *See* GX 28-6. This type of evidence amounts to little more than a game of semantic gotcha. Here, the record is clear that while TaxACT has been an aggressive and innovative competitor in the market, as defendants admit, TaxACT is not unique in this role. Other competitors, including HRB and Intuit, have also been aggressive and innovative in forcing companies in the DDIY market to respond to **[**114]** new product offerings to the benefit of consumers. *See* Defs.' Post-Trial Mem. at 20.

The government has not set out a clear standard, based on functional or economic considerations, to distinguish a maverick from any other aggressive competitor. At times, the government has emphasized TaxACT's low pricing as evidence of its maverick status, while, at other times, the government seems to suggest that almost any competitive activity on TaxACT's part is a "disruptive" indicator of a maverick. For example, the government claims that "[m]ost recently, TaxACT continued to disrupt the Digital DIY market by entering the boxed retail software segment of the **[*80]** market, which had belonged solely to HRB and [Intuit]." Pl.'s Post-Trial Mem. at 19. Credible evidence at the hearing, however, showed {otherwise}. *See* Dunn, TT, 9/8/11 p.m. (sealed), at 4. Moreover, the Court credits Mr. Dunn's explanation that TaxACT has little interest in selling boxed retail software because he believes this market segment is {redacted} not particularly significant. *See* Dunn, TT, 9/7/11 p.m. (sealed), at 123 ({redacted}).

What the Court finds particularly germane for the "maverick" or "particularly aggressive competitor" **[**115]** analysis in this case is this question: Does TaxACT consistently play a role within the competitive structure of this market that constrains prices? *See* Staples, 970 F. Supp. at 1083 (finding "merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market" where the merger would remove competition between "the two lowest cost and lowest priced firms" in the market); Merger Guidelines § 2.1.5 (noting maverick concerns may arise where "one of the merging firms may have the incentive to take the lead in price cutting or [with] . . . a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition."). The Court finds that TaxACT's competition does play a special role in this market that constrains prices. Not only did TaxACT buck prevailing pricing norms by introducing the free-for-all offer, which others later matched, it has remained the only competitor with significant market share to embrace a business strategy that relies primarily on offering high-quality, full-featured products for free with associated products at low prices.

Moreover, as the plaintiff's expert, Dr. Warren-Boulton, **[**116]** explained, the pricing incentives of the merged firm will differ from those of TaxACT pre-merger because the merged firm's opportunity cost for offering free or very low-priced products will increase as compared to TaxACT now. *See* Warren-Boulton, 9/9/11 p.m., at 14-16. In other words, the merged firm will have a greater incentive to migrate customers into its higher-priced offerings – for example, by limiting the breadth of features available in the free or low-priced offerings or only offering innovative new features in the higher-priced products. *See* Commentary on the Horizontal Merger Guidelines (2006) at 24 (noting the importance of asking "whether the acquired firm has behaved as a maverick and whether the incentives that are expected to guide the merged firm's behavior likely would be different.").

While the defendants oppose the government's maverick theory, they do not deny that TaxACT has been an aggressive competitor. Indeed, they submit that "that's why H&R Block wants to buy them." Defs.' Closing Argument, TT, 10/3/11 a.m., at 132. HRB contends that the acquisition of TaxACT will result in efficiencies and management improvements that "will lead to better, more effective, **[**117]** and/or cheaper H&R Block digital products post-merger" that are better able to compete with Intuit. Defs.' Post-Trial Mem. at 17. This argument is quite similar to the argument of the defendants in *Heinz,* which some commentators have described as arguing that the merger would create a maverick. *Heinz, 246 F.3d at 720-22*; *see* Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws, 77 N.Y.U. L. Rev. 135, 184 (2002)*. While the district court in *Heinz* accepted this argument that the merger would enhance rather than stifle competition, the D.C. Circuit reversed, finding that the "district court's analysis [fell] short of the findings necessary for a successful efficiencies defense" in that case. *Heinz, 246 F.3d at 721*. As **[*81]** explained more fully in Section III.B.2.d below, the defendants' efficiency arguments fail here for some of the same reasons the D.C. Circuit identified in *Heinz.*

Finally, the defendants suggest that coordinated effects are unlikely because of the ease of expansion for other competitors in the market. As detailed above in the Court's discussion of barriers to entry and expansion, the Court does not find that **[**118]** ease of expansion would counteract likely anticompetitive effects.

Accordingly, the defendants have not rebutted the presumption that anticompetitive coordinated effects would result from the merger. To the contrary, the preponderance of the evidence suggests the acquisition is reasonably likely to cause such effects. *See id. at 711-12* (finding, in market characterized by high barriers to entry and high HHI figures, that "no court has ever approved a merger to duopoly under similar circumstances.").

c. Unilateral Effects

HN23[] A merger is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms. *See Swedish Match, 131 F. Supp. 2d at 169*; Merger Guidelines § 6 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."). "The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects." Merger Guidelines § 6.1. As Judge Collyer in *CCC Holdings* explained:

> Unilateral effects in a differentiated **[**119]** product market are likely to be profitable under the following conditions: (1) the products must be differentiated; (2) the products controlled by the *merging* firms must be

> close substitutes, *i.e.,* "a substantial number of the customers of one firm would turn to the other in response to a price increase"; (3) other products must be sufficiently different from the products offered by the merging firms that a merger would make a small but significant and non-transitory price increase profitable for the merging firm; and (4) repositioning must be unlikely.

605 F. Supp. 2d at 68 (citing Oracle, 331 F. Supp. 2d at 1117-18).[31] Since the Court has already found that the preponderance of the evidence shows a reasonable likelihood of coordinated effects, the Court need not reach the issue of unilateral effects. *See* id. at 67. The Court will discuss it, however, since there has been substantial argument on this topic and the Court's findings regarding unilateral effects bolster the conclusion that this proposed merger would violate Section 7 of the Clayton Act. As with coordinated effects, since the government has established its prima facie case, the burden is on the defendants to produce evidence **[**120]** showing that the presumption of anticompetitive effects that attaches to a merger in a highly concentrated market is unfounded, but the ultimate burden of proof remains with the government.

i. Elimination of Direct Competition Between the Merging Parties

The government argues that unilateral effects are likely because the merger will eliminate head-to-head competition between HRB and TaxACT that has benefited taxpaying American consumers. Much **[*82]** of the evidence indicating direct competition between HRB and TaxACT is discussed above in relation to the market definition. *See supra* Section III.A. The government emphasizes that HRB has lowered its DDIY prices to better compete with free online products, the category pioneered by TaxACT, and has directly considered TaxACT's prices in setting its own prices. *See* GX 53 at 2, 8; GX 188; GX 199 at 5-9. HRB has also determined the nature of its free offerings in response to competitive activity from TaxACT. *See, e.g.,* GX 304 at 5 (HRB changed timing of FFA offering in response to TaxACT's offer); GX 44 (recognizing need to compete with **[**121]** TaxACT offerings); GX 79 (comparing contemplated free product description on HRB's website with TaxACT's website); GX 51 at 4 (noting launch of free online products intended "[t]o match competitor offerings and stem online share loss to Intuit and TaxACT"). The government also points to HRB documents that appear to acknowledge that TaxACT has put downward pressure on HRB's pricing ability. *See* GX 296-16 at 20-21 (noting TaxACT's association with the "commoditization of online space" and downward price pressure from commoditization); GX 20 at 11 ({redacted}). From all of this evidence, and the additional evidence discussed in this opinion, it is clear that HRB and TaxACT are head-to-head competitors.

ii. Pledge to Maintain TaxACT's Current Prices

Defendants press a few different arguments against a finding of likely unilateral anticompetitive effects. First, the defendants have pledged to maintain TaxACT's current prices for three years.[32] While the Court has no reason to doubt that defendants would honor their promise, this type of guarantee cannot rebut a likelihood of anticompetitive effects in this case. *See* Cardinal Health, 12 F. Supp. 2d at 64 (finding that "even with such guarantees **[**122]** [to maintain prices], the mergers would likely result in anti-competitive prices."). Even if TaxACT's list price remains the same, the merged firm could accomplish what amounts to a price increase through other means. For example, instead of raising TaxACT's prices, it could limit the functionality of TaxACT's products, reserving special features or innovations for higher priced, HRB-branded products. The merged firm could also limit the availability of TaxACT to consumers by marketing it more selectively and less vigorously. Indeed, the defendants concede that one immediate effect of the merger will be the removal of TaxACT from the IRS-sponsored FFA website, a marketing channel whose importance the defendants themselves emphasize in their argument regarding barriers to expansion. *See* Dunn, TT, 9/7/11 p.m., at 76-77; Defs.' Post-Trial Mem. at 22.

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[31] The first criterion in this analysis is satisfied because it is undisputed that DDIY products are differentiated.

[32] Before the hearing, the plaintiff filed a motion in limine to exclude evidence relating to this guarantee. ECF No. 44. Following oral argument at the pre-hearing conference, the plaintiff withdrew this motion. *See* Minute Entry dated September 2, 2011.

iii. Value Versus Premium Market Segments

Second, defendants argue that HRB and TaxACT are **[**123]** not particularly close competitors. The defendants contend that HRB and TaxACT largely compete in distinct segments of the market – with HRB in the higher-priced, "premium" segment and TaxACT in the lower-priced, "value" segment.[33] The defendants also argue that **[*83]** there can be no unilateral effects because the evidence shows that both TaxACT and HRB are closer competitors to TurboTax than to each other. Defs.' Post-Trial Mem. at 15.

As part of the argument that HRB and TaxACT focus on separate value and premium segments, the defendants argued that for several years in the mid-2000s, HRB was trapped in the "murky middle" between TaxACT's value offerings and Intuit's premium offerings. *See* DX 17 (Meyer Rep.) at 29; Meyer, TT, 9/13/2011 a.m., at 103-107. The defendants argue that, in recent years, HRB has positioned itself more clearly as a premium provider, as evidenced by the fact that the list price of its online federal plus state DDIY product has tracked Intuit's price more closely since 2010. *See* DX 17 (Meyer Rep.) at 29. This comparison is misleading because it focuses solely on the comparison of the list prices for the companies' highest-priced products. *See id.* at 29 n.116. During the past few years, while HRB has increased the list price of its top-priced DDIY offering, it has also more heavily marketed free products. *See* GX 51 at 4; *see also* Meyer, TT, 9/13/2011 a.m., at 105-106. Accordingly, since 2008, HRB's average DDIY sales price has declined, while the average revenue per paid customer has remained roughly the same. **[**125]** *See* GX 296-7 ("Digital Tax Solutions FY11 Actual Deep Dive") at 1; Meyer, TT, 9/13/11 a.m., at 107-108.

Further, the evidence discussed above indicating direct price and feature competition between HRB and TaxACT negates the conclusion that they operate in separate value and premium segments of the market. There are certainly occasional references to different pricing levels in the defendants' documents. *See* GX 20 at 11 (HRB document noting {redacted}) (emphasis added). This hardly means that the companies are not in close competition, however. Rather, as Mr. Dunn's testimony reflects, TaxACT competes with capital-rich HRB and Intuit by offering high-quality products at substantially lower prices. *See* Dunn, TT, 9/7/11 p.m., at 71-72 (noting that rather than attempting to outspend its richer competitors on marketing, TaxACT's growth strategy has depended on providing "great customer service, a great product, and a great customer experience" for a much lower price, including free). *Id.* This type of healthy competition benefits taxpaying consumers.

The fact that Intuit may be the closest competitor for both HRB and TaxACT also does not necessarily prevent a finding of unilateral effects **[**126]** for this merger. *See* Areeda & Hovenkamp, ¶ 914, 77-80 (explaining that the merging parties need not be the closest rivals for there to be unilateral anticompetitive effects); *see also* Commentary on the Horizontal Merger Guidelines (2006) at 28 ("A merger may produce significant unilateral effects even though a non-merging product is the 'closest' substitute for every merging product . . ."). Using a simple estimate of diversion based on market share would indeed suggest that HRB and TaxACT are each other's second closest rivals after Intuit.[34] **[*84]** *See* GX 121 (Warren-Boulton Rep.) at 44 (explaining that using market share to estimate diversion is a "benchmark" assumption in standard empirical models of consumer demand).

iv. Merged Company's Combined Market Share

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[33] In the defendants' submissions to the Antitrust Division of the DOJ prior to this litigation, the defendants appeared to emphasize this "value" and "premium" distinction as the basis for their definition of the relevant market. *See* GX 135 at 14-15; GX 629 at 18-30. As a result, the government accuses the defendants of having "tacked back and forth" regarding their proposed relevant market definition. Pl.'s Post-Trial Mem. at 1-2. While the Court agrees that the import of the hearing testimony about value and premium products was not always clear, the defendants' counsel clarified during closing arguments that the "only real relevance" of the premium versus value distinction was to show that HRB and TaxACT are not closest the competitors for the purposes **[**124]** of unilateral effects analysis. Defs.' Closing Argument, TT, 10/3/2011 a.m., at 93-94.

[34] The relevance of the diversion estimates provided by the expert economists to the unilateral effects analysis is discussed more fully below.

Another argument that the defendants present against a likelihood of unilateral effects is that, in their view, unilateral effects cannot be demonstrated where the combined firm's market share does not surpass a certain threshold. The defendants point out that in *Oracle,* the court stated that **[**127]** "[a] presumption of anticompetitive effects from a combined share of 35% in a differentiated products market is unwarranted. Indeed, the opposite is likely true." *331 F. Supp. 2d at 1123*. The *Oracle* court stated that "[t]o prevail on a differentiated products unilateral effects claim, a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position." *Id.* Some commentators have criticized this standard, however, because "impermissible price increases . . . can be achieved on far lower market shares" than *Oracle*'s standard evidently requires. Areeda & Hovenkamp ¶ 914, at 84. Indeed, Judge Brown's subsequent opinion from this Circuit in *Whole Foods* implied that a market definition itself may not even be required for proving a Section 7 violation based on unilateral effects. *See Whole Foods, 548 F.3d at 1036*. In a footnote, Judge Brown explained that "a merger between two close competitors can sometimes raise antitrust concerns due to unilateral effects in highly differentiated markets. In such a situation, it might not be necessary to understand the market definition to conclude a preliminary injunction should issue."[35] *Id.* at **[**128]** n.1 (citation omitted). **[*85]** The Court therefore declines the defendants' invitation, in reliance on *Oracle,* to impose a market share threshold for proving a unilateral effects claim.[36]

v. Post-Merger Dual Brand Strategy

HRB's plans for the post-merger company raise anticompetitive questions. Post-merger, **[**131]** HRB's stated plan is to maintain both the HRB and TaxACT brands –with the HRB-brand focusing on higher priced-products and the TaxACT brand focusing on the lower-priced products. *See* Bennett, TT, 9/6/11 a.m., 101-102; DX 1005 at 1. HRB's general pre-merger pricing strategy has been to price its products a bit below Intuit's products. Bennett, TT, 9/6/11 a.m., at 99. Part of HRB's post-merger strategy, however, appears to involve raising prices on HRB-branded

[35] "As a matter of applied economics, evaluation of unilateral effects does not require a market definition in the traditional sense at all." Areeda & Hovenkamp ¶ 913a, at 66. This is so because unilateral effects analysis focuses on measuring a firm's market power directly by "estimating the change in residual demand facing the post-merger firm. 'Residual demand' refers to the demand for a firm's goods after the output of all other competing firms has been taken into account." *Id.* at 63. If market power itself can be directly measured or estimated reliably, then in theory market definition is superfluous, at least as a matter of economics, because "[i]dentifying a market and computing market shares provide an indirect means for measuring market power." *Id.* ¶ 532a at 242-43; *see also id.* ¶ 521c. The 2010 revisions to the Merger Guidelines also appear to reflect this understanding. *See* Merger Guidelines § 4 ("The Agencies' analysis need not start with market definition. Some of the analytical tools used by **[**129]** the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis."). As a legal matter, however, a market definition may be required by Section 7 of the Clayton Act. *See Brown Shoe, 370 U.S. at 324* ("[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected. The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').") (internal citation omitted); *see also Heinz, 246 F.3d at 719 n.17* ("Courts interpret 'line of commerce' [in the language of the Clayton Act] as synonymous with the relevant product market."). The Court is not aware of any modern Section 7 case in which the court dispensed with the requirement to define a relevant product market, although Judge Brown's opinion in *Whole Foods* may be **[**130]** read to endorse this possibility in accordance with the evolving understandings in economics. *See* ***Whole Foods, 548 F.3d at 1036 (Brown, J.)*** (stating that the *Baker Hughes* analytical framework, which "rests on defining a market and showing undue concentration in that market," "does not exhaust the possible ways to prove a § 7 violation on the merits").

[36] The Commentary on the Merger Guidelines, for its part, explains that while "[a]s an empirical matter, the unilateral effects challenges made by the Agencies nearly always have involved combined shares greater than 35%," "the Agencies may challenge mergers when the combined share falls below 35% if the analysis of the mergers' particular unilateral competitive effects indicates that they would be likely substantially to lessen competition." Commentary on the Horizontal Merger Guidelines (2006) at 26. "Combined shares less than 35% may be sufficiently high to produce a substantial unilateral anticompetitive effect if the products are differentiated and the merging products are especially close substitutes . . . ." *Id.*

products. Under this two-brand strategy, HRB would price its "premium" HRB-branded products equal to or above Intuit's prices. *See* Bennett, TT, 9/6/11 a.m., 101-102; DX 1005 at 1. At the same time, the company would "offer TaxACT as its free and value brand." DX 17 (Meyer Rep.) at 78. Yet, the defendants have never convincingly explained how this two-brand strategy would work in practice because defendants have repeatedly emphasized how important "free" product offerings are for all DDIY brands. *See* DFF ¶ 185 ("Free is a highly profitable method of acquiring customers for H&R Block."); DX 600 at 10 (HRB Board of Directors presentation for merger approval stating that after the merger TaxACT would be the "low cost value provider **[**132]** focused on free" but that the company would "[c]ontinue to offer a free product in the HRB brand to drive client acquisition").

Part of the government's concern with HRB's two-brand strategy is that the incentives for the combined firm in marketing and developing the TaxACT product would be quite different from the incentives that exist in the current market. HRB may feel comfortable raising its "premium" prices because it knows that consumers looking for lower-cost DDIY options would be most likely to migrate to TaxACT, the established "value leader" in the market. Since HRB will also control TaxACT post-merger, however, HRB can still ensure that TaxACT's value proposition does not get "too good" and undermine the paid HRB products with the highest profit margins. For example, HRB might restrict the features of TaxACT's free and low-cost products to ensure they do not cannibalize sales of HRB's higher priced offerings. Indeed, assuming that there are high barriers to entry and expansion, this strategy would appear logical because it would maximize HRB's profit per customer. Post-merger, TaxACT will not have the same incentives it has today to develop robust free and low-cost offerings **[**133]** that can compete with the functionality offered by HRB and Intuit. *See* Warren-Boulton, TT, 9/8/11 p.m., at 32-33. Thus, this merger could potentially have the effect of stifling price and feature competition compared with maintaining TaxACT as an independent firm.

[*86] vi. Merger Simulation Shows Likely Unilateral Price Increase

The government's expert economist, Dr. Warren-Boulton, did a merger simulation analysis that suggests a unilateral price increase is likely. Warren-Boulton, TT, 9/9/11 a.m., at 5-11; GX 121 (Warren-Boulton Rep.) at 52. The key factors in this simulation are HRB and TaxACT's price-cost margins and the diversion ratios between their products. *Cf. Swedish Match, 131 F. Supp. 2d at 169* ("High margins and high diversion ratios support large price increases, a tenet endorsed by most economists.").

(a). Diversion Ratios Between the Merging Parties' DDIY Products

As explained above, the diversion rate from TaxACT to HRB measures the proportion of customers that would leave TaxACT in response to a price increase and switch to HRB. Dr. Warren-Boulton's report explains that higher diversion rates between merging parties "allow the firms to recapture more lost sales following a **[**134]** price increase, and therefore lead to greater upward pricing pressure and post-merger unilateral price increases." GX 121 (Warren-Boulton Rep.) at 44. Dr. Warren-Boulton estimated diversion ratios from two sources: the parties' DDIY market share data and the IRS switching data.[37] *Id.* at 44-48.

By assuming diversion rates in accordance with market share, Dr. Warren-Boulton estimated the diversion rate from TaxACT to HRB to be 12 percent and from HRB to TaxACT to be 14 percent. *Id.* at 44-45. Dr. Warren-Boulton notes that these diversion estimates likely underestimate what the actual post-merger diversion rates will be since the merged company will likely implement marketing strategies to keep customers within the umbrella of the combined company. *Id.* at 45.

Dr. Warren-Boulton estimated diversion ratios using IRS switching data as well. As discussed above in Section III.A.3.a, he also used this switching data to test the relevant market definition. As previously noted in that prior discussion, switching data is **[**135]** not equivalent to diversion, since diversion measures switching in response to

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[37] Dr. Warren-Boulton declined to rely on the defendants' proposed diversion data, derived from their consumer surveys, for the reasons already discussed *supra* in Section III.A.3.

a price increase as opposed to all switching generally. In particular, Dr. Warren-Boulton found that switching data is especially likely to overstate diversion from DDIY products to assisted preparation. *Id.* at 46-47. Therefore, Dr. Warren-Boulton discounted the switching rates from DDIY to assisted by half to correct for this effect.[38] *Id.* After this correction, Dr. Warren-Boulton calculated estimated diversion rates from TaxACT to HRB and from HRB to TaxACT of 12 percent. *Id.*at 47-48.

(b). Price-Cost Margins

The next step in his analysis **[**136]** was to estimate the firms' price-cost margins. "All else equal, higher margins lead to greater unilateral price increases because **[*87]** the value of recaptured sales is higher." *Id.* at 48. Using a procedure described in his report, Dr. Warren-Boulton estimated {that the merging parties have high margins}. *Id.* at 49. The merger simulation also required quantities of units sold and average revenue per unit. Dr. Warren-Boulton obtained this data from the companies' submissions. *Id.* at 50.

(c). Simulation Results

Using all of these data, Dr. Warren-Boulton performed a linear demand Bertrand model simulation. *Id.* at 51. Unless there are significant efficiencies from the merger that are passed on to consumers, this simulation predicts a unilateral price increase.[39] *Id.* at 52. Assuming diversion ratios according to market share, the model predicts TaxACT's price will increase by 12.2 percent and HRB's price by 2.5 percent. *Id.* Assuming diversion ratios based on the IRS switching data as discussed above, the model predicts TaxACT's price will increase by 10.5 percent and HRB's price by 2.2 percent. *Id.*

(d). Critique of the Simulation's Unilateral Effects Results

The defendants attack Dr. Warren-Boulton's simulation on several grounds. The defendants reiterate their critique that switching data is an inappropriate proxy for diversion data. Further, defendants criticize the way in which Dr. Warren-Boulton discounted the switching rates from DDIY products to assisted preparation. *See* Warren-Boulton, TT, 9/9/9 p.m., at 60-65. In addition, the defendants contend that Dr. Warren-Boulton's simulator model is flawed because it will always predict a price increase with any positive diversion and because the model is "static," does not take various factors into account, such as the parties' different products, innovation, and marketing, and would never predict that a firm would offer free products, even though free products are a staple of the industry. DX 17 (Meyer Rep.) at 74-75.

The Court agrees that Dr. Warren-Boulton's discounting by half of the switching data from DDIY to assisted appears imprecise. Dr. Warren-Boulton clarified in his report, however, that "the model still predicts significant unilateral harm when non-discounted switching rates are **[**138]** used to approximate diversion rates." GX 121 (Warren-Boulton Rep.) at 47. Further, and more importantly, Dr. Warren-Boulton also estimated diversion ratios based on market share and the Court has concluded above that DDIY is the appropriate relevant product market.[40]

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[38] As a basis for this conclusion that switching data overstates diversion and for his choice to discount the DDIY-to-assisted switching rate by half, Dr. Warren-Boulton relies upon HRB documents that suggest that more than half of switching from DDIY to assisted occurs for reasons unrelated to price, such as a change in tax complexity. GX 121 (Warren-Boulton Rep.) at 46 n.128 (citing GX 635, GX 126). He also relies on IRS data showing that customers switching from DDIY to assisted were twice as likely to have a complexity increase as taxpayers who stayed within DDIY. *Id.* at 47.

[39] As discussed in Section III.B.2.d below, the Court finds most of defendants' claimed efficiencies **[**137]** are not merger-specific or unverifiable.

[40] The defendants suggest that Dr. Warren-Boulton's reliance on market share as an estimate of diversion ratios is somewhat circular in that his market shares derive from his market definition, which, in turn, relied on his use of switching data as a proxy

As for the defendants' critiques about Dr. Warren-Boulton's economic model itself, Dr. Warren-Boulton addressed these directly. First, insofar as the model will predict at least some price increase absent efficiencies with any positive diversion ratios, Dr. Warren-Boulton explained that outcome is fully consistent with correct economic theory. GX 665 (Warren-Boulton Reply Rep.) at 14 ("Economic theory concludes that absent merger specific efficiencies, a merger between competing **[**139]** firms will cause the merging firms to increase their prices by at least some **[*88]** amount. Thus, it is not a deficiency, but a strength, of merger simulation models that they reflect this aspect of economic reality."). In response to the critique that his "static" model would never predict that companies would offer free products, Dr. Warren-Boulton contends that because free DDIY products are often packaged with other paid products, these "free" products actually provide the companies with a positive average revenue per free unit, which his model does take into account. *See id.* at 14-15. As for the remaining critiques that the model does not factor in marketing or innovation, Dr. Warren-Boulton replies that any model is inherently a simplification of the real world, but there is no reason to assume these factors negate the price effect findings of the model. *Id.*

The Court finds that the merger simulation model used by the government's expert is an imprecise tool, but nonetheless has some probative value in predicting the likelihood of a potential price increase after the merger. The results of the merger simulation tend to confirm the Court's conclusions based upon the documents, testimony, **[**140]** and other evidence in this case that HRB and TaxACT are head-to-head competitors, that TaxACT's competition has constrained HRB's pricing, and that, post-merger, overall prices in the DDIY products of the merged firms are likely to increase to the detriment of the American taxpayer.

vii. Repositioning Unlikely to Defeat Unilateral Price Increase

Repositioning by smaller competitors in response to a unilateral price increase is unlikely for the same reasons discussed above regarding barriers to entry and expansion. *See* Merger Guidelines § 6.1 ("Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency.").

Repositioning by Intuit is also unlikely due to the coordinated effects incentives discussed above. The Merger Guidelines make clear that a unilateral price increase may be defeated where "non-merging firms [are] able to reposition their products to offer close substitutes for the products offered by the merging firms." Merger Guidelines § 6.1. Since the Court has already found that HRB and Intuit would have coordinated pricing incentives post-merger, that finding implies that repositioning by Intuit **[**141]** would not prevent HRB from raising prices. By relying on its finding of coordinated effects to predict the likelihood of repositioning by Intuit, the Court acknowledges that its unilateral effects finding is not strictly "unilateral" in the sense that it does take coordination into account. The case law and the Merger Guidelines, however, require that "repositioning" be considered in assessing unilateral effects, and the repositioning inquiry necessarily entails a consideration of the likely actions of other competitors in response to a price increase. *See CCC Holdings, Inc., 605 F. Supp. 2d at 67* (noting that the distinction between coordinated and unilateral effects "has more significance in law than it does in economics" and citing expert testimony describing the distinction as "artificial").

viii. Finding Unilateral Anticompetitive Effects Likely

On balance, and considering the evidence as a whole, the Court finds that, absent efficiencies, the plaintiff has demonstrated a reasonable likelihood of unilateral effects by a preponderance of the evidence. *See Swedish Match, 131 F. Supp. 2d at 169* (finding likelihood of unilateral price increase where merger would eliminate one of the **[**142]** larger merging firm's "primary **[*89]** direct competitors," "the third largest selling" brand "that has consistently played a role in constraining the price" of the larger firm's products); *see also Staples 970 F. Supp. at*

for diversion ratios. DX 17 (Meyer Rep.) at 76. As discussed above, however, the Court's finding that DDIY is the correct relevant product market is not dependent on Dr. Warren-Boulton's analysis.

1083 (finding anticompetitive effects where the "merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the . . . market.").

The Court will now turn to the defendants' final rebuttal argument – the existence of significant, merger-specific efficiencies.

d. Post-Merger Efficiencies

HN24[] One of the key benefits of a merger to the economy is its potential to generate efficiencies. *See* Heinz, 246 F.3d at 720. As the Merger Guidelines recognize, merger-generated efficiencies can "enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." Merger Guidelines § 10. Courts have recognized that a showing of sufficient efficiencies may rebut the government's showing of likely anticompetitive effects. Heinz, 246 F.3d at 720. High market concentration levels require "proof of extraordinary efficiencies," however, and courts "generally have found **[**143]** inadequate proof of efficiencies to sustain a rebuttal of the government's case." *Id.* (citation omitted).

HN25[] "[T]he court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." Id. at 721. As the Merger Guidelines explain, "[c]ognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service." Merger Guidelines § 10. Efficiencies are inherently "difficult to verify and quantify" and "it is incumbent upon the merging firms to substantiate efficiency claims" so that it is possible to "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." *Id.* In other words, a "cognizable" efficiency claim must represent a type of cost saving that could not be achieved without the merger and the estimate of the predicted saving must be reasonably verifiable by **[**144]** an independent party.

The defendants claim that "H&R Block's primary motivation for the TaxACT acquisition is to achieve significant synergies that will enable H&R Block to provide better products at a lower price and to compete more effectively."[41] Defs.' Post-Trial Mem. at 24. The defendants predict that they will achieve over ${redacted} million in annual efficiencies in ten different areas.[42] *Id.* at 24-25.

The chart below summarizes the defendants' claimed efficiencies and predicted annual cost savings:

Efficiency	**Description**	**Estimated Annual Cost Saving**
1. Online IT	{redacted}	${redacted} million
2. Emerald Card	Allowing TaxACT's prepaid debit card offerings to be fulfilled through HRB's bank	${redacted} million
3. H&R Block Bank Refund Anticipation Checks	Funding TaxACT's refund anticipation checks through HRB's bank	${redacted} million
4. {redacted}	{redacted}	${redacted}million

[41] "Cognizable efficiencies" are a subset of "synergies." "Synergies" refer more generally to any business performance benefits that result from the merger of two companies. *See* Zmijewski, TT, 9/19/11 a.m., at 99.

[42] Originally, the defendants claimed 11 efficiencies, including an efficiency related to {redacted}. This task is "really not an efficiency" but "an additional cost," Dunn, TT, 9/8/11 p.m. (sealed) at 7, and defendants do not reference it in their proposed findings of fact. DFF ¶ 291.

Efficiency	Description	Estimated Annual
5. {redacted}	{redacted}	${redacted} million
6. {redacted}	{redacted}	${redacted} million
7. Corporate Website	{redacted}	${redacted} million
8. Software IT	{redacted}	${redacted} million
9. Download Fulfillment	{redacted}	${redacted} million
10. {redacted}	{redacted}	${redacted}million

[*90]

DFF **[**145]** ¶ 292; *see also* DX236-007.

Dr. Mark E. Zmijewski, an expert witness for the government, analyzed the defendants' alleged efficiencies and concluded that – with the exception of {one efficiency related to eliminating third-party contracts} – the proposed efficiencies identified by the defendants are either not merger-specific or not verifiable.[43] *See generally* GX 664 (Zmijewski Rep.).

The Court agrees with Dr. Zmijewski that the defendants have not demonstrated that their claimed efficiencies are merger-specific. ***HN26***[] If a company could achieve certain cost savings without any merger at all, then those stand-alone cost savings cannot be credited as merger-specific efficiencies. The defendants must show that their "efficiencies . . . cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *Heinz, 246 F.3d at 722*. For example, if HRB's {redacted} **[**146]** are not running in the most efficient, cost-effective manner, it is hard to see why a merger with TaxACT is necessary to improve their cost structure. The reasons HRB claims it has higher {redacted} costs than TaxACT include (1) that TaxACT has lower labor costs in Cedar Rapids than HRB has in Kansas City and (2) that TaxACT is simply more cost conscious. Bowen, TT, 9/15/11 p.m., (sealed), at 104-105. Plainly, then, HRB could therefore achieve at least some of the {redacted} cost savings on its own – by relocating {redacted} and taking a more cost conscious attitude toward them. Likewise, the efficiencies related to bringing HRB's outsourced {redacted} functions in-house are unlikely to be wholly merger-specific.

Similarly, the defendants' IT-related efficiencies, which account for the largest efficiency claims, are not entirely merger-specific either. Both TaxACT and HRB witnesses testified that {redacted} – suggesting that the platform consolidation would result in at least some merger-specific efficiencies. *See* Dunn, TT, 9/8/11 p.m. (sealed), at 16-17; Bowen, TT, 9/15/11 p.m. (sealed), at 67-68. One way in which {redacted}. Dunn, TT, 9/8/11 p.m. (sealed), at 16-17; Bowen, TT, 9/15/11 **[**147]** p.m. (sealed), at 67-68; Bowen, TT, 9/19/11 a.m., at 12. Thus, the IT consolidation efficiency actually can be thought of as entailing two distinct consolidations: (1) **[*91]** {redacted} and (2) HRB's platform will be merged with TaxACT's platform. Bowen, TT, 9/19/11 a.m., at 12. Yet the claimed IT efficiency is not discounted for whatever savings HRB could obtain by {performing the first consolidation} on its own – an option the company considered in the past but did not adopt – and the defendants did not present evidence explaining why, as a technical matter, {performing the first consolidation} would not be feasible or, in fact, would not be more feasible than {the double consolidation}. Bowen, TT, 9/19/11 a.m., at 12; 9/15/11 p.m. (sealed) at 75. The IT efficiencies also apparently account for cost reductions associated with TaxACT's more cost-conscious culture and practices. *See* Dunn, TT, 9/8/11 a.m. (sealed), at 5 ("for Block to achieve these [efficiencies] would require them to come up with an entirely different corporate culture {redacted}.").

Even if the efficiencies were entirely merger-specific, many of them are also not independently verifiable. As Dr. Zmijewski explained, for the **[**148]** various efficiencies that involve the activities now performed by HRB or its vendors that are proposed to be transferred to TaxACT, TaxACT's predicted cost figures for taking over these

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[43] Dr. Zmijewski is a professor of accounting and deputy dean at The University of Chicago Booth School of Business and a founder and principal of Navigant Economics, a consulting firm. GX 664 (Zmijewski Rep.) at 5. He holds a Ph.D. in accounting. *Id.*

activities were not based on an analysis of facts that could be verified by a third party. Instead, TaxACT based its cost estimates on management judgments. GX 664 (Zmijewski Rep.) at 22-25. By comparison, HRB's estimated costs for the relevant activities were rooted in accounting and planning documents prepared in the ordinary course of business.

The testimony at the hearing confirmed that TaxACT's recurring cost estimates were largely premised on its managers experiential judgment about likely costs, rather than a detailed analysis of historical accounting data. *See, e.g.,* Dunn, TT, 9/8/11 p.m. (sealed), at 28-31. ***HN27***[] While reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable by the Court. If this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would **[**149]** be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise. The difficulty in substantiating efficiency claims in a verifiable way is one reason why courts "generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case." *Heinz, 246 F.3d at 720* (citation omitted); *see also* *Staples, 970 F. Supp. at 1089* (finding "defendants failed to produce the necessary documentation for verification" of efficiencies).

Particular scrutiny of HRB's efficiencies claims is also warranted in light of HRB's historical acquisitions. In 2006, HRB acquired a software company called TaxWorks, which was renamed "RedGear." Bowen, TT, 9/15/11 p.m. (sealed), at 84. For the RedGear acquisition, which was much smaller in scale than the proposed TaxACT deal, HRB projected a total of ${redacted} million in efficiencies over three years. GX 1459 (February 2009 "Taxworks Financial Analysis") at 5. HRB failed to achieve these {efficiencies} {redacted}. *Id.* In this case, the efficiency estimates are much more aggressive, in that defendants are claiming approximately ${redacted} million in efficiencies for 2013 and ${redacted} **[**150]** million in annual savings going forward thereafter, as opposed to ${redacted} million over three years. *See* Bowen, TT, 9/15/11 p.m. (sealed), at 77-78. While HRB has attempted to learn from the mistakes of the RedGear acquisition, *id.* at 85-87, the Court finds that this history only underscores **[*92]** the need for any claimed efficiencies to be independently verifiable in order to constitute evidence that can rebut the government's presumption of anticompetitive effects.

Considering all of the evidence regarding efficiencies, the Court finds that most of the defendants' claimed efficiencies are not cognizable because the defendants have not demonstrated that they are merger-specific and verifiable.[44]

IV. CONCLUSION

The Court concludes that the proposed merger between HRB and TaxACT violates Section 7 of the Clayton Act because it is reasonably likely to cause anticompetitive effects. The law of this Circuit supports this conclusion. In *Heinz,* the Court of Appeals reversed **[**151]** a district court's denial of a preliminary injunction against a merger involving the second- and third-largest jarred baby food companies. *246 F.3d at 711-12*. After noting the high barriers to entry and high HHI figures that characterized the market, the D.C. Circuit observed that "[a]s far as we can determine, no court has ever approved a merger to duopoly under similar circumstances." *Id. at 717*. The situation in this case is similar. The government established a prima facie case indicating that anticompetitive effects are likely to result from the merger. The defendants have not made a showing of evidence that rebuts the presumption of anticompetitive effects by demonstrating that the government's market share statistics give an inaccurate account of the merger's probable effects on competition in the relevant market. To the contrary, the totality of the evidence confirms that anticompetitive effects are a likely result of the merger, which would give H&R Block and Intuit control over 90 percent of the market for digital do-it-yourself tax preparation products.

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[44] In addition, the defendants have not addressed how much of the claimed efficiencies would be passed through to consumers. *See* *Staples, 970 F. Supp. at 1090* (analyzing projected pass-through rate for claimed efficiencies).

Accordingly, the Court will enjoin H&R Block's proposed acquisition of TaxACT. An appropriate Order will accompany this **[**152]** Memorandum Opinion.

DATED: November 10, 2011

/s/ Beryl A. Howell

BERYL A. HOWELL

United States District Judge

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Johnson Bros. Liquor Co. v. Bacardi U.S.A., Inc.

United States District Court for the District of Minnesota

November 17, 2011, Decided; November 17, 2011, Filed

Civil No. 11-824 ADM/JSM

Reporter
830 F. Supp. 2d 697 *; 2011 U.S. Dist. LEXIS 132768 **; 2011 WL 5598335

Johnson Brothers Liquor Company; Johnson Brothers Northwest Beverages, Inc., d/b/a Ed Phillips & Sons Co. of North Dakota; and Johnson Brothers Famous Brands, Inc., d/b/a Famous Brands and/or Western Wholesale; Plaintiffs, v. Bacardi U.S.A., Inc.; and Brown-Forman Corporation, Defendants.

Subsequent History: Related proceeding at *Johnson Bros. Liquor Co. v. Brown-Forman Corp., 2012 U.S. Dist. LEXIS 83670 (D. Minn., June 18, 2012)*

Core Terms

Liquor, distributor, Brands, products, whiskey, rum, subsidiaries, contracts, implied contract, market power, allegations, motion to dismiss, entities, prices, distributes, Wine, forum selection clause, anti trust law, first-filed, manifested, franchise, terminate, franchise agreement, alcoholic beverage, termination notice, relevant market, concentration, alignment, distribution rights, competitor

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Judges: ANN D. MONTGOMERY, U.S. DISTRICT JUDGE.

Opinion by: ANN D. MONTGOMERY

Opinion

[*699] MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On September 7, 2011, the undersigned United States District Judge heard oral arguments on Defendant Bacardi U.S.A., Inc.'s ("Bacardi") Motion to Dismiss First Amended Complaint or for Transfer [Docket No. 24] ("Bacardi's

Motion to Dismiss or Transfer"), on Defendant Brown-Forman Corporation's **[**2]** ("Brown-Forman") Motion to Dismiss the First Amended Complaint [Docket No. 26] ("Brown-Forman's Motion to Dismiss"), and on Bacardi's Motion to Stay [Docket No. 30]. Brown-Forman's Motion to Stay or Transfer [Docket No. 66], filed subsequent to oral argument of the other identified motions, will also be considered.

[*700] Plaintiffs Johnson Brothers Liquor Company ("Johnson Brothers Liquor"); Johnson Brothers Northwest Beverages, Inc., d/b/a Ed Phillips & Sons Co. of North Dakota ("Ed Phillips & Sons"); and Johnson Brothers Famous Brands, Inc., d/b/a Famous Brands and/or Western Wholesale ("Famous Brands") assert claims under the Minnesota Franchise Act (the "MFA"), Minn. Stat. Ch. 80C, as well as federal antitrust violations under Section 4 of the Clayton Act, *15 U.S.C. § 15*, and Section 1 of the Sherman Act, *15 U.S.C. § 1*, against Defendants (Bacardi and Brown-Forman collectively are "Defendants"). For the reasons set forth below, Bacardi's Motion to Dismiss or Transfer is granted, Brown-Forman's Motion to Dismiss is granted, Bacardi's Motion to Stay is denied, and Brown-Forman's Motion to Stay or Transfer is denied.

II. BACKGROUND[1]

Defendant Bacardi produces, imports, distributes, markets, promotes, and sells alcoholic beverages throughout the United States from its principal place of business in Coral Gables, Florida. Am. Compl. [Docket No. 22] ¶ 10. Bacardi owns brands of rum, gin, vodka, vermouth, sparkling wines, scotch whiskey, tequila, and liqueur. Id. ¶ 10. Defendant Brown-Forman produces, imports, distributes, markets, promotes, and sells alcoholic beverages throughout the United States from its principal place of business in Louisville, Kentucky. Id. ¶ 11. Brown-Forman owns brands of whiskey, vodka, champagne, liqueur, tequila, and wines, including Jack Daniel's Whiskey and Southern Comfort. Id. ¶¶ 11, 40. Plaintiffs (Johnson Brothers Liquor, Ed Phillips & Sons, and Famous Brands are collectively "Plaintiffs") are in the business of distributing alcoholic beverages. Id. ¶ 7. Ed Phillips & Sons is incorporated in and has its principal place of business in North Dakota, and it distributes alcoholic beverages in that state. Id. ¶¶ 7-8. Famous Brands is incorporated in and has its principal **[**4]** place of business in South Dakota, and it distributes alcoholic beverages in that state. Id. Johnson Brothers Liquor is a Minnesota corporation with its principal place of business in St. Paul, Minnesota. Id. ¶ 7. Ed Phillips & Sons and Famous Brands are wholly-owned subsidiaries of Johnson Brothers Liquor and are controlled and managed by Johnson Brothers Liquor from its Minnesota office. See id. ¶¶ 7-9, 25, 38.

Johnson Brothers Liquor and Bacardi have a business relationship that spans over thirty years. Id. ¶ 19. In August 2004, Bacardi and Ed Phillips & Sons entered into an Agreement (the "2004 North Dakota Agreement") for the distribution of certain Bacardi products in North Dakota. Id. ¶¶ 21-24. The terms of the 2004 North Dakota Agreement obligated Ed Phillips & Sons to make annual "expenditures" equal to 10% of Ed Phillips & Sons' gross profit in support of promotional, advertising, and sales programs for Bacardi products. Id. ¶ 26. Since 2008, these expenditures reached approximately $110,000 annually. Id. ¶ 28. The terms of the 2004 North Dakota Agreement gave either party the right to terminate the agreement on ninety days notice without cause. Steinberg Decl. [Docket No. **[**5]** 34] Ex. 1 ("2004 North Dakota Agreement") § 9.2. The 2004 North Dakota Agreement also provides a forum selection clause designating courts in Miami-Dade County, Florida, as the exclusive forum to litigate disputes arising from the agreement. Id. § 11.2.

On December 31, 2010, Bacardi telephoned Johnson Brothers Liquor's Minnesota **[*701]** office and informed Johnson Brothers Liquor's vice president that Bacardi was terminating the 2004 North Dakota Agreement. Am. Compl. ¶ 29. Bacardi then sent to Ed Phillips & Sons, at its Fargo, North Dakota office, a written notice of termination of the 2004 North Dakota Agreement. Id., Ex. A. Bacardi then granted distribution rights for its products in North Dakota to Republic National Distribution Company ("RNDC"), a competitor of Ed Phillips & Sons and Johnson Brothers Liquor. Id. ¶ 31.

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[1] In considering Defendants' Motion to Dismiss, the Court **[**3]** considers the facts alleged in Plaintiffs' Complaint to be true. See *Hamm v. Groose, 15 F.3d 110, 112 (8th Cir. 1994)*.

Johnson Brothers Liquor and Brown-Forman have a business relationship that spans over twenty-five years. Id. ¶ 32. Between 1987 and 1998, Brown-Forman entered into at least five distributor agreements with Johnson Brothers Liquor or its subsidiaries covering Minnesota, North Dakota, South Dakota, and Iowa. Id. ¶ 34. Specifically, in July 1987, Brown-Forman entered into an **[**6]** agreement with Ed Phillips & Sons for distribution of certain Brown-Forman products in North Dakota, and entered into two agreements with Famous Brands for distribution of Brown-Forman products in South Dakota. Id. ¶ 35. In June 1989, Brown-Forman also entered into an agreement with Johnson Brothers Liquor for distribution of all Brown-Forman products in Minnesota. Id. ¶ 36. Finally, in July 1998, a division of Brown-Forman entered into an agreement with Johnson Brothers Liquor for distribution of Brown-Forman wines in Iowa. Id. ¶ 37.

Similar to the 2004 North Dakota Agreement, Brown-Forman's distribution agreements with Johnson Brothers Liquor, or its subsidiaries, require the distributor to "bank" a portion of its profits for use in promoting Brown-Forman products. Id. ¶ 40. Since 2006, Famous Brands has spent $370,000 promoting Brown-Forman products in South Dakota. See id. Likewise, since 2008, Ed Phillips & Sons has spent $215,000 promoting Brown-Forman products in North Dakota. See id. Furthermore, like the 2004 North Dakota Agreement, the various Brown-Forman agreements with Plaintiffs allow either party to the agreement to terminate without cause. Hardwicke Decl. [Docket No. **[**7]** 38] Ex. 1 § 12, Ex. 2 § 12, Ex. 3 § 12, Ex. 4 § 12, Ex. 5 § 12.

On January 4, 2011, four days after Bacardi sent its notice of termination of the 2004 North Dakota Agreement, Brown-Forman sent notice to Johnson Brothers Liquor's Minnesota office to terminate Johnson Brothers Liquor's wine distribution rights in Minnesota, its wine and spirits distribution rights in Iowa, and to terminate all of Ed Phillips & Sons' distribution rights in North Dakota and all of Famous Brands' distribution rights in South Dakota. Compl. ¶ 42, Ex. B. Brown-Forman then transferred distribution rights for its products in North Dakota and South Dakota to RNDC. Id. ¶ 44.

In the January 4, 2011 termination notice, Brown-Forman referenced its "national strategic distribution and broker alliance with Bacardi" and informed Plaintiffs that it was "moving to align" distribution of its brands with Bacardi. Id. ¶ 50, Ex. B. Furthermore, in public statements Brown-Forman has stated it has a "unique relationship" with Bacardi, seeks ways to "collaborate" with Bacardi, and "highly value[s] [its] partnership with Bacardi." Id. ¶ 47. Likewise, Bacardi has affirmed its "unique distribution partnerships" with Brown-Forman. **[**8]** Id. ¶ 48. Bacardi and Brown-Forman have entered into agreements for Bacardi to distribute Brown-Forman brands in several European markets. Id. ¶ 49.

After receiving notice of termination from both Bacardi and Brown-Forman, Johnson Brothers Liquor responded with a letter to Bacardi alleging that Bacardi's **[*702]** action in aligning its distribution with Brown-Forman constituted a violation of federal antitrust laws and that terminating the 2004 North Dakota Agreement without cause constituted a violation of the Minnesota Franchise Act. Steinberg Decl. Ex. 5. Some correspondence ensued, and on March 21, 2011, Johnson Brother Liquors sent Bacardi a letter with a draft complaint alleging violations of the MFA and federal antitrust laws and seeking to negotiate a resolution. Steinberg Decl. Ex. 6. Less than forty-eight hours after receiving Johnson Brothers Liquor's draft complaint, on March 23, 2011, Bacardi filed its own complaint in the U.S. District Court for the Southern District of Florida, Miami Division (the "Florida action"), against Ed Philips & Sons, Johnson Brothers Liquor, and another Johnson Brothers Liquor subsidiary, Iowa Wine & Beverage Company ("Iowa Wine"). See Steinberg Decl. **[**9]** Ex. 8. The Florida action seeks declaratory judgment that Bacardi's termination of the 2004 North Dakota Agreement, and two other agreements with Iowa Wine, did not violate federal ***antitrust law*** or the MFA. Id. This case in Minnesota suing both Bacardi and Brown-Forman was initiated less than two weeks later on April 4, 2011.

The Florida action was assigned to Senior U.S. District Court Judge Paul C. Huck. On June 27, 2011 Judge Huck issued an order staying discovery to allow mediation of the claims related to the two Iowa agreements and on July 18, 2011 issued another order dismissing those claims without prejudice. Kranz. Decl. [Docket No. 45] Exs. D, E. Then, Johnson Brothers Liquor and Ed Phillips & Sons moved to transfer the Florida action, with its single claim relating to the 2004 North Dakota Agreement, here to federal district court in Minnesota. Judge Huck denied that motion, finding that the *28 U.S.C. § 1404(a)* transfer factors weighed in favor of the Florida venue, particularly given the forum selection clause in the 2004 North Dakota Agreement. During oral argument, Judge Huck opined that the claims in this action against Brown-Forman may be compulsory counterclaims in **[**10]** the Florida action. Tr. of Mot. Hr'g before J. Paul C. Huck [Docket No. 56] ("Huck Hr'g Tr.") 18. Accordingly, Johnson Brothers Liquor and Ed Phillips & Sons filed those counterclaims, without waiving arguments made before this Court, in the Florida action on October 7, 2011. Oct. 11, 2011 Letter [Docket No. 63] Ex. 1.

Therefore, as it now stands two nearly identical actions are proceeding in tandem, one here in Minnesota and another in Florida, with the Florida court having already ruled to retain jurisdiction. Nonetheless, Plaintiffs note that Judge Huck invited this Court to rule on issues of Minnesota law, and Plaintiffs contend that this Court should retain jurisdiction over this action because the forum selection clause relied on by the court in the Florida Action is invalid under the MFA. Plaintiffs further argue that once the forum selection clause is viewed as invalid, the first-filed rule dictates that this Court is the proper forum for this litigation. Defendants counter that this case should be stayed or transferred to the U.S. District Court for the Southern District of Florida (the "Southern District of Florida"), or alternatively the Complaint in this matter should be **[**11]** dismissed for failure to state a claim for which relief may be granted.

III. DISCUSSION

A. Motion to Dismiss Standard

Rule 12 of the Federal Rules of Civil Procedure provides that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. In considering a motion to dismiss, the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in **[*703]** the complaint must be taken as true. *Hamm, 15 F.3d at 112*; *Ossman v. Diana Corp., 825 F. Supp. 870, 879-80 (D. Minn. 1993)*. Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the nonmoving party. *Ossman, 825 F. Supp. at 880*.

Under *Rule 8(a) of the Federal Rules of Civil Procedure*, pleadings "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief." A pleading must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct **[**12]** alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but not 'shown'—'that the pleader is entitled to relief.'" Id. (quoting *Fed. R. Civ. P. 8(a)(2)*).

B. MFA claims

Plaintiffs' MFA claims arise from an alleged franchise relationship between Johnson Brothers Liquor and Bacardi and Johnson Brothers Liquor and Brown-Forman. Essentially, Plaintiffs argue that Brown-Forman's dealings with Ed Phillips & Sons in North Dakota, Famous Brands in South Dakota, Johnson Brothers Liquor in Iowa, and Johnson Brothers Liquor in Minnesota formed a franchise-franchisee relationship between Brown-Forman and Johnson Brothers Liquor centered in Minnesota and covering a region comprised of North Dakota, South Dakota, Iowa, and Minnesota. Similarly, Plaintiffs argue that Bacardi's dealings with Ed Phillips & Sons in North Dakota created a franchise-franchisee relationship between **[**13]** Bacardi and Johnson Brothers Liquor centered in Minnesota because Bacaradi was aware of Johnson Brother Liquor's control of Ed Phillips & Sons as its parent corporation. Based on the alleged existence of these franchise-franchisee relationships, Plaintiffs argue that their various distribution agreements could not be terminated except with good cause as required by *Minn. Stat. § 80C.14, subd. 3(b)*.

The viability of Plaintiffs' theories with respect to both Brown-Forman and Bacardi requires the Court to disregard the individual distribution agreements, each signed by either Brown-Forman or Bacardi and a distinct legal entity related to Johnson Brothers Liquor, and instead imply direct contracts between Bacardi and Johnson Brothers Liquor and between Brown-Forman and Johnson Brothers Liquor. This argument is essential to Plaintiffs' MFA theories because the MFA applies only to "franchise agreements" within the purview of Minnesota law. Minnesota cannot regulate "franchise agreements" that are formed and preformed in other states. See *In re St. Paul & K.C. Grain Co., 89 Minn. 98, 94 N.W. 218, 225 (Minn. 1903)* (noting that "general rule" is that state statutes apply only to territory of state that enacted **[**14]** the statute). Indeed, even where a party to a "franchise agreement" is a Minnesota corporation, the agreement is not within the purview of the MFA if the franchisee is not located in and does not operate in Minnesota. *Hockey Enters., Inc. v. Total Hockey Worldwide, LLC, 762 F. Supp. 2d 1138, 1146 (D. Minn. 2011)*.

Johnson Brothers Liquor tacitly recognizes this limitation on the MFA by carefully **[*704]** premising its claims only on the alleged implied contracts with Johnson Brothers Liquor, and not any of the contracts with its subsidiaries. Pls.' Mem. of Law in Opp. to Def. Brown-Forman's Mot. to Dismiss the First Am. Compl. [Docket No. 48] 25; Pls.' Mem. of Law in Opp. to Def. Bacardi's Mot. to Dismiss the First Am. Compl. or for Transfer [Docket No. 46] 32. Therefore, because Plaintiffs argue that their MFA claims are premised only on implied contracts, to the extent any MFA claims are premised on the express contracts, they are dismissed. The Court now turns to the alleged implied contracts.

Johnson Brothers Liquor strenuously argues that a franchise under Minnesota law is created by "a contract or agreement, *either express or implied* . . . by which a franchisee is granted the right to engage **[**15]** in the business of offering or distributing goods or services . . . ." *Minn. Stat. § 80C.01, subd. 4(a)* (emphasis added). Based on that language, Plaintiffs argue that a franchise was implied between Johnson Brothers Liquor in Minnesota and both Brown-Forman and Bacardi for distribution of alcoholic beverages in certain upper Midwestern states.

However, there is nothing remarkable about Minnesota allowing franchise agreements to be implied. Under the common law of Minnesota, contracts of any sort can be implied in fact and can be oral or written. See *McArdle v. Williams, 193 Minn. 433, 258 N.W. 818, 820-21 (Minn. 1935)* (noting that contracts may be written, oral, implied from the actions of the parties, or some combination thereof) (citing *Restatement (First) of Contracts § 21, cmt. a* (1932)). Equally uncontroversial in the law of contracts is that the formation of an implied contract is evaluated objectively. *Gryc v. Lewis, 410 N.W.2d 888, 891 (Minn. Ct. App. 1987)*. In other words, "[a]n intent to be contractually bound is determined by the objective manifestations of the parties' words, conduct, and documents, and not by their subjective intent." *Norwest Bank Minn. North, N.A. v. Beckler, 663 N.W.2d 571, 578 (Minn. Ct. App. 1983)* **[**16]** (citing *Holman Erection Co. v. Orville E. Madsen & Sons, 330 N.W.2d 693, 695 (Minn. 1983))*. Plaintiffs have identified no authority, and the Court finds none, that the Minnesota legislature intended to deviate from this fundamental tenet of contract law through the MFA. Therefore, the Court now considers in turn whether either Bacardi or Brown-Forman objectively manifested an intent to form an implied franchise agreement with Johnson Brothers Liquor.

1. Bacardi

Johnson Brothers Liquor has not plausibly alleged the existence of a "franchise agreement" between it and Bacardi. No factual content has been pled from which one may reasonably infer that an implied contract between Johnson Brothers Liquor and Bacardi exists.

Johnson Brothers Liquor's argument that an implied contract exists between it and Bacardi centers on allegations that: Johnson Brothers Liquor "controlled and managed" Ed Phillips & Sons, see Am. Compl. ¶ 9; that Johnson Brothers Liquor was "operating through" Ed Phillips & Sons in North Dakota, Am Comp. ¶¶ 22-24, 26, 28; or that Ed Philips & Sons was "effectively managed" by Johnson Brothers Liquor and that Johnson Brothers Liquor "carried out many of the essential functions" **[**17]** of Ed Phillips & Sons, Am Comp. ¶¶ 25, 87. That a parent corporation controls, manages or "effectively" manages, operates through, or carries out the essential functions of its wholly-owned subsidiary is no surprise. These allegations say nothing about Bacardi's manifestation of assent to be contractually bound with Johnson Brothers Liquor.

[*705] The sole allegation of any direct conduct between Bacardi and Johnson Brothers Liquor is that Bacardi notified Johnson Brothers Liquor's vice-president, Bill Johnson, of its intent to cancel the 2004 North Dakota Agreement. Am. Compl. ¶ 4. However, any suggestion that this conduct objectively manifested an intent to contract with Johnson Brothers Liquor is belied by the factual assertion that Johnson Brothers Liquor and Ed Phillips & Sons have common officers. Id. ¶ 9. The suggestion that this conduct was an objective manifestation of an intent to contract with Johnson Brothers Liquor is further undermined because Bacardi's notice to Bill Johnson was confirmed with a letter addressed to Ed Phillips & Sons, sent to Ed Phillips & Sons' address in North Dakota. Id. Ex. A. Finally, an argument that this conduct created an implied contract is rebutted **[**18]** by Bacardi's explicit references to the express contract between Bacardi and Ed Phillips & Sons. That contract is unambiguous-it is between Bacardi and Ed Philips & Sons only. See generally Steinberg Decl. Ex. 1.

Plaintiffs cannot avoid this result by conflating Ed Phillips & Sons and Johnson Brothers Liquor. For example, Plaintiffs cannot plausibly allege that Bacardi granted Ed Phillips & Sons "and/or" Johnson Brothers Liquor the right to use Bacardi's trade name, trademarks, or other commercial symbols, Am. Compl. ¶ 88, because the express terms of the 2004 North Dakota Agreement unambiguously granted those rights to Ed Phillips & Sons only, Steinberg Decl. Ex. 1§ 6.1. Bacardi entered into an agreement with Ed Phillips & Sons, not Johnson Brothers Liquor. Bacardi appointed as a distributor of its products in North Dakota Ed Phillips & Sons, not Johnson Brothers Liquor. Therefore, Bacardi's objective intent was to contract with Ed Phillips & Sons only. In light of the constitutionally-endorsed state-specific alcohol distribution regulations, see U.S. Const. amend. XXI, § 2 ("The transportation or importation into any State . . . of intoxicating liquors, in violation of the laws therefore, **[**19]** is hereby prohibited."), Johnson Brothers Liquor can offer no plausible explanation as to why Bacardi would contract with any entity other than Ed Phillips & Sons, the only member of the Johnson Brothers Liquor corporate family licensed to distribute alcoholic beverages in North Dakota. Therefore, Johnson Brothers Liquor's MFA claim against Bacardi is dismissed because no franchise agreement exists between them.

2. Brown-Forman

Johnson Brothers Liquor bases its MFA claim against Brown-Forman on a "single unitary multi-state franchise" theory. In essence, Johnson Brothers Liquor argues that Brown-Forman's acts of contracting with its subsidiaries in North Dakota and South Dakota and with it in Minnesota and Iowa created an implied contract between Johnson Brothers Liquor and Brown-Forman for distribution of liquor throughout these upper Midwestern states.

The allegations in the Complaint, however, do not plausibly suggest the existence of such an implied contract. As with Bacardi, allegations that Johnson Brothers Liquor, as parent corporation to Ed Phillips & Sons and Famous Brands, carried out "essential functions" or "operated" its subsidiaries from its headquarters in Minnesota is **[**20]** unremarkable and does not reasonably lead to an inference that Brown-Forman intended to contract with Johnson Brothers Liquor generally instead of with its subsidiaries individually. Furthermore, as discussed above with respect to Bacardi, Brown-Forman objectively manifested an intent to contract with each entity *individually* by entering into separate contracts with each and individually **[*706]** granting them rights as distributors in their respective states only. For example, Brown-Forman chose to contract individually with Famous Brands, granted Famous Brands the right to use Brown-Forman trademarks in South Dakota, and appointed Famous Brands an authorized distributor in South Dakota. See generally Hardwicke Decl. Ex. 3. The unambiguous language of each contract is an objective manifestation of an intent by Brown-Forman to be contractually bound in discrete state-by-state areas with each entity only. Artful pleading cannot alter that result.

Unlike with Bacardi, for its MFA claim against Brown-Forman, Johnson Brothers Liquor further alleges that Brown-Forman's notice of termination corroborates its "unitary multi-state franchise" theory because Brown-Forman sent a single notice of termination **[**21]** that referred to a general "relationship with Johnson Brothers." Am. Compl. Ex. B. Johnson Brothers Liquor further notes that the letter never expressly references Johnson Brothers Liquors' subsidiaries or any distinct written agreements. These allegations cannot plausibly support the inference that an implied contract exists. First, the letter must be read in context. Brown-Forman signed discrete contracts for each state. The allegations in the Complaint are insufficient evidence from which a reasonable inference could be drawn that Brown-Forman intended to contract with Johnson Brothers Liquor for a multi-state distribution franchise given the distinct contracts with distinct legal entities covering discrete territories. Second, the letter on its face does not support the multi-state unitary franchise theory at all. Contrary to Johnson Brothers Liquor's characterization, the letter expressly states that notice of termination was provided for several "*relationships.*" Id. The use of the plural negates the suggestion that the letter could support an inference of a single implied contract. Such action is consistent with each contract being distinct, and is inconsistent with the multi-state **[**22]** unitary contract theory.

At most the letter supports the inferences that (1) Brown-Forman knew that Johnson Brothers Liquor formed wholly-owned subsidiaries and (2) Brown-Forman knew it had contracted with those subsidiaries. Mere knowledge of the existence of the Johnson Brothers Liquor corporate family is not a sufficient factual basis to infer that Brown-Forman manifested an objective intent to eviscerate its distinct contracts with Johnson Brother Liquor and its subsidiaries in favor of a single implied contract for distribution over the upper Midwest. Therefore, Johnson Brothers Liquor's MFA claim against Brown-Forman is dismissed.

In summary, Bacardi and Brown-Forman contracted with Johnson Brothers Liquor or its subsidiaries individually for distribution of alcoholic beverages in discrete state-by-state territories. Bacardi and Brown-Forman's awareness of the Johnson Brothers Liquor corporate family structure and their directing termination notices to Johnson Brothers Liquor's Minnesota office does not alter the fact that Bacardi and Brown-Forman both objectively manifested intents to contract with each Johnson Brothers Liquor subsidiary individually by entering into individual **[**23]** contracts with those subsidiaries. No implied contracts exist, only the express contracts are of legal significance. Without any franchise agreements within the purview of the MFA, Plaintiffs' MFA claims (Counts I and II of the Complaint) are dismissed.

C. Antitrust claims

In addition to asserting claims under the MFA, Plaintiffs allege Bacardi and Brown-Forman conspired to violate **[*707]** federal antitrust laws by engaging in a "concerted refusal to deal" with Johnson Brothers Liquor and its subsidiaries. As a matter of right, a private business is free to conduct business with whomever it chooses to the exclusion of others. *United States v. Colgate & Co. , 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*. However, central to ***antitrust law*** is that what one entity may do on its own may be illegal for two or more entities to do in concert. *Fed. Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441, 453, 42 S. Ct. 150, 66 L. Ed. 307, 4 F.T.C. 583, 19 Ohio L. Rep. 586 (1922)* (noting that the Colgate rule does not extend to "contracts or combinations" that "unduly hinder or obstruct . . . trade"). For example, when two or more firms jointly agree not to deal with another, it may run afoul of antitrust laws. *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-14, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)* (holding **[**24]** that concerted refusal to deal among appliance manufacturers and distributors was violation of antitrust laws).

"Whether an agreement unreasonably restrains trade is determined under one of two approaches: the per se rule and the rule of reason." *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 388 F.3d 955, 959 (6th Cir. 2004)*. The per se rule is reserved for those agreements that are so obviously anti-competitive that unreasonableness is presumed and the agreements are deemed unlawful. *Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 387 (8th Cir. 2007)*. In all other cases, conduct is evaluated under the "rule of reason," which looks to whether an arrangement is an "unreasonable restraint on competition." Id. (quotation omitted). "The antitrust laws, however, were enacted for 'the protection of competition not competitors . . . .'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*.

1. Per Se Treatment is Not Warranted

In refusal to deal cases, such as this one, per se treatment is warranted only when the cartel refusing to deal with another possesses market power **[**25]** or exclusive access to an element essential to effective competition. *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*. Here, per se treatment is unwarranted because Plaintiffs have not plausibly alleged that Bacardi and Brown-Forman possess market power or exclusive access to an element essential to effective competition.

a. Defendants do not have market power

Plaintiffs urge that the relevant market is the *distribution* of liquor in the upper Midwest. This is a market in which Bacardi and Brown-Forman do not participate (which is precisely why they contracted with Plaintiffs to engage in distribution for them), much less one in which they have market power. Market power is typically defined as the ability "to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." *Craftsmen Limousine, 491 F.3d at 388* (quoting *Midwestern Mach. Co. v. N.W. Airlines, Inc., 392 F.3d 265, 274 (8th Cir. 2004))*. Implicit in that reasoning is that a firm must be a participant in the market; otherwise, there are no "sales" within the market to be lost. Here, Bacardi and Brown-Forman **[**26]** do not make any sales, and have no market power, in the market for distribution of liquor in the upper Midwest. Furthermore, market power has been alternatively defined **[*708]** as the ability to control output, typically from an ability to exclude other sources of supply. *Ball Memorial Hosp. Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1336 (7th Cir. 1986)*. However, no allegations have been made that Bacardi and Brown-Forman can control output of distribution in the liquor distribution market or restrict supply of liquor. To the contrary, Plaintiffs have alleged the existence of available alternative sources of supply of liquor, and of whiskey and rum in particular-namely Beam Global Spirits & Wine, Inc. ("Beam"), and Cruzan International, Inc. ("Cruzan"). Am. Compl. ¶ 73. Therefore, Bacardi and Brown-Forman together do not have market power in the relevant market as defined by Plaintiffs.

Plaintiffs argue that Bacardi and Brown-Forman have market power in the market for distribution of liquor because they have the ability to "impinge" on that market. See *Insignia Sys., Inc. v. News Am. Marketing In-Store, Inc., 661 F. Supp. 2d 1039, 1063 (D. Minn. 2009)* (defining market power sufficient **[**27]** to sustain antitrust violation as the power to "significantly impinge on competition") (quotation omitted). Plaintiffs' argument is unavailing in several respects. To begin, the defendant in Insignia was a participant in the relevant market. *Id. at 1057*. Therefore, Insignia does not address the issue of defining market power for a non-participant in the market, as discussed above. Furthermore, no factual allegations support the argument that Bacardi and Brown-Forman together can "impinge" on the market for liquor distribution. Plaintiffs carefully define the relevant market as one not for distribution of any particular class of liquor, such as rum, whiskey, or vodka, but rather the market for distribution of all liquor. Am. Compl. ¶ 61; Pls.' Mem. of Law in Opp. to Def. Bacardi's Mot. to Dismiss the First Am. Compl. or for Transfer 27-29; Pls.' Mem. of Law in Opp. to Def. Brown-Forman's Mot. to Dismiss the First Am. Compl. 21-22. Yet, Plaintiffs have not articulated *how* Bacardi and Brown-Forman can impinge that market. Plaintiffs clearly allege that much of the market for distribution of rum and whiskey in North Dakota is now concentrated with RNDC. Am. Compl. ¶ 72. But, no explanation **[**28]** has been offered as to how a concerted raise in prices for Bacardi and Brown-Forman products could impinge on the market for distribution of *all* liquors when vodka, tequila, gin, scotch whisky, liqueur, and other liquors comprise a significant portion of the relevant market as alleged by Plaintiffs, and distribution of those liquors is not concentrated in any one distributor.

Even more significantly, no explanation is given as to how Bacardi and Brown-Forman could collude to raise prices without having their customers, including RNDC, begin to favor competitors. Absent collusion or a wider conspiracy, neither of which is alleged, the price of liquor sold from distillers to distributors is independent of the price of liquor sold from distributors to retailers, which is also independent of the price of liquor sold from retailers to customers. Cf. 2004 North Dakota Agreement §§ 4.1-4.2 (allowing Bacardi to unilaterally determine price of products sold to Ed Phillips & Sons, and allowing Ed Phillips & Sons to unilaterally determine price of Bacardi products sold retailers if such prices are competitive). Therefore, if Defendants colluded to raise prices charged to their distributor, the **[**29]** distributor must still competitively price the Defendants' products and absorb the price raise. Absorbing the price increase, a rational distributor would invest more effort into distributing lower cost (and therefore higher profit) competitor brands. Likewise, absent collusion between Defendants and their distributor, which is not alleged, if the distributor has market power and can raise prices on rum and whiskey or **[*709]** other liquors, there is no reason to believe that the increased profits will be passed along to Bacardi and Brown-Forman given that they must still compete with other distillers, such as Beam and Cruzan.

b. Defendants do not have exclusive access to an element essential to effective competition.

Bacardi and Brown-Forman are not the only distillers of liquor in the United States. As noted above, if Bacardi and Brown-Forman collectively raise prices, distributors of liquor would rationally choose to invest more effort into distributing lower cost (and therefore higher profit) liquors. The only suggestion by Plaintiffs that Bacardi and Brown-Forman could raise prices without suffering lost market share comes from the allegation that RNDC, Bacardi and Brown-Forman's present **[**30]** distributor in North Dakota, now controls 99% of the market for whiskey and 95% of the market for rum in that state. However, no explanation has been offered as to why or how Bacardi and Brown-Forman could profitably raise prices for whiskey and rum without having RNDC favor other rum and whiskey manufacturers, as discussed above. In particular, RNDC's large market share for distribution of rum and whiskey is attributable to RNDC also being a distributor for Beam and Cruzan products. Am. Compl. ¶ 73. No explanation is given as to how or why Bacardi and Brown-Forman could raise their prices without having RNDC, or any other distributor, favor Beam and Cruzan products to the detriment of the would-be cartel. Beam and Cruzan are not alleged to be co-conspirators and neither is RNDC.

Furthermore, even if the relevant market were revised to be distribution of whiskey and rum, the allegation that RNDC has a large market share for distribution of whiskey and rum in North Dakota cannot plausibly support an antitrust violation because Plaintiffs have defined the relevant market to include an area larger than just North Dakota. Brown-Forman and Bacardi have evidently chosen as distributors entities **[**31]** other than RNDC in both Minnesota and Iowa. See Am. Compl. Ex. B (noting Brown-Forman moved its spirits and wine distribution to non-RNDC entities in Minnesota and Iowa). Plaintiffs offer no explanation as to how alignment with those other entities, also non-conspirators, would allow Brown-Forman and Bacardi to control output, restrict access to supply, or raise prices.

2. Plaintiffs Have Failed to State a Claim under the Rule of Reason

Under the Rule of Reason, an arrangement between firms is repugnant to federal antitrust laws if it constitutes an "unreasonable restraint on competition." *Craftsmen Limousine, 491 F.3d at 387*. Plaintiffs have failed to identify an unreasonable restraint on competition resulting from Bacardi and Brown-Forman's concerted refusal to deal with Plaintiffs.

Plaintiffs' entire argument focuses on the concentration of the market for distribution of rum and whiskey with RNDC. Plaintiffs aver "Defendants' joint conduct and illegal agreement eliminates competition between liquor distillers, including but not limited to Bacardi, Brown-Forman, Beam, and Cruzan, and eliminates interbrand competition between their products by combining their distribution into one distributor." **[**32]** Pls.' Mem. of Law in Opp. to Def. Brown-Forman's Mot. to Dismiss the First Am. Compl. 19. But, Plaintiffs may not rely on mere recitation that competition will be eliminated; they must allege factual content that plausibly suggests such an occurrence. See *Twombly, 550 U.S. at 555-57* (noting that "formulaic recitation" of elements is insufficient pleading, well-pled allegations **[*710]** must state plausible grounds for relief).

Plaintiffs do not plausibly suggest that interbrand competition will cease. Bacardi and Brown-Forman are not alleged to have any agreement with Beam or Cruzan. Therefore, Plaintiffs must articulate some reason as to *why* Bacardi and Brown-Forman will no longer have to compete with Beam or Cruzan. Plaintiffs have not done so. As discussed above, merely using the same distributor will not end interbrand competition. Without market power if a brand or cartel of brands raises prices, consumers will merely substitute a cheaper competitor brand. By way of illustration, virtually all drug stores purchase multiple brands of the same products, yet interbrand competition continues at all levels of the supply chain. Each brand still must compete for end-customers as well as for placement **[**33]** in drug stores. Likewise, there is no reason to assume that merely because Bacardi and Brown-Forman sell to a customer in common with Beam and Cruzan that competition will cease among those firms. In that market, if Bacardi and Brown-Forman collude to raise prices, it will be to their own detriment as distributors will begin to favor now-cheaper (and now more profitable) brands, like Beam or Cruzan products. The Complaint does not allege the rationale of how or why interbrand competition will be stifled because a single distributor will buy and distribute competing brands of liquor.

Furthermore, assuming *arguendo* that the concentration of whiskey and rum brands in RNDC in North Dakota will cause an increase in whiskey and rum prices for retailers, there is no reason to believe that Bacardi or Brown-Forman will benefit or are culpable in any way. No allegations of a wider conspiracy involving Beam, Cruzan, or other distributors has been alleged. Absent some wider conspiracy, if another distributor has monopolized the distribution market, a Sherman Act § 2 claim may lie against them, but such monopolization was not the result of the alleged concerted refusal to deal. Rather, the monopolization **[**34]** was the result of the actions of the distributor alone. Plaintiffs allege that "[b]ecause RNDC now markets several brands that were once competitors . . . [RNDC] no longer has the incentive to compete with the remaining distributor, [Ed Phillips & Sons], whose market share for rum and whiskey is negligible." Am. Compl. ¶ 83. While the concentration of rum and whiskey distribution with RNDC may be anticompetitive, it cannot be said to be an anti-competitive *effect* of any action by Defendants. The Complaint asserts that the concentration of the market for distribution of whiskey in North Dakota was the result of the alignment of Brown-Forman and Beam, entities that are *not* alleged to have any agreement or otherwise be co-conspirators. See Am. Compl. ¶¶ 10-11, 73 (indicating that Brown-Forman and Beam manufacture whiskey, but Bacardi does not). Similary, the Complaint makes clear that the concentration of the market for distribution of rum in North Dakota was the result of alignment of Bacardi and Cruzan, entities that are *not* alleged to have any agreement or otherwise be co-conspirators. See Am. Compl. ¶¶ 10-11, 73 (indicating that Bacardi and Cruzan manufacture rum, but Brown-Forman **[**35]** does not).

The result here is bolstered by the result in a nearly identical, albeit forty-plus year-old, case. In Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., two distillers, Calvert and Barton, jointly decided to use a single distributor McKesson. *416 F.2d 71, 73-74 (9th Cir. 1969)*, cert. denied, *396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970)*. Calvert's former distributor, Hawaiian Oke & Liquors, Ltd., then brought suit alleging an antitrust violation from Calvert and Barton's concerted **[*711]** refusal to deal. Id. Without any evidence of an anti-competitive effect or motive, the court there held that no unreasonable restraint of trade had resulted from the joint decision to align in a single distributor, and overturned a jury verdict for the plaintiff. *Id. at 76-80*. The court reasoned that the distillers had a legitimate business interest in selecting a distributor with a "well rounded group of lines." *Id. at 80*. As in Seagram & Sons, without plausible allegations that Bacardi and Brown-Forman's alignment of their products in a single distributor will have some anticompetitive effect, Plaintiffs have not adequately alleged an antitrust violation.

D. Stay and Transfer

In addition to addressing the merits of **[**36]** the case, the parties have dedicated a substantial volume of briefing to arguing which forum is appropriate for this litigation to proceed. The first in time filing was in the Southern District of Florida. However, the two "red flags" identified by both the Eighth and Eleventh Circuits-filing a declaratory judgment and bringing a lawsuit after "compelling circumstances" for allowing the litigation to proceed in Minnesota. *Manuel v. Convergys Corp., 430 F.3d 1132, 1135 (11th Cir. 2005)* (noting that filing of declaratory judgment action and filing in anticipation of litigation are factors in determining whether compelling circumstances exist for exception to first-filed rule); *N.W. Airlines, Inc. v. Am. Airlines, Inc., 989 F.2d 1002, 1007 (8th Cir. 1993)* (noting that notice that litigation is imminent and filing of declaratory judgment action are red flags that may be compelling circumstances for abrogating first-filed rule).

An additional factor to consider is that Judge Huck denied a *§ 1404(a)* transfer motion by Plaintiffs and in so doing noted that the Florida action was technically filed first. Huck Hr'g Tr. 56. The *§ 1404(a)* motion in the Florida action was argued by all parties **[**37]** under what is known in the Eighth Circuit as the Terra factors [2]—convenience of the witnesses, convenience of the parties, and the interests of justice. *Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688, 691 (8th Cir. 1997)*. The interests of justice factor looks to, among other things, where the lawsuit was filed as a consideration. *Id. at 696* (noting that the plaintiff's choice of forum is considered under interests of justice). Indeed, Plaintiffs here (Defendants in the Florida action), briefed the first-filed rule in the Florida action as an element of the Plaintiffs' (Defendants here) choice of forum. See Steinberg Decl. [Docket No. 34] Ex. 10 at 13-15. However, such analyses may be viewed as distinct, with *§ 1404(a)* merely serving as the procedural mechanism, without respect to the tri-part analysis developed for *§ 1404(a)* in other contexts, for effectuating a transfer appropriate under the first-filed doctrine. See *Zimmer Enters., Inc. v. Atlandia Imports, 478 F. Supp. 2d 983, 989 (S.D. Ohio 2007)* (noting that first-filed rule and transfer of venue analysis are "separate questions, the analysis of which are conducted separately"). Therefore, it appears the question of which **[**38]** court, the Southern District of Florida or the District of Minnesota, properly has jurisdiction under the first-filed doctrine has not yet been fully addressed.

Another significant consideration is that the 2004 North Dakota Agreement includes a forum selection clause. 2004 North Dakota Agreement § 11.2. A forum selection clause may trump the first-filed doctrine. See, e.g., *Nat'l Union Fire Ins. Co. v. Las Vegas Professional Football Limited P'ship, 409 Fed. App'x 401, 403* ***[*712]*** *(2d Cir. 2010)* (disregarding first-filed rule in favor of forum selection clause). However, a forum selection clause may not be applicable where it applies to only one of multiple defendants, as is the case here. See *Vangura Kitchen Tops, Inc. v. C&C N. Am., Inc., No. 08cv1011, 2008 U.S. Dist. LEXIS 79360, 2008 WL 4540186, at *5 (W.D. Pa. Oct. 7, 2008)* (Where . . . a forum selection clause is only applicable to claims against one of multiple parties, by its terms such clause does not supply venue over claims sounding in tort against third parties.") (citation omitted).

The resolution of the nuances of appropriate venue need not be reached here. Bacardi's Motion **[**39]** to Dismiss or Stay was made in the alternative. [3] When a motion is pursued in the alternative, the Court has discretion to consider the alternative requests in any order. See *United States v. Thomas, Civil No. 08-788-GPM, 2009 U.S. Dist. LEXIS 23853, 2009 WL 792571, at *3 (S.D. Ill. Mar. 24, 2009)* (granting in part motion with respect to dismissal on merits, and denying in part same motion as to dismissal for improper venue or for transfer). Here, the Court exercised that discretion to consider the portion of the motion seeking dismissal first. As such, Bacardi's arguments related to transfer are now moot. Indeed, it appears that much of the complexity regarding which forum is most appropriate is owed to the novel "extra-contractual" theories Plaintiffs pursued for their MFA claims. Judge Huck invited this Court to weigh in on Plaintiffs' MFA theories, Huck Hr'g Tr. 39. The theories are rejected, as are Plaintiffs' antitrust allegations.

IV. CONCLUSION

Based upon the foregoing, **[**40]** and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Bacardi's Motion to Dismiss First Amended Complaint or for Transfer [Docket No. 24] is **GRANTED** to the extent it seeks dismissal;

2. Brown-Forman's Motion to Dismiss First Amended Complaint [Docket No. 26] is **GRANTED**;

3. Bacardi's Motion to Stay [Docket No. 30] is **DENIED** as moot;

4. Brown-Forman's Motion to Stay or Transfer [Docket No. 66] is **DENIED** as moot; and

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[2] Named after *Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688 (8th Cir. 1997)*.

[3] Bacardi's Motion to Stay and Brown-Forman's Motion to Transfer or Stay were both made after each had moved for dismissal. Therefore, considering those motions in the order they were presented to the Court, they are now moot and are denied.

5. All claims in the Complaint are **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/ Ann D. Montgomery

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: November 17, 2011.

End of Document

State v. MaineHealth

Supreme Judicial Court of Maine

October 11, 2011, Argued; November 17, 2011, Decided

Docket: BCD-11-285

Reporter

2011 ME 115 *; 31 A.3d 911 **; 2011 Me. LEXIS 110 ***; 2011-2 Trade Cas. (CCH) P77,702

STATE OF MAINE v. MAINEHEALTH et al.

Disposition: [*1]** Order denying CMMC's motion to intervene affirmed.

Core Terms

antitrust, intervene, entities, parties, motion to intervene, enforcement action, injunctive relief, authorizes

LexisNexis® Headnotes

Antitrust & Trade Law > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

HN1[] **Antitrust & Trade Law**

See *Me. Rev. Stat. Ann. tit. 10, § 1104(2)* (2010).

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Motions to Intervene

HN2[] **Parties, Intervention**

Me. R. Civ. P. 24 requires that a motion to intervene be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN3[] **Appeals, Standards of Review**

Unpreserved errors will be reviewed only for any seriously prejudicial error tending to produce a manifest injustice.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN4[] **Appellate Jurisdiction, Final Judgment Rule**

Although a final judgment is normally required before an appeal may be taken, the Supreme Judicial Court of Maine has recognized an exception to the final judgment rule for appeals challenging the denial of a motion to intervene. The exception applies whether the party sought intervention of right or permissive intervention.

Antitrust & Trade Law > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

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

HN5[] **Antitrust & Trade Law**

Under Maine statutory law, the Attorney General may seek injunctive relief by commencing a proceeding in equity to prevent and restrain antitrust violations. *Me. Rev. Stat. Ann. tit. 10, § 1104(2)* (2010). The statute also authorizes any person injured directly or indirectly in its business or property by an antitrust violation to sue for the injury in a separate civil action for treble damages and reasonable costs and fees. *§ 1104(1)*. The statute does not, however, authorize private entities to file complaints seeking injunctive relief.

Civil Procedure > Parties > Intervention > Intervention of Right

HN6[] **Intervention, Intervention of Right**

Pursuant to Me. R. Civ. P. 24(a), intervention is permitted of right in either of two circumstances. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene, or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Antitrust & Trade Law > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

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

HN7[] **Antitrust & Trade Law**

Maine ***antitrust law*** allows any person injured in business or property, whether directly or indirectly, to sue for the injury in a civil action and seek treble damages. *Me. Rev. Stat. Ann. tit. 10, § 1104(1)*. Only the Attorney General, however, is authorized to institute proceedings in equity to prevent and restrain antitrust violations. *§ 1104(2)*.

Antitrust & Trade Law > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

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

HN8[] **Antitrust & Trade Law**

See *Me. Rev. Stat. Ann. tit. 10, § 1104(1)* (2010).

Antitrust & Trade Law > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

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

HN9[] **Antitrust & Trade Law**

Private and public antitrust actions are designed to be cumulative, not mutually exclusive. Because private parties are not bound by the government litigation, any liability to private parties may be determined separately under Maine's statutory framework. *Me. Rev. Stat. Ann. tit. 10, § 1104(1)*, *(2)*. Thus, there is no entitlement in a private party to intervene of right in a State antitrust enforcement action in Maine unless the party provides evidence of bad faith or malfeasance on the part of the government such that intervention is necessary to protect the public's interests. *§ 1104(1)*, *(2)*.

Civil Procedure > Parties > Intervention > Permissive Intervention

HN10[] **Intervention, Permissive Intervention**

Pursuant to Me. R. Civ. P. 24(b), a person who files a timely application may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. In making this discretionary determination, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Me. R. Civ. P. 24(b).

Counsel: On the briefs: Michael R. Poulin, Esq., Skelton, Taintor & Abbot, Auburn, for appellant Central Maine Medical Center.

Peter J. Brann, Esq., Heather B. Sanborn, Esq., Brann & Isaacson , Lewiston, for appellee MaineHealth.

William J. Schneider, Attorney General, Christina M. Moylan AAG, Augusta, for appellee State of Maine.

At oral argument: Michael R. Poulin, Esq., for appellant Central Maine Medical Center.

Peter J. Brann, Esq. for appellee MaineHealth.

Christina Moylan, AAG, for appellee State of Maine.

Judges: Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, and JABAR, JJ.

Opinion by: SAUFLEY

Opinion

[912]** SAUFLEY, C.J.

[*P1] Central Maine Medical Center (CMMC) appeals from an order entered in the Business and Consumer Docket (*Horton, J.*) denying CMMC's motion to intervene in an antitrust enforcement action commenced by the State of Maine against MaineHealth, Maine Medical Center, Maine Cardiology Associates, P.A., and Cardiovascular Consultants of Maine, P.A. (collectively, the MaineHealth entities). *See* *10 M.R.S. § 1104(2)* (2010). [1] CMMC contends that the court abused its discretion in denying the motion to intervene, filed pursuant to M.R. Civ. P. 24, and inappropriately **[***2]** relied on federal ***antitrust law*** in reaching its decision. We affirm the denial of CMMC's motion to intervene.

I. BACKGROUND

[*P2] On March 22, 2011, the State of Maine filed a complaint for antitrust enforcement against the MaineHealth entities based on the proposed acquisition by MaineHealth of two major Portland-area **[***3]** cardiology practices: Maine Cardiology Associates and Cardiovascular Consultants of Maine. MaineHealth is Maine's largest health system and owns Maine Medical Center in Portland, which is Maine's largest hospital.

[*P3] On the day that the State filed the complaint, it also filed a motion for approval of a consent decree between the State and the MaineHealth entities. The matter was transferred to the Business and Consumer Docket upon the State's and the MaineHealth entities' application for transfer, and the court entered a procedural order indicating that it would accept written comments from the public.

[*P4] In April 2011, CMMC moved to intervene in the proceeding, either of right or permissively. *See* M.R. Civ. P. 24(a), **[**913]** (b). CMMC argued that it had an interest in the case as Maine Medical Center's principal competitor in southern Maine regarding cardiovascular surgery and that it could be driven from the market for cardiovascular surgery and angioplasty services as a result of the proposed merger, to the detriment of CMMC and its patients. CMMC contended that it should be allowed to intervene as it had when these parties attempted to merge in 2010.

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[1] This statute provides:

> *HN1*[] **Injunction.** The Attorney General may institute proceedings in equity to prevent and restrain violations of sections 1101, 1102 and 1102-A.
>
> > **A.** These proceedings may be by way of petitions setting forth the case and praying that the violation shall be enjoined or otherwise prohibited.
> >
> > **B.** When the parties complained of have been duly notified of that petition, the court shall proceed as soon as possible to the hearing and determination of the case.
> >
> > **C.** Pending the petition and before final decree, the court may at any time make such temporary restraining order or prohibition as considered just under the circumstances.
> >
> > **D.** Any person who violates the terms of an injunction issued under this section must forfeit and pay to the State, to be applied in carrying out this chapter, a civil penalty of not more than $50,000 for each violation.

10 M.R.S. § 1104(2) (2010).

CMMC did not file a proposed pleading presenting **[***4]** allegations against any of the already-joined parties as required by M.R. Civ. P. 24(c). [2]

[*P5] After receiving written objections and memoranda, the court denied CMMC's motion to intervene. The court held that CMMC could not intervene of right, *see* M.R. Civ. P. 24(a), because it had failed to show any adverse effect on its ability to protect its interests through other mechanisms. *See* *10 M.R.S. § 1104(1)* (2010); **[***5]** *15 U.S.C.S. § 15* (LexisNexis 1985). The court also declined to allow permissive intervention because it is rarely permitted in antitrust enforcement actions brought by the government and generally requires some showing of governmental bad faith. The court noted that CMMC would have the opportunity to participate in a nontestimonial oral argument as authorized by the court in a separate order that invited "oral comment and written submissions" from third parties due to the public interest involved in the case.

[*P6] CMMC did file extensive written comments, and it requested the opportunity for oral argument within the time prescribed by the court, but it also appealed to us from the denial of its motion to intervene, which resulted in a stay of all proceedings in the Superior Court during the pendency of the appeal. *See* M.R. App. P. 3(b). We denied the State's and MaineHealth's motions for summary affirmance or immediate remand, but we granted their motion for expedited review.

II. DISCUSSION

A. Interlocutory Appeal

[*P7] ***HN4***[] Although a final judgment is normally required before an appeal may be taken, *see* *Morse Bros., Inc. v. Webster, 2001 ME 70, ¶ 13, 772 A.2d 842*, we have recognized an exception to **[***6]** the final judgment rule for appeals challenging the denial of a motion to intervene, *see* *Francis v. Dana-Cummings, 2007 ME 16, ¶ 15, 915 A.2d 412*. The exception applies whether the party sought intervention of right or permissive intervention. *Donna C. v. Kalamaras, 485 A.2d 222, 223 (Me. 1984)*. We therefore immediately review the court's denial of CMMC's motion to intervene for error of law or abuse of discretion. *Doe v. Roe, 495 A.2d 1235, 1238 (Me. 1985)*; *Donna C., 485 A.2d at 224-25*.

B. Intervention in Antitrust Actions in Maine

[*P8] ***HN5***[] Under Maine statutory law, the Attorney General may seek injunctive relief by commencing a "proceeding[] in equity to prevent and restrain [antitrust] **[**914]** violations." *10 M.R.S. § 1104(2)*. The statute also authorizes "[a]ny person . . . injured directly or indirectly in its business or property" by an antitrust violation to sue for the injury in a separate civil action for treble damages and reasonable costs and fees. *10 M.R.S. § 1104(1)*. The statute does not, however, authorize private entities to file complaints seeking injunctive relief. *See id.*

[*P9] CMMC acknowledges that no Maine statute authorizes it to seek injunctive relief against the MaineHealth entities **[***7]** as a remedy for antitrust violations. CMMC does not argue that we have allowed or authorized such intervention in the past. [3] Nor does it cite to any supporting authority from other jurisdictions in which the statutes similarly permit only the government to seek injunctive relief. Nonetheless, CMMC argues that it should have been permitted to intervene, either of right or permissively, in the antitrust claim brought by the Attorney General seeking injunctive relief. We address each ground for intervention separately.

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[2] ***HN2***[] Rule 24(c) of the Maine Rules of Civil Procedure requires that a motion to intervene "be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Because no such proposed pleading was filed in this matter, the court could have dismissed the motion for failure to comply with the rule, but it did not. Neither the State nor MaineHealth raised this deficiency to the court in their memoranda in opposition to intervention, however, and the court's decision to address the motion on its merits did not constitute obvious error. *See* *Kondaur Capital Corp. v. Hankins, 2011 ME 82, ¶ 15, 25 A.3d 960* (stating that ***HN3***[] unpreserved errors will be reviewed only for any "seriously prejudicial error tending to produce a manifest injustice" (quotation marks omitted)).

[3] Although CMMC emphasizes that it was allowed to intervene in a prior action, we did not review the court's determination in that case.

1. Intervention of Right

[*P10] ***HN6***[] Pursuant to Rule 24(a), intervention is permitted of right in either of two circumstances:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless **[***8]** the applicant's interest is adequately represented by existing parties.

The first ground for intervention is inapplicable here because no "statute confers an unconditional right to intervene." M.R. Civ. P. 24(a)(1). Thus, the question for our consideration is whether CMMC satisfied the requirements of the second ground for intervention of right, which is allowed when, "on timely application: (1) [a party] claims an interest in the property or transaction that is the subject of the action, and (2) [the party] is so situated that the disposition of the action may impair or impede [its] ability to protect [its] interest, and (3) [its] interest is not adequately represented by the existing parties to the action." *Doe, 495 A.2d at 1237*; *see* M.R. Civ. P. 24(a)(2).

[*P11] As one of the competitors of the MaineHealth entities, CMMC has an interest related to the antitrust action, but CMMC did not demonstrate that the disposition of the antitrust action would impair or impede its ability to protect its own interests through independent litigation. *See* M.R. Civ. P. 24(a)(2). ***HN7***[] Maine ***antitrust law*** allows any person injured in business or property, whether directly or indirectly, to sue for the injury in **[***9]** a civil action and seek treble damages. *10 M.R.S. § 1104(1)*. [4] Only the Attorney General, **[**915]** however, is authorized to "institute proceedings in equity to prevent and restrain [antitrust] violations." *Id.* *§ 1104(2)*.

[*P12] Thus, as the United States Supreme Court has held with regard to comparable federal ***antitrust law***, ***HN9***[] private and public actions "were designed to be cumulative, not mutually exclusive." *Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689, 81 S. Ct. 1309, 6 L. Ed. 2d 604 (1961)* (quotation marks omitted). Because private parties are not bound by the government litigation, any liability to private parties **[***10]** may be determined separately under Maine's statutory framework. *See* *10 M.R.S. § 1104(1)*, *(2)*; *Sam Fox Publ'g Co., 366 U.S. at 689-90*. Thus, there is no entitlement in a private party to intervene of right in a State antitrust enforcement action in Maine unless the party provides evidence of bad faith or malfeasance on the part of the government such that intervention is necessary to protect the *public's* interests. *See* *10 M.R.S. § 1104(1)*, *(2)*; *Sam Fox Publ'g Co., 366 U.S. at 689*; *United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir. 1976)*; *United States v. Visa U.S.A., Inc., 2000 U.S. Dist. LEXIS 11872, at *2-3 (S.D.N.Y. Aug. 17, 2000)*; *United States v. G. Heileman Brewing Co., Inc., 563 F. Supp. 642, 648-49 (D. Del. 1983)*; *United States v. Int'l Tel. & Tel. Corp., 349 F. Supp. 22, 26-27 (D. Conn. 1972)*.

[*P13] CMMC argues that the federal authorities to which we have referred above are now outdated because Congress has amended its statutes to allow for intervention in government antitrust cases. *See* *15 U.S.C.S. § 16* (LexisNexis 1985 & Supp. 2011). Maine's antitrust enforcement statute has not been amended, however, since 1991. *See* P.L. 1991, ch. 137, §§ 2, 3 (effective **[***11]** October 9, 1991) (codified at *10 M.R.S. § 1104* (2010)). Because the Maine statute authorizes only one party—the Attorney General—to bring an enforcement action

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[4] The statute provides:

> ***HN8***[] **Right of action and damages.** Any person, including the State or any political subdivision of the State, injured directly or indirectly in its business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by section 1101, 1102 or 1102-A, may sue for the injury in a civil action. If the court finds for the plaintiff, the plaintiff shall recover 3 times the amount of the damages sustained and cost of suit, including necessary and reasonable investigative costs, reasonable experts' fees and reasonable attorney's fees.

10 M.R.S. § 1104(1) (2010).

seeking injunctive relief, *see* *10 M.R.S. § 1104(2)*, and does not authorize private intervention, the federal cases cited above remain persuasive regarding the limitations on private intervention in Maine.

[*P14] Because CMMC made no evidentiary showing of bad faith, collusion, or other malfeasance, intervention of right was properly denied.

2. Permissive Intervention

[*P15] ***HN10***[] Pursuant to Rule 24(b), a person who files a timely application "may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common." In making this discretionary determination, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." M.R. Civ. P. 24(b).

[*P16] Here, the court determined that joining a private cause of action to the State's enforcement claim would unduly burden the proceedings, and the court supplied an alternative method for CMMC to participate in the enforcement action by providing oral comments and written **[***12]** submissions to the court. The court did not abuse its discretion in denying permissive intervention. Although CMMC contends that it occupies an exceptional position as a competitor of the MaineHealth entities, its situation is not unique. The MaineHealth entities have other competitors for cardiac care, and all are entitled to participate in the State's enforcement action as permitted **[**916]** by the court, or to bring an independent claim for damages, *see* *10 M.R.S. § 1104(1)*; *15 U.S.C.S. § 15*, or both.

The entry is:

Order denying CMMC's motion to intervene affirmed.

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LexisNexis

Church & Dwight Co. v. Mayer Labs., Inc.

United States District Court for the Northern District of California

November 18, 2011, Decided; November 18, 2011, Filed

No. C11-3288 EMC (JSC)

Reporter

2011 U.S. Dist. LEXIS 133540 *; 2011-2 Trade Cas. (CCH) P77,687

CHURCH & DWIGHT CO., INC, Plaintiff, v. MAYER LABORATORIES, INC., Defendant.

Core Terms

documents, confidentiality, regulation, settlement, attorney-client, subpoena, waived, white paper, communications, disclosure, email

Counsel: **[*1]** For Sharon Randall, as guardian ad litem for Jamar Bryant, Sharon Randall, Plaintiffs: Gayla B. Libet, Law Offices of Gayla B. Libet, Oakland, CA; John L. Burris, Law Offices of John L. Burris, Oakland, CA.

For City of Oakland, Chief of Police Howard Jordan, Defendants: James F. Hodgkins, City Attorney's Office, City of Oakland, Oakland, CA.

Judges: JACQUELINE SCOTT CORLEY, UNITED STATES MAGISTRATE JUDGE.

Opinion by: JACQUELINE SCOTT CORLEY

Opinion

ORDER GRANTING MOTION FOR FTC DOCUMENTS (Dkt. Nos. 138, 144)

This antitrust and trademark infringement action involves the United States market for condoms. Now pending before the Court is the motion of Mayer Laboratories, Inc. ("Mayer") to compel production of documents Church & Dwight Co. ("C&D") disclosed to the Federal Trade Commission ("FTC") in connection with a FTC investigation. (Dkt. Nos. 138, 144.) After carefully considering the parties' written arguments, and having had the benefit of telephonic oral argument on November 17, 2011, Mayer's motion to compel is GRANTED: the disputed documents are responsive to Mayer's document request, the FTC confidentiality regulations do not shield the disputed documents from discovery, any attorney-client or attorney-work product **[*2]** privilege was waived by disclosure of the documents to the FTC, and *Federal Rule of Evidence 408* does not bar their discoverability.

BACKGROUND

Mayer served C&D with a document request for "[a]ll documents and data submitted, provided or disclosed by Church & Dwight to the FTC in the FTC Investigation." C&D responded to the request as follows:

> Church & Dwight repeats and restates all of its General Objections, as set forth above, as if set forth in full herein. Furthermore, the investigation of Church & Dwight by the FT C is non-public and subject to *15 USCA*

> 57b-2(b)(3)(C). Therefore, all statements made to the FTC by Church & Dwight and communications between the FTC and Church and & Dwight are confidential and cannot be disclosed. Subject to and without waiving any of the foregoing objections, Church & Dwight will produce a copy of documents responsive to this Request.

(Dkt. No. 138 at p. 20.) On October 6, 2011, the parties jointly submitted a letter brief "regarding Mayer's motion to compel C&D to produce the entire C&D production of documents previously produced by C&D to the Federal Trade Commission ('FTC') pursuant to the FTC's non-public antitrust investigation of C&D." The parties' **[*3]** dispute concerns whether "certain Canadian documents that C&D possesses that were produced to the FTC but which C&D has withheld, at least in part, from its production to Mayer." (Dkt. No. 138.) After hearing argument, the district ruled as follows: "Defendant's motion to compel production of FTC documents is granted. Plaintiff shall produce FTC documents to Defendant by 10/15/2011." (Dkt. No. 132.)

C&D subsequently took the position that the term "FTC documents" as used by the district court refers only to documents "produced" to the FTC in response to the FTC's subpoena to C&D, and does not include documents voluntarily provided to the FTC outside of the subpoena, such as email, correspondence and "white papers" that express C&D's view on its compliance with the antitrust laws. C&D argues that the FTC investigation is non-public and that all materials submitted to the FTC in connection with the investigation are confidential and therefore non-discoverable. It also contends that to the extent such documents involve settlement discussions, they are inadmissible and also non-discoverable. The parties brought this dispute to the district court's attention by letter filed November 8, 2011 **[*4]** (Dkt. No. 138) and the dispute was referred to this Court for decision. (Dkt. No. 140.)

By joint letter filed November 17, 2011, the parties raised another, related dispute with the Court: "whether C&D is obligated to produce certain documents that it voluntarily submitted to the FTC in connection with the FTC's non-public investigation, including 'white papers' and other documents setting forth C&D's position on the legal merits of its compliance with ***antitrust law***." (Dkt. No. 144.) C&D contends that such documents are protected work-product and/or attorney-client privilege while Mayer contends that any such privilege was waived when the documents were provided to the FTC.

In summary, the Court understands that C&D has provided to Mayer all documents which C&D produced to the FTC in response to FTC subpoenas, including documents involving the Canadian market for condoms, but is withholding any documents that were not disclosed pursuant to the subpoena, including email, correspondence, and "white papers" on the following grounds: (1) confidentiality of the FTC investigation, (2) attorney work product and/or attorney-client privilege, (3) *Federal Rule of Evidence 408* settlement communications, **[*5]** and (4) burden and basic unfairness.

DISCUSSION

There is an issue as to whether C&D has properly preserved any objections to disclosing all the documents it provided to the FTC in light of (1) the district court's October 12, 2011 order that it produce "FTC documents", and/or (2) C&D's failure to produce a privilege log or specifically identify many of its objections in its written response to Mayer's document request number four. As discussed at oral argument, the Court will first decide whether the objections—assuming properly preserved—are valid. Because the Court concludes that they are not, it does not address whether C&D's document request response properly preserved the objections.

A. Confidentiality

Federal regulations provide that "[a]ny material which is received by the [FTC] in any investigation, a purpose of which is to determine whether any person may have violated any provision of the law administered by the [FTC], and which is provided pursuant to any compulsory process . . . shall not be required to be disclosed under [the Freedom of Information Act], or any other provision of law." *15 U.S.C. § 57b-2(f)(1)*. The Court concludes that this regulation does not create some privilege **[*6]** from discovery in a lawsuit between the target of the FTC's investigation and a third party. First, the regulation governs public disclosure by the FTC; it does not purport to create some privilege that can be asserted by the producing party in litigation with a third party. Second, the regulation applies only to those documents provided "pursuant to any compulsory process." C&D concedes that the district court's October 12, 2011 order applies to those documents that were produced in response to a FTC subpoena. (Dkt. No. 138 at 5.) Thus, the regulation does not apply to the documents at issue here—those which C&D voluntarily provided to the FTC and were not disclosed in response to a subpoena. The other regulation cited by C&D—*15 U.S.C. § 57b-2(b)(3)(C)*—similarly applies to "documents, tangible things, or transcripts of oral testimony received by the [FTC] pursuant to compulsory process." *15 U.S.C. § 57b-2(b)(1)*. Again, C&D concedes that the district court already ordered it to provide the documents produced to the FTC pursuant to compulsory process. Accordingly, the Court finds that the FTC confidentiality provisions do not shield C&D's voluntary disclosures to the FTC from production **[*7]** in this case.

B. Work-product and/or attorney-client privilege

The Court also concludes that C&D waived any attorney work product protection for correspondence, email and "white papers" it voluntarily submitted to the FTC, an adversary. See *S.E.C. v. Berry, 2011 U.S. Dist. LEXIS 28301, 2011 WL 825742 *3-6 (N.D. Cal. March 7, 2011)*; *United States v. Bergonzi, 216 F.R.D. 487, 497 (N.D. Cal. 2003)*; *United States v. Reyes, 239 F.R.D. 591, 604 (N.D. Cal. 2006)*. The Court is not persuaded by the holding to the contrary in *Aronson v. McKesson HBOC, Inc., 2005 U.S. Dist. LEXIS 7078, 2005 WL 934331 *9 (N.D. Cal. March 31, 2005)*. First, in Aronson, the work product was produced to the government pursuant to an express confidentiality agreement. *2005 U.S. Dist. LEXIS 7078, [WL] at *1*. There is no argument, let alone evidence, that such an agreement accompanied the voluntary production of the "white papers" here. No case holds that work product protection is maintained when documents are disclosed without a confidentiality agreement. And, as explained above, the FTC regulations prohibiting public disclosure only apply to documents produced pursuant to subpoena, that is, to documents not at issue on this motion. Second, all of the Circuits to have addressed the issue have held that **[*8]** waiver applies to voluntary production to the government as well as to private parties, even when the documents are produced in conjunction with a confidentiality agreement. See *In re Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1194 (10th Cir. 2006)*; *In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 303 (6th Cir. 2002)*; *Westinghouse Elec. Corp. v. Rep. of the Philippines, 951 F.2d 1414, 1430 (3d Cir. 1991)*. It is thus unsurprising that Aronson relied on a dissent by a Sixth Circuit judge. *2005 U.S. Dist. LEXIS 7078, 2005 WL 934331 at *9*. Accordingly, any work product privilege was waived by voluntarily sharing the documents with the FTC.

While C&D refers to attorney-client privilege, it does not cite any case that suggests that any attorney-client privilege was not waived when C&D voluntarily shared the documents with the FTC. See *Berry, 2011 U.S. Dist. LEXIS 28301, 2011 WL 925742 at *3 n.3* (holding that the attorney-client privilege is waived for communications shared with the government).

C. Settlement communications

C&D also contends that pursuant to *Federal Rule of Evidence 408* "any material" relating to any settlement communications with the FTC is not relevant and could never lead to the discovery of admissible **[*9]** evidence The Court disagrees. *Rule 408* is quite narrow: it only limits the *admissibility* of offers of settlement (or acceptance), or statements made in settlement negotiations, to prove or disprove liability or an amount of a claim. "The rule applies to the admissibility of evidence at trial, not to whether evidence is discoverable." *West v. Jewelry Innovations, Inc., 2009 U.S. Dist. LEXIS 24103, 2009 WL 668695 *1 (N.D. Cal. March 13, 2009)* (internal quotation marks and citation omitted); see also *Phoenix Solutions Inc. v. Wells Fargo Bank, N.A., 254 F.R.D. 568, 584 (N.D. Cal. 2008)* ("*Rule 408* does not warrant protecting settlement negotiations from discovery"). C&D may not withhold documents on the grounds that they are connected to settlement discussions.

D. Burden and unfairness

Finally, C&D complains that it would be fundamentally unfair to allow Mayer to obtain correspondence and any white papers or expert reports C&D has "potentially" submitted to the FTC because it would allow for premature disclosure for the bases of C&D's expert reports. The Court is unclear why C&D modifies its statement with the word "potentially"—the document request at issue seeks only those documents that were, in fact, submitted to **[*10]** the FTC. Further, C&D does not explain what is so unfair about Mayer knowing what position C&D took with the FTC. C&D's assertion that it would be unduly burdensome to require its outside counsel to "search for, collect, and review hundreds of emails" in its counsel's e-mail archives to and from the FTC is unpersuasive, especially in litigation of this nature.

CONCLUSION

For the reasons explained above, Mayer's motion to compel production of documents responsive to its Document Request No. 4 is GRANTED. C&D shall produce the responsive documents on or before November 28, 2011.

This Order disposes of Docket Nos. 138, 144.

IT IS SO ORDERED.

/s/ Jacqueline S. Corley

JACQUELINE SCOTT CORLEY

UNITED STATES MAGISTRATE JUDGE

Dated: November 18, 2011

End of Document

Church & Dwight Co. v. Mayer Labs., Inc.

United States District Court for the Northern District of California

November 18, 2011, Decided; November 18, 2011, Filed

No. C10-4429 EMC (JSC)

Reporter

2011 U.S. Dist. LEXIS 133762 *

CHURCH & DWIGHT CO., INC, Plaintiff, v. MAYER LABORATORIES, INC., Defendant.

Subsequent History: Motion granted by *Church & Dwight Co. v. Mayer Labs., Inc., 2011 U.S. Dist. LEXIS 141315 (N.D. Cal., Dec. 8, 2011)*

Prior History: *Church & Dwight Co. v. Mayer Labs., Inc., 2011 U.S. Dist. LEXIS 35969 (N.D. Cal., Apr. 1, 2011)*

Core Terms

documents, confidentiality, regulation, settlement, attorney-client, subpoena, waived, white paper, communications, disclosure, email

Counsel: **[*1]** For Church & Dwight Co., Inc., a Delaware Corporation, Plaintiff, Counter-defendant: John Diawon Huh, LEAD ATTORNEY, DLA Piper US LLP, Philadelphia, PA; Carl W. Hittinger, PRO HAC VICE, Lesli Esposito, PRO HAC VICE, DLA Piper LLP, Philadelphia, PA; Jarod Michael Bona, DLA Piper US LLP, Minneapolis, MN; Matthew A. Goldberg, DLA Piper LLP (US), Philadelphia, PA.

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Judges: JACQUELINE SCOTT CORLEY, UNITED STATES MAGISTRATE JUDGE.

Opinion by: JACQUELINE SCOTT CORLEY

Opinion

ORDER GRANTING MOTION FOR FTC DOCUMENTS (Dkt. Nos. 138, 144)

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BACKGROUND

Mayer served C&D with a document request for "[a]ll documents and data submitted, provided or disclosed by Church & Dwight to the FTC in the FTC Investigation." C&D responded to the request as follows:

> Church & Dwight repeats and restates all of its General Objections, as set forth above, as if set forth in full herein. Furthermore, the investigation of Church & Dwight by the FT C is non-public and subject to *15 USCA 57b-2(b)(3)(C)*. Therefore, all statements made to the FTC by Church & Dwight and communications between the FTC and Church and & Dwight are confidential and cannot be disclosed. Subject to and without waiving any of the foregoing objections, Church **[*4]** & Dwight will produce a copy of documents responsive to this Request.

(Dkt. No. 138 at p. 20.) On October 6, 2011, the parties jointly submitted a letter brief "regarding Mayer's motion to compel C&D to produce the entire C&D production of documents previously produced by C&D to the Federal Trade Commission ('FTC') pursuant to the FTC's non-public antitrust investigation of C&D." The parties' dispute concerns whether "certain Canadian documents that C&D possesses that were produced to the FTC but which C&D has withheld, at least in part, from its production to Mayer." (Dkt. No. 138.) After hearing argument, the district ruled as follows: "Defendant's motion to compel production of FTC documents is granted. Plaintiff shall produce FTC documents to Defendant by 10/15/2011." (Dkt. No. 132.)

C&D subsequently took the position that the term "FTC documents" as used by the district court refers only to documents "produced" to the FTC in response to the FTC's subpoena to C&D, and does not include documents voluntarily provided to the FTC outside of the subpoena, such as email, correspondence and "white papers" that express C&D's view on its compliance with the antitrust laws. C&D argues that **[*5]** the FTC investigation is non-public and that all materials submitted to the FTC in connection with the investigation are confidential and therefore non-discoverable. It also contends that to the extent such documents involve settlement discussions, they are inadmissible and also non-discoverable. The parties brought this dispute to the district court's attention by letter filed November 8, 2011 (Dkt. No. 138) and the dispute was referred to this Court for decision. (Dkt. No. 140.)

By joint letter filed November 17, 2011, the parties raised another, related dispute with the Court: "whether C&D is obligated to produce certain documents that it voluntarily submitted to the FTC in connection with the FTC's non-public investigation, including 'white papers' and other documents setting forth C&D's position on the legal merits of its compliance with ***antitrust law***." (Dkt. No. 144.) C&D contends that such documents are protected work-product and/or attorney-client privilege while Mayer contends that any such privilege was waived when the documents were provided to the FTC.

In summary, the Court understands that C&D has provided to Mayer all documents which C&D produced to the FTC in response **[*6]** to FTC subpoenas, including documents involving the Canadian market for condoms, but is withholding any documents that were not disclosed pursuant to the subpoena, including email, correspondence, and "white papers" on the following grounds: (1) confidentiality of the FTC investigation, (2) attorney work product and/or attorney-client privilege, (3) *Federal Rule of Evidence 408* settlement communications, and (4) burden and basic unfairness.

DISCUSSION

There is an issue as to whether C&D has properly preserved any objections to disclosing all the documents it provided to the FTC in light of (1) the district court's October 12, 2011 order that it produce "FTC documents", and/or (2) C&D's failure to produce a privilege log or specifically identify many of its objections in its written response to Mayer's document request number four. As discussed at oral argument, the Court will first decide whether the objections—assuming properly preserved—are valid. Because the Court concludes that they are not, it does not address whether C&D's document request response properly preserved the objections.

A. Confidentiality

Federal regulations provide that "[a]ny material which is received by the [FTC] **[*7]** in any investigation, a purpose of which is to determine whether any person may have violated any provision of the law administered by the [FTC], and which is provided pursuant to any compulsory process . . . shall not be required to be disclosed under [the Freedom of Information Act], or any other provision of law." *15 U.S.C. § 57b-2(f)(1)*. The Court concludes that this regulation does not create some privilege from discovery in a lawsuit between the target of the FTC's investigation and a third party. First, the regulation governs public disclosure by the FTC; it does not purport to create some privilege that can be asserted by the producing party in litigation with a third party. Second, the regulation applies only to those documents provided "pursuant to any compulsory process." C&D concedes that the district court's October 12, 2011 order applies to those documents that were produced in response to a FTC subpoena. (Dkt. No. 138 at 5.) Thus, the regulation does not apply to the documents at issue here—those which C&D voluntarily provided to the FTC and were not disclosed in response to a subpoena. The other regulation cited by C&D—*15 U.S.C. § 57b-2(b)(3)(C)*—similarly applies to **[*8]** "documents, tangible things, or transcripts of oral testimony received by the [FTC] pursuant to compulsory process." *15 U.S.C. § 57b-2(b)(1)*. Again, C&D concedes that the district court already ordered it to provide the documents produced to the FTC pursuant to compulsory process. Accordingly, the Court finds that the FTC confidentiality provisions do not shield C&D's voluntary disclosures to the FTC from production in this case.

B. Work-product and/or attorney-client privilege

The Court also concludes that C&D waived any attorney work product protection for correspondence, email and "white papers" it voluntarily submitted to the FTC, an adversary. See *S.E.C. v. Berry, 2011 U.S. Dist. LEXIS 28301, 2011 WL 825742 *3-6 (N.D. Cal. March 7, 2011)*; *United States v. Bergonzi, 216 F.R.D. 487, 497 (N.D. Cal. 2003)*; *United States v. Reyes, 239 F.R.D. 591, 604 (N.D. Cal. 2006)*. The Court is not persuaded by the holding to the contrary in *In re McKesson HBOC, Inc. Secs. Litig., 2005 U.S. Dist. LEXIS 7098, 2005 WL 934331 *9 (N.D. Cal. March 31, 2005)*. First, in Aronson, the work product was produced to the government pursuant to an express confidentiality agreement. *2005 U.S. Dist. LEXIS 7098, [WL] at *1*. There is no argument, let alone evidence, that such an agreement accompanied the voluntary **[*9]** production of the "white papers" here. No case holds that work product protection is maintained when documents are disclosed without a confidentiality agreement. And, as explained above, the FTC regulations prohibiting public disclosure only apply to documents produced pursuant to subpoena, that is, to documents not at issue on this motion. Second, all of the Circuits to have addressed the issue have held that waiver applies to voluntary production to the government as well as to private parties, even when the documents are produced in conjunction with a confidentiality agreement. See *In re Qwest Communs. Int'l, 450 F.3d 1179, 1194 (10th Cir. 2006)*; *In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 303 (6th Cir. 2002)*; *Westinghouse Elec. Corp. v. Rep. of the Philippines, 951 F.2d 1414, 1430 (3d Cir. 1991)*. It is thus unsurprising that Aronson relied on a dissent by a Sixth Circuit judge. *2005 U.S. Dist. LEXIS 7098, 2005 WL 934331 at *9*. Accordingly, any work product privilege was waived by voluntarily sharing the documents with the FTC.

While C&D refers to attorney-client privilege, it does not cite any case that suggests that any attorney-client privilege was not waived when C&D **[*10]** voluntarily shared the documents with the FTC. See *Berry, 2011 U.S. Dist. LEXIS 28301, 2011 WL 925742 at *3 n.3* (holding that the attorney-client privilege is waived for communications shared with the government).

C. Settlement communications

C&D also contends that pursuant to *Federal Rule of Evidence 408* "any material" relating to any settlement communications with the FTC is not relevant and could never lead to the discovery of admissible evidence The Court disagrees. *Rule 408* is quite narrow: it only limits the *admissibility* of offers of settlement (or acceptance), or statements made in settlement negotiations, to prove or disprove liability or an amount of a claim. "The rule applies to the admissibility of evidence at trial, not to whether evidence is discoverable." *West v. Jewelry Innovations, Inc., 2009 U.S. Dist. LEXIS 24103, 2009 WL 668695 *1 (N.D. Cal. March 13, 2009)* (internal quotation marks and citation omitted); see also *Phoenix Solutions Inc. v. Wells Fargo Bank, N.A., 254 F.R.D. 568, 584 (N.D. Cal. 2008)* ("*Rule 408* does not warrant protecting settlement negotiations from discovery"). C&D may not withhold documents on the grounds that they are connected to settlement discussions.

D. Burden and unfairness

Finally, C&D complains that **[*11]** it would be fundamentally unfair to allow Mayer to obtain correspondence and any white papers or expert reports C&D has "potentially" submitted to the FTC because it would allow for premature disclosure for the bases of C&D's expert reports. The Court is unclear why C&D modifies its statement with the word "potentially"—the document request at issue seeks only those documents that were, in fact, submitted to the FTC. Further, C&D does not explain what is so unfair about Mayer knowing what position C&D took with the FTC. C&D's assertion that it would be unduly burdensome to require its outside counsel to "search for, collect, and review hundreds of e-mails" in its counsel's e-mail archives to and from the FTC is unpersuasive, especially in litigation of this nature.

CONCLUSION

For the reasons explained above, Mayer's motion to compel production of documents responsive to its Document Request No. 4 is GRANTED. C&D shall produce the responsive documents on or before November 28, 2011.

This Order disposes of Docket Nos. 138, 144.

IT IS SO ORDERED.

/s/ Jacqueline S. Corley

JACQUELINE SCOTT CORLEY

UNITED STATES MAGISTRATE JUDGE

Dated: November 18, 2011

End of Document

[Am. Airlines, Inc. v. Travelport Ltd.](#)

United States District Court for the Northern District of Texas, Fort Worth Division

November 21, 2011, Decided; November 21, 2011, Filed

CIVIL ACTION NO. 4:11-CV-244-Y

Reporter
2011 U.S. Dist. LEXIS 166373 *; 2011 WL 13047291

AMERICAN AIRLINES, INC. VS. TRAVELPORT LIMITED, et al.

Subsequent History: Motion denied by *Am. Airlines, Inc. v. Travelport Ltd., 2012 U.S. Dist. LEXIS 191138 (N.D. Tex., Feb. 28, 2012)*

Prior History: *Am. Airlines, Inc. v. Travelport Ltd., 2011 U.S. Dist. LEXIS 86905 (N.D. Tex., July 26, 2011)*

Core Terms

airlines, travel agent, conspiracy, alleges, monopolization, submarkets, relevant market, travel agency, motion to dismiss, subscribers, amended complaint, foreclosed, flight, booking fee, anticompetitive, contracts, booking, pleaded, terms, substantial share, monopoly power, quotation, contends, marks, Sherman Act, consumers, restrain, second amended complaint, compensation agreement, tortious interference

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Judges: TERRY R. MEANS, UNITED STATES DISTRICT JUDGE.

Opinion by: TERRY R. MEANS

Opinion

ORDER REGARDING MOTIONS TO DISMISS AND MOTION FOR LEAVE TO AMEND

Before the Court are three motions to dismiss: one filed by defendant Orbitz Worldwide, LLC ("Orbitz") (doc. 77); another by defendants Travelport Limited and Travelport, LP (collectively, "Travelport") (doc. 85); and the final one by defendants Sabre Inc., Sabre Holdings Corporation, **[*7]** and Sabre Travel International Limited (collectively, "Sabre") (doc. 97). Also before the Court is the motion for leave to file a second amended complaint (doc. 148) filed by plaintiff American Airlines, Inc. ("American"). After review, the Court will grant Orbitz's motion to dismiss, grant in part and deny in part Travelport's motion to dismiss, grant in part and deny in part Sabre's motion to dismiss, and grant in part and deny in part American's motion for leave.[1]

I. Defendants' Motions to Dismiss

A. Background

Plaintiff American Airlines, Inc. ("American"), is a domestic and international airline that logs approximately 3500 departures each day. (Am. Compl. ¶ 19 (doc. 70).) Orbitz operates an online travel agency. (*Id.* ¶ 6.) Travelport and Sabre each operate global distribution systems ("GDSes"). (*Id.* ¶ 2.)

GDSes distribute airline fare, flight, and availability information to travel agents, enabling those travel agents to make reservations and issue tickets to travelers. (*Id.*) Airlines provide their information to GDSes and pay each GDS a booking fee for every reservation that is made through the GDS. (*Id.* ¶ 2, 6.) American pays Travelport and Sabre several million dollars in booking **[*8]** fees every year. (*Id.* ¶ 6.)

Five GDSes operate in the United States. (*Id.* ¶ 3.) Sabre controls the largest, which accounts for more than 60% of all airline ticket sales made by U.S.-based travel agencies. (*Id.*) Travelport controls three GDSes--Galileo, Apollo, and Worldspan--which collectively account for over 30% of all airline ticket sales made by U.S.-based travel agencies. (*Id.*) The fifth GDS is Amadeus, whose operator is not a party to this lawsuit. (*Id.*) Over the past year, some $7 billion of American's sales were booked through Sabre and more than $2.7 billion were booked through Travelport GDSes. (*Id.*)

GDSes typically enter into long-term subscriber agreements with travel agents. (*Id.* ¶ 35.) Under the usual subscriber agreement, a travel agent receives a portion of a GDS's booking fee when the agent makes a reservation through that GDS. (*Id.*) Using a GDS, a travel agent can conduct a single search for airline fare, flight, and availability information and review the search results in a single integrated display. (*Id.*) Subscribing to multiple GDSes often means additional costs and expenses for a travel agent by adding layers to the search process, requiring additional training **[*9]** costs, and complicating the travel agent's record-keeping systems. (*Id.* at ¶ 38.) Consequently, a travel agency typically subscribes to only a single GDS and uses software applications that interoperate with that GDS. (*Id.*)

According to American, network airlines are dependent upon travel agencies to sell airline tickets to travelers. (*Id.* ¶ 29.) Although the airlines sell some tickets directly to consumers through their websites, call centers, and ticket offices, the majority of the airlines' passenger revenues are generated by ticket sales through travel agencies. (*Id.*) These travel agencies include both traditional brick-and-mortar agencies and online agencies such as Orbitz. (*Id.*) Approximately 51% of American's passenger revenue is generated by sales through brick-and-mortar travel agencies, and approximately 10-15% is generated by sales through online agencies. (*Id.*)

American further alleges that network airlines are dependent upon travel agents to reach business travelers in particular. (*Id.* ¶ 30.) Business travelers account for a disproportionately high share of network airlines' revenues,

[1] Sabre requests oral argument. Because the Court is able to resolve the motions based on the parties' briefing, the Court DENIES this request.

including American's. (*Id.*) And according to American's complaint, less than 10% of business **[*10]** travel is booked through the internet. (*Id.* ¶ 31.) Instead, most businesses contract with travel agencies to manage their employees' travel, resulting in virtually exclusive working relationships between business travelers and their travel agents. (*Id.* at ¶ 31.)

American contends that this landscape favors GDSes and disfavors airlines and consumers. Broadly speaking, American alleges that, because consumers (particularly business travelers) rely heavily on travel agencies to purchase airline tickets, and because those travel agencies, in turn, rely almost exclusively on GDSes to book flights, airlines are dependent upon GDSes to reach travel agents and, ultimately, to sell tickets to consumers. (*Id.* ¶ 2.) It is American's position that Sabre and Travelport each have monopoly power over American and that each of them has used its monopoly power to exclude competition in the relevant market and submarkets. (*Id.* ¶ 9.) It is also American's position that Sabre and Travelport, along with Orbitz and other industry participants, "have engaged in a broad and unlawful multi-part anticompetitive scheme." (*Id.*)

This scheme, according to American, includes charging supracompetitive booking fees **[*11]** to airlines, entering into restrictive long-term contracts with travel agents, and imposing various anticompetitive contract terms upon airlines. (*Id.* ¶ 10.) In addition, American alleges that Travelport and Sabre have retaliated against American for its development and implementation of "AA Direct Connect," a method of providing airline information and booking services directly to travel agents without having to go through GDSes. (*Id.* ¶¶ 8-9.) American contends that Travelport and Sabre view AA Direct Connect as a threat to the vitality of the current GDS-dominated landscape. (*Id.*) Sabre's and Travelport's retaliatory actions, American alleges, include doubling American's booking fees on certain types of flight reservations and biasing American's flight information on their displays. (*Id.* ¶¶ 12-13.) Moreover, American alleges that the defendants' retaliatory practices have been directed not only at American, but also certain third-party software developers who have worked with American in developing non-GDS technologies to distribute flight information directly to travel agents. (*Id.* ¶ 13.) The result of the defendants' actions, argues American, ultimately affects United States consumers. **[*12]** (*Id.* ¶ 15.)

American's first amended complaint (doc. 70) asserts six claims for relief. Its claims one and two are against Sabre and Travelport, respectively, for their alleged "monopolization of the distribution of airline tickets" in violation of *section 2 of the Sherman Antitrust Act*, *15 U.S.C.A. § 2 (West 2011)*. (Am. Compl. ¶¶ 128-33.) American's third claim, also brought under *section 2*, is for "conspiracy to monopolize the distribution of airline tickets through travel agents," and is directed at Travelport and Orbitz. (Am. Compl. ¶¶ 134-36.) American's fourth claim, which addresses all defendants, alleges that they entered into agreements that unreasonably restrain competition in violation of *section 1 of the Sherman Act, 15 U.S.C.A. § 1*. (Am. Compl. ¶¶ 137-42.) American's fifth claim is against Travelport for tortious interference "with existing and prospective contractual relationships." (Am. Compl. ¶¶ 143-51.) And similarly, American's sixth and final claim is asserted against Sabre and Travelport for tortious interference "with existing contractual relationships." (Am. Compl. ¶¶ 152-57.) All defendants now seek dismissal of American's amended complaint under *Federal Rule of Civil Procedure 12(b)(6)*.

B. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a complaint that fails "to **[*13]** state a claim upon which relief can be granted." This rule must be interpreted in conjunction with *Rule 8(a)*, which sets forth the requirements for pleading a claim for relief in federal court. *Rule 8(a)* requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*; *see* *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)* (holding that *Rule 8(a)*'s simplified pleading standard applies to most civil actions). The Court must accept as true all well-pleaded, non-conclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982)*.

The plaintiff must, however, plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992)*. Indeed, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," and his "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 547, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citations omitted). The Court need not credit bare conclusory allegations or "a formulaic recitation of the elements of a cause of action." Id. at 1965. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the **[*14]** reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

C. Analysis of American's Section 2 Claims

"Section 2 of the Sherman Antitrust Act provides a cause of action against 'single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize.'" Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc., 200 F.3d 307, 315 (5th Cir. 2000) (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)).[2] Thus, section 2 denounces three actions: (1) actual monopolization, (2) attempted monopolization, and (3) conspiracy to monopolize. Geddie v. Seaton, No. 3:06-CV-0895-R, 2006 U.S. Dist. LEXIS 55106, 2006 WL 2263335, at *5 (N.D. Tex. Aug. 8, 2006) (Buchmeyer, J.) (citing 15 U.S.C.A. § 2; N. Miss. Commc'ns, Inc. v. Jones, 792 F.2d 1330, 1335 (5th Cir. 1986)). As previously noted, in its first amended complaint American asserts claims for actual monopolization and conspiracy to monopolize.

1. American's Monopolization Claims

a. Relevant Market and Submarkets

"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence **[*15]** of a superior product, business acumen, or historic accident." Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 781 (5th Cir. 1999) (quoting Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)) (internal quotation marks omitted). Thus, as a preliminary matter, "the plaintiff must first establish the relevant product market." Alcatel, 166 F.3d at 781 (citation omitted).

"Whether a relevant market has been identified is usually a question of fact . . . ." Apani Sw., Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620, 628 (5th Cir. 2002) (citing Seidenstein v. Nat'l Med. Enters., Inc., 769 F.2d 1100, 1106 (5th Cir. 1985)). A proffered relevant market is insufficient as a matter of law, however, "[w]here the plaintiff fails to define [the] market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor." *Id.* (citations omitted).[3]

In the instant case, American defines the relevant product market as "[t]he distribution of airline fare, flight, and availability information and the provision of reservations and ticketing capability to travel agents." (Am Compl. ¶ 117.) The participants in this market ("the Market") include GDSes as well as entities like American who seek to

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[2] Section 2 of the Sherman Act reads, in relevant part, as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

15 U.S.C.A. § 2.

[3] "'The cross-elasticity of demand for substitutes' measures consumers' propensity to switch from one product to another, similar product when relative prices change. Products similar enough that a small relative price change causes consumers to substitute one for another are in the same market." United Farmers Ass'n, Inc. v. Farmers Ins. Exchange, 89 F.3d 233, 236 n.3 (5th Cir. 1996) (citations omitted) (internal quotation marks omitted). Similarly, "'[i]nterchangeability' looks to the use or function of the given product as compared to other products. Every product that can be substituted for the same use or purpose should be included within a single product market." Intellective, Inc. v. Mass. Mut. Life. Ins. Co., 190 F. Supp. 2d 600, 610 (S.D.N.Y. 2002).

provide airline booking services to travel agents. None of the parties challenges that this is a plausible product **[*16]** market.[4]

American also alleges the existence of two relevant submarkets: (1) the provision of airline booking services to Sabre subscribers ("the Sabre submarket") and (2) the provision of airline booking services to Travelport subscribers ("the Travelport submarket"). (Am. Compl. ¶¶ 118-19.) Unlike the Market, Sabre and Travelport do challenge the plausibility of American's proffered submarkets. Sabre and Travelport argue that the submarkets fail to take into account cross-elasticity of demand as well as all reasonably-interchangeable substitutes. Moreover, Sabre and Travelport contend that the circumstances under which a single-brand market may serve as a relevant product market are limited to the type of circumstances present in *Eastman Kodak Company v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*--that is, where consumers are "locked in" to purchasing a particular aftermarket product because of a lack of reasonably-interchangeable substitutes.

After review, the Court disagrees. First of all, American has described the submarkets in terms of reasonable interchangeability and cross-elasticity of demand. For example, American alleges that airlines cannot afford to forego access to any of the GDSes because each GDS controls access to **[*17]** a critical group of travel agents who, in turn, have access to a discrete set of business travelers. According to American, because the typical travel agent aligns with a particular GDS, and because it is cost-prohibitive for the travel agent to switch to a new GDS, an airline must participate in every GDS or risk losing a crippling amount of sales. American further alleges that, in light of the foregoing, each GDS can, and does, raise its booking fees to supracompetitive levels--without fear of losing revenue from airlines and without regard to the other GDSes' booking fees. In short, American alleges that one GDS is not a substitute for another and that each GDS therefore constitutes a separate submarket. This, in the Court's view, is sufficient to avoid dismissal under *Rule 12*.

Moreover, the Court is not persuaded that the circumstances present in *Kodak* are the sole circumstances under which a single-brand market may be plausible. The defendant in that case, Eastman Kodak Company ("Kodak"), manufactured and sold complex business machines requiring unique replacement parts. *Kodak, 504 U.S. at 456-57*. The United States Supreme Court determined that "[b]ecause service and parts for Kodak equipment [were] not interchangeable **[*18]** with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective [was] composed of only those companies that service[d] Kodak machines." *Id. at 482*. Stated differently, because Kodak equipment-owners were "locked-in" to purchasing Kodak's repair parts and services following their initial purchase of Kodak equipment, the plaintiffs had a triable claim that the Kodak parts and service markets were each relevant markets. *Id. at 481-83*.

In rejecting Kodak's argument that a single brand could never be a relevant market, the Supreme Court noted that "proper market definition . . . can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Id. at 482* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. And the commercial reality in *Kodak* was that there were no interchangeable substitutes for Kodak equipment parts. *See id.* The Supreme Court's decision was thus driven by a recognition that market definition is a factual inquiry. *See id.* Nowhere in *Kodak* did the Supreme Court state that aftermarkets present the only circumstances under which a single-brand market may be plausible.[5] To the contrary, the Supreme Court cited a

[4] American's amended complaint alleges that "[e]ach country served by American in which Sabre or Travelport accounts for a substantial percentage of airline bookings is a relevant geographic market, including the United States, the United Kingdom, Belgium, and Switzerland." (Am. Compl. ¶ 120.) But in its response to Travelport's motion to dismiss, following a jurisdictional challenge from Travelport, American states that "the [amended complaint]'s allegations with respect to [Traveport]'s market share and conduct in certain foreign markets are not intended to demonstrate that [Travelport] has unlawfully monopolized those markets." (Pl.'s Resp. to Travelport's Mot. to Dismiss 16 (doc. 107).) Instead, says American, "the [amended complaint] alleges that Travelport used its monopoly power in those markets in order to quash [American]'s attempt to introduce competition to [Travelport]'s GDSs *in the United States*." (*Id.* at 16-17.) Thus, American's response clarifies that the geographical scope of its alleged product market and submarkets is limited to the United States.

number of its prior cases, some of which did not involve aftermarkets, **[*19]** that "support[ed] the proposition that in some instances one brand of a product can constitute a separate market." *Id.* [6]

In its amended complaint, American alleges facts that, if proven might show, or at least raise a factual dispute as to whether, a GDS's services are not interchangeable with those of another GDS. Corroborating those allegations is another alleged fact: that all airlines participate in every GDS. "The boundaries of . . . a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Apani, 300 F.3d at 626* (quoting *Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 980 (5th Cir. 1977))* (internal quotation marks omitted). Sabre and Travelport may dispute that their travel-agent subscribers are "distinct customers" or that there is "industry or public recognition of [each of their submarkets] as a separate economic entity," but at the *Rule 12* stage the Court must construe all factual allegations in favor of American. *See Apani, 300 F.3d at 628*; *see also Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1348-49 (5th Cir. 1980)* ("Relevant market is a question of fact, and findings **[*20]** concerning the market should be overturned on appeal only if clearly erroneous or where there is no evidence to support the finding below." (citation omitted)).

Therefore, because American has pleaded the Sabre and Travelport submarkets in a way that takes into account the rules of interchangeability and cross-elasticity of demand, and given the fact-intensive nature of the relevant-market inquiry, the Court concludes that the Sabre and Travelport submarkets are sufficiently plausible to survive the defendants' challenges under *Rule 12*. *See In re Air Passenger Computer Reservs. Sys. Antitrust Litig., 694 F. Supp. 1443, 1459-60 (C.D. Cal. 1988)* (holding that plaintiff-airline had created a dispute of fact as to whether Sabre (then owned by American) was "a separate service market" where the plaintiff-airline had produced "evidence that airlines view[ed] each [GDS] as offering a unique service: access to a particular set of travel agents").

b. Monopoly Power

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[5] Earlier in the *Kodak* opinion, the Supreme Court observed that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***." *Kodak, 504 U.S. at 466-67*. The Supreme Court further observed that it "has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record." *Id. at 467* (citations omitted) (internal quotation marks omitted). Thus, rather than label the Travelport and Sabre submarkets "single-brand markets" and dismissing them on the basis of that label, the Court is of the opinion that it must look to the commercial realities of the airline industry, as depicted in American's complaint.

[6] The Court notes that the instant case is distinguishable from *PSKS, Inc. v. Leegin Creative Leather Products, Inc., 615 F.3d 412 (5th Cir. 2010)*, in which the Fifth Circuit affirmed a district court's rejection of the proffered market consisting of defendant's single brand of products. In that case, the Fifth Circuit noted that single-brand markets are appropriate only in "rare circumstances" and, indeed, even seemed to suggest that such circumstances were "limited to situations in which consumers are 'locked in' to a specific brand by the nature of the product." *Leegin, 615 F.3d at 418*. But the court's decision to reject the proffered single-brand market in that case was based on its finding that the plaintiff had failed to plead that there was a "structural barrier to the interchangeability of [the defendant's] products with goods produced by competing manufacturers." *Id.* The court did not reach its decision merely because a single-brand market was involved. *Id.* Here, American has alleged the existence of structural barriers to the interchangeability of the GDSes's respective services, as well as a number of other facts showing that GDSes are not substitutes for one another. Thus, *Leegin* is distinguishable. The instant case is also distinguishable from *United Farmers Agents Association v. Farmers Insurance Exchange, 89 F.3d 233 (5th Cir. 1996)*, another case in which the Fifth Circuit rejected a proffered single-brand market. In that case, the Fifth Circuit found that the plaintiffs--insurance agents--had not alleged the existence of "a superior or unique insurance product that allow[ed] [defendant Farmers Insurance] to charge consumers more for policies or pay agents less for selling them." *Farmers, 89 F.3d at 236*. The *Farmers* court also found that the plaintiffs had "shown no evidence that new Farmers agents would face significant information or switching costs." *Id.* The court therefore concluded that the plaintiffs "ha[d] failed to give [it] any reason to view the market for electronic access to Farmers policy information as the relevant market." *Id.* In the instant case, by contrast, American has pleaded facts showing that the GDSes have unique power that enables them to charge airlines high booking fees. American has also alleged that the GDSes' power is maintained in part because of the significant switching costs that travel agents face. Thus, *Farmers* is distinguishable from the instant case.

Once a plaintiff alleging monopolization has successfully pleaded the relevant product market, his next hurdle is to plead facts showing that the defendant possesses monopoly power in that market. *See* Stewart, 200 F.3d at 315. "Monopoly power is understood as 'the power to control price or exclude competition.'" *Id.* (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)). It is undisputed that Travelport and Sabre **[*21]** possess monopoly power in the Travelport and Sabre submarkets, respectively. Moreover, Sabre appears to concede, at least for purposes of its motion, that its alleged market share of over 60% of the Market is sufficient market power to support a claim for monopolization under section 2.

Travelport, on the other hand, contends that its alleged 34% share of the Market is, as a matter of law, too insubstantial to constitute a monopoly. And after review, the Court agrees. It is a "widely accepted rule of thumb that while a 90 percent market share definitely is enough to constitute monopolization, 'it is doubtful whether 60 or 64 percent would be enough; and certainly, 33 percent is not.'" Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 489 (5th Cir. 1984) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945)). Furthermore, the "Supreme Court cases, as well as cases from [the Fifth Circuit], suggest that absent special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization." *Id.* (collecting cases). "[L]ow market shares, if undisputed, make monopolization an impossibility as a matter of law." Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516, 529 (5th Cir. 1982). Accordingly, American has failed to state a claim against Travelport for monopolization of the Market.

c. Exclusionary Conduct

As previously noted, the second **[*22]** element of a monopolization claim is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Alcatel, 166 F.3d at 781. In analyzing whether this sort of exclusionary conduct has occurred, courts consider "the proffered business justification for the act. If the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported." Stearns v. Airport Equip. Co., Inc. v. FMC Corp., 170 F.3d 518, 522 (5th Cir. 1999) (citing Aspen Skiing Co. v. Aspen Highlands, 472 U.S. 585, 608, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)).

In its amended complaint, American alleges that Sabre and Travelport "impose anticompetitive terms and conditions on airlines that participate in their GDSs." (Am. Compl. ¶ 49.) As an example, American points to section 2.1 of the Preferred Fares Amendment ("PFA"), entered into between American and one of Travelport's predecessors-in-interest.[7] The PFA includes a "full-content" provision requiring American to make flight-related content available to Travelport "at levels and amounts that are at least as favorable to [Travelport] as those upon which American makes the same types of [content] available through any other GDS or distribution channel." (Am. Compl. ¶ 52.) According to American, terms like this stifle **[*23]** innovation in the provision of booking services because they "prevent participating airlines from encouraging travel agents or consumers to use alternative, less-costly, distribution channels by making certain content available only through those channels." (Am. Compl. ¶ 54.) As another example, American points to a term in one of its contracts with Sabre that allegedly limits its ability to market AA Direct Connect to Sabre subscribers. (Am. Compl. ¶ 61.)

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[7] Travelport contends that American's claims are based on the "content parity" provision of the PFA, which was executed in 2006, and are barred by the Sherman Act's four-year statute of limitations. 15 U.S.C.A. § 15b. In response, American insists that its claims based on the PFA are preserved by the continuing-violation theory and that, even if they are not, American can use those allegations as proof that Travelport is liable for monopolization during the limitations period. In the Court's view, the applicable statute of limitations does not bar American's PFA-related allegations. American's monopolization claims are not based heavily on the PFA; rather American simply points to the PFA as an example of what it considers a larger continuing effort by Travelport to exclude competition in the Travelport submarket. Therefore, although ultimately American will only be able to recover damages incurred as a result of acts committed during the limitations period, American may rely on its PFA-related allegations to establish that Travelport is liable for monopolization. *See* Imperial Point Colonnades Condo., Inc. v. Mangurian, 549 F.2d 1029, 1034-35 (5th Cir. 1977).

Moreover, American alleges that it is forced to accept the defendants' desired contract terms. For one thing, says American, Sabre and Travelport stagger the expiration dates of their contracts with airlines to place the airlines at a bargaining disadvantage when negotiating over new contract terms. According to American, an airline has less leverage in negotiations when it knows that its competitors have already accepted the GDS's terms in their contracts. Further, American asserts that because it is financially dependent upon Travelport and Sabre for access to their travel agents, it has little choice but to accept the GDSes' desired terms.

In addition to imposing anticompetitive contract terms on airlines, American's amended **[*24]** complaint alleges that Sabre and Travelport include anticompetitive terms in their subscriber agreements with travel agents. These contracts, according to American, are typically long-term--often three years but sometimes longer--and in many cases require the contracting travel agent to align exclusively with the contracting GDS. American alleges that these contracts, when combined with other market realities, make it difficult for travel agents to switch GDSes and for airlines to provide flight information directly to the travel agents.

American also alleges that Sabre and Travelport have taken a number of retaliatory actions against American in response to American's efforts to develop alternative channels of providing booking services. These retaliatory practices include raising certain booking fees and biasing against American's flight and fare content in their displays, which is, according to American, economically irrational. American alleges that display bias is "inconsistent with a competitor seeking to obtain the highest number of bookings." (Am. Compl ¶ 107.)

Sabre's and Travelport's retaliatory practices, American alleges, have been directed at not only American, but also **[*25]** certain third-party software developers who have worked with American in developing non-GDS technologies to distribute flight information directly to travel agents. For example, American alleges that Sabre terminated its developer agreement with Farelogix, a third-party technology provider, as a result of Farelogix's efforts at helping airlines, including American, establish direct connections with travel agents.

Sabre and Travelport contend that these allegations do not describe actions that are offensive to the Sherman Act. Sabre insists that its contractual arrangements with airlines--specifically its inclusion of most-favored-nation provisions, staggered contract-termination dates, and restrictions on American's promotion of AA Direct Connect--are perfectly kosher under the antitrust laws, as are its contracts with travel agents. While the factfinder may eventually find otherwise, at this stage of the litigation the Court is simply not able to say that the aforementioned allegations are, as a matter of law, insufficient to support a monopolization claim under *section 2*.[8]

2. American's Conspiracy-to-Monopolize Claims

"A conspiracy to monopolize can be established only by proof of (1) the existence **[*26]** of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce." *Stewart, 200 F.3d at 316* (quoting *N. Miss. Commc'ns, 792 F.2d at 1335*) (internal quotation marks omitted). In their motions to dismiss, Travelport and Orbitz collectively challenge elements two and four.

a. Existence of Combination or Conspiracy

i. Conspiracy Between Orbitz and Travelport

Under *Copperweld Corporation v. Independence Tube Corporation, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, and its progeny, a parent and its wholly-owned subsidiary are treated as a single enterprise and are legally incapable of conspiring for purposes of the *Sherman Act*.[9] This rule also applies to sibling companies owned

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[8] Sabre and Travelport also point out that they have no duty to assist competitors. They contend that any refusal on their part to deal with third party providers such as Farelogix is not offensive to the antitrust laws. But the sum of American's allegations is not that Sabre and Travelport have declined to assist competitors; it is that they have taken actions intended to destroy competition in the Market and the relevant submarkets. For example, American alleges that Sabre terminated its developer agreement with Farelogix after Farelogix worked with American on developing AA Direct Connect. According to American, Sabre's actions were intended to stifle innovation and competition in the airline flight-booking industry.

by the same parent company. *See* [*Hood v. Tenneco Tex. Life Ins. Co., 739 F.2d 1012, 1015 (5th Cir. 1984)*]. Orbitz contends that American's conspiracy claim fails because it is based largely on the subscriber service agreement ("SSA"), which was executed when Orbitz was wholly owned by Travelport. In addition, Orbitz and Travelport argue that, even though Travelport no longer wholly owns Orbitz, they still cannot conspire with one another because they are under common ownership.

Initially, the Court notes that, as American points out in its response, the SSA is not **[*27]** the only agreement between Travelport and Orbitz challenged in the amended complaint. American also alleges that Travelport and Orbitz entered into an agreement ("the Orbitz-Travelport compensation agreement") by which "Travelport agreed to pay Orbitz significant monetary consideration to offset any lost profits that resulted from American's termination of Orbitz's ticketing authority--**conditioned only on Orbitz'[s] continued refusal to adopt AA Direct Connect**." (Am. Compl. ¶ 101.) And it can reasonably be inferred from the amended complaint that Travelport no longer wholly owned Orbitz because, according to the complaint, the Orbitz-Travelport compensation agreement was executed after a "partial divestiture" of Travelport's ownership of Orbitz. (Am Compl. ¶¶ 91, 101.).[10] Orbitz seems to acknowledge as much in its reply, noting that the Orbitz-Travelport compensation agreement "took place after Travelport partially divested its shares in Orbitz, but while Travelport and its affiliates still owned a majority of Orbitz's stock." (Orbitz Reply 8-9.)

Thus, because the Orbitz-Travelport compensation agreement was executed when Travelport did not wholly own Orbitz, the fact that Orbitz **[*28]** was wholly owned by Travelport at the time of the SSA does not dispose of American's conspiracy claims. And although Orbitz and Travelport contend they are currently under common ownership, this is simply not what American alleges. Rather, according to American, Travelport owns a 48% interest in Orbitz. Additionally, American argues that the corporate ownership structure between Orbitz and Travelport is complex and requires additional discovery to fully resolve.

The Court agrees with American that it is American's factual perspective on the Travelport-Orbitz corporate relationship that matters at this stage. The relevant inquiry is thus whether Travelport's 48% ownership of Orbitz precludes the possibility of a conspiracy. And, in the Court's view, it does not. *Copperweld* does not, by its terms, apply to situations involving partially-owned subsidiaries, and neither Orbitz nor Travelport has offered any cases suggesting that it should. *See* [*Free v. Abbott Labs., Inc., 176 F.3d 298, 299-300 (5th Cir. 1999)*]. Moreover, American's allegations, broadly viewed, paint a picture of Orbitz and Travelport as "separate economic actors pursuing separate economic interests." [*Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 130 S. Ct. 2201, 2212, 176 L. Ed. 2d 947 (2010)*] (quoting [*Copperweld, 467 U.S. at 769*]) (internal quotation marks omitted). Therefore, because American's amended **[*29]** complaint alleges the existence of an agreement entered into between Orbitz and Travelport when they were neither wholly owned by one another nor sibling companies, and because American describes those two companies as separate economic actors, the Court concludes that *Copperweld* does not preclude a determination that Orbitz and Travelport can conspire.

ii. Conspiracy Involving "Unnamed Industry Participants"

American's complaint purports to allege a conspiracy between "Travelport, Orbitz, and other unnamed industry participants," presumably travel agents. (Am. Compl. ¶ 135.) Travelport contends that American's allegations concerning the involvement of unnamed industry participants fall short of plausibility. Similarly, Orbitz contends that American has failed to sufficiently plead Orbitz's involvement in a larger conspiracy beyond its agreements with Travelport.

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[9] Although *Copperweld* birthed this rule in the context of a [*section 1*] claim, the rule covers [*section 2*] conspiracy cases as well. *See* [*Stewart Glass & Mirror, Inc. v. U.S.A. Glas, Inc., 17 F. Supp. 2d 649, 657 (E.D. Tex. 1998)*]. The parties appear to agree on this.

[10] Admittedly, it is difficult to discern from American's amended complaint the precise timing of Orbitz's ownership changes. But the Court must draw all reasonable inferences in American's favor. *See* [*Kaiser Aluminum, 677 F.2d at 1050*].

After review, the Court agrees. First of all, American has not alleged any specific relationships between Orbitz and other travel agents or competitors. Consequently, American has not alleged any horizontal conspiracies involving Orbitz. *See Spectators' Commc'n Network, Inc. v. Colonial Country Club, 253 F.3d 215, 223 (5th Cir. 2001)* (defining a horizontal conspiracy "a conspiracy between competitors," as opposed to **[*30]** "a vertical conspiracy between firms at different levels"). Instead, what American has essentially alleged are discrete vertical conspiracies between Travelport and individual travel agents, such as Orbitz. *See id.*; *see also Jayco Sys., Inc. v. Savin Business Machines Corp., 777 F.2d 306, 317 n.40* ("Vertical agreements are those among persons at different levels of the market structure--i.e., among a manufacturer and its distributors--in contra-distinction to horizontal agreements among competitors at the same level of the market structure--i.e., among manufacturers or distributors." (citation omitted) (internal quotation marks omitted)).

But because a conspiracy necessarily involves an agreement between at least two parties, for each of the vertical conspiracies to survive a *Rule 12* challenge, American must identify at least one other participant, along with Travelport, in each instance. *See Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974 (11th Cir. 1985)* (affirming dismissal of Sherman Act conspiracy claim where "the specific participants of the conspiracy [were] not even identified"); *In re Refined Petroleum Prods. Antitrust Litig., 649 F. Supp. 2d 572, 580 (S.D. Tex. 2009)* ("A conspiracy cannot be formed unless at least two separate persons or corporations reach an agreement or understanding." (quoting Fifth Circuit Pattern Jury Instruction (Civil) § 6.1 (2006))); *see also Fuentes v. South Hills Cardiology, 946 F.2d 196, 202 (3d Cir. 1991)* (determining that "allegations identifying **[*31]** the conspiracy's participants, purpose[,] and motive are sufficient to survive a motion to dismiss"); *Geddie, 2006 U.S. Dist. LEXIS 55106, 2006 WL 2263335, at *8* (noting that a defendant "cannot engage in a conspiracy by himself"); *In re Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385, 417 (S.D.N.Y. 2003)* ("The complaint must identify the co-conspirators, and describe the nature and effects of the alleged conspiracy." (citation omitted) (internal quotation marks omitted))).

For this reason, American's broad allegations of a conspiracy involving unnamed industry participants will not suffice. *See Fort Wayne Telsat v. Entm't & Sports Programming Network, 753 F. Supp. 109 (S.D.N.Y. 1990)* (dismissing Sherman Act claim alleging a conspiracy between defendant ESPN and "certain unnamed cable operators"). Thus, the only conspiracy that American has properly pleaded involves the Orbitz-Travelport compensation agreement. No other *section 2* conspiracies have been properly pleaded.[11]

b. Effect Upon a Substantial Amount of Commerce

Orbitz also contends that American has not pleaded facts showing that Orbitz and Travelport's alleged conspiracy had an effect on a substantial amount of interstate commerce. Orbitz's theory is that the primary tie between itself and Travelport alleged in the amended complaint--the SSA--does not foreclose a sufficient share of the market to support a conspiracy-to-monopolize claim. As the Court has **[*32]** already noted, however, American has adequately pleaded a second agreement between Orbitz and Travelport: the Orbitz-Travelport compensation agreement.

But as a result of either agreement, American loses access to Orbitz--that is all.[12] And American's complaint does not provide any information concerning what share of the market Orbitz holds, aside from its allegation that Orbitz is

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[11] In its response brief, American purports to explain "why GDSs and their travel agency subscribers, including Orbitz, share a common economic interest in preserving the GDSs' [alleged] monopoly positions." (American's Resp. to Orbitz's Mot. to Dismiss 8.) But American also alleges that Orbitz's agreements with [Travelport] were not in fact rational or part of a competitive business strategy." (*Id.* at 10.) These two statements, in the Court's view, seem to contradict one another. It is unclear to the Court how Orbitz's contracts can accurately reflect a shared economic interest with Travelport and, at the same time, lack any rational justification or connection to Orbitz's business strategy. Thus, even assuming American had adequately alleged an industry-wide conspiracy, the Court is not persuaded that the motive behind such a conspiracy is evident from the amended complaint.

[12] American contends that, for purposes of its conspiracy claims, the Court should aggregate the effects of Travelport's agreements with Orbitz and the effects of Travelport's agreements with other travel-agent subscribers. This argument, however,

the third-largest online travel agency in the United States. Without more, the Court cannot discern whether the amount of commerce affected by the alleged Orbitz-Travelport conspiracy is substantial. Given that online travel agencies account for only 10-15% of American's passenger revenue, however, it is reasonable to infer that Orbitz's market share is quite low. Therefore, in the Court's view, American has failed to plead facts showing that the alleged Orbitz-Travelport conspiracy had an effect on a substantial amount of commerce. *See* Stewart, 200 F.3d at 315 ("A conspiracy to monopolize can be established only by proof of . . . an effect upon a **substantial** amount of interstate commerce." (quoting N. Miss. Commc'ns, 792 F.2d at 1335) (emphasis added)(internal quotation marks omitted)).

D. Analysis of American's Section 1 Claims

"To establish a § 1 violation, a plaintiff must **[*33]** prove that: (1) the defendants engaged in a conspiracy; (2) that restrained trade; (3) in the relevant market." Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 271 (5th Cir. 2008) (citing Apani Sw., Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620, 627 (5th Cir. 2002)).[13] In addition, "antitrust plaintiffs must prove they have suffered an injury stemming from the complained-of anti-competitive behavior." Stewart, 200 F.3d at 312 (citing Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).[14]

But as a threshold matter, courts apply a "market-power screen" to section 1 claims, dismissing claims against defendants who are not alleged to have significant market power. *See* Leegin, 615 F.3d at 418. Travelport contends that American has failed to allege that it has sufficient market power in the Market to support a section 1 claim. Market power and monopoly power, however, are not the same thing. *See* Dimmitt, 679 F.2d at 529. And as the United States Court of Appeals for the Fifth Circuit has noted, "[s]ome circuit courts have used 30% as a rough benchmark for the minimum amount of market power necessary to give rise to a *per se* violation of ***antitrust law***." Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc., 21 F.3d 83, 87 (5th Cir. 1994). Although American's section 1 claims do not give rise to *per-se* violations, the Court sees no reason why the 30% threshold would not be sufficient in the context of section 1 rule-of-reason analysis. Thus, the 34% market share that Travelport allegedly holds in the Market is, in the Court's view, sufficient **[*34]** to survive the market-power screen.

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presumes that American has properly pleaded a conspiracy among Travelport, Orbitz, and its other travel-agent subscribers. And as previously noted, American has not adequately alleged such a conspiracy.

Moreover, even assuming American had sufficiently pleaded the existence of several discrete vertical conspiracies, the effects of each agreement would have to be considered individually, not in the aggregate. "Indeed, to hold otherwise would be to suggest that the distinction between a single conspiracy and multiple conspiracies involving a common defendant is one without a difference." Dickson v. Microsoft Corp., 309 F.3d 193, 210 (4th Cir. 2002).

[13] Section 1 states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C.A. § 1.

[14] "Once a plaintiff establishes that a conspiracy occurred, whether it violates § 1 is determined by the application of either the *per se* rule or the rule of reason." Golden Bridge, 547 F.3d at 271 (citing Spectators' Commc'n Network, Inc. v. Colonial Country Club, 253 F.3d 215, 222-23 (5th Cir. 2001)). Should "the court determine[] that the defendant's conduct 'would always or almost always tend to restrict competition and decrease output,' the restraint is *per se* illegal and no further inquiry occurs." Golden Bridge, 547 F.3d at 271 (citing Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)). But "if the conduct is not deemed *per se* unreasonable, the plaintiff will also have to prove that the conduct unreasonably restrains trade in light of actual market forces under the rule of reason." Golden Bridge, 547 F.3d at 271 (citing Leegin, 551 U.S. at 886). Most cases will require analysis under the rule of reason. *See* N. Tex. Specialty Physicians v. F.T.C., 528 F.3d 346, 360 (5th Cir. 2008) (noting that the Supreme Court "has analyzed most restraints under the so-called rule of reason" (footnote omitted) (internal quotation marks omitted)).

American does not allege that the defendants' activities are *per se* illegal under section 1. Moreover, American's complaint pleads only vertical agreements, which are analyzed under the rule of reason. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007).

Turning to the first element, Travelport and Orbitz contend, as they did with American's *section 2* conspiracy-to-monopolize claims, that American has not adequately alleged the existence of a conspiracy. As the Court previously noted, American has sufficiently pleaded a conspiracy between Orbitz and Travelport in the form of the Orbitz-Travelport compensation agreement, but has not sufficiently pleaded Orbitz's involvement in any broader conspiracy beyond its agreement with Travelport.

With regard to element two, Sabre contends, as it did before, that its contracts with travel agents and airlines are not anticompetitive and thus do not unreasonably restrain trade. But as the Court previously concluded, it is not prepared to say that Sabre's alleged conduct is not anti-competitive as a matter of law.[15] In addition, Sabre, Travelport, and Orbitz all contend that American has not alleged an unreasonable restraint on trade because it has not stated that their allegedly anticompetitive agreements and practices foreclosed a substantial share of the relevant market and submarkets.[16] Collectively, the defendants argue that American must allege some percentage of foreclosure **[*35]** or at least identify the specific agreements that allegedly restrain trade.

The Court agrees. First, with regard to Sabre, because a single defendant cannot unilaterally violate *section 1*, American must allege that a particular conspiracy involving Sabre and at least one other entity forecloses a substantial share of the market. *See* *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)* ("[T]he competition foreclosed by the contract must be found to constitute a substantial share of the relevant market."); *Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320, (5th Cir. 1998)* ("Independent action is not proscribed. Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under *§ 1* in the absence of a combination or agreement. Thus, the distinction between independent action and joint action is fundamental in antitrust jurisprudence, and a claim will not exist in the absence of the latter." (footnotes omitted) (internal quotation marks omitted)).

Although American's complaint describes the various types of agreements that Sabre allegedly enters into with its travel-agent subscribers,[17] American does not identify any particular agreement that it is challenging **[*36]** under

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[15] Sabre also contends that American cannot challenge its own contracts because American is equally responsible for any antitrust violation that occurs as a result of its contracts. In *Perma Life Mufflers, Inc. v. International Parts Corporation, 392 U.S. 134, 140, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*, *overruled on other grounds by* *Copperweld, 467 U.S. at 777*, the Supreme Court held that the doctrine of *in pari delicto* is not a defense to an antitrust action. The Court, however, left open the question of whether a plaintiff could be barred from recovering against a defendant on the basis of the plaintiff's "truly complete involvement and participation in a monopolistic scheme." *Perma, 392 U.S. at 140*.

The first amended complaint, which the Court must take as true, does not paint the picture of American as a coparticipant in the alleged industry-wide conspiracy. Thus, for purposes of this motion, American lacks any "truly complete involvement [or] participation in a monopolistic scheme," and Sabre cannot avail itself of the defense of *in pari delicto. Id.* The implication of American's lack of involvement in a Sabre-related conspiracy, however, is that American cannot rely on its own contracts with Sabre to establish a *section 1* violation because Sabre cannot be unilaterally liable under *section 1*. *See* *Metro Ford, 145 F.3d at 325* ("Independent action is not proscribed [by *section 1*].").

[16] As it did with its *section 2* conspiracy-to-monopolize claims, American contends that, for purposes of its *section 1* claims, the Court should aggregate the effects of Travelport's agreements with Orbitz and the effects of Travelport's agreements with other travel-agent subscribers. As previously noted, this argument fails because American has not adequately pleaded a conspiracy among Travelport, Orbitz, and its other travel-agent subscribers and because the effects of each alleged vertical agreement between Travelport and each of its subscribers must be considered individually, not in the aggregate. *See supra* note 12.

[17] For example, American alleges that "[b]oth Sabre and Travelport enter into long term contracts with travel agents, typically three years but sometimes longer. Most of these contracts include some type of provision that either requires or provides financial incentives for the travel agents to use one GDS exclusively, or nearly exclusively." (Am. Compl. ¶ 63.) In addition, elsewhere American alleges that "[s]ome agreements between the GDSs and their subscribers contain an express provision that requires the travel agent to use one GDS exclusively, either for all its bookings or for bookings at particular locations or for particular corporate customers." (*Id.* ¶ 65.)

section 1. Nor does it identify the specific travel agents involved with Sabre or what types of agreements the travel agents have entered into. Without information of this nature, the Court cannot assess whether a substantial share of the market has been foreclosed.[18]

The Court, after all, cannot conclude that a substantial share of the Market or Sabre submarket has been foreclosed simply by considering the level of foreclosure that would result from a broad conspiracy involving Sabre and all its travel agents. American has not alleged any relationships among Sabre's travel agents, aside from conclusory allegations such as this one: "Sabre, Travelport, Orbitz, and other industry participants have, in fact, stood 'shoulder to shoulder' in punishing American for promoting the use of technology that could disrupt their monopolistic distribution system." (Am. Compl. ¶ 88.) Instead, American has essentially pleaded several discrete conspiracies, each of which involves Sabre and an unnamed travel agent. And without identifying the specific travel agents involved, or at least providing some information about the travel agents' agreements with Sabre, American cannot successfully aver that a substantial **[*37]** share of the market has been foreclosed with each conspiracy.[19]

With regard to the Orbitz-Travelport conspiracy, the Court concludes that just as American failed to plead facts indicating whether the conspiracy affected a substantial amount of commerce, it likewise has failed to allege facts indicating that a substantial share of the market has been foreclosed. *See* *Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253 (5th Cir. 1988)* ("[Plaintiff] did not prove the extent of its foreclosure from the replacement market; [Plaintiff] offered no comparison between the number of distribution outlets available and the number of those foreclosed. Without more, no reasonable jury could have concluded that [Defendant]'s efforts foreclosed a 'substantial share of the relevant market.'" (citing *Tampa, 365 U.S. at 328-29*)); *see also* *Apani, 300 F.3d at 625* (To show exclusive dealing, "a plaintiff must show that the competition foreclosed by the arrangement constitutes a substantial share of the relevant market. That is, the opportunities for other traders to enter into or remain in that market must be significantly limited." (citations omitted) (internal quotation marks omitted)). And, once again, considering that it is alleged that online travel agencies only account for 10-15% of American's revenues, **[*38]** it is reasonable to infer that whatever share of the market that the Orbitz-Travelport conspiracy is alleged to foreclose is insubstantial.

E. Analysis American's State-Law Claims

Sabre and Travelport contend that American's claims for tortious interference with existing and prospective contractual relationships are preempted by the Airline Deregulation Act ("ADA"), *49 U.S.C. § 41713(b)(1)*.[20] The

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[18] To illustrate, consider a scenario in which "Travel Agency A" has a market share of 3% and "Travel Agency B" has a market share of 45%. A conspiracy involving Sabre and Travel Agency A would not foreclose a substantial share of the market, whereas a conspiracy between Sabre and Travel Agency B likely would.

[19] The Court notes that American's failure to identify Sabre's coconspirators and to point to a specific agreement involving Sabre not only means that American has failed to plead foreclosure of a substantial share of the market (element two), it also means that American has failed to adequately allege a conspiracy involving Sabre in the first place (element one). The Court did not address this in its discussion of element one (i.e., the existence of a conspiracy), however, because Sabre did not raise it. Morever, in evaluating whether substantial foreclosure has occurred, the Court cannot aggregate the effects of Sabre's agreements with its travel agents for the reasons set forth in footnote 12. *See supra* note 12.

[20] To state a claim "for tortious interference with an existing contract, a plaintiff must demonstrate '(1) the existence of a contract subject to interference, (2) the act of interference was willful and intentional, (3) such intentional act was a proximate cause of plaintiff's damage and (4) actual damage or loss occurred.'" *Stewart, 200 F.3d at 316* (quoting *Johnson v. Hosp. Corp. of Am., 95 F.3d 383, 394 (5th Cir. 1996))*. Similarly, to state a claim for tortious interference with prospective contract or business relationships, a plaintiff must allege facts showing:

> (1) a reasonable probability that the parties would have entered into a contractual relationship, (2) an intentional and malicious act by the defendant that prevented the relationship from **[*39]** occurring, with the purpose of harming the plaintiff, (3) the defendant lacked privilege or justification to do the act, and (4) actual harm or damage resulted from the defendant's interference.

ADA provides that, with limited exceptions, a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C.A. § 41713(b)(1). The Supreme Court has explained that "[t]he scope of ADA preemption is a question of statutory intent." Lyn-Lea Travel Corp. v. American Airlines, Inc., 283 F.3d 282, 286 (5th Cir. 2002) (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992)). The Supreme Court has, likewise, "held that the phrase 'relating to rates, routes, or services' in the ADA [is] 'deliberately expansive' and preempt[s] any 'state enforcement action having a connection with or reference to airline rates, routes, or services.'" *Id.* (quoting Morales, 504 U.S. at 384).

However, "the ADA's preemption clause does not shelter airlines [or GDSes] from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id. at 287* (quoting Am. Airlines v. Wolens, 513 U.S. 219, 228, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995)). Thus, "[t]he ADA does not preempt 'state-law-based court adjudication of routine breach-of-contract claims' so long as there is 'no enlargement or enhancement of the contract based on state laws or policies external to the agreement.'" *Id.* (quoting Wolens, 513 U.S. at 228). Nor is the ADA concerned with "displacing state tort law." *Id.* (quoting Hodges v. Delta Airlines, Inc., 44 F.3d 334, 340 (5th Cir. 1995) (en banc)).

In the Court's view, the ADA preempts American's claims for tortious interference with existing and prospective contractual relationships. First, American's claims "relate to" the defendants' rates and services and have "a significant relationship to the economic aspects of the airline industry." *Id.* Second, American is seeking to enforce state-created standards, not "self-assumed contractual obligations." *Id. at 289*.

Like **[*40]** the plaintiff in Lyn-Lea Travel Corporation v. American Airlines, Inc., 283 F.3d 282 (5th Cir. 2002), American "is seeking the application of Texas common law in a way that would regulate [Sabre's and Travelport]'s pricing policies [i.e., booking fees], commission structure [i.e., sharing booking fees with travel agents], and reservation practices [i.e., biasing American's flights in their displays]." *Id. at 287* (footnote omitted). In *Lyn-Lea*, the plaintiff had asserted a claim for tortious interference with business relationships, alleging that the defendant "intentionally interfered with its business relationships with four customers and an employee, luring the customers away with discounted fares." *Id.* The Fifth Circuit determined that the "business relations claim [was] plainly preempted because it involve[d] [the defendant]'s prices and services to customers." *Id. at 287-88*. Similarly, the Court holds that American's state-law claims are preempted.

F. Disposition of the Motions to Dismiss

Based on the foregoing, the Court GRANTS Orbitz's motion to dismiss, GRANTS in part and DENIES in part Travelport's motion to dismiss, and GRANTS in part and DENIES in part Sabre's motion to dismiss. The following claims, as pleaded in American's first amended complaint, should be dismissed:

> (1) all **[*41]** claims against **Orbitz**;
>
> (2) American's claims against **Travelport** for monopolization of the Market, conspiracy to monopolize in violation of section 2 of the Sherman Act, unreasonably restraining competition in violation of section 1 of that act, and tortious interference with existing and prospective contractual relationships; and
>
> (3) American's claims against **Sabre** for unreasonably restraining competition in violation of section 1 of the Sherman Act and tortious interference with existing contractual relationships.

To be clear, this leaves the following claims: (1) monopolization by Travelport in the Travelport submarket, (2) monopolization by Sabre in the Sabre submarket, and (3) monopolization by Sabre in the Market.

II. American's Motion for Leave to Amend

Id. (quoting Exxon Corp. v. Allsup, 808 S.W.2d 648, 659 (Tex. App.--Corpus Christi 1991, writ denied)) (internal quotation marks omitted).

After the defendants' motions to dismiss American's amended complaint became ripe for review, and subsequent to the Court's consideration of those motions, American filed its motion for leave to file a second amended complaint. In its proposed second amended complaint, American's objectives appear to be four-fold. First, American seeks to add new allegations in support of its existing claims, based on recently-discovered information. Second, American seeks to **[*42]** add three new claims: (1) a *section 1* claim against Sabre and Travelport for entering into an alleged anticompetitive agreement together; (2) another *section 1* claim against Sabre, Travelport, and "numerous travel agencies" based on an alleged group boycott; and (3) a *section 1* claim against Orbitz and Travelport for allegedly entering into an agreement to allocate customers. Third, American seeks to include Sabre in its *section 2* conspiracy claim, which was previously asserted against only Travelport and Orbitz. Fourth, and finally, American seeks to drop its state-law tortious-interference claims.

Under *Federal Rule of Civil Procedure 15(a)(2)*, a "court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. There are five factors the Court must consider when determining "whether to grant a party leave to amend a complaint: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by previous amendments, (4) undue prejudice to the opposing party, and (5) futility of the amendment." *Smith v. EMC Corp., 393 F.3d 590, 595 (5th Cir. 2004)* (citing *Rosenzweig v. Azurix Corp., 332 F.3d 854, 864 (5th Cir. 2003))*.

As an initial matter, the Court notes that American's fourth objective--dropping its state-law tortious-interference claims--is a moot point, given the Court's decision to dismiss those claims. Additionally, with regard to American's second **[*43]** objective, the Court is persuaded that American's three new claims should be allowed. In so allowing, the Court is not concluding that these claims are plausible and sufficient to survive a *Rule 12(b)(6)* challenge. The Court is merely concluding that these claims are not patently futile. Along these same lines, the Court is satisfied that American's proposed change to its *section 2* monopolization claim--adding Sabre--is permissible in light of *Rule 15*. Likewise, the Court is persuaded that American should be allowed to include its newly-discovered allegations in support of its existing claims, as there does not appear to have been bad faith or undue delay on American's part.

There is one claim in the proposed second amended complaint, however, that, in the Court's view, should not be allowed to go forward: American's claim that Sabre's and Travelport's agreements with participating airlines and travel-agent subscribers unreasonably restrain competition in violation of *section 1* of the Sherman Act. Allowing amendment of this claim, which is designated as count four in both American's first amended complaint and its proposed second amended complaint, would prove futile, as American does not remedy the deficiencies noted in **[*44]** Part I.D. of this order in its proposed second amended complaint.

Therefore, the Court GRANTS in part and DENIES in part American's motion for leave to amend. American is thus GRANTED leave to file its proposed second amended complaint no later than December 5, 2011, except that its fourth claim for relief should be stricken.

III. Conclusion

In light of the foregoing, American's state-law tortious-interference claims, as well as American's claim that Sabre's and Travelport's agreements with participating airlines and travel-agent subscribers unreasonably restrain trade in violation of *section 1* of the Sherman Act, are hereby DISMISSED WITH PREJUDICE.

SIGNED November 21, 2011.

/s/ Terry R. Means

TERRY R. MEANS

UNITED STATES DISTRICT JUDGE

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In re Wellbutrin SR Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

November 21, 2011, Filed

CIVIL ACTION NO. 04-5525

Reporter
2011 U.S. Dist. LEXIS 158833 *; 2011 WL 13392296

IN RE: WELLBUTRIN SR ANTITRUST LITIGATION

Prior History: Med. Mut. of Ohio, Inc. v. GlaxoSmithKline PLC (In re Wellbutrin SR Antitrust Litig.), 2010 U.S. Dist. LEXIS 144273 (E.D. Pa., Mar. 31, 2010)

Core Terms

settlement, awards, class member, antitrust, notice, attorney's fees, risks, purchaser, named plaintiff, settlement fund, class action, approving, expenses, reimbursement, Plaintiffs', cases, class representative, final judgment, negotiations, roughly, preliminary approval, fee request, multiplier, discovery, lawsuits, damages, factors, costs, lodestar, parties

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Judges: LAWRENCE F. STENGEL, J.

Opinion by: LAWRENCE F. STENGEL

Opinion

ORDER AND FINAL JUDGMENT APPROVING DIRECT PURCHASER CLASS SETTLEMENT AND AWARDING ATTORNEYS' FEES, REIMBURSEMENT OF COSTS, AND CLASS REPRESENTATIVE AWARDS

STENGEL, J.

Plaintiffs SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. (together, "SAJ") and Meijer, Inc. and Meijer Distribution, Inc. (together, "Meijer") (collectively, "Plaintiffs") executed a Settlement Agreement, dated August 3, 2011, with Defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline, including GlaxoSmithKline plc, ("GSK") to fully resolve this direct purchaser class action antitrust case.

On August 31, 2011, this Court granted preliminary approval of the parties' proposed settlement ("Preliminary Approval Order") (Doc. 407). The Preliminary Approval Order authorized Plaintiffs to disseminate to members of the direct purchaser class notice of the settlement, the fairness hearing, and related matters. Notice was provided to the class in accordance with the Preliminary Approval **[*4]** Order, and the Court held a final fairness hearing on November 21, 2011 to further consider the proposed settlement, as well as Class Counsel's requests for an award of attorneys' fees, reimbursement of expenses advanced on behalf of the class, and awards to the two named Plaintiffs for their efforts in representing the class.

AND NOW, this 21st day of November, 2011, having considered Plaintiffs' Motion for Final Approval of Direct Purchaser Class Settlement; Class Counsel's Motion for Attorneys' Fees, Reimbursement of Expenses, and Class Representative Awards; oral argument presented at the fairness hearing; and the complete record in this matter, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** as follows:

The Class

1. This case was previously certified as a class action, by Memorandum and Order of May 2, 2008 (Doc. 258), on behalf of the following class: "all persons or entities in the United States, excluding governmental entities, that purchased the 100mg or 150mg dosage of Wellbutrin SR directly from GSK during the period from January 24, 2002 to June 30, 2006." As set forth in the Preliminary Approval Order (at ¶ 2), notice of class certification was provided to class members in 2008, **[*5]** in full compliance with the requirements of *Fed. R. Civ. P. 23* and due process. No class member requested exclusion from the class by the September 12, 2008 deadline.

Jurisdiction

2. This Court has jurisdiction over the claims of Plaintiffs, the class, and GSK.

3. The Preliminary Approval Order directed the substance, form, and manner by which the Plaintiffs would provide the class with notice of the proposed settlement with GSK; the date, time, and location of the fairness hearing; and related matters, such as how class members could object to the settlement or otherwise be heard. The notice

program included individual notice to class members, as well as publication (twice) of a summary notice in *The Pink Sheet* and the establishment of a website (WellbutrinDirectPurchserSettlement.com), through which notice and other information could be obtained. Proof that the mailing, publication, and website conformed with the Preliminary Approval Order has been filed with the Court. The notice constituted the most effective and best notice practicable under the circumstances and was due and sufficient notice for all other purposes to all potential class members entitled to receive notice.

Approval of the Settlement **[*6]** and Plan of Allocation

4. The parties' settlement resulted from an extensive investigation of the facts, complete discovery, expert analysis and reports, motion practice, and development of the case for trial. It was reached only after arm's-length negotiations, which were undertaken in good faith by counsel for the parties.

5. The settlement provides a recovery from GSK of $49 million dollars in cash and up to $500,000 in costs of notice to the class and administration of the settlement.

6. The Court has evaluated the proposed settlement under Rule 23 of the Federal Rules of Civil Procedure, as well as relevant Third Circuit jurisprudence, including the factors set forth in *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)* and the additional factors, where relevant, identified in *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 323 (3d Cir. 1998)*, finding as follows:

a. *The complexity, expense, and likely duration of the litigation*. This case was no exception to the oft-recognized conclusion that antitrust cases are among the most complex to litigate. *See Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining & Mfg. Co.), 513 F. Supp. 2d 322, 338-39 (E.D. Pa. 2007)*; *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp., Civ. A. 03-4578, 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *11 (E.D. Pa. May 19, 2005)*; *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003)*. Although the case was nearing trial at the time of settlement, after roughly six-and-a-half years of litigation (preceded by pre-suit investigation), the settlement nonetheless saved substantial resources. These savings included the time and expense **[*7]** of further oral argument on the several pretrial motions that were still pending, but had not yet been argued, at the time of settlement; the Court's consideration and resolution of those motions, as well as others that had been argued, but not yet decided; final preparations for trial; a trial that could have lasted several weeks; post-trial motions; and, potentially, appeals. Collectively, these matters would have required substantial additional time and expense for the Court, the parties, and counsel, the savings of which supports final approval of this settlement. *See In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 536 (3d Cir. 2004)*; *Meijer, Inc. v. 3M, Civ. A. 04-5871, 2006 U.S. Dist. LEXIS 56744, 2006 WL 2382718, at *13 (E.D. Pa. Aug. 14, 2006)*.

b. *The reaction of the class to the settlement*. There were no objections to the settlement filed by any class member. The absence of any objections despite ample notice to class members providing the opportunity to object is "particularly telling," *Warfarin, 391 F.3d at 536*, and supports approval of the settlement. *In re Cendant Corp. Litig., 264 F.3d 201, 235 (3d Cir. 2001)*. This is particularly true here, where the class members are sophisticated businesses. *In re Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 629 (E.D. Pa. 2004)*. Moreover, the three class members whose claims represent roughly 78% of the recovery obtained for the class have, after being apprised of the facts, circumstances, legal hurdles, and other risks involved in the case, **[*8]** advised the Court that they support the settlement as fair and adequate.

c. *The stage of the proceedings and the amount of discovery completed*. Settlements reached after discovery "are more likely to reflect the true value of the claim and be fair." *Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1314 (3d Cir.1993)*. *See also Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 144-45 (E.D. Pa. 2000)*; *Linerboard, 321 F. Supp. 2d at 630*. This case was well past discovery and virtually ready for trial at the time of settlement. The settlement here was the process of informed, arm's-length negotiations, *see Prudential, 148 F.3d at 319*, and settled much later in the litigation process than the stages at which some settlements have been approved. *See, e.g.,* Cendant, 264 F.3d at 236 (settlement approved even though the case was only in the early stages of discovery). This factor also supports final approval.

d. *The risks of establishing liability*. Plaintiffs in this case faced real risks in establishing, by clear and convincing evidence, that GSK's patent infringement lawsuits against its competitors in the market for Wellbutrin SR constituted sham litigation under the standard of Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) ("*PRE*"). This was Plaintiffs' only remaining liability theory after this Court granted summary judgment to GSK on Plaintiffs' allegation that GSK had defrauded the U.S. Patent and Trademark Office within the meaning of Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965). The *PRE* standard **[*9]** would have required Plaintiffs to establish that GSK's lawsuits were both objectively baseless in that no reasonable litigant in GSK's position could have expected to succeed on the merits, as well as that GSK filed its lawsuits with the intent to interfere with its competition. *See* PRE, 508 U.S. at 60-61. Compounding this was the fact that assessing GSK's patent infringement lawsuits involved consideration of difficult patent law theories, aspects of which were being parsed and refined by the United States Supreme Court and United States Court of Appeals for the Federal Circuit while GSK was pursuing those lawsuits. Plaintiffs also faced significant evidentiary challenges related to GSK's withholding in discovery many documents under claims of attorney-client privilege and/or work product protection. Beyond establishing liability for purposes of *PRE*, Plaintiffs would also have needed to establish each of the standard elements of antitrust liability, such as monopoly power, causation, and antitrust injury. Given the many liability issues at stake, there was also the risk that, even if Plaintiffs had prevailed in establishing liability, GSK might ultimately have succeeded on appeal. These substantial liability **[*10]** risks weigh in favor of approving this settlement. Warfarin, 391 F.3d at 537; Prudential, 148 F.3d at 319; In re Corel Corp. Inc. Sec. Litig., 293 F. Supp. 2d 484, 490 (E.D. Pa. 2003).

e. *The risks of establishing damages*. At the time of settlement, GSK's *Daubert* motion seeking to exclude the testimony of Plaintiffs' expert economist remained to be decided and, to the extent it would not have been granted, GSK had its own expert economist prepared to oppose Plaintiffs' economic theories at trial. The existence of competing expert opinions on complex damages issues weighs in favor of settlement. Cendant, 264 F.3d at 239; Corel Corp., 293 F. Supp. 2d at 492.

f. *The risks of maintaining the class action through the trial*. At the time of settlement, GSK had not moved to decertify the class and the Court is not aware of any manageability problems faced by the class. This factor is thus neutral in this case. *See* Cendant, 264 F.3d at 239; Linerboard, 321 F. Supp. 2d at 631.

g. *The ability of the defendants to withstand a greater judgment*. This is not a case in which a lower settlement was reached due to the inability of the defendant to pay more. *See* Reibstein v. Rite Aid Corp., 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011); Chakejian v. Equifax Info. Services, LLC, 275 F.R.D. 201, 214 (E.D. Pa. 2011). The theoretical ability of a defendant to pay more is not relevant when divorced from context and considerations of whether a settlement is fair in light of the legal issues and circumstances involved. *See* Warfarin, 391 F.3d at 538. This case involved many difficult legal issues, presented substantial risks **[*11]** that Plaintiffs would either not prevail or would be required to spend substantial additional time and expenses pursuing the case to its ultimate end, and the settlement negotiations, as with the case generally, were hard-fought by GSK. The amount that Plaintiffs obtained in settlement is an excellent benefit on its face, and an even better result when these considerations are taken into account. The theoretical ability of GSK to pay more, considered absent this context, is not relevant to determining the reasonableness of this settlement. *See id.*

h. *The range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation*. These two factors assess "whether the settlement represents a good value for a weak case or a poor value for a strong case." Warfarin, 391 F.3d at 538. Since it is a compromise, a settlement need not approach the maximum possible recovery to be found reasonable. Prudential, 148 F.3d at 316-17. A settlement may be reasonable even though it represents only a fraction of the potential recovery. Cullen, 197 F.R.D. at 144; Linerboard, 321 F. Supp. 2d at 632; Fisher Bros. v. Phelps Dodge Indus., Inc., 604 F. Supp. 446, 451 (E.D. Pa. 1985). Based on the damages estimated by Plaintiffs' expert economist, the settlement in this case represents a recovery of between 5.8% and 10.7% of Plaintiffs' estimated, **[*12]** non-trebled damages, which is the measure courts use in assessing antitrust settlements. *See* Fisher Bros., 604 F. Supp. at 451. This amount is well within the range of recovery demonstrated by court-approved settlements in other antitrust litigation. *See, e.g.,* Linerboard, 296 F. Supp. 2d at 581 (identifying antitrust settlements ranging from 5.35% to 28% of estimated damages); Stop & Shop, 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *9 (approving direct purchaser antitrust settlement representing approximately 11.4% of estimated damages). This factor thus also supports final approval.

i. *Factors that bear on the maturity of the underlying substantive issues*. This case was settled after roughly six-and-a-half years of litigation (which followed an extensive pre-suit investigation), well after the completion of extensive discovery, just before trial, and only after hard-fought settlement negotiations. That the underlying substantive issues were so well-developed further supports approval of this settlement. *See* Chakejian, 275 F.R.D. 201, 2011 WL 2411109, at *12.

j. *The existence and probable outcome of claims by other classes and subclasses*. Because there were no other direct purchaser actions outside this case and no direct purchaser plaintiffs elected to opt out of the class, there are no comparable claims being pursued by other direct purchaser classes or **[*13]** subclasses. This factor is thus not pertinent.

k. *Results achieved by settlement for individual class members versus the results achieved—or likely to be achieved—for other claimants*. For the reasons above, there are no other results to be compared against those of the class members. (As noted below, however, the plan of allocation ensures class members equitable claims payments vis-à-vis one another.)

l. *Whether class or subclass members are accorded the right to opt out of the settlement*. As noted above, class members were given the opportunity to opt out of the class in 2008, when they were notified that the class had been certified. After ample opportunity, no class member requested exclusion from the class by the September 12, 2008 opt-out deadline. *See id.*

m. *Whether any provisions for attorneys' fees are reasonable*. The provisions for attorneys' fees are reasonable, as described in greater detail below.

n. *Whether the procedure for processing individual claims under the settlement is fair and reasonable*. Reasonable notice of the settlement has been provided, and class members have until the postmark deadline of December 31, 2011 to submit claims. The Court previously authorized **[*14]** Class Action Administration, Inc. ("CAA"), which is experienced in administering class action settlements, to receive and process class members' claims, with the supervision of Class Counsel. After all timely claims have been processed, claims payments will be distributed to class members from the net settlement fund (i.e., the amount remaining after reduction for payment of taxes, attorneys' fees, reimbursement of expenses, and awards to the named Plaintiffs for their efforts in representing the class) on a *pro rata* basis, according to class members' purchases of Wellbutrin SR during the class period. This plan of allocation does not grant preferential treatment to any class member and is both fair and reasonable. This factor thus also supports approval of this settlement.

7. Upon consideration of the above factors and the record in this case, the Settlement Agreement and each of its terms, as well as the plan of allocation, are finally approved as fair, reasonable, and adequate within the meaning of Rule 23 of the Federal Rules of Civil Procedure, and the parties are directed to consummate the settlement according to its terms.

Attorneys' Fees

8. Class Counsel seek attorneys' fees of one-third of the gross settlement fund (or 33 **[*15]** 1/3 % of the $49 million settlement fund).

9. The percentage-of-the-fund method of awarding attorneys' fees is the appropriate method to be used in this common fund case. *In re AT & T Corp., 455 F.3d 160, 164 (3d Cir. 2006)*.

10. The Court has considered Class Counsel's request for attorneys' fees under the factors identified in *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000)* and *Prudential, 148 F.3d at 338-40*, each of which supports the reasonableness of Class Counsel's request:

a. *Complexity and duration of the litigation*. As noted above, this class action—like most antitrust cases, *see Bradburn Parent Teacher Store, Inc., 513 F. Supp. 2d at 338-39—*was especially complex, involving challenging issues of patent and ***antitrust law***, difficult liability theories, and demanding evidentiary issues. This case was also hard-fought, lasting nearly seven years from the time the complaint was filed until the final approval hearing (in addition to an extensive pre-suit investigation). This factor weighs in favor of approving Class Counsel's attorneys' fees request. *See In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig., 263 F.R.D. 226, 243 (E.D. Pa. 2009)*; *Boone v. City of Philadelphia, 668 F. Supp. 2d 693, 714 (E.D. Pa. 2009)*; *Bradburn Parent Teacher Store, 513 F. Supp. 2d at 339*; *Corel Corp., 293 F. Supp. 2d at 496*.

b. *The size of the fund and the number of people benefited*. This $49 million cash settlement (plus accrued interest, and less attorneys' fees, expenses to the extent not covered by the $500,000 that GSK has agreed to pay towards the costs of administering the settlement, and awards to the named Plaintiffs) is an **[*16]** excellent benefit to the class. Class members are assured recovery without the expense and burden involved in duplicative and expensive individual trials, and, as discussed above, the recovery falls within a reasonable range in comparison to the potential damages.

c. *The presence or absence of objections to terms or fees*. The absence of any objections despite ample notice to class members describing the opportunity to object weighs in favor of granting the fee request, *see In re Sterling Fin. Corp. Sec. Class Action, MDL 1879, 2009 U.S. Dist. LEXIS 83224, 2009 WL 2914363, at *2 (E.D. Pa. Sept. 10, 2009)*, particularly given the sophisticated nature of the absent class members. *See Bradburn Parent Teacher Store, 513 F. Supp. 2d at 338*. Indeed, the three class members whose claims represent roughly 78% of the recovery obtained for the class have advised the Court that they support not only the settlement (as noted above), but also Class Counsel's request for attorneys' fees, reimbursement of litigation expenses, and awards to the named Plaintiffs for their work on behalf of the class.

d. *The skill and efficiency of counsel*. Class Counsel are experienced practitioners in the highly specialized area of pharmaceutical antitrust class action cases. This experience and the results obtained for the class reflect Class Counsel's skill and efficiency. *In re Linerboard Antitrust Litig., MDL 1261, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004)*. Class Counsel also faced **[*17]** formidable opposition from the skilled counsel opposing this litigation. All of these facts weigh in favor of granting Class Counsel's request for attorneys' fees. *See Am. Investors, 263 F.R.D. at 244*; *Bradburn Parent Teacher Store, 513 F. Supp. 2d at 338*; *Corel Corp., 293 F. Supp. 2d at 496*.

e. *The risk of nonpayment*. Class Counsel faced numerous risks in preparing and litigating this case, including the risks associated with the motion to dismiss, class certification, summary judgment, and—had the case continued—ultimately proving liability and damages at trial and potentially surviving any appeals. Underlying all of these risks was the enormous one of handling this case for its entire duration on a contingent basis, doing everything necessary to honor Class Counsel's commitment and obligations to the class. *See In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D. Pa. 2000)*; *Serrano v. Sterling Testing Sys., Inc., 711 F. Supp. 2d 402, 423 (E.D. Pa. 2010)*. The substantial risk of nonpayment that Class Counsel faced throughout this litigation strongly supports their fee request. *See Am. Investors, 263 F.R.D. at 244*; *Bradburn Parent Teacher Store, 513 F. Supp. 2d at 339*; *In re Auto. Refinishing Paint Antitrust Litig., MDL No. 1426, 2008 U.S. Dist. LEXIS 569, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008)*.

f. *The amount of time devoted to the litigation*. Class Counsel invested more than 41,000 hours, during the course of nearly seven years, preparing, litigating, and negotiating the settlement of this case, and will continue to commit time to this litigation in connection with claims administration and, potentially, handling any appeals. This substantial time **[*18]** commitment, made with no guarantee of recovery, likewise supports approval of Class Counsel's fee request. *See* Boone, 668 F. Supp. 2d at 714; Bradburn Parent Teacher Store, 513 F. Supp. 2d at 339; Nichols v. SmithKline Beecham Corp., Civ. A. 00-6222, 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, at *22 (E.D. Pa. Apr. 22, 2005).

g. *The consistency with fee awards in comparable cases*. Class Counsel's requested fee of one-third of the gross settlement fund falls just slightly above the average attorneys' fees percentage identified in one study of settlements ranging from $1 to $50 million, and directly on the median percentage identified in that same study. *See* Boone, 668 F. Supp. 2d at 714 (citing In re Rite Aid Corp. Sec. Litig., 146 F.Supp.2d 706, 735 (E.D. Pa. 2001)). It is within the range of awards that the Third Circuit has recognized as typical, *see* In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 303 (3d Cir. 2005), as well as the normal range of common fund recoveries identified by a leading treatise. *See* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 14:6 (4th ed. 2006). It is also well within the range of percentage awards approved in recent antitrust actions within the Third Circuit. *See, e.g.,* In re Methyl Methacrylate (MMA) Antitrust Litig., 06-MD-1768, 2009 U.S. Dist. LEXIS 133759, 2009 WL 3150399, at *2 (E.D. Pa. Sept. 23, 2009); Auto. Refinishing Paint, 2008 U.S. Dist. LEXIS 569, 2008 WL 63269, at *3, 6; Bradburn Parent Teacher Store, 513 F. Supp. 2d at 337-38, 341-42; Nichols, 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, at *20, 24; In re Remeron Direct Purchaser Antitrust Litig., Civ. 03-0085 FSH, 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *12, 17 (D.N.J. Nov. 9, 2005). In addition, as demonstrated by several unreported decisions appended to Class Counsel's motion, numerous other courts have awarded fees of one-third of the gross settlement **[*19]** fund in similar pharmaceutical antitrust class actions. *See Meijer, Inc. v. Abbott Labs.*, No C. 07-5985 CW (N.D. Cal. Aug. 11, 2011); *In re Nifedipine Antitrust Litig.*, No. 03-mc-223-RJL (D.D.C. Jan. 31, 2011); *In re Oxycontin Antitrust Litig.*, 04-md-1603-SHS (S.D.N.Y. Jan. 25, 2011); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR (D. Del. Apr. 23, 2009); *Meijer, Inc. v. Barr Pharm., Inc.*, C.A. No. 05-2195 (D.D.C. Apr. 20, 2009); *North Shore Hematology-Oncology Assoc., P.C. v. Bristol-Myers Squibb Co.*, No. 04-248-EGS (D.D.C. Nov. 30, 2004); *In re Relafen Antitrust Litig.*, No. 01-12239-WHY at 7-8 (D. Mass. Apr. 9, 2004).

h. *The value of benefits accruing to class members attributable to the efforts of class counsel, as opposed to the efforts of others*. Class Counsel developed this case through their own investigative efforts, without the advantages of following a prior government investigation or lawsuit. This factor thus also supports Class Counsel's fee request. *See* AT & T Corp., 455 F.3d at 173.

i. *The percentage fee that would have been privately negotiated*. A one-third contingency fee is comparable, or perhaps even less than, the fee that Class Counsel could have been expected to negotiate on a private basis. *See* Bradburn Parent Teacher Store, 513 F. Supp. 2d at 340; Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *16. Testimony **[*20]** to that is the largest three class members' support of Class Counsel's fee request. This factor therefore supports the reasonableness of Class Counsel's fee request.

j. *Innovative settlement terms*. Class Counsel have acknowledged that this settlement, while providing an excellent benefit to the class, does not contain any especially innovative settlement terms, and this factor thus neither supports nor detracts from Class Counsel's fee request. *See* Bradburn Parent Teacher Store, 513 F. Supp. 2d at 340.

11. Class Counsel's request for attorneys' fees of one-third of the gross settlement fund (33 1/3% of the $49 million settlement fund, or $16,333,333) is hereby approved as reasonable under the factors set forth in Gunter and Prudential, as confirmed by a lodestar cross-check, *see* Rite Aid, 396 F.3d at 305-06, which demonstrates a lodestar (using Class Counsel's actual, current, reasonable hourly rates) that exceeds the requested fee. In general, the Third Circuit has observed that multipliers ranging from one to four are frequently awarded in common fund cases, Prudential, 148 F.3d at 334, and substantial multipliers have frequently been awarded in other cases. *See, e.g.,* In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 741-42 (3d Cir. 2001) (remanding the case and suggesting that a lodestar multiplier of 3 would be appropriate, even though the Third Circuit **[*21]** found the case

was lacking in legal and factual complexity, and—in this pre-*Rite Aid* case—the lodestar was calculated using the senior partner rate as the rate for all hours); *Bradburn Parent Teacher Store, 513 F. Supp. 2d at 341* (approving a fee award resulting in a lodestar multiplier of 2.5 at counsel's then-current rates); *Nichols, 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, at *24* (awarding fees as a percentage of the fund that translated to a 3.15 multiplier); *Ikon Office Solutions, 194 F.R.D. at 195* (conducting a lodestar cross-check of the percentage fee award and finding a 2.7 multiplier, calculated at counsel's then-current rates, to be well within an appropriate range); *Meijer, 2006 U.S. Dist. LEXIS 56744, 2006 WL 2382718, at *19, 24* (approving a percentage fee award that translated to a 4.77 multiplier). A comparison with these other cases further demonstrates the requested fee award to be quite reasonable.

Reimbursement of Litigation Expenses

12. Class Counsel's request for reimbursement of $1.3 million in out-of-pocket expenses advanced on behalf of the class is approved. Attorneys who create a common fund for the benefit of a class are entitled to reimbursement from that fund of the reasonable litigation expenses that they advanced on behalf of the class. *See Cendant Corp. PRIDES Litig., 243 F.3d at 732 n.12*; *Ikon Office Solutions, 194 F.R.D. at 192*. The costs incurred (such as for experts, depositions, photocopying, computerized legal research, and travel) are reasonable, **[*22]** appropriate, and comparable to, or lower than, those awarded in other antitrust litigation that did not last nearly as long as this case did. *See, e.g., MMA, 2009 U.S. Dist. LEXIS 133759, 2009 WL 3150399, at *2* (awarding reimbursement of roughly $1.3 million in expenses incurred over roughly three years); *Auto. Refinishing Paint, 2008 U.S. Dist. LEXIS 569, 2008 WL 63269, at *6* (expenses of roughly $1.2 million incurred over approximately three-and-a-half years); *Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *17* ($1.925 million in expenses incurred during roughly three years).

Awards to the Class Representative Plaintiffs

13. The requested awards of $25,000 each to the two named Plaintiffs, SAJ and Meijer, are approved in recognition of their efforts on behalf of the class, without which this settlement would not have occurred. Those efforts included assisting in the pre-filing investigation, reviewing draft complaints, collecting and producing documents, preparing for and giving depositions, and preparing to participate in what could have been a several-week trial. (These awards are separate from, and in addition to, any monies that SAJ and Meijer may receive from claims made against the settlement fund, according to the court-approved plan of allocation discussed above.) These types of awards are common in class action litigation, and particularly in cases **[*23]** in which a common fund has been created for the benefit of an entire class. *Cullen, 197 F.R.D. at 145*. Courts routinely grant awards to compensate class representatives for the services they provided and the risks they undertook in pursuing a case, placing the interests of the class above their own. *Id. See also Bradburn Parent Teacher Store, 513 F. Supp. 2d at 342* ("It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class."); *Auto. Refinishing Paint, 2008 U.S. Dist. LEXIS 569, 2008 WL 63269, at *7* ("Incentive awards are typically awarded to class representatives for their often extensive involvement with a lawsuit and courts in this Circuit have traditionally granted requests for these awards."). The requested awards are well within the acceptable range awarded by courts within the Third Circuit in other recent direct purchaser antitrust litigation. *See, e.g., Bradburn Parent Teacher Store, 513 F. Supp. 2d at 342* (approving award of $75,000 to the named plaintiff); *Auto. Refinishing Paint, 2008 U.S. Dist. LEXIS 569, 2008 WL 63269, at *7* (approving awards to four class representatives resulting in aggregate awards of $30,000 each); *Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *18* ($60,000 to be divided between two named plaintiffs); *Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *18-19* ($25,000 each to five class representative plaintiffs). *See also In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 535-36 (E.D. Mich. 2003)* (awarding $75,000 each to the corporate **[*24]** class representatives); *McCoy v. Health Net, Inc., 569 F. Supp. 2d 448, 479-80 (D.N.J. 2008)* (ERISA action approving awards of $60,000 each to the named plaintiffs and citing cases approving named plaintiff awards ranging from $35,000 to $200,000 each).

Entry of Final Judgment Binding on the Class and Dismissal of the Case With Prejudice

14. As noted above, no class member timely and validly requested exclusion from the class. Each class member therefore is, and will forever remain, bound by this Order and Final Judgment.

15. This class action is dismissed with prejudice and in its entirety, on the merits, as to GSK. This dismissal shall not affect, in any way, Plaintiffs' or class members' rights to pursue any claims other than those released, as set forth in the Settlement Agreement.

16. Plaintiffs and all members of the class are permanently enjoined and barred from instituting, commencing, or prosecuting any action or other proceeding asserting any released claims, as set forth in the Settlement Agreement, against any released party, either directly, individually, representatively, derivatively, or in any other capacity, by whatever means, in any local, state, or federal court, or in any agency or other authority or arbitral or other forum wherever **[*25]** located.

17. Plaintiffs and all members of the class hereby remise, release, forever discharge, and covenant not to sue the released parties from and for the released claims, as set forth in the Settlement Agreement.

18. In no event shall GSK be obligated to pay anything in addition to (a) the $49 million settlement fund created pursuant to the Settlement Agreement, and (b) up to $500,000 towards the costs of notice and settlement administration, including without limitation, attorneys' fees, awards to the named Plaintiffs for their efforts on behalf of the class, notice or settlement administration costs exceeding $500,000, escrow costs, taxes, or any other cost or expense arising from or to be paid as part of the settlement.

19. This Order and Final Judgment does not settle or compromise any claims by Plaintiffs or the class against persons or entities other than the released parties, as set forth in the Settlement Agreement. All rights against any other person or entity are specifically reserved.

20. The settlement, this Order and Final Judgment, and/or any and all negotiations, documents, and discussions associated with it shall be without prejudice to the rights of any party, shall **[*26]** not be deemed or construed to be an admission or evidence of any kind, including without limitation of any violation of any statute or law or any liability or wrongdoing by GSK or an acknowledgement of defenses by Plaintiffs, or the truth of any of the claims or allegations contained in any pleading in this case or the standing of any party to assert claims against GSK or defenses against Plaintiffs, and evidence thereof shall not be discoverable or used directly or indirectly, by any party or any third party, in any way, whether in this class action or in any other action or proceeding of any kind whatsoever, civil, criminal or otherwise, before any court, tribunal, administrative agency, regulatory body or other similar entity, provided, however, that nothing contained herein shall preclude use of the Settlement Agreement or this Order and Final Judgment in any proceeding to enforce the Settlement Agreement.

21. Without affecting the finality of this Order and Final Judgment, this Court retains exclusive and continuing jurisdiction over the Settlement and the Settlement Agreement, including the Settlement Fund and the administration, consummation, and interpretation of the Settlement **[*27]** and Settlement Agreement.

22. The escrow account established by the parties is hereby approved by the Court. GSK has deposited or will deposit $49 million as the settlement fund into that escrow account pursuant to the Settlement Agreement, and that escrow fund, including any accrued interest, is approved as a Qualified Settlement Fund pursuant to *Internal Revenue Code Section 468B* and the Treasury Regulations promulgated thereunder.

23. Pursuant to *Federal Rule of Civil Procedure 54*, the Court finds that there is no just reason for delay and hereby directs the entry of final judgment of dismissal forthwith as to GSK.

BY THE COURT:

/s/ *Lawrence F. Stengel*

LAWRENCE F. STENGEL, J.

End of Document

NAR Apts. LLC v Ippolito

Supreme Court of New York, New York County

November 21, 2011, Decided; November 22, 2011, Filed

107866/10

Reporter

2011 N.Y. Misc. LEXIS 5575 *; 2011 NY Slip Op 33056(U) **

[2]** NAR APARTMENTS LLC, Plaintiff, - against - PATRICIA IPPOLITO, Defendant. Index No. 107866/10

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Subsequent History: Summary judgment denied by, Summary judgment denied by *NAR Apts. LLC v. Ippolito, 2013 N.Y. Misc. LEXIS 6224 (N.Y. Sup. Ct., Dec. 5, 2013)*

Core Terms

dog, apartment, letter agreement, disabled, reasonable accommodation, LEASE, emotional support, counter-claim, rights, amend

Judges: **[*1]** HON. EILEEN A. RAKOWER, J.S.C.

Opinion by: EILEEN A. RAKOWER

Opinion

DECISION and ORDER

HON. EILEEN A. RAKOWER:

Plaintiff NAR Apartments LLC ("NAR") is the owner of the 25-unit apartment building located at 517 East 13th Street in New York County (the "Building"). Plaintiff brings this action against defendant Patricia Ippolito ("Defendant"), a tenant in the Building, seeking a judgment declaring as valid and enforceable a letter agreement dated March 3, 2010 and signed by both parties (the "Letter Agreement"), wherein Defendant represented and agreed that she would not keep (or permit any other individual to keep) a dog in her apartment.

Defendant has lived in the Building for approximately 18 years, and has resided in her apartment (Apartment 3B) pursuant to a lease since 1998. On a rider to the lease in effect at the times relevant to the complaint herein was a no-pet clause which provided as follows:

> **No Pets**
>
> 9. Dogs or animals of any kind shall not be kept or harbored in the in the Apartment, unless in each instance it be expressly permitted in writing by Owner... BECAUSE OF THE HEALTH HAZARD AND POSSIBLE

> DISTURBANCE OF OTHER TENANTS WHICH ARISE FROM THE UNCONTROLLED PRESENCE OF ANIMALS, ESPECIALLY DOGS, **[*2]** IN THE BUILDING, THE STRICT ADHERENCE TO THE PROVISIONS OF **[**3]** THIS RULE BY EACH TENANT ISA MATERIAL REQUIREMENT OF EACH LEASE. TENANT'S FAILURE TO OBEY THIS RULE SHALL BE CONSIDERED A SERIOUS VIOLATION OF AN IMPORTANT OBLIGATION BY TENANT UNDER THIS LEASE. OWNER MAY ELECT TO END THIS LEASE BASED UPON THIS VIOLATION.

It is undisputed that, in January 2010, Defendant adopted a four year old Yorkie and brought it into her apartment without informing NAR or seeking its permission prior thereto.[1] NAR states that it became aware of a dog in the premises when its managing agent, who resides one floor above Defendant heard the dog barking. A letter dated February 22, 2010 from NAR to Defendant confirms a prior conversation that day wherein Defendant confirmed that she had a dog in her apartment, and further demanded that Defendant remove the dog from her apartment immediately or face actions to ensure compliance with the lease rules concerning pets. Defendant responded by letter, also dated February 22, 2010. In her letter, Defendant stated that the dog is a "rescue dog," and that she rarely barks, is not aggressive, is completely housebroken, and that neither she nor her roommate had received **[*3]** any complaints about the dog. The letter further advised that Defendant and her roommate would take the dog to a day care center for dogs during their work hours, and asked that NAR "[p]lease give Puddy a chance for a happy home, she's really come around in the time we've had her and I'm sure we can train her not to bark, she's proven herself to be a very intelligent dog." NAR notes that nowhere in this letter is there any mention that Defendant requires the presence of the dog for emotional support.

On February 23, 2010, NAR sent another letter to Defendant, wherein NAR advised Defendant that it would not accept rent from her until they have received written confirmation that the dog is no longer in her apartment. Defendant states that NAR commenced eviction proceedings immediately thereafter. By March 1, 2010, Defendant advised NAR that the dog has been removed from the apartment, and offered to let a representative from NAR inspect the apartment to confirm same. After inspection of the apartment, NAR provided **[*4]** Defendant with the Letter Agreement **[**4]** dated March 3, 2010. The Letter Agreement provided that

> You hereby represent and warrant to us and hereby agree as follows: (i) you will not hereafter permit the dog to be present in your apartment under any circumstances, and (ii) neither you, nor any person whom you permit to reside with you in your apartment, will maintain or permit to maintain, or allow any dog to visit or to reside in your apartment at any time for any purpose whatsoever.

Defendant signed the Letter Agreement indicating that she understood the terms and provisions of the agreement, and agreed to be bound by the terms thereof. NAR thereafter told its process server not to serve Defendant with the papers from the holdover proceeding.

Defendant claims that she signed the Letter Agreement under duress; specifically, she claims that NAR placed her in the "terrifying position of facing homelessness or parting with [her] dog, leaving [her] with what [she] perceived as no option but to give away the dog..." Defendant states that she thereafter sought and obtained the advice of counsel in order to protect her rights. By letter dated June 8, 2010, Defendant's attorney claimed that the Letter **[*5]** Agreement, and NAR's coercion of Defendant into signing the letter constituted unlawful discrimination against a disabled person. The letter claimed that Defendant suffers from depression and is disabled as defined under relevant federal, state, and city anti-discrimination laws. Further, the letter claims that Defendant's dog is a medically necessary source of emotional support for Defendant. In support of this assertion, Defendant attached a letter from Psychiatrist Bradford M. Goff, M.D. In that letter, Dr. Goff states that Defendant has been under his care since 2007, and that she has had a long history of depression dating back to early adulthood. Further, Dr. Goff stated that, in his opinion, the availability of pets in the home has had a tremendously positive effect on Defendant, providing her with much-needed emotional support. Dr. Goff further stated that, after the dog was removed from the apartment, Defendant's condition worsened significantly, to the point of interfering with her work. Based on all of the foregoing, Defendant's counsel advised in his letter that, if NAR did not agree to Defendant's demand for a reasonable accommodation within ten days, Defendant intended **[*6]** to pursue a claim to vindicate her legal rights.

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[1] NAR also states that Defendant has several cats in her apartment without NAR's prior knowledge or consent, but states that it decided to refrain from litigating that issue.

[5]** NAR commenced this action on June 15, 2010 by purchasing an Index number and filing its summons and complaint. On August 6, 2010, Defendant filed a complaint with DHR.

In October of 2010, Defendant moved for summary judgment, or alternatively, for an order staying the action during the pendency of Defendant's State Division of Human Rights ("DHR") proceeding concerning her request for a reasonable accommodation; and for an order quashing subpoenas served on Dr. Goff seeking his deposition and pertinent medical records. NAR cross-moved for an order compelling the deposition of Dr. Goff; alternatively NAR sought summary judgment on the issue of the enforceability of the Letter Agreement.

By order dated November 16, 2010, the court denied the parties' motions for summary judgment, and granted NAR's cross-motion to the extent that it sought to depose Dr. Goff and obtain pertinent medical records. In its decision, the court rejected Defendant's argument that she signed the Letter Agreement under duress - i.e., that NAR knowingly forced her to relinquish her right to a reasonable accommodation as a disabled person under threat of being evicted **[*7]** and facing homelessness. In so holding, the court noted that the undisputed facts in the record indicated that, at the time Defendant signed the Letter Agreement, she had never claimed — nor was NAR otherwise on notice of any claim — that Defendant was disabled and required the dog as a support animal. Nevertheless, the court denied NAR's motion for a judgment declaring the Letter Agreement enforceable, as issues of fact remained as to whether Defendant was in fact disabled, and whether she required the presence of her dog in the apartment as a reasonable accommodation for her claimed disability.

Defendant now moves to amend her answer to assert an additional cross-claim. The additional cross-claim seeks compensatory and punitive damages, as well as costs and attorney's fees based upon NAR's failure to grant her a reasonable accommodation by allowing her to harbor her dog. Defendant's second counter-claim alleges and seeks damages for NAR's commencement and prosecution of this action in retaliation for Defendant's assertion of her right to a reasonable accommodation under the Fair Housing Act, and other state and local claims.

NAR opposes Defendant's motion to amend her answer, and cross-moves **[*8]** for dismissal of Defendant's counter-claims and the imposition of sanctions.

[6]** Pursuant to *CPLR §3025(b)*, "A party may amend his pleading... at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just...." "*CPLR §3025* allows liberal amendment of pleadings absent demonstrable prejudice" (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co., 271 A.D.2d 278, 280, 707 N.Y.S.2d 398 [1st Dept. 2000])*. In the absence of prejudice, leave to amend a pleading should be denied only when the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker, 190 A.D.2d 636, 594 N.Y.S.2d 18 [1st Dept. 1993])* (*see also Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 A.D.3d 363, 836 N.Y.S.2d 68, 2007 NY Slip Op 4179, *2 [1st Dept. 2007])* ("[I]n considering the proposed amendment, 'the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face. Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment'").

Here, the court finds that Defendant is entitled to amend her answer **[*9]** to the extent that she may add a counter-claim based upon her claim of entitlement to a reasonable accommodation. Factual issues remain as to the existence and/or extent of Defendant's purported disability, as well as the necessity of harboring a dog as an emotional support animal, assuming that Defendant is in fact disabled.

However, the court finds that NAR is entitled to dismissal of Defendant's counter-claim for retaliation[2]. The commencement of litigation is a protected activity under the *Noerr-Pennington* doctrine, which bars the imposition of liability of a party based upon its petitioning the government (*I. G. Second Generation Partners, L.P. v. Duane Reade, 17 A.D.3d 206, 793 N.Y.S.2d 379 [1st Dept. 2005])*. Although originally derived from ***antitrust law***, the

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[2] The court notes that, although the court denied NAR's prior motion for summary judgment, NAR's motion was based upon the enforceability of the Letter Agreement, and the court did not specifically address the merits of Defendant's retaliation claim.

doctrine is rooted in *First Amendment* principles and has been applied to bar liability for alleged violations of civil rights laws, including the Fair Housing Act (*see* *Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills, 701 F. Supp.2d 568 [E.D.N.Y. 2008])* (*citing, inter alia,* *Sanghvi v. City of Claremont, 328 F.3d 532, 543 [9th Cir. 2003]*, which affirmed the dismissal of plaintiffs' claim that municipal defendant's commencement of legal **[*10]** action against them constituted unlawful retaliation for asserting their rights under *42 U.S.C. §1983* and the Fair Housing Act.). An exception to the doctrine is made when a party demonstrates that the **[**7]** challenged action was "a sham" and was "objectively baseless" (*I. G. Second Generation Partners at 208*).

Here, the court cannot find that NAR's commencement of this lawsuit was objectively baseless. As previously noted, it is undisputed that NAR and Defendant entered into the Letter Agreement, whereby she agreed not to harbor a dog in her apartment. It was further established that she did so free of duress or coercion on the part of NAR, and that up to that point, Defendant made no mention of suffering from a disability and requiring a dog for emotional support. Irrespective of the ultimate determination of Defendant's reasonable accommodation claim, and whether the Letter Agreement must yield to Defendant's rights under the Fair Housing Act **[*11]** or other applicable laws, Defendant cannot show that NAR's declaratory judgment action is a sham brought merely for the purpose of harming Defendant.

Wherefore it is hereby

ORDERED that Defendant's leave to amend her answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served on defendants upon service of a copy of this Order with notice of entry thereof; and it is further;

ORDERED that NAR's cross-motion is granted to the extent that Defendant's counter-claim for retaliation is dismissed.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: November 21, 2011

/s/ EILEEN A. RAKOWER

EILEEN A. RAKOWER, J.S.C.

End of Document

Apple iPod iTunes Antitrust Litig.

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

November 22, 2011, Decided; November 22, 2011, Filed

NO. C 05-00037 JW

Reporter

2011 U.S. Dist. LEXIS 134836 *; 2011-2 Trade Cas. (CCH) P77,701; 2011 WL 5864036

The Apple iPod iTunes Antitrust Litigation

Subsequent History: Counsel Amended October 23, 2014.

Motion denied by, Motion denied by, Objection overruled by, Motion to strike denied by, Summary judgment denied by *Apple iPod iTunes Antitrust Litig., 2014 U.S. Dist. LEXIS 136437 (N.D. Cal., Sept. 26, 2014)*

Prior History: *In re Apple iPod iTunes Antitrust Litig., 796 F. Supp. 2d 1137, 2011 U.S. Dist. LEXIS 77155 (N.D. Cal., 2011)*

Core Terms

iPod, generation, Plaintiffs', class certification, damages, nano, resellers, antitrust, parties, touch, Consolidated, shuffle, summary judgment, Sherman Act, certify, Models

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN1[] **Class Actions, Judicial Discretion**

The decision to certify a class is committed to the discretion of the district court within the guidelines of *Fed. R. Civ. P. 23*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] **Class Actions, Certification of Classes**

The party seeking class certification bears the burden of establishing that each of the four requirements of *Fed. R. Civ. P. 23(a)* and at least one requirement of *Fed. R. Civ. P. 23(b)* have been met. A district court may certify a class only if, after rigorous analysis, it determines that the party seeking certification has met its burden.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN3[] **Class Actions, Certification of Classes**

In reviewing a motion for class certification, the court generally is bound to take the substantive allegations of the complaint as true. However, the court may look beyond the pleadings to determine whether the requirements of *Fed. R. Civ. P. 23* have been met. In fact, courts are at liberty to consider evidence which goes to the requirements of *Rule 23* at the class certification stage even if the evidence may also relate to the underlying merits of the case. A trial court's rigorous analysis under *Rule 23* will frequently entail some overlap with the merits of the plaintiff's underlying claim.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN4[] **Prerequisites for Class Action, Commonality**

During the class certification stage, the court must simply determine whether plaintiffs have made a sufficient showing that the evidence they intend to present concerning antitrust impact will be made using generalized proof common to the class and that these common issues will predominate. The court cannot weigh in on the merits of plaintiffs' substantive arguments, and must avoid engaging in a battle of expert testimony. During the class certification stage, the plaintiffs need not supply a precise damage formula, but must simply offer a proposed method for determining damages that is not so insubstantial as to amount to no method at all.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN5[] **Price Fixing & Restraints of Trade, Tying Arrangements**

As a matter of ***antitrust law***, when a seller overcharges a buyer, the fact that the buyer raises the price for its own product, thereby passing on the overcharge to its customers and avoiding a loss in profit, has no bearing on the issue of whether the buyer has suffered an injury and thus has the right to recover damages from the seller.

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For Apple Inc., Defendant: Caroline Nason Mitchell, Craig Ellsworth Stewart, David Craig Kiernan, Michael Tedder Scott, Robert Allan Mittelstaedt, Jones Day, San Francisco, CA; George A. Riley, O'Melveny & Myers LLP, San Francisco, CA.

Judges: JAMES WARE, Chief United States District Judge.

Opinion by: JAMES WARE

Opinion

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs [1] bring this class action against Defendant Apple Computer, Inc. ("Apple"), alleging violations of the Sherman Act, *15 U.S.C. § 2*, and related **[*3]** state law claims. Plaintiffs allege that Apple has committed unlawful acts in issuing software updates for its iPod, in violation of federal and state antitrust laws.

Presently before the Court is Plaintiffs' Motion for Class Certification. [2] The Court conducted a hearing on June 27, 2011. [3] Based on the papers submitted to date and oral argument, the Court GRANTS Plaintiffs' Motion for Class Certification.

A. Background

A detailed account of the earlier procedural history in this case may be found in the Court's December 20, 2006 Order Denying Defendant's Motion to Dismiss [4] and in the Court's December 22, 2008 Order Granting Plaintiffs' Motion for Class Certification. [5] The Court reviews the procedural history relevant to the present Motion.

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[1] Named Plaintiffs are Somtai Troy Charoensak, Mariana Rosen and Melanie Tucker.

[2] (Plaintiffs' Notice of Motion and Renewed Motion for Class Certification and Appointment of Lead Counsel, hereafter, "Motion," Docket Item No. 477 (filed under seal).)

[3] After the hearing on June 27, 2011, the Court ordered supplemental briefings and expert reports on the issue of damages calculation and gave the parties a few weeks to complete and submit these additional materials. (hereafter, "June 27 Order," Docket Item No. 650.) In response to the Court's June 27 Order, the parties requested additional time. (See Docket Item No. 661.) On August 2, 2011, the Court denied the parties' Stipulation. (See Docket Item No. 672 at 1.) Instead, the Court ordered: (1) Plaintiffs to file their Supplemental Expert **[*4]** Report on or before September 23, 2011; and (2) Defendant to file a Supplemental Rebuttal Expert Report on or before November 14, 2011. (Id. at 1-2.)

[4] (hereafter, "December 20 Order.") This Order may be found as Docket Item No. 27 in the docket for Tucker v. Apple Computer, Inc., No. C 06-04457 JW, which was one of the original cases now included in this consolidated action. It may also be found as *Tucker v. Apple Computer, Inc., 493 F. Supp. 2d 1090 (N.D. Cal. 2006)*.

This case is a consolidated putative class action. The original cases were Charoensak v. Apple Computer, Inc., No. C 05-00037 JW, **[*5]** and Tucker v. Apple Computer, Inc., No. C 06-04457 JW. On March 21, 2007, the Court ordered these cases consolidated, and renamed the consolidated case The Apple iPod iTunes Antitrust Litigation. [6] (Docket Item No. 106.) The Court designated The Katriel Law Firm, P.L.L.C. and Coughlin Stoia Geller Rudman & Robbins as Co-Lead Counsel, and designated Somtai Troy Charoensak, Mariana Rosen and Melanie Tucker as Lead Plaintiffs. (Id. at 1.) On April 19, 2007, Plaintiffs filed a Consolidated Complaint for Violations of Sherman Antitrust Act, Clayton Act, Cartwright Act, California Unfair Competition Law, Consumer Legal Remedies Act, and California Common Law of Monopolization. (Docket Item No. 107.)

On December 22, 2008, the Court granted Plaintiffs' Motion for Class Certification as to all but one of Plaintiffs' counts. (December 22 Order at 13-14.) As to the remaining count, which stated a claim for Unlawful Tying in violation **[*6]** of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, the Court denied certification without prejudice pending further proceedings in the case. (Id. at 13.) On December 21, 2009, the Court *sua sponte* decertified the classes it had previously certified. [7] In its December 21 Order, the Court explained that the technological interoperability between iPods and media sold through Apple's iTS did not constitute unlawful tying under the Sherman Act. (Id. at 2.) The Court stated that Plaintiffs' monopoly claims "interweave[d] allegations that there were technological ties between Apple products when they were first introduced to the market," which by itself does not constitute anticompetitive conduct, and "allegations that Apple made technological modifications to its products for the express purpose of maintaining monopoly power," which could support a monopoly claim. (Id.) The Court invited Plaintiffs to submit an Amended Consolidated Complaint "that does not depend upon allegations of tying as the anticompetitive conduct upon which they base their monopoly claims." (Id. at 3.)

On January 26, 2010, Plaintiffs filed an Amended Consolidated Complaint. [8] On January 18, 2011, Defendant filed a Motion for Summary Judgment. (See Docket Item No. 473.) On May 19, 2011, the Court granted in part and denied in part Defendant's Motion for Summary Judgment. [9] While the Court granted Defendant summary judgment on Plaintiffs' antitrust claims relating to Defendant's introduction of iTunes 4.7, the Court denied Defendant summary judgment on Plaintiffs' antitrust claims relating to Defendant's introduction of iTunes 7.0. (Id. at 11-13.) In its May 19 Order, the Court also denied Plaintiffs' Motion for Class Certification as premature. (Id. at 14.) The Court explained that it lacked information necessary to certify the class, and accordingly, the Court ordered further briefing to address the issues of how the class should be defined and the length of the class period. (Id. at 14-15.) On June 6, 2011, the parties filed supplemental briefs to address those issues. [10]

On June 22, 2011, the Court ordered further supplemental briefing to have the parties address the specific definition of the products at issue in the class period, the geographic scope of the class, and the effect of the Supreme Court's June 20, 2011 decision in Wal-Mart Stores, Inc. v. Dukes [11] on Plaintiffs' Motion for Class Certification. (See

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[5] (Order Granting Plaintiffs' Motion for Class Certification as to Counts Two, Three, Four, Five, Six, and Seven Only and Appointing Class Counsel; *Sua Sponte* Order Reconsidering Defendant's Motion to Dismiss Count One and Requiring Further Briefing, hereafter, "December 22 Order," Docket Item No. 196.)

[6] Prior to consolidation, the Court denied Apple's Motion to Dismiss the antitrust claims in Tucker case. (See December 20 Order at 16.) No other dispositive motions were filed in Tucker or in Charoensak prior to consolidation.

[7] (See Order Decertifying Classes Without Prejudice to Being Renewed; Inviting Further Motions at 2, hereafter, "December **[*7]** 21 Order," Docket Item No. 303.)

[8] (Amended Consolidated Complaint for Violations of Sherman Antitrust Act, Clayton Act, Cartwright Act, California Unfair Competition Law, Consumers Legal Remedies Act, and California **[*8]** Common Law of Monopolization, Docket Item No. 322.)

[9] (Order Granting in part and Denying in part Defendant's Motion for Summary Judgment; Denying as Premature Plaintiffs' Motion for Class Certification, hereafter, "May 19 Order," Docket Item No. 627.)

[10] (See Supplemental Brief in Support of Plaintiffs' Renewed Motion for Class Certification and Response to Court's May 19, 2011 Order, hereafter, "Plaintiffs' Brief," Docket Item No. 629; Apple's Supplemental Brief Re Class Certification, hereafter, "Defendant's Brief," Docket Item No. 633.)

Docket Item No. 639.) On June 23, 2011, both parties filed further supplemental briefs to address those issues. [12] On August 2, 2011, the Court granted both parties time to file supplemental expert reports. [13] Pursuant to the Court's August 2 Order, on September 23, 2011 and November 14, 2011, the parties filed **[*9]** their supplemental expert reports. [14]

Presently before the Court is Plaintiffs' Motion for Class Certification.

B. Standards

HN1[] The decision to certify a class is committed to the discretion of the district court within the guidelines of *Federal Rule of Civil Procedure 23*. See *Fed. R. Civ. P. 23*; *Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1309 (9th Cir. 1977)*. ***HN2***[] The party seeking class certification bears the burden of establishing that each of the four **[*10]** requirements of *Rule 23(a)* and at least one requirement of *Rule 23(b)* have been met. See *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001)*, amended, *273 F.3d 1266 (9th Cir. 2001)*. A district court may certify a class only if, after "rigorous analysis," it determines that the party seeking certification has met its burden. *Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 158-61, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*.

HN3[] In reviewing a motion for class certification, the court generally is bound to take the substantive allegations of the complaint as true. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 691 F.2d 1335, 1342 (9th Cir. 1982)* (citing *Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975))*. However, the court may look beyond the pleadings to determine whether the requirements of *Rule 23* have been met. *Hanon v. Dataproducts Corp., 976 F.2d 497, 509 (9th Cir. 1992)* (citation omitted). In fact, courts are "at liberty to consider evidence which goes to the requirements of *Rule 23* [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case." Id. A trial court's "rigorous analysis" under *Rule 23* will frequently **[*11]** "entail some overlap with the merits of the plaintiff's underlying claim." *Dukes, 131 S. Ct. at 2551*.

C. Discussion

Plaintiffs seek to certify a damages class under *Rule 23(b)(3)*, seeking damages for the supracompetitive price paid for iPods as a result of Defendant's alleged anticompetitive conduct. (Motion at 1, 16.) Defendant contends that: (1) Plaintiffs fail to demonstrate a class-wide method of proving impact and damages; and (2) Plaintiffs have also failed to carry their burden to show that resellers may properly be included in the Class. [15]

As discussed previously, the Court earlier certified classes in this case under both *Rule 23(b)(2)* and *Rule 23(b)(3)*. (See December 22 Order.) The Court later *sua sponte* decertified those classes without prejudice. (See December 21 Order.) However, the Court only decertified the classes in order to reexamine Plaintiffs' Sherman Act claims. (Id.

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[11] *131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*.

[12] (See Plaintiffs' Response to the Court's June 22, 2011 Order Requiring Further Supplemental Briefing, hereafter, "Plaintiffs' Further Brief," Docket Item No. 644; Apple's Further Supplemental Brief Re Class Certification, hereafter, "Defendant's Further Brief," Docket Item No. 646.)

[13] (See Order Denying Stipulation; Setting Schedule for Submission of Supplemental Expert Reports, hereafter, "August 2 Order," Docket Item No. 672.)

[14] (Second Supplemental Declaration of Roger G. Noll on Class Certification, hereafter, "Supplemental Noll Decl.," Docket Item No. 679 (filed under seal); Second Supplemental Report of Dr. Michelle M. Burtis, hereafter, "Supplemental Burtis Decl.," Docket Item No. 692 (filed under seal).)

[15] (Apple's Opposition to Renewed Motion for Class Certification at 8-21, hereafter, "Opp'n," Docket Item No. 512 (filed under seal).)

at 2-3, 10-11.) Because the Court, in its May 19 Order, found that Plaintiffs state a claim under the Sherman Act as to iTunes 7.0, the Court's earlier findings that Plaintiffs' **[*12]** proposed class satisfies the requirements of *Rule 23(a)* and *23(b)(3)* still stand. (See December 22 Order at 4-13.) Thus, the Court need only consider class issues that are challenged on this round of certification.

1. Impact and Damages

Plaintiffs contend that they have provided sufficient expert testimony to show that antitrust impact may be demonstrated, and damages may be calculated, through generally accepted economic methodologies. (Motion at 19-22.) Defendant responds that the methods proposed by Plaintiffs' expert are inadequate to establish impact and damages on a class-wide basis. (Opp'n at 8-21.)

HN4[] During the class certification stage, "the court must simply determine whether plaintiffs have made a sufficient showing that the evidence they intend to present concerning antitrust impact will be made using generalized proof common to the class and that these common issues will predominate." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., No. M 02-1486 PJH, 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *9 (N.D. Cal. June 5, 2006)*. "The court cannot weigh in on the merits of plaintiffs' substantive arguments, and must avoid engaging in a battle of expert testimony." Id. During the class certification **[*13]** stage, plaintiffs need not supply a "precise damage formula," but must simply offer a proposed method for determining damages that is not "so insubstantial as to amount to no method at all." *In re Online DVD Rental Antitrust Litig., No. M 09-2029 PJH, 2010 U.S. Dist. LEXIS 138558, 2010 WL 5396064, at * 11 (N.D. Cal. Dec. 23, 2010)*.

Here, the Court has previously found that Plaintiffs have provided an adequate method for proving common impact on the class. (See December 21 Order at 2 n.6.) Although the parties dispute in their Supplemental Expert Reports whether Plaintiffs can prove impact and damages with a class-wide method in light of the Court's May 19 Order granting partial summary judgment to Defendant, [16] the Court finds that Plaintiffs have demonstrated that it can be done. (See Supplemental Noll Decl.) Plaintiffs have proposed three specific methodologies [17] which, upon review, are sufficient to establish their method for determining damages at this stage. See *In re Online DVD Rental Antitrust Litig., 2010 U.S. Dist. LEXIS 138558, 2010 WL 5396064, at *11*.

Accordingly, the **[*14]** Court finds that Plaintiffs have adequately demonstrated class-wide methods of proving impact and damages.

2. Resellers

Defendant contends that the class should be limited to end-user consumers and should exclude resellers, on the ground that resellers are not situated similarly to end-users insofar as resellers benefit from higher retail prices. [18] (Opp'n at 21-24.) Plaintiffs respond that: (1) the Court has already considered and rejected this argument; and (2) they can represent all direct purchasers, including resellers. [19]

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[16] (See, e.g., Supplemental Burtis Decl. at 1-4.)

[17] (See Class Certification Motion at 21; Declaration of Roger G. Noll at 68-84, Docket Item No. 488 (filed under seal).)

[18] Defendant defines the term "reseller" to include a variety of vendors, including "large electronic stores" such as Best Buy and Circuit City, "retail stores" such as Target, "discount warehouses" such as Costco, and other stores and on-line retailers. (Opp'n at 22.)

[19] (Reply Memorandum in Support of Plaintiffs' Renewed Motion for Class Certification at 10-14, Docket Item No. 550 (filed under seal).)

In its January 15, 2009 Order, the Court stated that "in ruling on class certification, the Court considered Defendant's contentions that resellers should be excluded from the class definition." [20] The Court expressly stated that by "declining to address this issue **[*15]** in [its Class Certification Order]," it had "implicitly included resellers in the certified class." (Id.) Thus, the Court has already found that resellers are properly included in the certified class.

Further, the Court finds that Defendant's contention that resellers are differently situated from end-users insofar as they "benefit from higher retail prices" is misguided. (Opp'n at 22.) ***HN5***[] As a matter of ***antitrust law***, "when a seller overcharges a buyer . . . the fact that the buyer raises the price for its own product, thereby passing on the overcharge to its customers and avoiding a loss in profit, has no bearing on the issue of whether the buyer has suffered an injury and thus has the right to recover damages from the seller." *Meijer, Inc. v. Abbott Labs., 251 F.R.D. 431, 433 (N.D. Cal. 2008)* (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489-92, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968))*. Thus, because "all class members have the right to pursue overcharge damages, they have the same incentive to do so, and there is no conflict among class members **[*16]** allegedly harmed by the same antitrust violation." *Id. at 435* (citation omitted).

Accordingly, the Court finds that Plaintiffs can represent all direct purchasers, including resellers.

D. Conclusion

The Court GRANTS Plaintiffs' Motion for Class Certification. [21] The Court certifies Plaintiffs' class as follows:

> All persons or entities in the United States (excluding federal, state and local governmental entities, Apple, its directors, officers and members of their families) who purchased an iPod directly from Apple between September 12, 2006 [22] and March 31, 2009 [23] ("Class Period"). The specific models of iPods covered by the Class Definition are as follows [24]:
>
> I. iPod Standard, Classic, Special Models

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[20] (See Order Vacating Case Management Conference; Clarifying and Correcting Class Certification Order; Setting Briefing Schedule at 2, Docket Item No. 198.)

[21] Because the Court grants Plaintiffs' Motion for Class Certification, the Court DENIES as moot Plaintiffs' Request for Leave to File Brief Response to Apple's Objections to Plaintiffs' Evidence Filed in Support of Reply in Support of Plaintiffs' Renewed Motion for Class Certification, Docket Item No. 573. For the same reason, the Court DENIES as moot the following: (1) Defendant's Motion for Leave to File Supplemental Objections to Reply Declaration of Roger C. Noll and Supplemental Opposition to Class Certification Motion, Docket Item No. 579; (2) Plaintiffs' Notice of Motion and Motion for Leave to File Plaintiffs' Motion to Strike the Supplemental Expert Report of Dr. Michelle M. Burtis, Ph.D., Docket Item No. 604; (3) Plaintiffs' Notice of Motion and Motion **[*18]** to Strike the Supplemental Expert Report of Dr. Michelle M. Burtis, Ph.D., Docket Item No. 605; and (4) Plaintiffs' Notice of Motion and Motion for Leave to File Plaintiffs' Opposition to Apple's Supplemental Objections to Reply Declaration of Roger G. Noll and Supplemental Opposition to Class Certification Motion, Docket Item No. 607.

[22] Plaintiffs contend that the Class Period should begin on September 12, 2006 because that is the date on which iTunes 7.0 was released to the public, and because the Court's May 19 Order found that Plaintiffs had stated an antitrust claim with regard to the release of iTunes 7.0. (Plaintiffs' Brief at 3-4.) Defendant responds that Plaintiffs have not offered sufficient evidence to show a class-wide method of proving impact and damages for a period beginning with the introduction of iTunes 7.0 in September 2006. (Defendant's Brief at 2-5.) However, as discussed previously, in its December 22 Order the Court certified a *Rule 23(b)(3)* damages class beginning in April 2003. (December 22 Order at 13.) Thus, the Court has already determined that Plaintiffs have shown a class-wide method of proving impact and damages during the Class Period.

[23] Plaintiffs contend **[*19]** that the Class Period should end on March 31, 2009, because Defendant was able to "maintain its supracompetitive pricing" of the iPod "until at least March 31, 2009," when it "began selling its full catalog of music" without FairPlay, its DRM-encryption system. (See Motion at 8-9.)

[24] (See Declaration of Bonny E. Sweeney in Support of Plaintiffs' Response to the Court's June 22, 2011 Order Requiring Further Supplemental Briefing, Ex. A, Docket Item No. 645-1.)

iPod (5th generation) 30 GB
iPod (5th generation) 80 GB
iPod U2 Special Edition 30 GB
iPod Classic 120 GB
iPod Classic 80 GB
iPod Classic 160 GB
iPod (5th generation) 60 GB

II. iPod shuffle Models
iPod shuffle (2nd generation) 1 GB
iPod shuffle (2nd generation) 2 GB
iPod shuffle (3rd generation) 4 GB
iPod shuffle (1st generation) 1 GB
iPod shuffle 512 MB

III. iPod touch Models
iPod touch 8 GB
iPod touch 16 GB
iPod touch 32 GB
iPod touch (2nd generation) 8 GB
iPod touch (2nd generation) 16 GB

iPod touch (2nd **[*17]** generation) 32 GB

IV. iPod nano Models
iPod nano (2nd generation) 2 GB
iPod nano (2nd generation) 4 GB
iPod nano (2nd generation) 8 GB
iPod nano (3rd generation) 4 GB
iPod nano (3rd generation) 8 GB
iPod nano (4th generation) 4 GB (Apple retail sales only during the class period.)
iPod nano (4th generation) 8 GB
iPod nano (4th generation) 16 GB
iPod nano (1st generation) 1 GB
iPod nano (1st generation) 2 GB
iPod nano (1st generation) 4GB

The Court names Robbins Geller Rudman & Dowd LLP as Class Counsel. [25]

On or before **December 9, 2011**, the parties shall file a proposed form of class notice and a joint proposal for dissemination of notice for the Court's approval.

Dated: November 22, 2011

/s/ James Ware

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[25] In its December 22 Order, the Court named the Robbins Geller firm and the Katriel Law Firm as "Co-Lead Class Counsel." (See December 22 Order at 13.) In their Motion for Class Certification, Plaintiffs contend that "Robbins Geller now moves separately for Lead Class Counsel and has given notice to The Katriel Law Firm." (Motion at 24 n.18.) Accordingly, the Court now names Robbins Geller as Class Counsel.

JAMES WARE

United States District Chief Judge

End of Document

[Procongps, Inc. v. Star Sensor LLC]

United States District Court for the Northern District of California

November 29, 2011, Decided; November 29, 2011, Filed

No. C 11-3975 SI

Reporter

2011 U.S. Dist. LEXIS 137366 *; 2011 WL 5975271

PROCONGPS, INC, Plaintiff, v. STAR SENSOR LLC, et al., Defendants.

Subsequent History: Patent interpreted by *ProconGPS, Inc. v. Skypatrol, LLC, 2012 U.S. Dist. LEXIS 112382 (N.D. Cal., Aug. 9, 2012)*

Core Terms

counterclaim, patent, alleges, misrepresentations, infringement, unfair, marketplace, customers, leave to amend, contends, tactics, litigation privilege, third party, bad faith, part due, Lanham Act, threatens

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Patent Law > Infringement Actions > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN1[] **Bad Faith, Fraud & Nonuse, Bad Faith**

Before a patentee may be held liable under § 43(a) of the Lanham Act, *15 U.S.C.S. § 1125(a)*, for marketplace activity in support of its patent, and thus be deprived of the right to make statements about potential infringement of its patent, the marketplace activity must have been undertaken in bad faith. This prerequisite is a function of the interaction between the Lanham Act and patent law, and is in addition to the elements required by *§ 1125(a)* itself, as *§ 1125(a)* alone does not require bad faith.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN2[] **Regulated Practices, Trade Practices & Unfair Competition**

The elements of an unfair competition claim under the Lanham Act are: (1) that the defendant made a false or misleading statement of fact in commercial advertising or promotion about the plaintiff's goods or services; (2) that the statement actually deceives or is likely to deceive a substantial segment of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the defendant caused the statement to enter interstate commerce; and (5) that the statement results in actual or probable injury to the plaintiff.

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

HN3[] **State Regulation, Claims**

When a party sues an ostensible competitor under the unfair prong of *Cal. Bus. & Prof. Code § 17200*, the claim may be proven only on the basis of conduct that threatens an incipient violation of an ***antitrust law*** or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law or otherwise significantly threatens or harms competition.

Torts > Intentional Torts > Defenses > General Overview

HN4[] **Intentional Torts, Defenses**

The litigation privilege, codified at *Cal. Civ. Code § 47*, applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. The privilege bars all tort causes of action other than malicious prosecution and applies to any communication: (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. Statements to nonparticipants in the action are generally not privileged under *§ 47(b)* and are thus actionable unless privileged on some other basis. In addition, in order for the litigation privilege to apply, the communicative act--be it a document filed with the court, a letter between counsel or an oral statement--must function as a necessary or useful step in the litigation process and must serve its purposes.

Counsel: **[*1]** For Procongps, Inc., a Tennessee Corporation, Plaintiff: Ashwin Krishna Anand, Vandana Balakrishnan, Raj Abhyanker, P.C., Mountain View, CA; Christian John Martinez, Raj Abhyanker, PC, Mountain View, CA; Raj Vasant Abhyanker, Raj Abhyanker, PC, Palo Alto, CA; Samik Bhattacharyya, Raj Abhyander PC, mountain view, ca.

For Jim Schumacher, a California Limited Liability Company doing business as GPS Vehicle Finder, Star Sensor Technology, LLC, Jim Schumacher, an individual, Tony Rangel, an individual, Defendants: John William Holcomb, Knobbe Martens Olson and Bear LLP, Irvine, CA.

For Skypatroll, LLC, a Florida Limited Liability Corporation, Defendant: Bryan Joseph Wilson, Eric Chingyun Pai, Morrison & Foerster LLP, Palo Alto, CA; Jeremiah Rey Torres, Palo Alto, CA.

For Skypatroll, LLC, a Florida Limited Liability Corporation, Counter-claimant: Bryan Joseph Wilson, Eric Chingyun Pai, Morrison & Foerster LLP, Palo Alto, CA; Jeremiah Rey Torres, Palo Alto, CA.

For Procongps, Inc., a Tennessee Corporation, Counter-defendant: Ashwin Krishna Anand, Vandana Balakrishnan, Raj Abhyanker, P.C., Mountain View, CA; Christian John Martinez, Raj Abhyanker, PC, Mountain View, CA; Raj Vasant Abhyanker, Raj **[*2]** Abhyanker, PC, Palo Alto, CA; Samik Bhattacharyya, Raj Abhyander PC, mountain view, ca.

For Star Sensor Technology, LLC, Jim Schumacher, an individual, Jim Schumacher, a California Limited Liability Company, Tony Rangel, an individual, Counter-claimants: John William Holcomb, Knobbe Martens Olson and Bear LLP, Irvine, CA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS AND GRANTING SKYPATROL LEAVE TO *AMEND THIRD* COUNTERCLAIM

Plaintiff's motion to dismiss defendant Skypatrol's third counterclaim is scheduled for a hearing on December 2, 2011. Pursuant to *Civil Local Rule 7-1(b)*, the Court determines that the matter is appropriate for resolution without oral argument, and VACATES the hearing. For the reasons set forth below, the Court GRANTS plaintiff's motion and GRANTS Skypatrol leave to amend. Skypatrol's amended counterclaim must be filed by **December 22, 2011.**

DISCUSSION

On August 15, 2011, plaintiff ProconGPS, Inc. filed this lawsuit against several defendants, including defendant Skypatrol, LLC. Plaintiff alleges that defendants are infringing two patents owned by plaintiff.

Plaintiff moves to dismiss defendant Skypatrol's third counterclaim. **[*3]** The third counterclaim for unfair competition alleges,

> On information and belief, Procon has represented and is representing to third parties, including but not limited to Skypatrol's existing and prospective customers, that Skypatrol is going out of business, at least in part due to Procon's litigation tactics. As an example, during the week of August 29, 2011, a Procon sales representative called one of Skypatrol's existing customers, The Best Choice Inc., and represented multiple times that Skypatrol was going out of business and that Skypatrol's efforts to sell additional products were aimed at collecting as much money as possible before closing or going bankrupt. These representations are false.

Skypatrol's Amended Answer and Counterclaims ¶ 71. The third counterclaim also alleges, "[o]n information and belief, Skypatrol has lost at least one customer based on Procon's representations to third parties that Skypatrol is going out of business." *Id.* ¶ 72. In addition, Skypatrol alleges on information and belief that Procon "is asserting patents that are not valid and not infringed," and that Procon's conduct constitutes unfair competition under common law, *California Business and Professions Code § 17200 et seq.*, **[*4]** and the Lanham Act, *15 U.S.C. § 1125(a)*. *Id.* ¶¶ 73-74.

I. *Rule 9(b)*

Plaintiff moves to dismiss defendant's counterclaim on numerous grounds. First, plaintiff contends that Skypatrol failed to plead the counterclaim with heightened particularity as required by *Federal Rule of Civil Procedure 9(b)*. Plaintiff argues that *Rule 9(b)* applies because Skypatrol alleges that Procon falsely misrepresented Skypatrol's financial condition. Plaintiff contends that the counterclaim does not meet the pleading requirements of *Rule 9(b)* because Skypatrol alleges that unidentified Procon employees made false statements to unidentified third parties at unspecified times.

Skypatrol responds that *Rule 9(b)* does not apply because Skypatrol's counterclaim does not sound in fraud. Skypatrol asserts that the basis for its counterclaim is that Procon's false statements are unfair, not that they are fraudulent. Skypatrol also argues that even if *Rule 9(b)* applies, the counterclaim meets that standard because Skypatrol alleges specific facts about Procon's misrepresentations to one of Skypatrol's customers, The Best Choice, Inc.

The Court agrees with plaintiff that *Rule 9(b)* applies because Skypatrol's unfair competition **[*5]** counterclaim is based entirely on the allegation that Procon employees have and continue to falsely represent Skypatrol's financial condition; there is no other conduct that is alleged to be "unfair." The Court further finds that, with the exception of the allegations concerning misrepresentations made to The Best Choice, Inc., the counterclaim does not meet *Rule 9(b)*'s pleading standard. Skypatrol alleges "on information and belief" that Procon is falsely representing to unnamed third parties that Skypatrol is going out of business "at least in part due to Procon's litigation tactics." These allegations are too vague to provide Procon with notice of the particular misconduct with which it is charged. The Court grants Skypatrol leave to amend to allege more specific details about the alleged misrepresentations. While the Court does not expect Skypatrol to be able to allege the names of the persons who allegedly made the misrepresentations, in order to provide Procon with adequate notice, Skypatrol must allege some information about the person or persons who made the misrepresentations (such as if the person was a sales representative), when the misrepresentations were made, and to **[*6]** whom. In addition, Skypatrol must allege the substance of the false statements, and specify what it means by "at least in part due to Procon's litigation tactics."

II. Lanham Act

Plaintiff contends that Skypatrol has not stated a claim for unfair competition under the Lanham Act because Skypatrol has not alleged any facts showing that plaintiff acted in bad faith. Plaintiff relies on *Zenith Electronics Corporation v. Exzec, Inc., 182 F.3d 1340, (Fed. Cir. 1999)*, in which the Federal Circuit held,

> ***HN1***[] [B]efore a patentee may be held liable under *§ 43(a)* for marketplace activity in support of its patent, and thus be deprived of the right to make statements about potential infringement of its patent, the marketplace activity must have been undertaken in bad faith. This prerequisite is a function of the interaction between the Lanham Act and patent law, and is in addition to the elements required by *§ 43(a)* itself, as *§ 43(a)* alone does not require bad faith [citations].

Id. at 1353.

The parties dispute whether Skypatrol has alleged "marketplace activity in support of [Procon's] patent." *Id.* Plaintiff argues that Skypatrol fails to allege that Procon made statements about Skypatrol's business outside **[*7]** the context of informing customers of patent infringement, while Skypatrol contends that Procon's false statements about Skypatrol's financial condition and business operations are distinct from its claims of patent infringement.

The Court concludes that, as currently pled, it is unclear whether Skypatrol's Lanham Act counterclaim seeks to hold plaintiff liable for marketplace activity in support of its patent. The Court agrees with Skypatrol that Procon's alleged misstatements about Skypatrol going out of business, on their own, do not constitute marketplace activity in support of Procon's patent. However, the counterclaim alleges that Procon has represented, and is representing that "Skypatrol is going out of business, at least in part due to Procon's litigation tactics." Counterclaim ¶ 71. It is unclear what Skypatrol means by "Procon's litigation tactics." If Skypatrol is alleging that Procon told third parties that Skypatrol is going out of business because Skypatrol is infringing Procon's patents, such conduct would appear to constitute "marketplace activity in support of its patent." *Zenith Elecs., 182 F.3d at 1353*; *see id. at 1354* (patent holder's statement that alleged infringer **[*8]** could not design around patent was marketplace activity in support of patent).

The Court will grant Skypatrol leave to amend to clarify the nature of its Lanham Act counterclaim. In amending this claim, Skypatrol should take care to allege all of ***HN2***[] the elements of a such a claim: "(1) that the defendant . . . made a false or misleading statement of fact in commercial advertising or promotion about the plaintiff's goods or services; (2) that the statement actually deceives or is likely to deceive a substantial segment of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the defendant caused the statement to enter interstate commerce; and (5) that the statement results in actual or probable injury to the plaintiff." *Zenith Elecs., 182 F.3d at 1348*. If Skypatrol's amended counterclaim alleges conduct by Procon in support of its patent such that the bad faith requirement of *Zenith* applies, Skypatrol must also allege facts in support of its allegation that Procon is asserting patents it knows are not valid and not infringed; it is not sufficient to simply make such an allegation "on information and belief."

III. UCL

With **[*9]** regard to the UCL, plaintiff argues that Skypatrol has not alleged any facts depicting any deception of Skypatrol's customers or any facts to support an inference that plaintiff committed an unfair practice that broke or violated the spirit of antitrust laws. ***HN3***[] "When a party sues an ostensible competitor under the 'unfair' prong of *§ 17200*, the claim may be proven only on the basis of 'conduct that threatens an incipient violation of an anti-trust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" *Watson Labs, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1118 (C.D. Cal. 2001)* (quoting *Cel–Tech Commn's, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

Skypatrol contends that under *Watson Labs* and *Cel-Tech* it need not allege an antitrust violation, and instead can state a claim under the "unfair" prong by alleging conduct that harms or threatens competition. While Skypatrol is correct in its statement of the law, Skypatrol's counterclaim does not actually allege that plaintiff's conduct "significantly threatens or **[*10]** harms competition." Instead, the counterclaim only alleges that Skypatrol has lost at least one customer based on Procon's alleged misrepresentations. Harm to a competitor is not the same as harm to competition, and Skypatrol must allege conduct that significantly threatens or harms competition in order to state a claim. *Watson Labs, 178 F. Supp. 2d at 1118-19*. In addition, if Skypatrol's UCL claim is based on Procon's marketplace activity in support of its patent, Skypatrol must allege facts showing bad faith on the part of Procon. *See Zenith Elecs., 182 F.3d at 1355*. Accordingly, the Court GRANTS plaintiff's motion and GRANTS Skypatrol leave to amend.

IV. Litigation privilege

Plaintiff also contends that Skypatrol's counterclaim fails because Procon's alleged misrepresentations are protected by California's litigation privilege. ***HN4***[] The litigation privilege, codified at *California Civil Code § 47*, "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved." *Jacob B. v. County of Shasta, 40 Cal. 4th 948, 56 Cal. Rptr. 3d 477, 154 P.3d 1003, 1007 (Cal. 2007)* **[*11]** (citation omitted). The privilege bars all tort causes of action other than malicious prosecution and applies to any communication "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson, 50 Cal.3d 205, 219-220, 266 Cal. Rptr. 638, 786 P.2d 365 (1990)*.

In light of the Court's dismissal of the counterclaim with leave to amend, the Court finds it unnecessary to decide whether the alleged misrepresentations to Skypatrol's current and potential customers are protected by the litigation privilege. However, the Court notes that "[s]tatements to nonparticipants in the action are generally not privileged under *section 47, subdivision (b)*, and are thus actionable unless privileged on some other basis." *Rothman v. Jackson, 49 Cal. App. 4th 1134, 1141, 57 Cal. Rptr. 2d 284 (1996)*. In addition, in order for the litigation privilege to apply, "the communicative act – be it a document filed with the court, a letter between counsel or an oral statement – must function as a necessary or useful step in the litigation process and must serve its purposes." *Id. at 1146*. **[*12]** While it is unclear what Skypatrol means by its allegation that Procon has represented that Skypatrol is going out of business "at least in part due to Procon's litigation tactics," the other alleged statements – that Skypatrol is going out of business, and that Skypatrol's efforts to sell additional products were aimed at collecting as much money as possible before closing or going bankrupt – do not function as a necessary or useful step in the process of litigating plaintiff's claims of patent infringement.

CONCLUSION

For the foregoing reasons, the Court GRANTS plaintiff's motion and GRANTS Skypatrol leave to amend. The amended counterclaim must be filed by **December 22, 2011.**

IT IS SO ORDERED.

Dated: November 29, 2011

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

End of Document

[Garon v. eBay, Inc.](#)

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

November 30, 2011, Decided; November 30, 2011, Filed

NO. C 10-05737 JW

Reporter

2011 U.S. Dist. LEXIS 148621 *; 2011 WL 6329089

Max Garon, et al., Plaintiffs, v. eBay, Inc., Defendant.

Subsequent History: Related proceeding at *Dunkel v. eBay Inc., 2013 U.S. Dist. LEXIS 13866 (N.D. Cal., Jan. 31, 2013)*

Prior History: *Garon v. Ebay, Inc., 2011 U.S. Dist. LEXIS 171436 (N.D. Cal., July 1, 2011)*

Core Terms

sellers, antitrust, auction, cause of action, Sherman Act, eBay, allegations, pleaded, unjust enrichment, online, unfair, trade libel, monopolization, competitors, special damage, anti-competitive, ratings, economic loss rule, e-mail, cognizable, prong, tortious interference, economic relations, customers, feedback, libelous, website, supra-competitive, implemented, monopolist

Counsel: **[*1]** For Max Garon, on behalf of themselves and all others similarly situated and on behalf of the general public of the United States, Phil Lentsch, Office Dynamics, Fred Rickel, Ben Guz, Amy Rickel, Jonathan Pais, Eric Gieseke, Jason Adams, Liquidation Sports Inc., Labb Surplus, Steven Shellhorn, Dan Goodwill, Nate Demont, on behalf of themselves and all others similarly situated and on behalf of the general public of the United States, Plaintiffs: Marina Trubitsky, LEAD ATTORNEY, Law Office of Marina Trubitsky, New York, NY.

For eBay, Inc., a Foreign corporation, Defendant: Thomas Patrick Brown, O'Melveny & Myers LLP, San Francisco, CA.

Judges: JAMES WARE, Chief United States District Judge.

Opinion by: JAMES WARE

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs [1] bring this putative class action against eBay ("Defendant"), alleging, *inter alia*, violations of the Sherman Act, *15 U.S.C. §§ 1 et seq.*, and various state law claims. Plaintiffs allege that Defendant engaged in anti-competitive and monopolistic conduct by implementing a customer feedback policy that resulted in sellers with low feedback ratings being excluded from Defendant's website.

Presently before the Court is Defendant's Motion to Dismiss. [2] The Court conducted a hearing on October 17, 2011. Based on the papers submitted to date and oral argument, the Court GRANTS Defendant's Motion to Dismiss.

II. BACKGROUND

A. Factual Allegations

In a First Amended Complaint [3] filed on June 25, 2011, Plaintiffs allege as follows:

> Defendant is the world's largest online auction house. (FAC ¶ 22.) Defendant controls in excess of 90% to 98% of the online auction market. (Id. ¶ 25.) Defendant's dominance as an online auctioneer exists because it has the largest amount of buyers and sellers in a single place. (Id. ¶ 26.) In addition, Defendant benefits from a network effect, where the value of a product or service increases as more people use it. (Id. ¶ 31.)
>
> On or about May 2008, Defendant utilized its dominant position and economic **[*3]** power within the online auctions market to implement the Detailed Seller Rating Policy ("DSR Policy"). (FAC ¶ 35.) This policy appreciably restrained competition within the online auction market to the financial benefit of Defendant. (Id.) Specifically, the DSR policy affords buyers the opportunity to rate the service provided by eBay sellers on a one to five star scale in four different areas. (Id. ¶ 36.) These areas are "item as described," "communication," "shipping time" and "shipping charges." (Id.)
>
> Recently, Defendant has added requirements to the DSR policy which further undermine the ability of small auction sellers to compete with larger sellers. (FAC ¶ 37.) Defendant now mandates that all eBay sellers must have less than a specified percentage of one and two star ratings in every category. (Id.) In addition, sellers are required to maintain a DSR average of 4.3 stars to operate freely on eBay. (Id. ¶ 40.) This policy is destroying the business and livelihood of many well-established, small eBay auction sellers. (Id. ¶ 38.) A multitude of sellers who had feedback ratings of 90-100% now have restrictions on their accounts or have had their accounts permanently disabled due to **[*4]** low DSR ratings. (Id.) The DSR policy leaves sellers vulnerable to "feedback extortion," where unscrupulous buyers use the power of DSR rankings to force sellers to provide them items and services above and beyond what they have paid for. (Id. ¶ 39.)
>
> In addition, the categories utilized in the DSR rankings are prejudicial to small sellers. (FAC ¶ 41.) The DSR policy contains no mechanism to prevent malicious competitors from artificially lowering a competitor's DSR rating, as DSR ratings are anonymous. (Id. ¶ 42.) Large sellers are often exempt from DSR penalties to which small sellers are subject, and have a much greater chance of rehabilitating their DSR rankings due to the volume of business they conduct. (Id.) Small business owners have no incentive to enter the online auctions market because it is now common knowledge that a large competitor can cause the DSR ratings of smaller sellers to plummet. (Id.)

---

[1] Plaintiffs are Max Garon, Phil Lentsch, Office **[*2]** Dynamics, Amy Rickel, Ben Guz, Jonathan Pais, Eric Geiseke, Jason Adams, Liquidation Sports, Inc., Labb Suruplus, Steven Shelhorn, Dan Goodwill and Nate Demont.

[2] (eBay's Notice of Motion and Motion to Dismiss Plaintiffs' First Amended Class Action Complaint; Memorandum of Points and Authorities in Support Thereof, hereafter, "Motion," Docket Item No. 29.)

[3] (See First Amended Class Action Complaint, hereafter, "FAC," Docket Item No. 20.)

> The intent and goal of Defendant's DSR policy was to attract large sellers to its website, thereby making sure that large sellers do business only with Defendant. (FAC ¶ 44.) By attracting large sellers from their competitors, Defendant sought to increase its dominance over its competitors **[*5]** even further. (Id.)
>
> In addition, by using market dominance in one market (the market for the provision of online auction services) to extend its market power into the online auction market, Defendant leveraged its monopoly power, which is prohibited under *§ 2* of the Sherman Act. (FAC ¶ 45.)

On the basis of the allegations above, Plaintiffs allege seven causes of action: (1) Monopolization under *§ 2* of the Sherman Act, *15 U.S.C. §§ 15*, *26*; (2) Attempted Monopolization under *§ 2* of the Sherman Act; (3) Unlawful and Unfair Competition in Violation of California's Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200 et seq.* (the "UCL"); (4) Tortious Interference; (5) Trade Libel; (6) Unjust Enrichment; and (7) Negligence.

Plaintiffs seek to assert these claims on behalf of three classes of individuals allegedly impacted by the DSR policy: (1) all companies and individuals whose eBay accounts were closed or limited in accordance with eBay's DSR policy; [4] (2) all companies and individuals whose eBay accounts were closed by Defendant for arbitrary and capricious reasons; [5] and (3) all companies and individuals **[*6]** who are buyers within Defendant's platform and are deprived of the ability to purchase from small businesses which have been limited or closed due to Defendant's DSR policy. [6]

B.Procedural History

On December 15, 2010, Plaintiffs filed their initial Class Action Complaint. (See Docket Item No. 1.) On April 28, 2011, Defendant moved to dismiss for failure to state a claim. (See Docket Item No. 16.) On June 25, 2011, rather than responding to Defendant's Motion to Dismiss, Plaintiffs filed a First Amended Complaint. (See Docket Item No. 20.) Although Plaintiffs' filing of the Amended Complaint did not comport with *Fed. R. Civ. P. 15(a)*, the Court accepted Plaintiffs' Amended Complaint pursuant to Ninth Circuit caselaw dictating that *Rule 15* should be construed with extreme liberality, and accordingly denied as moot Defendant's Motion to Dismiss. (See Docket Item No. 22.) Only July 1, 2011, the Court denied Defendant's motion for leave to file a motion for reconsideration. [7]

Presently before the Court is Defendant's Motion to Dismiss.

III. STANDARDS

Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a complaint **[*7]** may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*; *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984)*. For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir. 1973)*.

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[4] (See FAC ¶ 149.)

[5] (See FAC ¶ 158.)

[6] (See FAC ¶ 167.)

[7] (See Docket Item Nos. 23, 25.)

However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*; see also *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988)*. The complaint must plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is plausible **[*8]** on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009)*. Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000)*.

IV. DISCUSSION

Defendant moves to dismiss Plaintiffs' First Amended Complaint on the grounds that: (1) Plaintiffs have not identified a relevant antitrust market or alleged a cognizable antitrust injury as is necessary for a Sherman Act claim; (2) Plaintiffs' UCL claim must also fail, because they have not alleged conduct which amounts to a violation of ***antitrust law***; (3) Plaintiffs have not alleged the required elements of a trade libel claim, because they have not claimed any special damages; (4) Plaintiffs' claim for negligence is barred **[*9]** by the economic loss rule; (5) Plaintiffs' claim for tortious interference with prospective economic relations must fail because Plaintiffs have failed to allege unlawful conduct; and (6) Plaintiffs cannot maintain a cause of action for unjust enrichment because unjust enrichment is not a cause of action in California. [8]

Plaintiffs respond that: (1) Plaintiffs have alleged an antitrust market and antitrust injury in the form of exclusion from that market; (2) having adequately pleaded a violation of the Sherman Act, Plaintiffs have also adequately pleaded a violation of the "unlawful" prong of the UCL; (3) Plaintiffs are not required to allege special damages to succeed on a trade libel claim because the statements at issue were defamatory *per se*; (4) the economic loss rule does not bar suits for intentional torts even where the loss is purely monetary; (5) because Plaintiffs have adequately pleaded antitrust violations, the conduct that interfered with their prospective economic relationships was barred by law and is therefore actionable; and (6) unjust enrichment is recognized as cause of action in California. [9]

The Court considers the adequacy of Plaintiffs' pleadings for each cause of action in turn.

A. Monopolization Under *§ 2* of the Sherman Act

At issue is whether Plaintiffs have adequately pleaded a violation of *§ 2* of the Sherman Act. [10]

To state a monopolization claim under *§ 2* of the Sherman Act, a plaintiff must allege that: (1) the defendant possessed monopoly power in the relevant market; (2) the defendant willfully acquired or maintained that power through exclusionary conduct; and (3) the defendant's conduct caused antitrust injury. See *MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1130 (9th Cir. 2004)* (citation omitted). Antitrust injury is injury "of the type the antitrust laws were intended to prevent." *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 371 (9th Cir. 2003)* (citation omitted). In other words, "a plaintiff must prove that his loss flows from an *anticompetitive* aspect or effect

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[8] (Motion at 8-18.)

[9] (Plaintiffs' Opposition to eBay's Motion to Dismiss **[*10]** Plaintiffs' First Amended Complaint at 1, 17-22, hereafter, "Opp'n," Docket Item No. 36.)

[10] See *15 U.S.C. § 2*.

of the defendant's behavior . . . If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, **[*11]** even if the defendant's conduct is illegal *per se*." *Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001)* (citation omitted) (emphasis in original). Where all a plaintiff has alleged is that his injuries are causally linked to the defendant's illegal activities, that is not enough to maintain a private antitrust action. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

Here, Plaintiffs allege an antitrust market consisting of websites which provide online auction services. Within that market, Plaintiffs allege:

> Defendant's anti-competitive acts have injured Defendant's competitors by attracting all big sellers to Defendant's platform. (FAC ¶ 181.) As a result, Defendant's competitors shall not have large sellers on their platforms which will in turn decrease the overall number of participants [in] their auctions, further reducing their market share. (Id.) Defendant's auction sellers have paid or are likely to pay artificially inflated and supra-competitive fees. (Id. ¶ 180.) Plaintiffs and the Members of their Classes have been injured by their total exclusion from the relevant market. (Id. ¶ 187.) Further, Defendant has grossly abused said monopoly **[*12]** power by causing a grave antitrust injury to Plaintiffs by arbitrarily destroying their business and livelihood while leaving them no suitable alternatives for continuing their business. (Id. ¶ 189.)

Based on the allegations above, it appears that Plaintiffs are advancing two possible theories of antitrust injuries stemming from the DSR policy. However, as explained below, neither of these theories supports Plaintiffs' antitrust claim.

First, it appears that Plaintiffs are alleging that they have been directly excluded from a relevant antitrust market by Defendant's anti-competitive conduct. However, Plaintiffs have only alleged facts sufficient to support the claim that they have been excluded from Defendant's own website; Plaintiffs have not alleged that they were excluded from any other online auction site. The decision of a single company not to do business with a given client generally does not give rise to an antitrust claim. See *TV Commc'ns Network v. Turner Network Tel., Inc., 964 F.2d 1022, 1025 (10th Cir. 1992)* ("[A] company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product"). More fundamentally, even if Plaintiffs were to allege **[*13]** complete exclusion from all online auction websites, this would represent exclusion from an entirely different market than that in which Defendant is an alleged monopolist. Plaintiffs do not compete to provide online auction services (the "Auction Services Market"). Plaintiffs instead compete in the market to auction goods online (the "Sellers Market"), which is an entirely different market. Although success in the Sellers Market depends heavily on having access to the websites that make up the Auction Services Market, Plaintiffs do not allege that Defendant is a monopolist or even a competitor within the Sellers Market. Thus, Plaintiffs cannot state a monopolization claim against Defendant based on their effective exclusion from a market in which Defendant is neither alleged to be a monopolist nor a competitor.

Second, insofar as Plaintiffs' allegations can be construed as claiming that although Defendant implemented the DSR policy to harm competitors in its own market—namely, the Auction Services Market—this policy in effect injured Plaintiffs by shutting down their businesses. This injury, however, is not antitrust injury because it does not "flow from the anticompetitive aspect" **[*14]** of Defendant's behavior. See *Pool Water Prods., 258 F.3d at 1034*. Plaintiffs do not allege any causal connection between diminished competition within the Auction Services Market and the harm to their businesses. Instead, they merely allege that the policy which Defendant used to increase its market share within the Auction Services Market, the DSR policy, also had the effect of harming some businesses within the Sellers Market, including their own. But the allegation that a policy was implemented for anti-competitive reasons, even if true, does not render all grievances regarding that policy actionable under antitrust laws. See *Brunswick Corp., 429 U.S. at 489*. Because Plaintiffs have not alleged that their businesses were closed as a result of harm to competition within the Auction Services Market, they have not alleged an antitrust injury, and therefore have not stated a claim under *§ 2* of the Sherman Act.

Plaintiffs contend that they have alleged antitrust injury because "no one benefits if eBay users have to pay supra-competitive payment fees to consummate a transaction." (Opp'n at 16.) It is true that the payment of supra-competitive fees due to harm to competition in the Auction **[*15]** Services Market would be cognizable antitrust injury if the DSR policy resulted in such fees. Plaintiffs do not allege, however, that any of them actually paid supra-competitive fees. Although Plaintiffs allege that they all used eBay both before and after implementation of the DSR policy, and the First Amended Complaint alleges that this policy has damaged Plaintiffs' businesses, the Complaint does not allege any price increase for the use of Defendant's services after the alleged anti-competitive policy took effect. (See FAC ¶¶ 46-131.) Plaintiffs have also specifically represented to this Court that the injuries for which they seek relief are *not* the payment of supra-competitive fees. [11] Thus, although the payment of monopolistic fees would be sufficient to allege an antitrust injury, Plaintiffs have not done so here, and would be unable to in light of their judicial admission.

Accordingly, the Court GRANTS Defendant's Motion as to Plaintiffs' First Cause of Action. Because the injury claimed by Plaintiffs is not an antitrust injury, allowing Plaintiffs leave to amend their Sherman Act claim would be futile. Thus, the Court DISMISSES Plaintiffs' Sherman Act claim with prejudice.

B. Attempted Monopolization under the Sherman Act

At issue is whether Plaintiffs have adequately stated a claim for attempted monopolization under the Sherman Act.

To state a claim for attempted monopolization, a plaintiff must allege: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury. *Forsyth v. Humana, Inc., 114 F.3d 1467, 1477 (9th Cir. 1997)*. Thus, a claim of attempted monopolization, like a monopolization claim, must allege an antitrust injury in order to be cognizable under *§ 2* of the Sherman Act. Id.

For the reasons stated **[*17]** above, Plaintiffs have not pleaded any antitrust injury or facts sufficient to support such a claim. Accordingly, the Court GRANTS Defendant's Motion as to Plaintiffs' Second Cause of Action and DISMISSES the claim with prejudice.

C. UCL

At issue is whether Plaintiffs have adequately pleaded a violation of the UCL. Plaintiffs seek relief on the grounds that Defendant's DSR policy is both unlawful and unfair. (FAC ¶ 53.) The Court considers Plaintiffs' allegations under each prong of the UCL in turn.

1. Unlawful Conduct

The unlawful prong of the UCL "borrows violations of other laws and treats them as unlawful practices independently actionable." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 839, 33 Cal. Rptr. 2d 438 (Cal. Ct. App. 1994)* (citation omitted). To state a claim under the unlawful prong of the UCL, a plaintiff must allege acts by the defendant that violate some separate law. See *Birdsong v. Apple, Inc., 590 F.3d 955, 960 n.3 (9th Cir. 2009)* (citing *Webb v. Smart Document Solutions, LLC, 499 F.3d 1078, 1082 (9th Cir. 2007))*. Thus, where the conduct alleged by a plaintiff does not violate any law, the plaintiff has not stated a claim for relief under the unlawful prong of the UCL. See id.

Here, Plaintiffs' **[*18]** claim for relief under the unlawful prong of the UCL is contingent on their contention that the DSR policy violates both the Sherman Act and the Cartwright Act. (FAC ¶ 198.) Because the Court has already

[11] (See Plaintiffs' Memorandum in Opposition to Defendant eBay's Administrative Motion to Consider Whether Cases Should Be Related Pursuant to Civil *L.R. 3-12* and *7-11* at 3, Docket Item No. 15 (arguing that this case should not be related to a separate antitrust action against Defendant because plaintiffs in **[*16]** the other case claim injury based on payment of monopolistic fees, while Plaintiffs in the present action seek relief based on their businesses being closed, and not the payment of higher fees).)

found Plaintiffs' Sherman Act claims to be insufficient, Plaintiffs' UCL claim is viable only if they have sufficiently alleged a violation of the Cartwright Act.

The Cartwright Act "prohibits the combination of resources of two or more independent interests for the purpose of restraining commerce and preventing market competition in the variety of ways listed in the statute." *Lowell v. Mother's Cake & Cookie Co., 79 Cal. App. 3d 13, 23, 144 Cal. Rptr. 664 (Cal. Ct. App. 1978)*. The Cartwright Act "does not address *unilateral* conduct." *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986)* (citation omitted) (emphasis in original).

Here, Plaintiffs have alleged only unilateral conduct by Defendant; the Complaint contains no allegations that Defendant collaborated with another independent entity to restrain trade. Because Plaintiffs have not alleged that Defendant collaborated with another interest in restraint of trade, they have not alleged a violation of the Cartwright Act. Thus, because Plaintiffs **[*19]** have failed to state a claim for relief under either the Sherman or Cartwright Acts, Plaintiffs have failed to state a claim under the unlawful prong of the UCL.

2. Unfair Conduct

A business practice is unfair under the UCL if it "offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *People v. Duz-Mor Diagnostic Lab. Inc., 68 Cal. App. 4th 654, 658, 80 Cal. Rptr. 2d 419 (Cal. Ct. App. 1998)* (citation omitted). To find a business practice unfair for purposes of the UCL, a court must generally conduct an "examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 740, 162 Cal. Rptr. 543 (Cal. Ct. App. 1990)*. Therefore, where the pleading states a *prima facie* case of harm stemming from an apparently unfair business practice, dismissal on the pleadings is usually inappropriate, as the court cannot weigh the utility of the defendant's conduct without analysis of some evidence. See id.

Where conduct is alleged to be unfair on the basis that it is anti-competitive, however, a finding that the conduct alleged does not violate **[*20]** the Sherman Act also precludes a finding that it violates the UCL on grounds of unfairness. See *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (Cal. Ct. App. 2001)*. If the same conduct is alleged to be both an antitrust violation and an "unfair" business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not unfair toward consumers. Id.

Here, Plaintiffs have challenged the DSR policy implemented by Defendant on the grounds that it unreasonably restrains trade, but have failed to state a cognizable claim under the Sherman Act. Thus, Plaintiffs' cause of action under the UCL must also be dismissed. See *Chavez, 93 Cal. App. 4th at 375*.

Accordingly, the Court GRANTS Defendant's Motion as to Plaintiffs' Third Cause of Action. The Court further finds that because the UCL claim is entirely contingent upon Plaintiffs' Sherman Act claim, and the Sherman Act claim has been dismissed with prejudice, the UCL claim cannot be cured through amendment. Accordingly, the Court DISMISSES the claim with prejudice.

D. Trade Libel

At issue **[*21]** is whether Plaintiffs have adequately pleaded a cause of action for trade libel.

In California, a claim for trade libel requires (1) a publication, (2) which induces others not to deal with the plaintiff, and (3) special damages. *Aetna Cas. and Sur. Co., Inc. v. Centennial Ins. Co., 838 F.2d 346, 351 (9th Cir. 1998)*. To succeed on a claim for trade libel, a plaintiff must plead and prove special damages in the form of pecuniary loss. *Leonardini v. Shell Oil Co., 216 Cal. App. 3d 547, 572, 264 Cal. Rptr. 883 (Cal. Ct. App. 1989)*. Where an item of special damage is claimed by a plaintiff, the Federal Rules of Civil Procedure require that the item be specifically stated. *Fed. R. Civ. P. 9(g)*. Thus, while a dollar amount need not be specified, a plaintiff must allege the existence of an established business, the amount of sales for a substantial period preceding the publication, and facts showing that such losses in sales were the natural and probable result of such a publication. See *Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 12 F. Supp. 2d 1035, 1047 (C.D. Cal. 1998)* (citation omitted).

Here, Plaintiff Rickel alleges that Defendant sent an e-mail to his eBay customers after his account was closed **[*22]** which defamed him by stating that his account was a threat to eBay security. (FAC ¶ 217.) As to damages, Plaintiffs allege:

> [A]s a direct and proximate result of [the] emails, Plaintiff Fred Rickel and the members of his class have suffered and continue to suffer actual pecuniary loss due to the loss of business reputation, loss of value of the business, loss of business opportunities, and loss of goodwill. (FAC ¶ 219.) Specifically, Plaintiff Fred Rickel has not only lost his customers, but was also deprived of his all of his [sic] annual profits due to inability to utilize the acquired inventory that became useless after Plaintiff Fred Rickel lost his customers. (Id.) Such losses in sales were the natural and probable result of the publication of emails and closing of his accounts by Defendant eBay and PayPal. (Id.)

Based on the allegations above, it appears Plaintiff Rickel is claiming that the loss of his customers and his business on eBay constitutes trade libel damages. However, Plaintiff Rickel also alleges that the libelous e-mail was sent after Defendant closed his eBay account. (FAC ¶ 217.) Because the Complaint clearly alleges that Plaintiff Rickel's eBay business was shut **[*23]** down completely before the allegedly defamatory e-mail was sent, the Court finds that it would be impossible for Plaintiff Rickel to have lost his eBay customers as a result of the e-mail. Thus, Plaintiff Rickel has not pleaded special damages as is required to state a claim for trade libel under California law.

Plaintiffs contend that they do not need to plead special damages because the statements at issue are libelous per se, and statements which are libelous per se are actionable without a showing of special damages. (Opp'n at 18.) Plaintiffs contend that because Plaintiff Rickel had maintained a positive feedback rating prior to the implementation of the DSR policy, a reasonable person reading Defendant's e-mail would assume that Plaintiff Rickel had committed a crime, and accusing someone of a crime is generally considered to be libelous per se. [12] (Opp'n at 19.) This contention in misguided, as Plaintiffs base the inference that Plaintiff Rickel had committed a crime on an extrinsic fact—namely, his previously high feedback rating—defeating the argument that the e-mail is libelous without reference to extrinsic fact. Because Plaintiff Rickel has not alleged a statement that is **[*24]** libelous per se or pleaded special damages, his claim for trade libel fails as a matter of law.

Accordingly, the Court GRANTS Defendant's Motion as to Plaintiffs' Fifth Cause of Action and DISMISSES the claim with prejudice because amendment would be futile.

E. Negligence

At issue is whether Plaintiffs may maintain a cause of action for negligence against Defendant or if the economic loss rule bars such an action for purely economic damages.

The economic loss rule "requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." *Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 988, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004)*. Thus, in California, plaintiffs may seek remedies for negligence only where they experience "physical injury to person or property, and not for pure economic losses." *Chang Bee Yang v. Sun Trust Mortg., Inc., No. 1:10-CV-01541 AWI, 2011 U.S. Dist. LEXIS 31162, 2011 WL 902108, at *7 (E.D. Cal. Mar. 15, 2011)* **[*25]** (citation omitted). Purely economic damages to a plaintiff which stem from disappointed expectations from a commercial transaction must be

[12] A statement can be considered libelous per se if it is "defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact." *Cal. Civ. Code § 45a*.

addressed through contract law; negligence is not a viable cause of action for such claims. See id.; *Robinson Helicopter, 34 Cal. 4th at 988*.

Here, in support of their negligence claim, Plaintiffs allege in pertinent part:

> Defendant has an obligation to establish and maintain adequate procedures to avoid unfairness and bias to large eBay auction sellers on its platform. (FAC ¶ 227.) Defendant also has a duty to not close eBay seller accounts without an adequate investigation and explanation. (Id.) Defendant breached these obligations by implementing the DSR policy which is biased against small eBay auction sellers. (Id. ¶ 228.) Further Defendant breached these obligations by closing the eBay auction seller accounts of Plaintiffs without due investigation and explanation. (Id.)

Based on the allegations above, the Court finds that these claims are barred by the economic loss rule. The bounds of Defendant's duty to Plaintiffs, and any remedies stemming from breach of that duty, are solely within the purview of the contractual relationship between Defendant **[*26]** and its clients. The economic loss rule does not allow Plaintiffs to maintain an action for negligence for monetary losses stemming from breach of this alleged duty.

The cases relied on by Plaintiffs in support of their negligence claim are not to the contrary. [13] These cases instead stand for the proposition that certain intentional torts between parties to a contract are actionable even if they only result in economic loss. This proposition is inapposite to the economic loss rule, which applies only to negligence and strict liability cases, and not intentional torts. See *Jackson v. Balanced Health Prods., Inc., No. 08-05584 CW, 2009 U.S. Dist. LEXIS 48848, 2009 WL 1625944, at *5 (N.D. Cal. June 10, 2009)*. Since Plaintiffs have asserted a cause of action for negligence, and not an intentional tort against Defendant, this claim is within the category of cases barred by the economic loss rule.

Accordingly, the Court GRANTS Defendant's Motion as to Plaintiff's Seventh Cause of Action. The Court finds that the defects with this claim cannot be cured by amendment, and DISMISSES the claim with prejudice.

F. Tortious Interference with Prospective Economic Relationships

At issue is whether Plaintiffs **[*27]** have adequately pleaded a cause of action for tortious interference with prospective economic relationships.

"To establish a claim for interference with prospective economic advantage, a plaintiff must plead that the defendant engaged in an independently wrongful act." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1158, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. An act is "independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." Id. at 59. An act which has the effect of interfering with a prospective economic relationship but is not unlawful cannot give rise to a tortious interference claim. See id.

Here, having found that Plaintiffs have not adequately pleaded any other violation of law, their claim for tortious interference with prospective economic relationships must also fail. Accordingly, the Court GRANTS Defendant's Motion as to Plaintiff's Fourth Cause of Action, and DISMISSES the claim with prejudice as amendment would be futile.

G. Unjust Enrichment

At issue is whether Plaintiffs' claim for unjust enrichment is cognizable under California law.

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[13] (See Opp'n at 21-22.)

There is no cause of action in California for **[*28]** unjust enrichment. *Melchior v. New Line Prods., Inc., 106 Cal. App. 4th 779, 793, 131 Cal. Rptr. 2d 347 (Cal. Ct. App. 2003)*; *McBride v. Boughton, 123 Cal. App. 4th 379, 387-88, 20 Cal. Rptr. 3d 115 (Cal. Ct. App. 2004)*. "The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." *Melchior, 106 Cal. App. 4th at 793* (citation omitted). A court may look past the formal label of a claim for "unjust enrichment" if the allegations state a claim which allows for the type of recovery supported by the principle of unjust enrichment. *McBride, 123 Cal. App. 4th at 387*. A claim for unjust enrichment, however, cannot stand alone as an independent cause of action; it must be accompanied by a another cause of action which could give rise to recovery under such a theory. See *Miletak v. Allstate Ins. Co., No. C 06-03778 JW, 2010 U.S. Dist. LEXIS 26913, 2010 WL 809579, at *8 (N.D. Cal. Mar. 5, 2010)*.

Here, the Court has found that Plaintiffs have not stated any other cause of action which could give rise to recovery under a theory of unjust enrichment. Because the claim for unjust enrichment cannot stand alone as a cause of action, it also must be dismissed **[*29]** with prejudice. Accordingly, the Court GRANTS Defendant's Motion as to Plaintiffs' Sixth Cause of Action, and DISMISSES the claim with prejudice.

V. CONCLUSION

The Court GRANTS Defendant's Motion to Dismiss and DISMISSES Plaintiffs' First Amended Complaint with prejudice.

Dated: November 30, 2011

/s/ James Ware

JAMES WARE

United States District Chief Judge

JUDGMENT

Pursuant to the Court's November 30, 2011 Order Granting Defendant's Motion to Dismiss, judgment is entered in favor of Defendant eBay, Inc. and against Plaintiffs Max Garon, Phil Lentsch, Office Dynamics, Amy Rickel, Fred Rickel, Ben Guz, Jonathan Pais, Eric Gieseke, Jason Adams, Liquidation Sports, Inc., Labb Surplus, Steven Shellhorn, Dan Goodwill and Nate Demont.

Each party shall bear their own fees and costs. The Clerk shall close this file.

Dated: November 30, 2011

/s/ James Ware

JAMES WARE

United States District Chief Judge

Global Truss America LLC v. GLP German Light Prods.

United States District Court for the Central District of California

December 1, 2011, Decided; December 1, 2011, Filed

CV 11-00168 SJO (SSx)

Reporter

2011 U.S. Dist. LEXIS 168714 *

Global Truss America LLC v. GLP German Light Products Inc., et al.

Prior History: *Global Truss Am. LLC v. GLP German Light Prods., 2011 U.S. Dist. LEXIS 164689 (C.D. Cal., Jan. 11, 2011)*

Core Terms

Truss, products, Marks, summary judgment, trademark, imported, manufacturer, exclusive distributor, trade libel, registration, commerce, genuine, ownership, registered, prospective economic advantage, intentional interference, Lanham Act, distributor, argues, partial summary judgment, defamation, parties, customer, invoices, infringing, affirmative defense, trade secret, counterclaim, Appointment, Intervening

Counsel: **[*1]** COUNSEL PRESENT FOR PLAINTIFF: Not Present.

COUNSEL PRESENT FOR DEFENDANTS: Not Present.

Judges: HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE.

Opinion by: S. JAMES OTERO

Opinion

CIVIL MINUTES - GENERAL

PROCEEDINGS (in chambers): ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY PARTIAL SUMMARY JUDGMENT; AND PARTIAL SUMMARY JUDGMENT [Docket No. 64]**; ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** [Docket No. 72]

This matter is before the Court on Defendants GLP German Light Products, Mark Ravenhill, and Intervening Plaintiff B&K Braun GMBH's (collectively, "Defendants") Motion for Summary Judgment as to Plaintiff's Claims, or alternatively Partial Summary Judgment; and Partial Summary Judgment Granting Defendants and Intervening Plaintiff's Counterclaims and Claim ("Defendants' Motion"), filed August 15, 2011, and Plaintiff Global Truss America LLC's ("Plaintiff") Motion for Partial Summary Judgment ("Plaintiff's Motion"), filed August 15, 2011. (Docket Nos. 64, 72.) On August 29, 2011, Defendants filed their Opposition (Docket No. 85) to which Plaintiff filed its Reply (Docket No. 127) on September 12, 2011. On August 29, 2011, Plaintiff filed **[*2]** its Opposition (Docket No. 96) to which Defendants filed their Reply (Docket No. 122) on September 12, 2011.

On August 29, 2011, Plaintiff submitted a Request to Strike Portions of Evidence Submitted in Support of Defendants' Motion for Summary Judgment ("Plaintiff's Motion to Strike"). (Docket No. 96.) On September 12, 2011, Defendants filed a Reply to Plaintiff's Objections and Motion to Strike. (Docket No. 125.) Defendants filed their Objection to and Request to Strike Plaintiff's Evidence in Opposition to Defendants' Motion for Summary Judgment ("Defendants' Motion to Strike") on September 12, 2011. (Docket No. 126.) On September 13, 2011, Plaintiff filed its Response to Defendants' Motion to Strike. (Docket No. 130.)

The Court found these matters suitable for disposition without oral argument and vacated the hearings scheduled for September 26, 2011. *See* *Fed. R. Civ. P. 78(b)*. For the following reasons, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Partial Summary Judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. General Background

Plaintiff is a limited liability company formed in the state of California. (Decl. of Toby Velazquez **[*3]** in Supp. of Pl.'s Mot. ("Velazquez Mot. Decl.") ¶ 2.) On September 18, 2007, and February 5, 2008, Plaintiff registered the Global Truss logo and Global Truss name (collectively, "Global Truss Marks") with the United States Patent and Trademark Office ("USPTO"). (Velazquez Mot. Decl. ¶ 3, Ex. 2.) Plaintiff recorded the Global Truss Marks with the United States Customs and Border Protection ("Customs") on November 8, 2010. (Velazquez Mot. Decl. ¶¶ 5, 6, Exs. 4, 5.)

Plaintiff distributes and sells trussing products in the United States. (Decl. of Toby Velazquez in Supp. of Pl.'s Opp'n ("Velazquez Opp'n Decl.") ¶ 16.) In 2002, a distribution group was formed to manufacture and sell trussing products; which included: Plaintiff, B&K Bruan Gmbh ("B&K"), and Taiwan Georgia Corporation ("TGC") (collectively, "Distribution Group").[1] (Velazquez Decl. ¶ 11.) Prior to 2003, Plaintiff was known as Stage Tool America LLC and advertised its trussing products in the United States under the "Stage Tools" name and logo. (Decl. of Charles Davies in Supp. of Pl.'s Mot. ("Davies Decl.") ¶¶ 2-4.) However, B&K was unable to register a similar "Stage Tools" mark in Germany and the Global Truss name and marks **[*4]** were created for the Distribution Groups' trussing products. Plaintiff was encouraged by B&K and TGC to adopt the Global Truss name and logo in order to have the brand name recognized worldwide. (Decl. of Joshua A. Schaul in Supp. of Pl.'s Opp'n ("Schaul Opp'n Decl.") Ex. 4, at 55:17-20, 60:15-61:2, 62:7-15.) Plaintiff adopted the Global Truss name and marks and changed its company name to Global Truss America LLC in 2005. (Davies Decl. ¶¶ 5-6; Velazquez Decl. ¶ 2.)

B&K is a wholesaler of sound and lighting equipment with Hartmut Braun as its Chief Executive Officer. (Decl. of Hartmut Braun in Supp. of Defs.' Mot. ("Braun Decl.") ¶¶ 1-2, Ex. 1.) On March 13, 2003, B&K applied to register the Global Truss Marks with the German Patent and Trademark Office. (Braun Decl. 15, Ex. 3.) On August 4, 2004, Mr. Braun from B&K and Mr. Davies from Global Truss America signed an agreement which stated that Mr. Davies would not sell Global Truss products in Europe. (Braun Decl. ¶ 19, Ex. 8.) This is the only written exclusivity agreement between the parties.

Defendant GLP German Light Products, Inc. ("GLP") is a distributor of entertainment lighting products, including Global Truss products. (Decl. **[*5]** of Mark Ravenhill in Supp. of Defs.' Mot. ("Ravenhill Decl.") ¶ 2, Ex. 1.) Defendant Mark Ravenhill is the assistant secretary of GLP and is acting as the president of GLP. (Ravenhill Decl. ¶ 1.) Although GLP and B&K are not related companies, B&K has an extensive ownership interest in GLP. B&K also finances the purchase of Global Truss branded products for GLP so that GLP can import the products into the United States. (Schaul Opp'n Decl. Ex. 4, at 148:18-148:21; Ex. 5, at 61:12-61:19, 97:24-99:16.)

In November 2010, Defendants GLP and Ravenhill imported into the United States four shipping containers of trussing products bearing the Global Truss Marks. (Schaul Opp'n Decl. Ex. 5, at 24:23-25:2, 25:15-25:25.) On December 17, 2010, Plaintiff sought to have GLP's truss shipment seized by the Los Angeles Police Department ("LAPD") claiming GLP's goods to be infringing. (Decl. of Erica J. Pruetz in Supp. of Defs.' Mot. ("Pruetz Decl.") Ex.

[1] TGC also does business under the name Global Truss Corp. (Decl. of George Lee in Supp. of Defs.' Mot. ("Lee Decl.") ¶ 2.)

16.) In 2011, Defendants GLP and Ravenhill imported the following shipping containers of trussing products bearing the Global Truss Marks: one shipping container in March 2011, two shipping containers in April 2011, and one shipping container in July **[*6]** 2011. (Schaul Opp'n Decl. Ex. 5, at 102:7-18, 104:7-105:21.)

Prior to January 2011, Plaintiff's and Defendants' trussing products were both manufactured by a subcontractor, Aluforce Industrial Co. ("Aluforce") (Lee Decl. ¶ 3.) On January 31, 2011, TGC suspended shipments of Global Truss products to Plaintiff. (Lee Decl. ¶ 19.) After January 31, 2011, Plaintiff's Global Truss products are manufactured in Los Angeles, China, and the Czech Republic. (Velazquez Opp'n Decl. ¶ 26.) Defendants do not purchase their Global Truss products from any of Plaintiff's current manufacturers. (Velazquez Opp'n Decl. ¶¶ 20-21.)

Defendant GLP published three press releases on its Facebook page (www.facebook.com/GLP.German.Light.Products) and on the Projection, Lights and Staging News website (www.psln.com) regarding its distribution of Global Truss products in the United States. (First Am. Compl. ("FAC") ¶ 36, ECF No. 18.) In December 2010, GLP announced its appointment as the authorized distributor of Global Truss products. (Ravenhill Decl. ¶ 9, Ex. 3.) In February 2011, GLP issued a press release confirming its appointment as an authorized distributor. (Ravenhill Decl. ¶ 10, Ex. 4.) Lastly, in June 2011, **[*7]** GLP announced that it was the exclusive distributor of the Global Truss products in the United States. (Ravenhill Decl. ¶ 11, Ex. 5.) Following GLP's press releases, TGC sent Plaintiff a termination letter on July 21, 2011. (Lee Decl. ¶ 22, Ex. 5.)

Plaintiff also published two press releases regarding GLP's distribution of Global Truss products. (Pruetz Mot. Decl. Exs. 20, 21.) Plaintiff's statements were published on its website, sent to industry trade magazines, and sent via email blasts. (Ravenhill Decl. ¶ 20, Ex. 8.) On January 13, 2011 and June 27, 2011, Plaintiff published the following statements: (1) GLP has wrongfully implied that Global Truss is the source of the products; (2) GLP "made a deliberate effort . . . to misappropriate Global Truss' name and trademarks through wrongful and improper practices"; (3) GLP sells unauthorized products that bear the specious Global Truss Marks; (4) GLP falsely stated that George Lee is the CEO of Global Truss; (5) GLP committed a blatant and willful violation of the law; and (6) GLP is an infringer and products being sold by GLP are not authorized by Global Truss. (Pruetz Mot. Decl. Exs. 20, 21.) In the beginning of 2010 or earlier, Defendant **[*8]** GLP acquired information regarding Plaintiff's price lists and customer lists. (FAC ¶ 44.) GLP acquired Plaintiff's price list when a dealer sent the list to one of GLP's salesmen. (Ravenhill Decl. ¶ 19, Ex. 7.) In its Complaint, Plaintiff alleges that by acquiring Plaintiff's price and customer lists, GLP gained confidential knowledge of: the identities and information relating to dealers of customers of Plaintiff's products, the identities and information relating to vendors or potential vendors, and the details of the types and volume of Global Truss products that Plaintiff distributes through its dealers. (FAC ¶ 44.)

B. <u>Parties' Claims</u>

As a result of the aforementioned events, Plaintiff filed a Complaint against Defendants GLP and Ravenhill in this Court and amended its Complaint on January 18, 2011 ("Complaint"). (Docket Nos. 1, 18.) The Complaint alleges seven causes of action: (1) violation of the Lanham Act; (2) trade libel; (3) misappropriation of trade secrets; (4) intentional interference with prospective economic advantage; (5) negligent interference with prospective economic advantage; (6) unfair business practices; and (7) violations of the Tariff Act. (*See generally* FAC) **[*9]**

Defendants GLP and Ravenhill filed Counterclaims against Plaintiff on February 8, 2011, alleging: (1) trademark cancellation; (2) defamation; (3) trade libel; (4) unfair competition; and (5) intentional interference with prospective economic advantage. (*See generally* Countercl.)

On March 17, 2011, B&K moved to intervene in this action. (Docket No. 41.) This Court granted B&K's motion to intervene on April 18, 2011. (Docket No. 50.) Intervening Plaintiff B&K filed its Intervenor Complaint against Plaintiff, filed on April 20, 2011, alleging two causes of action: (1) trademark cancellation; and (2) copyright infringement. (*See generally* Intervenor Compl., ECF No. 51.) Defendant GLP, Defendant Ravenhill, and Intervening Plaintiff B&K bring their Motion for Summary Judgment as to Plaintiff's claims against them and as to their claims against Plaintiff. Plaintiff brings its Motion for Partial Summary Judgment as to its claims against Defendants and its affirmative defense against Intervening Plaintiff B&K's copyright claim. (*See generally* Defs.' Mot; Pl.'s Mot.)

II. DISCUSSION

Defendants bring a Motion seeking summary judgment as to Plaintiff's claims for Lanham Act violations, Tariff Act violations, **[*10]** trade libel, misappropriation of trade secrets, negligent interference with prospective economic advantage, intentional interference with prospective economic advantage, and unfair competition. (*See generally* Defs.' Mot.) Defendants also seek partial summary judgment as to Defendants' Counterclaims for trademark cancellation, trade libel, defamation, and intentional interference with prospective economic advantage. (*See generally* Defs.' Mot.) Plaintiff brings a Motion seeking partial summary judgment as to Plaintiff's claims for unauthorized importation under the Lanham Act and Tariff Act and its affirmative defense of laches on Intervening Plaintiff B&K's copyright infringement claim. (*See generally* Pl.'s Mot.) Plaintiff also seeks summary judgment as to its prayer for: (1) an award of the maximum amount of statutory damages; (2) permanent injunction; (3) seizure of Global Truss branded trussing products from GLP; (4) attorneys' fees; and (5) costs of suit. (*See generally* Pl.'s Mot.)

A. Legal Standard

Rule 56(a) of the Federal Rules of Civil Procedure mandates that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of **[*11]** law." *Fed. R. Civ. P. 56(a)*. The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000)* (citations omitted).

In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party does not need to produce any evidence or prove the absence of a genuine issue of material fact. *See* *Celotex Corp., 477 U.S. at 325*. Rather, the moving party's initial burden "may be discharged by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." *Id.* Once the moving party meets its initial burden, the "party asserting that a fact cannot be or is genuinely disputed must support the assertion." *Fed. R. Civ. P. 56(c)(1)*. "The mere existence of a scintilla of evidence in support of the [nonmoving party]'s position will be insufficient; there must be evidence on **[*12]** which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *accord* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("[O]pponent must do more than simply show that there is some metaphysical doubt as to the material facts."). Further, "[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment [and] [f]actual disputes that are irrelevant or unnecessary will not be counted." *Anderson, 477 U.S. at 248*. At the summary judgment stage, a court does not make credibility determinations or weigh conflicting evidence. *See* *id. at 249*. A court is required to draw all inferences in a light most favorable to the nonmoving party. *Matsushita, 475 U.S. at 587*.

B. Trademark Counterfeiting and Illegal Importation under the Lanham Act

Defendants move for summary judgment on Plaintiff's claims for trademark infringement and unauthorized importation of goods bearing an infringing mark pursuant to *§ 1114(1)(a)* and *§ 1124* of the Lanham Act. (Defs.' Mot. 9-12.) Plaintiff moves for partial summary judgment as to its claim for unauthorized importation of goods bearing an infringing mark in violation of *§ 1124* of the Lanham Act. (Pl.'s Mot. 8.) Defendants argue that Plaintiff's Lanham Act claims fail because Plaintiff does not own the Global Truss Marks, and the trussing **[*13]** goods at issue are genuine because they "emanate from the same source." (Defs.' Mot. 9:5-10:3.)

The Lanham Act bars importation of goods bearing a mark that "cop[ies] or simulate[s]" a valid registered trademark. *15 U.S.C. § 1124*. Similarly, *§ 1114(1)(a)* prohibits the use of "any **reproduction, counterfeit, copy, or colorable imitation** of a registered mark in connection with the sale . . . of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive," without the consent of the registrant. *15 U.S.C. § 1114(1)(a)* (emphases added). Thus, in order to state a *§ 1114(1)(a)* trademark infringement claim, a plaintiff must establish: "(1) ownership of a valid mark (i.e., a protectable interest); and (2) that the alleged infringer's use of the mark 'is likely to cause confusion, or to cause mistake, or to deceive' consumers." *Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1134 (9th Cir. 2006)* (quoting *15 U.S.C. § 1114(1)(a)*).

The parties' Motions for Summary Judgment hinge on two important issues: (1) whether Plaintiff has ownership rights to the Global Truss Marks; and (2) whether Defendants' parallel imports of the goods at issue are genuinely or materially different from Plaintiff's trussing goods. (*See generally* Defs.' Mot; Pl.'s Mot.; Pl.'s Opp'n.)

1. Ownership Rights to **[*14]** the Global Truss Marks

Defendants assert three grounds in support of their argument that Plaintiff does not own the Global Truss Marks. First, Defendants argue that B&K owns the Marks because it was the first to use the Global Truss Marks in commerce. (Defs.' Mot. 9:27-10:2.) Second, Defendants argue that Plaintiff is not an exclusive distributor of the Global Truss Marks and that the manufacturer of the Global Truss branded products, TGC, has superior ownership rights over Plaintiff. (Defs.' Mot. 10:1-12:5.) Finally, Defendants contend that Plaintiff fraudulently procured its trademark registrations. (Defs.' Mot. 12:6-7.) For the following reasons, the Court is not persuaded that Defendants are entitled to summary judgment regarding Plaintiff's ownership of the Marks.

a. Priority in Use

Defendants assert that B&K, not Plaintiff, was the first to use the Global Truss Marks, and Plaintiff has no ownership rights to the Global Truss Marks. (Defs.' Mot. 9:27-10:2; Braun Decl. ¶ 18.) "It is axiomatic in trademark law that the standard test of ownership is priority of use." *Sengoku Works Ltd. v. RMC Int'l, Ltd., 96 F.3d 1217, 1219 (9th Cir. 1996)*. However, under the territoriality principle, "[p]riority of trademark rights in the United States depends solely upon **[*15]** priority of use in the United States, not on priority of use anywhere in the world." *Grupo Gigante SA De CV v. Dallo & Co., Inc., 391 F.3d 1088, 1093 (9th Cir. 2004)*.

"When proving ownership of a trademark, federal registration is prima facie evidence that the registrant is the owner of the mark." *Sengoku Works, 96 F.3d at 1219*. "However, the non-registrant can rebut this presumption by showing that the registrant had not established valid ownership rights in the mark at the time of registration - in other words, if the non-registrant can show that he used the mark in commerce first, then the registration may be invalid." *Id. at 1220*. The non-registrant must overcome the presumption of ownership by a preponderance of the evidence. *Id. at 1219*.

"Under the principle of first in time equals first in right, priority ordinarily comes with earlier use of a mark in commerce. It is 'not enough to have invented the mark first or even to have registered it first.'" *Grupo Gigante SA De CV, 391 F.3d at 1093*. Defendants contend that "B&K was the first to use the Global Truss marks in interstate commerce in the United States, beginning on May 13, 2003, on invoices sent to American DJ, [Plaintiff's] sister company." (Defs.' Mot. 9:27-10:1; Braun Decl. ¶ 18, Ex. 7; Pruetz Decl. Ex. 3, at 185:20-186:13, 187:6-21.) Plaintiff argues that invoices sent by B&K to Plaintiff's **[*16]** sister company are not legitimate use in commerce sufficient to meet the threshold requirement for ownership by priority in use. (Pl.'s Opp'n 7:18-8:9.)

Under *section 45* of the Lanham Act,

> a mark shall be deemed to be in use in commerce . . . on goods when . . . it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and . . . the goods are sold or transported in commerce.

15 U.S.C. § 1127.

Plaintiff argues that Defendants fail to provide evidence that B&K's invoices "were in any way placed on 'Global Truss' marked products or their containers or the displays associated . . . or on the tags or labels affixed to 'Global Truss' marked products in commerce." (Pl.'s Opp'n 7:24-27.) Plaintiff asserts that B&K's invoices are "arbitrary invoices for Christmas presents and unrelated effects lighting engineering" equipment, and these invoices fail to demonstrate priority in use. (Pl.'s Opp'n 7:28-8:5; Schaul Opp'n Decl. Ex. 4, at 74:21-76:5.) According to Plaintiff's evidence, the invoices only show the Global Truss **[*17]** logo next to four other logos at the bottom of the page. (Schaul Opp'n Decl. Ex. 4, at 74:21-76:5.) Plaintiff argues that Defendants' evidence does not establish that B&K sold, distributed, transported, or advertised any products with the Global Truss Marks in the United States. (Pl.'s Opp'n 7:24-8:9.)

In response, Defendants assert that, in addition to sending invoices, B&K shipped a single piece of truss directly to Plaintiff to be used in an emergency situation. (Defs.' Reply 2:9-10.) Defendants argue that "even a single use constitutes first use and establishes seniority." (Defs.' Reply 2:10-12.) However, Defendants do not cite any evidence to support the assertion that B&K shipped a single piece of truss to Plaintiff. Even if Defendants could establish that B&K shipped a piece of truss to Plaintiff, "the use necessary to acquire protectable rights is more than token or de minimus [sic] use." *See* *Chance v. Pac-Tel Teletrac, Inc., 242 F.3d 1151, 1157 (9th Cir. 2001)*. Defendants have not provided evidence to indicate Defendants **sold** the emergency trussing products to Plaintiff. As such, the Court cannot find that Defendants' shipment was a use of the Global Truss Marks in commerce.

The invoices sent by B&K to American DJ are also insufficient **[*18]** to establish a use of the Global Truss Marks in commerce. Under *15 U.S.C. § 1127*, documents associated with goods, such as invoices, constitute a use of the mark in commerce only when the placement of the marks on the goods themselves is impracticable. *See* *15 U.S.C. § 1127*. Defendants have not provided any evidence to support the argument that placement of the Global Truss Marks on the trussing products was impracticable.

Further, B&K's invoices do not indicate that trussing products bearing the Global Truss Marks were in fact sold or transported in commerce in the United States. Indeed, the invoices presented by Defendants seem completely unrelated to the sale of Global Truss products in the United States. Defendants' evidence therefore does not establish prior use in commerce sufficient to rebut the presumption that Plaintiff, as the registrant, owns the Global Truss Marks. As such, the Court finds as a matter of law that B&K was not the first to use the Global Truss Marks in commerce, and Defendants are not entitled to summary judgment under their priority in use argument.

b. Superior Rights of Ownership

Disputes over trademark ownership often occur when the mark is used on goods manufactured by one company, but **[*19]** distributed by another company. *Sengoku Works Ltd., 96 F.3d at 1220*. In a dispute over the ownership of a trademark between a foreign manufacturer and an exclusive distributor in the United States, "the courts presume that contractual provisions as to trademark ownership are determinative." 4 J. McCarthy on Trademarks and Unfair Competition § 16:48 (4th ed. 2009); *see* *Sengoku Works Ltd., 96 F.3d at 1220*.

Defendants argue Plaintiff is a nonexclusive distributor because there is no exclusivity agreement between Plaintiff and the manufacturer. (Defs.' Mot. 10:23-11:6.) Defendants contend that in absence of an exclusivity agreement, the manufacturer should be presumed the owner of the Global Truss Marks. (Defs.' Mot. 10:14-16.) It is undisputed that Plaintiff does not manufacture trussing products bearing the Global Truss Marks. (Braun Decl. ¶ 7; Velazquez Opp'n Decl. ¶ 26.) However, the parties do dispute: (1) whether Plaintiff was the exclusive distributor of trussing products bearing the Global Truss Marks in the United States; and (2) who is the manufacturer of the Global Truss products. (*See generally* Defs.' Mot.; Pl.'s Opp'n.)

i. Exclusive Territory Agreement

The first question the Court must ask is whether there exists any agreement between the parties defining **[*20]** trademark ownership. The parties do not dispute that there is no written agreement between Plaintiff and TGC stating that Plaintiff is the exclusive distributor of the Global Truss Marks in the United States. (Lee Decl. ¶ 14, Exs. 1, 2; Schaul Opp'n Decl. Ex. 6.) Defendants argue that Plaintiff is not the owner of the Global Truss Marks because Plaintiff was given a nonexclusive license to distribute the goods in the United States. (Defs.' Mot. 10:28-11:6.) Plaintiff argues that there is an exclusivity agreement shown by the history of dealing between Plaintiff and the members of the Distribution Group. (Pl.'s Opp'n 9:1-10; Schaul Opp'n Decl. Ex 2, at 241:25-242:2; 242:2-243:22; Velazquez Opp'n Decl. ¶ 11, Ex. 3.)

As a general rule, "[w]here there is no express grant of exclusive territory in a contract or franchise, none will be impliedly read into the contract." *Pac. Supply Co-op. v. Farmers Union Cent. Exch., Inc., 318 F.2d 894, 907 (9th Cir. 1963)*. However, "the law recognizes exceptions." *Id.* One court found that an agreement "without provision as to exclusivity" does not necessarily make the agreement "under any and all circumstances non-exclusive." *Huber Baking Co. v. Stroehmann Bros. Co., 252 F.2d 945, 955 (2d Cir. 1958)*.

Defendants proffer two pieces of evidence to support the argument that Plaintiff is not the exclusive distributor **[*21]** of Global Truss products: (1) a Letter of Appointment; and (2) an email message sent by Mr. Lee of TGC. On December 21, 2010, TGC signed a Letter of Appointment stating that GLP is an authorized distributor of Global Truss products in the United States. (Lee Decl. Ex. 2.) Defendants assert that under the Letter of Appointment, TGC stated that it can have more than one distributor for the United States market. (Defs.' Mot. 11:7-12; Lee Decl. ¶¶ 9, 14, Exs. 1, 2.) On December 21, 2010, Mr. Lee also sent an email message to the members of the Distribution Group stating that TGC will sign a distribution agreement with GLP because the original agreement between the parties allowed for more than one distributor of Global Truss products in the United States. (Lee Decl. Ex. 1.)

It is undisputed that the only written exclusivity agreement between members of the Distribution Group states that Mr. Davies of Global Truss America cannot sell Global Truss products in Europe. (Braun Decl. ¶ 19; Pl.'s Statements of Genuine Disputes ("SGD") in Support of Pl.'s Opp'n ¶ 30.) However, Plaintiff argues that the course of conduct between Plaintiff, B&K, and TGC established over eight years indicates that **[*22]** there was an implied-in-fact agreement that Plaintiff would be the exclusive source of products bearing the Global Truss Marks in the United States. (Pl.'s Opp'n 9:8-10; Velazquez Opp'n Decl. ¶ 11, Ex. 3; Schaul Opp'n Decl. Ex. 1, at 313:16-20, 315:3-16.) Plaintiff further asserts that it would have never adopted the Global Truss Marks and changed its company name "if it was not understood by the Distribution Group, including B&K and TGC, that [Plaintiff] had exclusive rights to use" the Global Truss Marks in the United States. (Pl.'s Opp'n 9:10-17; Velazquez Opp'n Decl. ¶ 10; Davies Opp'n Decl. ¶ 9.)

The parties present conflicting evidence of whether Plaintiff had an agreement that it would be the exclusive distributor of the trussing products bearing the Global Truss Marks in the United States. Further, neither party has presented any sort of written agreement from which the Court could determine the presence or absence of an exclusivity provision. As such, there is a genuine issue of material fact; a reasonable jury could find that the parties had formed an agreement that Plaintiff would be the exclusive distributor of Global Truss branded products in the United States. Thus, Defendants' **[*23]** argument that Plaintiff was a nonexclusive distributor does not support a grant of summary judgment.

ii. Manufacturer of the Global Truss Products

Defendants argue that TGC, as the manufacturer of products bearing the Global Truss Marks, is the presumptive owner of the Marks. In absence of an agreement determining ownership, "the manufacturer is presumed to own the trademark." *Sengoku Works Ltd., 96 F.3d at 1220*. This presumption depends on whether there is an exclusivity agreement between Plaintiff and the manufacturer - a question that the Court has already determined must be submitted to the jury, see *supra* Part II.B.1.b.i. However, even assuming, arguendo, that Plaintiff is merely a nonexclusive distributor, Defendants' argument fails for the following reasons.

Defendants argue that TGC is the manufacturer of the trussing products bearing the Global Truss Marks and the Marks are affixed by TGC's subcontractor, Aluforce. (Defs.' Mot. 10:14-16; Lee Decl. ¶ 3.) Defendants assert that TGC "oversees the quality and uniformity of the Global Truss products." (Defs.' Mot. 10:17-18; Lee Decl. ¶ 6.) Defendants' argument that the manufacturer is presumed the owner of the trademark is a defense, known as *jus tertii*, of raising **[*24]** a third party's rights. However, a third party's superior use of a trademark is not a valid defense to a trademark infringement action. *See Autodesk, Inc. v. Dassault Systemes SolidWorks Corp., 685 F. Supp. 2d 1001, 1011 (N.D. Cal. 2009); see also Comm. for Idaho's High Desert v. Yost, 92 F.3d 814, 820 (9th Cir.1996)* (stating that "even if, for some purposes and in some territory, a [third party] may have a right in the trade-mark superior to that of the plaintiff, the defendant is not thereby exonerated from responsibility for an attempt to appropriate to itself a good will created by the plaintiff during a long course of business").

Furthermore, the presumption of ownership in favor of a manufacturer, foreign or domestic, may be rebutted by the distributor. *Sengoku Works, 96 F.3d at 1220*. Defendants argue that the factors set forth by the Ninth Circuit in *Sengoku Works* to determine the superior rights of ownership favor the manufacturer in this case. (Defs.' Mot. 19:22-11:21 (citing *Sengoku Works, 96 F.3d at 1220*).) Because Defendants are not entitled to a presumption that the manufacturer is the presumed owner of the trademark, they cannot argue that Plaintiff is unable to rebut this presumption. Thus, Defendants' argument that TGC is the true owner of the Marks does not support summary judgment.

c. Fraud in Obtaining Trademark Registration

Defendants move for summary judgment on their affirmative defense **[*25]** that Plaintiff's registrations of the Global Truss Marks are invalid. (Defs.' Mot. 11:22-12:5.) Defendants argue that Plaintiff's registration is invalid because it committed fraud on the USPTO. (Defs.' Mot. 12:6-7.) Defendants assert that Plaintiff falsely declared to the USPTO that it owned the Global Truss Marks and "to the best of the verifier's knowledge and belief, no other person has the right to use such marks in commerce." (Defs.' Mot. 12:6-12.) Defendants contend that Plaintiff should not have registered the marks because it "knew that it was not the exclusive distributor" of the Global Truss Marks. (Defs.' Mot. 12:23-24.)

Fraud in the procurement of a trademark registration may be raised as an affirmative defense to a charge of trademark infringement. *See* *UGG Holdings, Inc. v. Severn, No. CV 04-1137-JFW (FMOx), 2005 U.S. Dist. LEXIS 45783, 2005 WL 5887187, at *9 (C.D. Cal. Feb. 23, 2005)* ("A defendant asserting the affirmative defense of fraudulent procurement of a trademark registration 'must prove the alleged fraud by clear and convincing evidence.'"). Fraud requires the following elements: (1) "a false representation regarding a material fact"; (2) "the registrant's knowledge or belief that the representation is false"; (3) "the intent to induce reliance upon **[*26]** the misrepresentation"; (4) and "reasonable reliance" on the misrepresentation; and (5) "damages proximately resulting from the reliance." *Robi v. Five Platters, Inc., 918 F.2d 1439, 1444 (9th Cir. 1990)*.[2] The defendant has a heavy burden in showing that plaintiff fraudulently procured a trademark registration. *Id.*

Plaintiff argues that it did not commit fraud and that Defendants failed to meet their heavy burden to show that Plaintiff fraudulently procured a trademark registration. (Pl.'s Opp'n 9:18-10:6.) The Court finds that because Plaintiff has presented a triable issue of fact regarding whether the parties had an implied exclusivity agreement, Defendants cannot show absence of a genuine dispute that Plaintiff's statement was false. Because Defendants' fraud claim rests on the disputed assumption that Plaintiff was not the exclusive domestic distributor of Global Truss branded products, summary judgment is inappropriate.

Even if Plaintiff was not the exclusive distributor, taking the evidence in the light most favorable to the nonmoving party, the Court finds that Defendants have failed to establish that Plaintiff knew or believed that it made a false representation. *See* *Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 996* (finding that a good faith or honest belief of a statement of **[*27]** fact that may be inaccurate is not fraud). Plaintiff states that it believed it was the only company with the right to use the Marks in the United States. (*See* Velazquez Opp'n Decl. ¶ 11, Ex. 3; Schaul Opp'n Decl. Ex. 1, at 313:16-20, 315:3-16.) Even if this belief was inaccurate, Defendants have not met their burden to show that the statements were not made in good faith. Thus, there is a genuine issue of material fact as to whether Plaintiff knowingly made a false representation, and a reasonable jury could find either that Plaintiff's declaration to the USPTO was true or that Plaintiff was unaware of its falsity. Accordingly, the Court cannot grant summary judgment on Defendants' affirmative defense of fraudulent procurement of trademark registrations.

For the foregoing reasons, the Court **DENIES** Defendants' Motion for Summary Judgment that Plaintiff is not the valid owner of the Global Truss Marks.

2. Genuine or Materially Different Marks

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[2] The elements of fraud are discussed in greater detail regarding Defendants' Motion for Partial Summary Judgment as to their claim for trademark cancellation, *see infra* Part II.D.

Plaintiff moves for summary judgment that Defendants violated § 1124 because Defendants imported trussing products bearing marks identical to the Global Truss Marks. (Pl.'s Mot. 9:1-6.) Defendants move for summary judgment that Plaintiff cannot state a **[*28]** cause of action under the Lanham Act because Defendants' trussing products are genuine Global Truss branded products. (Defs.' Mot. 9:19-20.)

The Lanham Act bars importation of goods bearing a mark that "cop[ies] or simulate[s]" a valid registered trademark. 15 U.S.C. § 1124. Parallel imports, or "gray market" goods, are "foreign-manufactured good[s], bearing a valid United States trademark, that [are] imported without the consent of the United States trademark holder." *K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 285, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988)*. There is no violation of the Lanham Act for "the sale of genuine goods bearing a true mark even though such a sale is without the mark owner's consent." *NEC Elecs. v. CAL Circuit Abco, 810 F.2d 1506, 1509 (9th Cir. 1987)*. "[G]enuineness turns in some manner on the issue of common control of the goods." *Philip Morris, Inc. v. Cigarettes for Less, 69 F. Supp. 2d 1181, 1185 (N.D. Cal. 1999)*. However, "courts have generally held that 'gray market' goods infringe trademark rights if they 'differ materially' from similar domestic goods sold under the same mark." *Summit Tech., Inc. v. High-Line Med. Instruments Co., 922 F. Supp. 299, 308 (C.D. Cal. 1996)*; *see also* Am. Circuit Breaker Corp. v. Or. Breakers, Inc., 406 F.3d 577, 585-86 (9th Cir. 2005).

In its Motion, Plaintiff states that it is undisputed that the Global Truss Marks "appearing on products imported by Defendants are identical." (Pl.'s Mot. 9:1-6; Velazquez Decl. ¶ 11; Davies Decl. ¶ 11.) The uncontroverted evidence shows that until January 31, 2011, Plaintiff and GLP were selling the exact same Global **[*29]** Truss products from the same source, Aluforce, TGC's subcontractor. (Defs.' Opp'n 9:16-18; Pruetz Decl. Ex. 1, at 121:10-122:6; Decl. of Hartmut Braun in Supp. of Defs.' Reply ("Braun Reply Decl.") ¶ 22.) Plaintiff has not provided any evidence that trussing products imported by Defendants were materially different from Plaintiff's products. Indeed, the record indicates that prior to January 2011, Plaintiff's and Defendants' products were the same.

However, in its Opposition, Plaintiff asserts that after January 2011, Plaintiff discontinued ordering its products from Aluforce, and now orders its products from alternative manufacturers in China and the Czech Republic. (Pl.'s Reply 3:24-4:7; Pl.'s Opp'n 10:8-27; Schaul Opp'n Decl. Ex. 3, at 132:5-133:12; Velazquez Opp'n Decl. ¶ 25.) Plaintiff argues that because the trussing products come from "factories that specifically do not supply truss to B&K or GLP," the products differ materially. (Pl.'s Opp'n 10:12-26; Velazquez Opp'n Decl. 23-28.) Plaintiff asserts that its products differ in "both in etching and labeling" because its products are no longer etched with the Global Truss Marks, and the labels affixed to the products are created **[*30]** exclusively for Plaintiff. (Pl.'s Reply 4:3:25-4:7; Velazquez Decl. ¶¶ 25-27; Decl. of Charles Davies in Supp. of Pl.'s Reply ("Davies Reply Decl.") ¶ 9, Ex. 9.) In addition, Plaintiff contends that the imported products are not subject to Plaintiff's quality control measures. (Pl.'s Reply 4:3:25-4:7; Velazquez Opp'n Decl. ¶¶ 25-27.)

The Ninth Circuit has held that if there are no material differences between the parties goods, a plaintiff's trademark infringement claim must fail. *Am. Circuit Breakers Corp., 406 F.3d at 585-86*. In *American Circuit Breakers*, the Ninth Circuit determined whether a plaintiff had a valid trademark infringement claim for importation of gray market goods. *Id. at 578*. The plaintiff owned a trademark for circuit breakers in the United States and contracted with a foreign manufacturer that owned the identical trademark in the foreign jurisdiction. *Id. at 580*. The defendant was a third party that purchased the foreign manufactured goods and imported them for resale. *Id.* The parties stipulated that there were no material differences between the circuit breakers and they were identical except for the color - plaintiff's were black and defendant's were gray. *Id. at 579-80*. The Ninth Circuit found that because "consumers purchasing circuit **[*31]** breakers from [defendant] are getting exactly the same circuit breaker, both in specification and quality, as they would purchase from [plaintiff]," consumers were not likely to be confused as to the source of the goods. *Id. at 585-86*.

The Court finds that before January 2011, the trussing products imported by Defendants were identical to Plaintiff's products. Like consumers of the circuit breakers at issue in *American Circuit Breakers*, consumers purchasing trussing products from Defendants prior to January 2011 received the same trussing products, both in specification and quality, as they would have from Plaintiff, because they came from the same manufacturer. *See* *id. at 585-86*.

Plaintiff provides no admissible evidence to oppose the argument that prior to January 2011, Defendants' goods were not genuine.

In light of the complete lack of admissible evidence to oppose Defendants' allegations, and the overwhelming evidence to the contrary, the Court is convinced that no reasonable jury could find that the Defendants' trussing products are materially different from Plaintiff's products. Accordingly, there is no violation of the Lanham Act for imports of trussing products that occurred prior to January 2011.

However, **[*32]** the Court finds that there is a genuine issue of material fact as to whether the trussing products imported by Defendants after January 2011 differ materially from Plaintiff's products. After January 2011, Plaintiff's goods were manufactured by a different company and its products had different etching, labeling and quality control measures. Plaintiff's evidence suggests that Defendants are importing products "of one make under the trademark of another." *See* *Champion Spark Plug Co. v. Sanders, 331 U.S. 125, 128, 67 S. Ct. 1136, 91 L. Ed. 1386 (1947)*. Because there are triable issues relating to material differences between Plaintiff's and Defendants' trussing products, a reasonable jury could find that Defendants' products are not genuine.

For the foregoing reasons, the Court **GRANTS IN PART** Defendants' Motion for Summary Judgment and **DENIES IN PART** Plaintiff's Motion for Summary Judgment on Plaintiff's Lanham Act claims for violations that occurred prior to January 2011. The Court **DENIES IN PART** the parties' Motions for Summary Judgment on Plaintiff's Lanham Act claims for violations that occurred after January 2011.

3. Plaintiff's Request for an Award of the Maximum Amount of Statutory Damages, Permanent Injunction, Attorneys' Fees, and an Award of Costs

In its Motion, Plaintiff **[*33]** requests four types of relief pursuant to the Lanham Act. First, Plaintiff requests statutory damages in lieu of actual damages and argues that because Defendants' conduct is willful, Plaintiff is entitled to an award of the maximum amount of statutory damages. (Pl.'s Mot. 9:20-27.) Second, Plaintiff argues that it is entitled to a permanent injunction under *section 1116(a)* of the Act to prohibit Defendants from "importing, purchasing, distributing, selling . . . or otherwise using in commerce any trussing products bearing" the Global Truss Marks. (Pl.'s Mot. 12:21-13:9.) Third, Plaintiff argues that it is entitled to an award of reasonable attorneys' fees because Defendants' conduct is willful. (Pl.'s Mot. 14:3-12.) Lastly, Plaintiff requests an award of costs. (Pl.'s Mot. 14:14-23.)

Because the Court finds that Plaintiff is not entitled to summary judgment on its claim under *§ 1124*, the Court **DENIES** Plaintiff's Motion for Summary Judgment as to Plaintiff's request for an award of maximum amount of statutory damages, permanent injunction, attorneys' fees, and an award of costs.

C. Illegal Importation and Trademark Counterfeiting under the Tariff Act

Although the Lanham Act does not provide a remedy for the unauthorized importation of genuine goods, the Tariff Act **[*34]** does provide a remedy for such conduct. *See* *19 U.S.C. § 1526*; *see also* *Parfums Givenchy, Inc. v. Drug Emporium, Inc., 38 F.3d 477, 484 (9th Cir. 1994)* (the purpose of *§ 1526* "is to protect domestic companies against foreign competition"). Defendants move for summary judgment on Plaintiff's Tariff Act claim. (Defs.' Mot. 16:19-21.). Plaintiff also moves for summary judgment on its Tariff Act claim and requests that all products bearing the Global Truss Marks illegally imported be seized, forfeited, and destroyed. (Pl.'s Mot. 7:6-8:9, 13:19-24.)

The Tariff Act provides "extraordinary protection to certain holders of trademarks registered in the United States." *K Mart Corp., 486 U.S. at 295*. *Section 526* of the Act prohibits the importation of:

> any merchandise of foreign manufacture if such merchandise . . . bears a trademark **owned** by a citizen of, or by a corporation . . . organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, . . . unless written consent of the owner of such trademark is produced at the time of making entry.

19 U.S.C. § 1526(a) (emphasis added).

It is undisputed that Plaintiff is a United States limited liability company that has obtained federal trademark registrations for the Global Truss Marks, copies of which are filed with Customs, and that Defendants **[*35]** have imported at least eight shipping containers of products bearing the Global Truss Marks. (Pl.'s Mot. 7:22-8:2; Defendants' SGD of Material Facts ¶¶ 1, 4-5, 8-11, 14.) In its Motion, Plaintiff asserts that it prevails because it has proved all the elements of its illegal importation claim and requests that "all products bearing the counterfeit 'Global Truss' [M]ark . . . be immediately seized, forfeited and destroyed" pursuant to *section 526(e)* of the Tariff Act, *19 U.S.C. § 1526(e)*.[3] Under *§ 1526(e)*, any merchandise "bearing a counterfeit mark . . . imported into the United States in violation of [*§ 1124*] shall be seized and . . . forfeited . . . [and] the Secretary shall . . . after forfeiture, destroy the merchandise. *19 U.S.C. § 1526(e)*.

"There can be no question that Congress intended *section 1526(a)* to bar the importation of genuine goods unless authorized by the domestic trademark owner." *United States. v. Eighty-Nine (89) Bottles of Eau de Joy, 797 F.2d 767, 770 (9th Cir. 1986)*. Furthermore, "where a trademark is owned . . . by an exclusive distributor who is independent of the foreign manufacturer . . . the distributor is entitled under [*§ 1526(e)*] to prevent the importation even of genuine merchandise." *Premier Dental Prods. Co. v. Darby Dental Supply Co., 794 F.2d 850, 858 (3d Cir. 1986)*.

Defendants argue that Plaintiff is not the owner of the Global Truss Marks, thus Plaintiff cannot make a claim under **[*36]** the Tariff Act. (Defs.' Mot. 16:19-21.) Defendants assert that TGC is the manufacturer of the Global Truss Marks and has superior rights over Plaintiff to the marks. (Defs.' Mot. 16:25-17:3). As discussed previously, *supra* Part II.B.1.b.ii, Defendants may not raise a third-party defense that the manufacturer has superior rights over Plaintiff.

The parties also dispute whether Plaintiff is an exclusive distributor, providing Plaintiff ownership rights, of the trussing products bearing the Global Truss Marks. Because there is a genuine of issue of material fact as to whether Plaintiff is the exclusive distributor of the Global Truss Marks, a reasonable jury could find that Plaintiff is an exclusive distributor and the owner of the Global Truss Marks. As such, the Court **DENIES** both Defendants' and Plaintiff's Motion for Summary Judgment on Plaintiff's claim for illegal importation under the Tariff Act.

D. Trademark Cancellation

Defendants move for summary judgment on their counterclaim for trademark cancellation. In their Motion, Defendants contend that Plaintiff falsely declared in its sworn declaration to the USPTO that "no other person has the right to use such mark in commerce." (Defs.' **[*37]** Mot. 17:15-24.) Defendants argue that Plaintiff's declaration is false because it is not the exclusive owner of the trademark. (Defs.' Mot. 17:20-24; Pruetz Decl. Ex. 1, at 120:5-11.)

A claim for fraudulent procurement of a trademark requires the following elements: (1) "a false representation regarding a material fact"; (2) "the registrant's knowledge or belief that the representation is false"; (3) "the intent to induce reliance upon the misrepresentation"; (4) and "reasonable reliance" on the misrepresentation; and (5) "damages proximately resulting from the reliance." *Robi, 918 F.2d at 1444*. An important element in a claim for fraud is an "intent to induce reliance upon the misrepresentation" or "intent to deceive." *Robi, 918 F.2d at 1444*. "Intent to deceive cannot be inferred solely from the fact that information was not disclosed; there must be a factual basis for a finding of deceptive intent." *Levi Strauss & Co. v. Esprit US Distrib. Ltd., 588 F. Supp. 2d 1076, 1084 (N.D. Cal. 2008)*.

[3] "It is important to note that the standard for determining whether a mark is 'counterfeit'" under *section 45* of the Lanham Act, *15 U.S.C. § 1127*, "is higher than whether a mark shall copy or simulate 'a registered mark'" under *section 42* of the Lanham Act, *15 U.S.C. § 1124*. *United States v. 10,510 Packaged Computer Towers, More or Less,152 F. Supp. 2d 1189, 1200 (N.D. Cal. 2001)*. A counterfeit is defined as "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." *15 U.S.C. § 1127*. Whereas a "copy or simulate" mark is "one which may so resemble a recorded mark . . . as to be likely to cause the public to associate the copying or simulating mark . . . with the recorded mark." *19 C.F.R. § 133.22(a)*.

Defendants have not provided any evidence to support a finding that Plaintiff intended to deceive the USPTO. Defendants' argument solely relies on the fact that Plaintiff failed to disclose that it did not have an agreement in writing that Plaintiff is the exclusive distributor of the Global Truss products in the United States. **[*38]** (Defs.' Mot. 17:20-24.) There is no indication that Plaintiff intended to deceive the USPTO. Furthermore, Defendants have not met their burden to show that Plaintiff's declaration that it was not the exclusive distributor was false and made in bad faith. *See supra* Part II.B.1.c. In light of the complete lack of admissible evidence to support the allegation that Plaintiff intended to deceive, the Court **DENIES** Defendants' Motion for Partial Summary Judgment as to their claim for trademark cancellation.

E. Trade Libel Claim and Defamation Claims

Defendants move for summary judgment on Plaintiff's trade libel claim. Defendants also move for summary judgment on their trade libel and defamation counterclaims. For the following reasons, the Court **DENIES** Defendants' Motion for Summary Judgment on Plaintiff's trade libel claim and on Defendants' trade libel and defamation counterclaims.

1. Plaintiff's Claim for Trade Libel

Defendants GLP and Ravenhill issued three press releases on www.facebook.com and www.psln.com to its customers that are the subject of Plaintiff's trade libel claim. In December 2010, GLP announced its appointment as the authorized distributor of Global Truss products. (Defs.' **[*39]** Mot. 13:11-14; Ravenhill Decl. ¶ 9, Ex. 3.) In February 2011, GLP issued a press release confirming its appointment as an authorized distributor. (Defs.' Mot. 13:15-16; Ravenhill Decl. ¶ 10, Ex. 4.) In June 2011, following the termination of Plaintiff's relationship with its manufacturer, GLP announced that it was the exclusive distributor of the Global Truss products in the United States. (Defs.' Mot. 13:16-19; Ravenhill Decl. ¶ 11, Ex. 5.) Defendants allege that these statements were based upon the Letter of Appointment GLP received from TGC. (Defs.' Mot. 13:9-24; Lee Decl. ¶ 16; Lee Decl. Ex. 2.)

"Under California law, 'trade libel is an intentional disparagement of the quality of property, which results in pecuniary damage.'" *New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1113 (C.D. Cal. 2004)*. "To prove trade libel, Plaintiff must show (1) a statement that (2) was false, (3) disparaging, (4) published to others in writing, (5) induced others not to deal with it, and (6) caused special damages." *Id.*

Plaintiff asserts that these statements were false and disparaging to Plaintiff's products and business. (Pl.'s Opp'n 12:1-3.) Plaintiff argues that these statements are false because Plaintiff is the owner of the federally registered Global Truss Marks **[*40]** that Defendants claim they have the authority to use. (Pl.'s Opp'n 11:26-28.) According to Plaintiff, GLP's statements are disparaging because the statements tell the public that Plaintiff is no longer authorized to distribute its own Global Truss branded products. (Pl.'s Opp'n 11:23-25.)

Defendants argue that the statements were not false because the statements were factually based on the Letter of Appointment Defendant GLP received from TGC. (Defs.' Mot. 13:9-24; Lee Decl. ¶ 16, Ex. 2.) To determine whether a statement is false, "is a question of law for the court to decide, unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood." *Robinson v. HSBC Bank USA, 732 F. Supp. 2d 976, 985 (N.D. Cal. 2010)*. The falsity of Defendants' statements depends upon whether Plaintiff had an exclusivity agreement over the Global Truss Marks in the United States. Because there is conflicting evidence of whether Plaintiff had an agreement that it would be the exclusive distributor of the Global Truss Marks in the United States, the falsity of Defendants' statements is a question for the jury.

Defendants also argue that the statements were not disparaging because the press releases **[*41]** did not mention Plaintiff by name. (Defs.' Mot. 13:19-21.) To determine whether a statement is disparaging "the courts apply a totality of the circumstances test to review the meaning of the language in context and whether it is susceptible of a meaning alleged by the plaintiff." *Id. at 986*. Here, Defendants only refer to themselves and their own products, not Plaintiff or Plaintiff's product. Statements that refer only to a defendant's products and not to the plaintiff's products will not support a claim for trade libel. *See* *Atlapac Trading Co. v. American Motorists Ins. Co., No. CV 97-0871, 1997 U.S. Dist. LEXIS 21943, 1997 WL 1941512, at *6 (C.D. Cal. Sept. 19, 1997)* (finding no product disparagement where a party advertised its own product as "pure olive oil" but made no representation as to competitor's product).

However, "[t]here is no requirement that the person defamed be mentioned by name." Di Giorgio Fruit Corp. v. Am. Fed'n of Labor and Congress of Indus. Org., 215 Cal. App. 2d 560, 569, 30 Cal. Rptr. 350 (1963). Defendants' statements can reasonably be interpreted as referring to Plaintiff because stating that GLP is the exclusive distributor creates a negative implication that Plaintiff, Global Truss America, is no longer authorized to distribute Global Truss products. *See* Di Giorgio Fruit Corp., 215 Cal. App. 2d at 569 ("It is sufficient if from the evidence the jury can infer that the defamatory statement applies to the plaintiff.") Whether Defendants' statements were understood by the recipients **[*42]** as disparaging to Plaintiff's products and business is a question for the jury.

Accordingly, The Court **DENIES** Defendants' Motion for Summary Judgment on Plaintiff's trade libel claim.

2. Defendants' Trade Libel Claim and Defamation Claim

Defendants assert that Plaintiff has made the following false statements: (1) GLP has wrongfully implied that Global Truss is the source of the products; (2) GLP sells unauthorized products that bear the Global Truss Marks; and (3) GLP is an infringer and products being sold by GLP are not authorized by Global Truss. (Defs.' Mot. 18:23-19:1; Pruetz Mot. Decl. Exs. 20, 21.) Defendants also assert that Plaintiff attacked GLP's honesty by stating that GLP has: (1) falsely stated that George Lee is the CEO of Global Truss; (2) committed a blatant and willful violation of the law; and (3) made a deliberate effort . . . to misappropriate Global Truss' name and trademarks through wrongful and improper practices. (Pruetz Decl. Exs. 20, 21.) These statements were published on Plaintiff's website, sent to industry trade magazines, and sent via an email blast. (Defs.' Mot. 19:7-9; Pruetz Decl. Ex. 2, at 213:13-214:7.)

"[T]rade libel is an intentional disparagement **[*43]** of the quality of property, which results in pecuniary damage." New.Net, Inc., 356 F. Supp. 2d at 1113. Defamation, on the other hand, "exists whenever a false and unprivileged statement which has a natural tendency to injure or which causes special damage is communicated to one or more persons who understand its defamatory meaning and its application to the injured party." Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 66 F. Supp. 2d 1117, 1122 (C.D. Cal. 1999) (citing Jackson v. Paramount Pictures Corp., 68 Cal. App. 4th 10, 26, 80 Cal. Rptr. 2d 1 (1998)). It is important to note that "the two torts are distinct; that is, 'trade libel' is not true libel and is not actionable as defamation." Polygram Records, Inc. v. Super. Ct., 170 Cal. App. 3d 543, 549, 216 Cal. Rptr. 252 (1985). Trade libel deals with commercial damage to a product, whereas defamation deals with injury to the reputation of a person or a company. Id. at 549. Plaintiff's statements fall under both trade libel and defamation because the statements attack both the quality of Defendant GLP's products, by declaring them to be counterfeit, and Defendant GLP's reputation, by calling GLP an infringer.

Defendants argue that because these statements are clearly injurious to their business, they constitute liable per se and do not require proof of special damages. (Defs.' Mot. 18:14-15.) Defamation may be either categorized under libel or slander. Cal. Civ. Code § 44. Libel per se is defined under section 45a of the California Civil Code as a statement which is "defamatory of the plaintiff **[*44]** without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face." Cal. Civ. Code. § 45a. The "[l]aw presumes general damages follow from utterance or publication of matter slanderous or libelous per se." Clark v. McClurg, 215 Cal. 279, 9 P.2d 505, 506 (1932). However, damages are not presumed in an action for trade libel. Erlich v. Etner, 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256 (1964). Because Defendants did not provide any evidence as to special damages relating to their trade libel counterclaim, the Court **DENIES** Defendants' Motion for Summary Judgment on Defendants' trade libel counterclaim.

The Court agrees that Plaintiff's statements are libel per se. Plaintiff's statements assert that Defendant GLP is guilty of an act of dishonesty, infringing on Plaintiff's trademark, which is defamatory on its face. However, Defendants still have the burden to prove that the statements were false. Plaintiff asserts that the statements were true and because Plaintiff is the only entity that has the authority to permit Defendant GLP to import Global Truss products and Plaintiff never authorized or appointed Defendant GLP to do so. (Pl.'s Opp'n 19:1-9.) The falsity of Plaintiff's statements are dependent upon whether Plaintiff is the exclusive distributor over **[*45]** the Global Truss

Marks in the United States and is the owner of the Global Truss Marks. Because the parties have presented conflicting evidence of whether Plaintiff was the exclusive distributor in the United States, the falsity of Plaintiff's statements is a question for the jury. The Court **DENIES** Defendants' Motion for Summary Judgment on Defendants' defamation counterclaim.

F. Trade Secrets

Defendants move for summary judgment on Plaintiff's trade secrets claim. In their Motion, Defendants argue that Plaintiff's price and customer lists are not trade secrets. "The test for trade secrets is whether the matter sought to be protected is information (1) which is valuable because it is unknown to others and (2) which the owner has attempted to keep secret." *Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1454, 125 Cal. Rptr. 2d 277 (2002)*.

Defendants argue that Plaintiff's price and customer lists are not confidential. Defendants assert that Plaintiff sends its price lists to between five-hundred and a thousand dealers approximately three times a year. (Defs.' Mot. 15:4-7; Pruetz Decl. Ex. 2, at 67:1-22, 69:11-25.) Plaintiff argues that it takes action to maintain the confidentiality of its price lists. (Pl.'s Opp'n 12:14-17.) Plaintiff alleges that its price lists are **[*46]** clearly marked "Confidential" and Plaintiff asks its dealers to agree to maintain the contents of its price lists confidential. (Pl.'s Opp'n 12:14-17, 12:27:13:3; Schaul Opp'n Decl. ¶ 3, Ex. 2, at 170:18-171:4, 181:13-21.) The Court concludes that Plaintiff has made reasonable efforts to maintain the secrecy of its price lists.

Defendants also argue that Plaintiff's customer and price lists do not derive independent economic value because they are widely disseminated and commonly known to the trussing industry. (Defs.' Mot. 14:23-25.) However, cases have recognized that information that relates to pricing can be a trade secret. *See* *Courtesy Temporary Serv., Inc. v. Camacho, 222 Cal. App. 3d 1278, 1288, 272 Cal. Rptr. 352 (1990)* (billing and markup rates "irrefutably" of commercial value); *SI Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1260 (3d Cir. 1985)* (cost and pricing information are trade secrets); *Lumex, Inc. v. Highsmith, 919 F. Supp. 624, 628-30 (E.D.N.Y. 1996)* (pricing, costs, and profit margins treated as trade secrets). Defendants' contention that Plaintiff's customer and price lists do not derive independent economic value is not supported by any evidence. Accordingly, the Court **DENIES** Defendants' Motion for Summary Judgment on Plaintiff's trade secrets claim.

G. Interference with Prospective Economic Advantage Claim

Defendants move for summary judgment on Plaintiff's claims for intentional and negligent **[*47]** interference with prospective economic advantage. Defendants also move for summary judgment on their counterclaim for intentional interference with prospective economic advantage.

1. Intentional Interference with Prospective Economic Advantage

The elements of a cause of action for intentional interference with prospective economic advantage are:

> (1) the existence of a prospective business relationship advantageous to the plaintiff; (2) the defendant's knowledge of the existence of that relationship; (3) intentional acts by the defendant designed to disrupt the relationship; (4) actual causation; and (5) resulting damages.

Stolz v. Wong Communications Limited Partnership, 25 Cal. App. 4th 1811, 1825, 31 Cal. Rptr. 2d 229 (1994). A claim for intentional interference "is made out when interference resulting in injury to another is *wrongful by some measure beyond the fact of the interference itself*." *Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 385, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995)* (emphases in original).

Defendants move for summary judgment on Plaintiff's intentional interference claim as well as on their own intentional interference claim against Plaintiff. (Defs.' Mot. 17:10-12,19:27-20:17.) Defendants argue that because all of Plaintiff's other claims fail as a matter of law, Plaintiff cannot establish an independent wrong separate from the interference itself. (Defs.' Mot. **[*48]** 17:10-12.) However, the Court does not find that all of Plaintiff's claims fail as a matter of law, and therefore cannot conclude that Plaintiff is unable to prove an independent wrong under its intentional interference claim. The genuine disputes of fact that preclude summary judgment on Plaintiff's other claims preclude summary judgment on intentional interference. Similarly, because the Court has not granted summary judgment for Defendants on any of Defendants' claims, the Court cannot find that Defendants have established an independent wrong beyond interference.

As such, the Court **DENIES** Defendants' Motion for Summary Judgment on Plaintiff's claim for intentional interference with economic advantage and Defendants' claim for intentional interference with economic advantage.

2. Negligent Interference with Prospective Economic Advantage

Defendants move for summary judgment on Plaintiff's claim for negligent interference with prospective economic advantage. "The tort of negligent interference with economic relationship arises only when the defendant owes the plaintiff a duty of care." *Stolz v. Wong Communications Limited Partnership, 25 Cal. App. 4th 1811, 1825, 31 Cal. Rptr. 2d 229 (1994)*. Defendants allege that Plaintiff and Defendant GLP are competitors in the truss market. (Defs.' Mot. **[*49]** 15:22; Pruetz Decl. Ex.3, at 155:23-156:9.) Defendants argue that GLP does not owe a duty of care to Plaintiff. (Defs.' Mot. 15:22-27.)

The determination whether a defendant owes a duty of care to a plaintiff involves the balancing of various factors, among which are:

> [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.

Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16, 19 (Cal. 1958).

In their Motion, Defendants raise the privilege of competition, an affirmative defense. (Defs.' Mot. 15:22-27). There is no duty of care between competitors because "[t]he policy of the common law has always been in favor of free competition." *See* *A-Mark Coin Co. v. General Mills, Inc., 148 Cal. App. 3d 312, 323, 195 Cal. Rptr. 859 (1983)* (citation and internal quotation marks omitted). Defendants argue that because GLP and Plaintiff are competitors, GLP does not owe Plaintiff a duty of care. (Defs.' Mot. 15:22-27).

Plaintiff dispute Defendants' contention that Plaintiff and GLP are competitors. (Schaul Opp'n Decl. ¶ 4, Ex. 3, at 156:11-16.) **[*50]** Plaintiff argues that Defendants owe a duty not to interfere with its customers because Plaintiff and Defendants are joint venturers. (Pl.'s Opp'n 13:15-20.) Plaintiff asserts that B&K and Plaintiff are joint venturers because they are co-members of the Distribution Group. Furthermore, Plaintiff alleges that because GLP and B&K are related companies, both GLP and B&K owe a duty of care to Plaintiff.

The Court disagrees. Plaintiff has failed to provide sufficient evidence that B&K and Plaintiff are joint venturers. The elements for the creation of a joint venture are: "(1) joint interest in a common business; (2) with an understanding to share profits and losses; and (3) a right to joint control." *April Enterprises, Inc. v. KTTV, 147 Cal. App. 3d 805, 819, 195 Cal. Rptr. 421 (1983)*. While Plaintiff has provided evidence that members of the Distribution Group share profits, Plaintiff has not provided any evidence to show that members of the Distribution Group share losses and a right to joint control. As such, the Court finds that Plaintiff has failed to provide evidence sufficient to allow a jury to find that B&K and Plaintiff are joint venturers.

For the foregoing reasons, the Court finds that GLP and Plaintiff are competitors and Defendants do not owe Plaintiff a duty **[*51]** of care. The Court **GRANTS** Defendants' Motion for Summary Judgment on Plaintiff's claim for negligent interference with prospective economic advantage.

H. Unfair Competition

Defendants move for summary judgment on Plaintiff's unfair competition claim. (Defs.' Mot. 16:2-17.) The term "unfair competition" includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. Defendants argue that Plaintiff has not alleged or provided any facts to show that Defendant GLP's conduct unreasonably restrains competition. (Defs.' Mot. 16:11-17.) Defendants rely on *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d*

548, 973 P.2d 527 (Cal. App. Ct. 1999), for the proposition that "unfair" means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws." *Id. at 187*. However, *Cel-Tech Communications* was an action by a competitor alleging anticompetitive practices, and the court explicitly stated its holding had no impact on "actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices." *Id. at 187 n.12*.

Here, Plaintiff alleges that Defendants' actions are unlawful. (Pl.'s Opp'n 14:13-26.) "Unlawful **[*52]** acts are 'anything that can properly be called a business practice and that at the same time is forbidden by law . . . be it civil, criminal, federal, state, or municipal, statutory, regulatory, or court-made,' where court-made law is, 'for example a violation of a prior court order.'" *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1153 (9th Cir. 2008)* (quoting *Nat'l Rural Telecomm. Co-op. v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1074 & n.22 (C.D. Cal. 2003)*. Thus, Plaintiff's unfair competition claim stands if Plaintiff can show that Defendants' acts were unlawful. Because the unlawfulness of Defendants' actions must be determined by a jury, the Court **DENIES** Defendants' Motion for Summary Judgment on Plaintiff's unfair competition claim.

I. Affirmative Defense of Laches to B&K's Copyright Infringement Claim

Plaintiff moves for summary judgment on its affirmative defense of laches on Intervening Plaintiff B&K's copyright infringement claim. (Pl.'s Mot. 15:15-17.) "Laches is an equitable time limitation on a party's right to bring suit resting on the maxim that one who seeks the help of a court of equity must not sleep on his rights." *Seller Agency Council, Inc. v. Kennedy Center for Real Estate Educ., Inc., 621 F.3d 981, 988 (9th Cir. 2010)*. The defense of laches requires: (1) an unreasonable delay in bringing suit; (2) prejudice resulting from the delay. *Id. at 989*.

"[D]elay is to be measured from the time that the plaintiff knew or should have known about the **[*53]** potential claim at issue." *Kling v. Hallmark Cards, Inc., 225 F.3d 1030, 1036 (9th Cir. 2000)*. In 2003, Plaintiff began using the Global Truss Marks in the United States. (Schaul Decl. Ex. 14, at 61:16-22, 66:17-67:14, 68:2-69:7, 126:3-17.) Plaintiff alleges that Defendants have been sitting on their rights for approximately eight years. (Pl.'s Mot. 13:24.) However, Defendants argue that Plaintiff's alleged infringement occurred when Plaintiff exceeded the scope of its nonexclusive license by registering the Global Truss Marks with the USPTO. (Defs.' Opp'n 18:13-19.) A claim for copyright infringement can occur if the use of copyrighted materials exceeds the scope of an implied license. *Oddo v. Ries, 743 F.2d 630, 634 (9th Cir. 1984)*. Defendants assert that Plaintiff had an implied license to use the Global Truss Marks and exceeded its implied license once Plaintiff registered the marks. (Defs.' Opp'n 17:26-18:2.)

Plaintiff argues that Defendants were put on inquiry notice that the Global Truss Marks would be registered by each member of the Distribution Group in each member's respective territory. (Pl.'s Reply 4:11-15; Decl. of Joshua A. Schaul in Supp. of Pl.'s Reply ("Schaul Reply Decl.") ¶ 14, Ex. 13.) In support of its contention, Plaintiff points to an email sent by Mr. Lee on March 25, **[*54]** 3003, stating that the "Partners . . . need to register the brand and logo ASAP." (Schaul Reply Decl. ¶ 14, Ex. 13.) Defendants claim that they were unaware of the potential for copyright infringement until December 17, 2010, when Plaintiff sought to have Defendant GLP's truss shipment seized by the LAPD. (Defs.' Opp'n 18:8-9; Pruetz Opp'n Decl. ¶ 17, Ex. 16; Braun Opp'n Decl. ¶¶ 15, 23.)

Because the parties present conflicting evidence as to when B&K knew or had reason to know about the potential copyright infringement claim, a reasonable jury could find that B&K did not know about its potential claim against Plaintiff until December 17, 2010. See *Kling, 225 F.3d at 1041* ("[B]ecause a claim of laches 'depends on a close evaluation of all the particular facts in a case, it is seldom susceptible of resolution by summary judgment.'").

In addition, Defendants argue that there is a presumption that there has been no unreasonable delay because B&K brought its copyright claim within the statute of limitations period. (Defs.' Opp'n 18:22-23.) "The reasonableness of the plaintiff's delay is considered in light of the time allotted by the analogous limitations period." *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 838 (9th Cir. 2002)*. The statute of limitations period for a copyright **[*55]** claim is three years. *17 U.S.C. § 507(b)*.

Defendants argue that they brought their suit within the statutory period by filing its claim less than four months after it knew about Plaintiff's potential infringement. (Defs.' Opp'n 18:22-26.) Viewing the evidence in the light most favorable to the nonmoving party, the Court finds that there is a genuine issue of material fact as to when B&K knew or had reason to know about the potential copyright infringement. The Court **DENIES** Plaintiff's Motion for Summary Judgment on its affirmative defense of laches.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is **DENIED**.

For the foregoing reasons, Defendants' Motion for Summary Judgment as to Claims 2, 3, 4, 6, and 7 is **DENIED**. Defendants' Motion for Summary Judgment as to Claim 1 is **GRANTED IN PART AND DENIED IN PART**. The Court finds as a matter of law that Intervening Plaintiff B&K was not the first to use the Global Truss Marks in commerce in the United States. Defendants may proceed with the argument that Plaintiff does not own the Global Truss Marks on the theory that Plaintiff is not an exclusive distributor of the Global Truss products bearing the Global Truss Marks. **[*56]** The Court finds that Plaintiff's claim for violations under the Lanham Act prior to January 2011 fail as a matter of law. Plaintiff may proceed with the argument that Defendants violated the Lanham Act after January 2011. Defendants' Motion for Summary Judgment as to Claim 5 is **GRANTED**.

IT IS SO ORDERED.

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In re Fresh & Process Potatoes Antitrust Litig.

United States District Court for the District of Idaho

December 2, 2011, Decided; December 2, 2011, Filed

Case No. 4:10-MD-2186-BLW

Reporter

834 F. Supp. 2d 1141 *; 2011 U.S. Dist. LEXIS 138777 **; 2011-2 Trade Cas. (CCH) P77,739

IN RE: FRESH AND PROCESS POTATOES ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: ALL ACTIONS

Prior History: Simon v. United Potato Growers of Idaho, Inc. (In re Fresh & Process Potatoes Antitrust Litig.), 744 F. Supp. 2d 1381, 2010 U.S. Dist. LEXIS 119817 (J.P.M.L., Oct. 13, 2010)

Core Terms

potatoes, cooperative, growers, allegations, marketing, conspiracy, entities, Farms, exemption, immunity, motion to dismiss, farmers, organ, alleged conspiracy, foreign state, participated, conspired, antitrust, Capper-Volstead Act, associations, member agency, agricultural, prices, producers, sovereign, venture, plants, leave to amend, dehydration, connect

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Judges: B. LYNN WINMILL, Chief United States District Judge.

Opinion by: B. LYNN WINMILL

Opinion

[*1148] MEMORANDUM DECISION AND ORDER

INTRODUCTION

The Court has before it several pending motions (Dkts. 72, 73, 75, 76, 77, 78, 79, 82, 85, 88, 120 and 122). The Court heard oral argument on the motions on June 20, 2011, [1] and now issues the following memorandum decision and order.

BACKGROUND

[1] The Court apologizes to counsel and the parties for the delay in issuing this decision. The confluence of a number of unanticipated events led to the "perfect storm" which precluded me from meeting my aspirational goal of issuing a decision on all motions within 30-45 days after oral argument. The Court will do everything within its power to ensure that this type of delay does not occur in the future.

Plaintiffs are a company who claims to have purchased potatoes directly from one or more of the defendants, and a series of persons or entities who allege they have indirectly purchased potatoes **[**9]** from one or more of the defendants. The former is referred to as direct purchaser plaintiffs and the latter as indirect purchaser plaintiffs. [2] All plaintiffs contend that defendants illegally agreed to reduce the supply of potatoes in order to raise prices. Plaintiffs assert that the alleged scheme started when potato growers in Idaho formed a cooperative called United Potato Growers of Idaho ("UPGI"). The Idaho potato growers, along with potato farmers in several other states, then established United Potato Growers of America ("UPGA") as an umbrella cooperative.

Plaintiffs assert that the cooperatives were created for the purpose of increasing the price of potatoes through supply management. They further allege that defendants implemented their plan by agreeing to limit potato planting acreages, and by paying farmers to either destroy existing stocks or refrain from growing additional potatoes in order to reduce the overall number of potatoes available for sale to direct **[**10]** purchasers. Plaintiffs contend that defendants' supply reduction program caused potato prices to be fixed, raised, **[*1149]** maintained, and/or stabilized. This, it is argued, violated the antitrust laws.

Defendants filed motions to dismiss on several grounds. Some of their arguments apply to all defendants (or large groups of defendants), while some are specific to individual defendants. After laying out the general legal standard for motions to dismiss, the Court will address motions that apply to each large groups of defendants, and then address individual defendant motions. [3]

LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires only "'a short and plain statement of the claim showing that the pleader is entitled to relief,'" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests, . . ." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss **[**11]** "does not need detailed factual allegations," it must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id. at 570*. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id. at 556*. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id. at 557*.

In a more recent case, the Supreme Court identified two "working principles" that underlie *Twombly*. *See Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Id.* "*Rule 8* **[**12]** marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id. at 1950*. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

[2] In this decision, the Court will distinguish between direct and indirect purchaser plaintiffs when necessary. Otherwise, the Court will refer to both direct and indirect purchaser plaintiffs simply as Plaintiffs.

[3] Based on discussions between the Court and counsel during oral argument, the Court will not rule on jurisdictional issues at this time. It appears this Court will permanently preside over the matter by stipulation and/or concession.

A dismissal without leave to amend is improper unless it is beyond doubt that the complaint "could not be saved by any amendment." *Harris v. Amgen, Inc., 573 F.3d 728, 737 (9th Cir. 2009)* (issued two months after *Iqbal*). [4] The **[*1150]** Ninth Circuit has held that "in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 247 (9th Cir. 1990)*. The issue is not whether plaintiff will prevail but whether he "is entitled to offer evidence **[**13]** to support the claims." *See Hydrick v. Hunter, 466 F.3d 676, 685 (9th Cir. 2006)*.

These familiar principles guide the Court's analysis of any *12(b)(6)* motion, but they bear repeating here. The Court will consider the Supreme Court's landmark decision, *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, in more detail later, along with Ninth Circuit **[**14]** authority interpreting that decision. *Twombly* is of particular importance here - not only because it announced the plausibility standard in the first place, but because it did so in the context of a *Sherman Act § 1* claim.

ANALYSIS

Plaintiffs allege that defendants violated *§ 1* of the Sherman Act, which prohibits "any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. To state a claim under *§ 1*, plaintiffs must plead facts that plausibly suggest "(1) an agreement or conspiracy among two or more persons or distinct business entities, (2) by which the persons or entities intend to harm or restrain competition, and (3) which actually injures competition." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir. 1989)*. Additionally, for each individual defendant, plaintiffs must allege that *that* defendant had "'a conscious commitment to a common scheme designed to achieve an unlawful object.'" *Monsanto Co. v. Spray-Rite Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (citation omitted).

Defendants' motions to dismiss fall into four basic categories. First, a large group of defendants assert that the Capper-Volstead **[**15]** Act immunizes them from Sherman Act liability. Second, these defendants, along with several others, argue that plaintiffs have failed to plausibly allege that each individual defendant joined the conspiracy. Third, several defendants argue that the indirect-purchaser plaintiffs' claims should be dismissed based on standing and preemption doctrines. Fourth, defendant United Potato Growers of Canada ("UPGC") asserts unique arguments for dismissal based upon, among other things, the act of state doctrine.

1. MOTIONS TO DISMISS BASED ON THE CAPPER-VOLSTEAD ACT

A. The Capper-Volstead Act and Related Statutes

Congress enacted the Capper-Volstead Act in the early 1900's. It provides agricultural cooperatives with a limited exemption from antitrust laws. It states that:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in

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[4] The Court has some concern about the continued vitality of the liberal amendment policy adopted in *Harris v. Amgen*, based as it is on language in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, suggesting that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim . . . ." Given *Twombly* and *Iqbal*'s rejection of the liberal pleading standards adopted by *Conley*, a question arises whether the liberal amendment policy of *Harris v Amgen* still exists. Nevertheless, the Circuit has continued to apply the liberal amendment policy even after dismissing claims for violating *Iqbal* and *Twombly*. *See* *Market Trading, Inc. v. AT&T Mobility, LLC, 388 Fed. Appx. 707, 2010 WL 2836092 (9th Cir. July 20, 2010)* (not for publication). Accordingly, the Court will follow suit.

> collectively processing, preparing for market, handling, **[*1151]** and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations **[**16]** and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof . . . .

7 U.S.C. § 291. The Capper-Volstead Act clarified and expanded the antitrust exemption for cooperatives found in Section 6 of the Clayton Act, which provided that:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations instituted for the purposes of mutual help . . . or forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

15 U.S.C. § 17.

Congress had enacted Section 6 of the Clayton Act to counter the possibility that the Sherman Act's prohibition against combinations in restraint of trade would be applied to imperil the development of cooperative endeavors such as unions. *Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 390-91, 88 S. Ct. 528, 19 L. Ed. 2d 621 (1967)*. But Section 6 of the Clayton **[**17]** Act "shows no more than a purpose to allow farmers to act together in cooperative associations without the associations as such being held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws, as they otherwise might have been." *Maryland & Virginia Milk Producers Ass'n v. U.S., 362 U.S. 458, 465 (1960)* (Internal quotations omitted). Thus, "a group of farmers acting together as a single entity in an association cannot be restrained from lawfully carrying out the legitimate objects thereof, but . . . it [does not] give[] such an entity full freedom to engage in predatory trade practices at will." *Id.* (Internal quotations omitted).

With respect to the Capper-Volstead Act, the Supreme Court has recognized that it and its legislative history "'indicate[ ] a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws.'" *In re Mushroom Direct Purchaser Antitrust Litigation, 621 F. Supp. 2d 274, 283 (E.D. Pa., 2009)* (citing *Maryland & Virginia Milk Producers, 362 U.S. 458, 466, 80 S. Ct. 847, 4 L. Ed. 2d 880 (1960)*. **[**18]** It provides "that among the legitimate objects of farmer organizations [are] collectively processing, preparing for market, handling, and marketing products through common marketing agencies and the making of necessary contracts and agreements to effect such purposes." *Id.* (Internal quotations omitted). Thus, the general philosophy of Section 6 of the Clayton Act and the Capper-Volstead Act is simply that, through agricultural cooperatives acting as entities, individual farmers should be given the same unified competitive advantage and responsibility available to businessmen acting through corporations as entities. *Id.*

As explained below, the Court will deny the motions to dismiss to the extent they are based on the Capper-Volstead Act because questions of fact remain as to whether the Act applies in this case. However, the Court recognizes that the parties fully briefed and argued areas of law where case law is scant, and where there are no **[*1152]** disputed issues of fact in this case. Under these circumstances, the Court believes it prudent to address these areas of law because leaving them unresolved would likely cause the parties to incur unnecessary expense going forward. [5] If, as the **[**19]** case progresses, disputed issues of fact appear where there were none today, or if significant new decisions are issued, a motion for reconsideration may be appropriate.

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[5] This is an extraordinary step. Normally, the Court would not address an issue which was not legally or factually necessary to its decision. However, the Court views that offering such an "advisory opinion" in this case as consistent with the command of Rule 1, that the Federal Rules of Civil Procedure be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." *Fed. R. Civ. P. 1*.

(1).*Questions of Fact Remain about Whether the Capper-Volstead Act Applies*

As noted above, the Capper-Volstead Act exempts certain agricultural cooperatives from antitrust liability. However, the Supreme Court has made clear that the exemption only applies if all participants in the organization qualify under the Act. Questions of fact prevent the Court from making a final determination on this question at this time.

In their complaint, [6] Plaintiffs contend that the Capper-Volstead exemption does not apply because Defendants conspired with non-members, ineligible members, and non-producers. **[**20]** Plaintiff's contention is based upon the Supreme Court's decisions in *Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621 (1967)* and *National Broiler Marketing Ass'n v. United States, 436 U.S. 816, 98 S. Ct. 2122, 56 L. Ed. 2d 728 (1978)*.

In *Sunkist*, the Court concluded that Congress did not intend to allow organizations with nonproducer interests to avail themselves of the Capper-Volstead exemption. *Sunkist, 389 U.S. at 395-96*. In that case, the structure of the Sunkist system included local producers organized into associations operating packing houses, with those houses organized into exchanges. *Id. at 386*. Although eighty-five percent of the local associations were exclusively made up of fruit growers, the remaining members were private, for-profit packing houses. *Id.*

The packers entered into contracts with producers where they would handle each grower's fruit at cost, plus a fixed surcharge. *Id.* The Supreme Court explained that the exemption should be limited to only actual producers of agricultural **[**21]** products, and not those involved in the processing of those raw commodities into other products. *Id. at 393*. The Supreme Court concluded that Sunkist could not avail itself of the Capper-Volstead exemption because it included nonproducer interests. *Id.* The court noted that the right of agricultural producers to unite under the Capper-Volstead Act "cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise." *Id. at 395 (Internal citation omitted)*.

The holding in *Sunkist* was reaffirmed in *National Broiler Marketing Ass'n v. United States, 436 U.S. 816, 98 S. Ct. 2122, 56 L. Ed. 2d 728 (1978)*. There, the Supreme Court concluded that in order for a defendant to be exempt from antitrust **[*1153]** liability pursuant to Capper-Volstead, the defendant must establish that both itself, and all entities with which it conspired, qualify under the Act. *National Broiler, 436 U.S. at 822-23*. "It is not enough that a typical member qualify, or even that most of [the] members qualify." *Id.*

Plaintiffs' complaint alleges that the cooperatives involve numerous vertically integrated members who perform packing and processing functions for themselves and other growers **[**22]** of potatoes. The majority opinions in *Sunkist* and *National Broiler* do not provide a clear indication whether such integrated agribusiness would be a disqualified participant in an association otherwise protected by Capper-Volstead. Indeed, the majority in *National Broiler* expressly chose not to address the question. However, the dissenting and concurring opinions in that decision provide something of a roadmap to the answer to that question.

The dissent in *National Broiler* suggested that expanding the exemption to include integrated agribusiness is necessary because the nature of agriculture has changed dramatically since the Capper-Volstead Act was adopted. *Id.* Justice Brennan's concurring opinion explained why that argument fails. Justice Brennan noted that the dissent "recognizes that integrated . . . producers do not neatly fit the limitation Congress signified by the phrase 'as farmers,' but reads that limitation out of the Act in order to give effect to what it perceives as Congress' desire to aid the agricultural industry generally because of the uncertainty of profits in that industry caused by the combination of weather, fluctuations in demand, and perishability of the product." **[**23]** *National Broiler, 436 U.S. at 834* (Brennan, J., concurring). He then explained that such a drastic restructuring of the statute is both inconsistent with Congress' specific intent regarding the meaning of the limitation, and unnecessary to give continuing effect to its broader purposes. *Id.* In Justice Brennan's view, Congress consciously chose not to exempt processors engaged in

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[6] In this decision, the Court will refer to the direct purchaser complaint as DPC, and the indirect purchaser complaint as IPC when necessary to distinguish the two. Otherwise, the Court will simply refer to the complaint.

the production of agriculture even though they bore some risks in common with agriculture generally. *Id.* The dissent's approach of adopting a bright-line rule permitting integrated producers to partake of the benefits of Capper-Volstead would do violence to that legislative intent. In Justice Brennan's view the proper approach is to engage in a case-by-case analysis, in which, "the nature of the association's activities, the degree of integration of its members, and the functions historically performed by farmers in the industry are relevant considerations in deciding whether an association is exempt." *Id. at 836*. [7]

The defendants here urge the Court to adopt the bright line rule suggested by the dissent in *National Broiler*, to the effect that a farming operation is an eligible participant under Capper-Volstead, even if it is a fully integrated operation which extends from spring planting to the grocery store warehouse. However, the Court agrees with Justice Brennan's concern with that view. Adopting the dissent's **[*1154]** expansive reading of the statute would read "the farmer" requirement out of the statute, ignore congressional intent, and create the potential for abuse.

On the other hand, the Court is also disinclined to adopt a bright line rule that any degree of vertical integration disqualifies a farming operation from participating in a Capper-Volstead **[**25]** eligible association. Rather, a factually-intense inquiry is necessary - one which focuses on the economics and history of potato marketing, the actual functions of the associations, and the degree of integration of the participants. From that evaluation a determination must be made as to whether granting Capper-Volstead exemption here would be consistent with the legislative intent to create an environment in which farmers can compete on a level playing field. However, a better-developed record is necessary before the Court can make that determination.

Accordingly, the Court will deny the motions to dismiss to the extent they are based on Capper-Volstead. In their complaint, Plaintiffs allege that Defendants entered into agreements with unprotected entities, including non-protected potato groups, non-producer partners, a dehydration joint venture, and integrated members and packer/warehouses. If proved, these allegations could preclude application of the Capper-Volstead exemption. Resolving these allegations of alleged anti-competitive practices which potentially place a defendant's conduct outside the Capper-Volstead exemption requires a fact intensive inquiry which should be completed **[**26]** by the Court only after proper discovery has been conducted. [8]

(2).*Legal Issues*

As noted above, the Court will, although not necessary to its decision, address legal issues which have been fully briefed and argued, on which there is little case law, and where there are no disputed issues of fact.

(a)*Collusive Production Curtailment*

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[7] Relying on Justice Brennan's concurrence, at least one lower Court has denied application of the Capper-Volstead exemption to integrated producers. In *United States v. Hinote, 823 F. Supp. 1350 (S.D. Miss 1993)* **[**24]** the district court reasoned that applying Capper-Volstead to integrated producers would allow large agribusinesses organized to market and sell agricultural products to exempt themselves from the antitrust laws by simply purchasing or leasing some interest in a farming operation, no matter how de minimis the interest. *Id. at 1359*. The court concluded that such a result would undermine Congress' express purpose in enacting the Capper-Volstead Act. *Id.*

[8] As an additional ground for denying the motion to dismiss, the Court notes that the Capper-Volstead exemption is an affirmative defense. *Alexander v. National Farmers Organization, 687 F.2d 1173, 1184 (8th Cir. 1982)*(the Capper Volstead exemption "is an affirmative defense. . . ."). *See also* *Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1039 (2nd Cir. 1980)* (referring to Capper-Volstead exemption as an affirmative defense); *Northern California Supermarkets, Inc. v. Central California, 413 F. Supp. 984, 987 (D.C. Cal. 1976)* (referencing the Capper-Volstead as an affirmative defense). In general, the merits of an affirmative defense cannot be properly addressed through *Rule 12(b)(6)*, but should be resolved at trial or on summary judgment. *See* *In re Southeastern Milk Antitrust Litigation, 2008 U.S. Dist. LEXIS 44541, 2008 WL 2368212 (E.D. Tenn. 2008)*.

Plaintiffs contend that the **[**27]** list of activities protected by the Capper-Volstead Act excludes acreage reductions, production restrictions, or collusive crop planning. The Court agrees.

The Court first notes that there are no cases where a court specifically approved, under the Capper-Volstead Act, a pre-production agricultural output limitation as opposed to a post-production marketing decision such as withholding of product from market. Likewise, there are no cases where a court has concluded that Capper-Volstead immunizes cooperatives and their members who seek to collectively implement production controls in order to raise prices.

However, the language of the Capper-Volstead Act itself indicates that it does not apply to production limitations. The Court must construe statutory terms in accordance with their ordinary meaning. *Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 476* ***[*1155]*** *(1994)*; *United States v. Nader, 542 F.3d 713, 717 (9th Cir. 2008)*. The key phrase of the Act, "processing, preparing for market, handling, and marketing," applies to acts done to an agricultural product after it has been planted and harvested. Thus, under the plain language of the statute, coordinating and reducing acreage for planting **[**28]** is not allowed. [9]

The cases cited by Defendants for the contrary view are distinguishable. For example, in *In the Matter of Wash. Crab Ass'n, 66 F.T.C. 45 (1964)*, the court did not address Capper-Volstead. Instead, the case dealt with the Fishermen's Collective Marketing Act ("FCMA") (*15 U.S.C. § 521*), which states:

> Persons engaged in the fishery industry, as fishermen, catching, collecting, **[**30]** or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

15 U.S.C. § 521. The plain language of that statute is far different from the plain language of Capper-Volstead. It specifically allows fishermen to act jointly in producing and catching fish.

Defendants next suggest that the court in *Alexander v. Nat'l Farmers Organization, 687 F.2d 1173 (8th Cir. 1982)* broadly considered antitrust claims involving a cooperative's efforts to limit the supply of milk. Defendants cite the court's conclusion that the cooperative's decision to withhold milk from the market "as a general matter, is within the scope of the Capper-Volstead exemption." *Alexander, 687 F.2d at 1188*. *Alexander* did not involve a production restriction, however. Instead, members of a dairy farmer cooperative withheld already produced milk from the market for a matter of days until the DOJ successfully enjoined it. *Alexander, 687 F.2d at 1182*.

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[9] Federal agencies have also recognized that production limitations are 9 not permitted under Capper-Volstead. To the degree there is ambiguity in the statute on this issue, agencies with jurisdiction over the statue are typically entitled to *Chevron* deference, and their decisions would be persuasive. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)*. The DOJ and the FTC, the prime agencies responsible for enforcing federal antitrust laws, suggest a narrow interpretation of Capper-Volstead. The FTC's position seems clear from its statements in *California Lettuce* as explained below. As for the DOJ, it has expressed its position in its report to the task group on antitrust immunities. The DOJ explained that there is "evidence that Congress was concerned about the right or ability of cooperatives to restrict the supply of agricultural commodities." *A Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities*, p. 68 (1977), Dkt. 111-14, Ex. M. The DOJ went on to state that "[i]t is not surprising that Congress did not specifically grant to the cooperatives the power to restrict supply . . . ." *Id.* The DOJ concluded **[**29]** that "it would not be the act of a rational legislature to give the cooperatives the power to deal with overproduction, a factor which had been demonstrated was not a cause of the crisis it was addressing." *Id.* at 68-69.

The USDA's position has also been consistent with that of DOJ and FTC and in opposition to a view that production curtailments are allowed under Capper-Volstead. The USDA has issued reports and guidelines to farmers indicating that "it is not legal for cooperatives to control members' production. The basic role of cooperatives is to market the available supply in the most effective manner possible, not to limit production." *Farmer Cooperatives in the United States, Cooperative Information Report 1 Section 3, USDA, Rural Business - Cooperative Service*, p. 17 (1980, reprinted 1990), Dkt. 111-16, Ex. O.

The **[**31]** case of *Holly Sugar Corp. v. Goshen County Co-op. Beet Growers Ass'n, 725* ***[*1156]*** *F.2d 564 (10th Cir. 1984)* is even less applicable to this case. Defendants properly explain that in that case the Tenth Circuit recognized that the Capper-Volstead exemption protected the efforts of a sugar beet growers' association to prevent its members from contracting outside of the association. Members of the association had signed a marketing agreement which prevented them from contracting individually with a buyer. *Holly Sugar, 725 F.2d at 566*. After the association failed to reach an agreement with the buyer, several growers sought to sell their sugar beets outside of the association. *Id.* The members sued the association for relief from the marketing restriction, and the trial court granted the injunction. *Id. at 567*. The Tenth Circuit reversed and held that the marketing agreement did not violate antitrust laws and that the cooperative could prevent its members from negotiating independent sales contracts. *Id. at 569*.

Based on that finding, Defendants suggest that the Tenth Circuit concluded that the cooperative could manage the supply of sugar beets by preventing its members from putting their crops **[**32]** on the market. Notably, however, there was no finding that the cooperative controlled pre-production agricultural output.

Defendants next rely on *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Coop., et al., 413 F. Supp. 984 (N.D. Cal 1976)* which concluded that a cooperative's activities were within the purposes of Capper-Volstead and *Section 6* of the Clayton Act through all production phases. In that case, the court specifically noted that the cooperative engaged in marketing activities such as gathering and disseminating information concerning the planting, harvesting and shipment of lettuce. This general statement does seem to cloud the issue a bit. However, there was no dispute in *Northern California Supermarkets* that the "primary activity of [the cooperative] [was] to set prices or price ranges to which members [were] required to adhere in the sale of their lettuce." *Id. at 987*. There was no indication that the cooperative actually curtailed production or did anything more than gather and disseminate information regarding pre-production agricultural output.

Still, Defendants argue that because Capper-Volstead cooperatives are allowed to fix prices, **[**33]** they must also be allowed to restrict production. This argument is unpersuasive. The reason an agricultural cooperative can fix the price at which their good is sold is because if the price rises, farmers will produce more and consumers will not be overcharged. Individual freedom to produce more in times of high prices is a quintessential safeguard against Capper-Volstead abuse, which Congress recognized in enacting the statute.

Although dicta, the FTC's language in *In the Matter of Central California Lettuce Producers Cooperative, 90 F.T.C. 18, at 32 n. 20 (July 25, 1977)* is telling on this matter:

> Congress' attitude toward production controls provides an additional indication that it did not regard the corporation as the model around which the Capper-Volstead exemption would be built. Beyond doubt, a single corporation can restrict its output, if it chooses, without incurring antitrust liability. Nevertheless, *there are strong indications that Congress did not intend to allow farmers to use cooperatives as a vehicle by which they could effectively agree to limit production.*

(emphasis added). The FTC went on to quote Senator Capper during debate of the Act, where he stated:

> **[*1157]** But a farmers' **[**34]** monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years. No other industry except agriculture has this automatic safeguard. With corporation activities the group producers, such as the United States Steel Corporation, can reduce the quantity of steel rails it will produce at any given time or completely close down its mills and reduce the supply.

Id. (Internal citations omitted).

Furthermore, "Congress has reinforced the interpretation that production controls were not authorized by adding to the Capper-Volstead Act a comprehensive statutory scheme for controlling supply in the form of the Agricultural Marketing Agreement Act of 1937 (AMAA), *7 U.S.C. 601 et seq.*" *Id.* If a cooperative is allowed to limit production among its own members, it can "shut[] off the safety valve against private abuse that ameliorates the adverse consumer impact of the Capper-Volstead exemption and circumvent[] the important procedural safeguards of the AMAA." *Id.*

For these reasons, the Court concludes that acreage reductions, production restrictions, and collusive crop planning are not activities **[**35]** protected by the Capper-Volstead Act.

(b)*Alleged Conspiracy with Foreign Association*

Plaintiffs do not challenge the applicability of the Capper-Volstead exemption based on foreign farmers being members of UPGA. However, they do contend that any conspiracy with a foreign association negates the exemption. The issue has not been directly addressed by a court, and opinions on the matter are scant at best.

The most compelling evidence of whether a domestic cooperative forfeits application of the Capper-Volstead applies when it conspires with a foreign association is in the Act itself. The Capper-Volstead Act uses the term "persons" without limitation and does not exclude foreign producers. As pointed out by Defendants, the reference in the Act to "foreign commerce" demonstrates that Congress intended Capper-Volstead to apply to foreign entities. *7 U.S.C. §§ 291-292*. Additionally, *Section 6* of the Clayton Act serves to exempt agricultural producers from liability under the antitrust laws. The Sherman Act and the Clayton Act both define "person" to include "corporations and associations existing under or authorized by the laws of the United States, the laws of any of the Territories, the laws **[**36]** of any State, or the laws of any foreign country." *15 U.S.C. §§ 7*, *12(a)*. Accordingly, as a matter of law, any collaboration with foreign growers does not necessarily destroy the Capper-Volstead exemption.

A few courts have touched on the issue, but those cases are barely worth noting. For example, in *Northern Cranberries Inc., v. Ocean Spray, Inc., 382 F. Supp. 2d 221 (D. Mass. 2004)*, the court interpreted the term "persons" in *7 U.S.C. § 291* to include foreign persons and entities such that they could be members of a domestic cooperative. *Cranberries, 382 F. Supp. 2d at 225-26*. However, the decision did not directly address whether a domestic cooperative would lose access to the Capper-Volstead exemption if it conspired with a foreign cooperative. Similarly, in *United States v. Nat'l Board of Fur Farm Organizations, Inc., 395 F. Supp. 56, 57 (E.D. Wis. 1975)*, the court touched on the issue in the context of a motion to dismiss a criminal indictment. The court noted that both the government and the defendants appeared to agree that a Capper-Volstead organization is not exempt from liability if the **[*1158]** organization conspires with "other persons," but it never directly addressed the question **[**37]** of whether the foreign organizations were exempt under Capper-Volstead. Instead, the court simply denied the motion to dismiss because the government was not obligated to negate the defense in the criminal indictment. *Fur Farm, 395 F. Supp at 57*.

Finally, *United States v. Dairy Farmers of America, Inc., 2000 U.S. Dist. LEXIS 19979, 2001-1 Trade Cas. (CCH) P73,136, 2000 WL 33200552 (E.D. Pa. 2000)* is not as helpful as suggested by Plaintiffs. Plaintiffs suggest that the DOJ's view as to the inapplicability of the Capper-Volstead Act to foreign producers figured into the resolution to its challenge to the acquisition by the Dairy Farmers of America ("D.F.A.") of SODIALL North American Corporation, a subsidiary of a large foreign cooperative. Plaintiffs cite the DOJ's competitive impact statement in that case, and suggest that central to DOJ's decision to block the merger was DOJ's determination that SODIALL did not have the benefit of the Capper-Volstead exemption. The impact statement does indicate that DOJ believes that SODIALL did not have the benefit of the Capper-Volstead exemption. (Dkt. 111, Ex. S.) However, there is no discussion about why SODIALL does not have the benefit of the exemption, or more importantly, whether a conspiracy between **[**38]** D.F.A. and SODIALL would deny application of the exemption to D.F.A.

After considering the statutory language and the limited number of cases which have addressed the issue, the Court concludes that an association does not lose its Capper-Volstead exemption by including, among its members, foreign corporations or legal entities.

2. *TWOMBLY* MOTIONS

The defendants who seek a *Twombly* dismissal fall into four general categories: potato growers; licensors; marketers; and dehydrators.

A. The Potato Growers' Motion to Dismiss[10]

At its heart, this case is about a group of potato growers who allegedly agreed to reduce the supply of potatoes they produce so as to increase prices. *See DPC* ¶ 3. The core allegations against the potato growers begin with a September 2004 meeting in Blackfoot, Idaho, which is described in the complaints as follows:

> 167. The potato cartel was first formalized when Mr. Wada organized a meeting of Idaho potato farmers in September of 2004 to discuss how to "curb production" and "boost prices" for potatoes. At this meeting, Mr. Wada and Keith Cornelison (of Defendant Cornelison Farms) summoned 23 Idaho potato **[*1159]** growers to an office in Blackfoot, Idaho to discuss how their collective efforts at reducing potato supplies would help fix, raise, maintain, and stabilize prices.
>
> 168. After more meetings, **[**40]** phone calls, and emails among these growers, the group agreed to form UPGI - with the explicit goal of reducing potato supplies through various means.
> 169. The 23 growers in attendance at this meeting became the founders of UPGI, which filed for incorporation on November 2, 2004. The founders' operations encompassed approximately 60 percent of the fresh potatoes produced in Idaho and 25 percent of the fresh potato market in the United States.
> . . .
> 171. In the Articles of Incorporation of UPGI, the stated purpose of the organization is "to stabilize potato prices and supplies in the State of Idaho and to work with similar cooperatives in other states having similar purposes."

DPC ¶ 167-69, 171. The growers who are identified as having attended the meeting include the moving grower defendants. *Id.* ¶ 170. It further alleges that these growers were founding members of UPGI and that they "explicitly signed on to the supply reduction and price-fixing scheme alleged herein." *Id.* The DPC goes on to detail various acts taken after the 2004 meeting to implement the conspiracy, including, among other things:

- Yearly acreage reductions rules, meaning that the growers planted fewer potatoes;
- A bid **[**41]** buy-down program, whereby growers were paid not to plant potatoes;
- "Shipping holidays," during which packing plants were shut down for at least eight hours; and
- "Flow-control" activities, whereby certain defendants allegedly participated in marketing calls in an effort to prevent potatoes from being shipped when prices were too low.
- "Offloading" surplus potatoes by selling them to dehydration plants.

DPC ¶¶ 118, 185-90; *see also IPC* ¶¶ 221-27.

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[10] The potato growers' arguments are set forth in the following three motions:

> (1) *The Joint Motion.* Numerous defendants filed this motion, but the *Twombly* arguments are asserted only by Wada Farms, Inc., Wada Farms Potatoes, Inc., Wada-Van Orden Potatoes, Inc., Wada Farms Marketing Group, LLC, Raybould Brothers Farms, LLC, Lance Funk, Snake River Plains Potatoes, Cornelison Farms, Keith Cornelison, and Michael Cranney. Dkt. 79-1.
>
> (2) *The Larsen-Driscoll-Rigby Motion.* Moving defendants are Blaine Larsen, Blaine Larsen Farms, Inc., Driscoll Potatoes, and Rigby Produce, Inc. Dkt. 75-1.
>
> (3) *The Pleasant Valley Motion.* The sole moving defendant is Pleasant Valley Potato, Inc. Dkt. **[**39]** 73-1.

The first two motions raise common issues and will be addressed jointly under this heading. The Pleasant Valley Motion raises separate issues and is addressed below. United II also moved for dismissal in the Joint Motion, but it is more accurately categorized as a dehydrator defendant. United II's arguments are thus addressed below along with the other dehydrator defendants' motions for dismissal.

The grower defendants contend that these allegations fail to plausibly allege a *§ 1* conspiracy as to each individual defendant. They make two basic arguments in support of this contention. First, they argue that mere membership in a trade association such as UPGI or UPGA cannot form the basis of a *§ 1* conspiracy. *See Joint Mot. Memo.*, Dkt. 79-1, at 23. Second, they argue that plaintiffs have failed to allege each individual defendant's role in the alleged conspiracy with sufficient factual detail.

(1).*The Membership Argument*

Turning first to the membership argument, defendants rely on *Kline v. Coldwell Banker & Co., 508 F.2d 226 (9th Cir. 1974)* and *Kendall v. Visa U.S.A. Inc., 518 F.3d 1042 (9th Cir. 2008)*. In *Kline*, a group of real estate sellers **[**42]** sued a local realty board and thirty-two named brokers who were board members during the previous four years. Plaintiffs alleged that the defendants conspired to fix brokerage commissions at six percent by distributing a recommended fee schedule to its members. *Id. at 228*. The Ninth Circuit reversed the district court's grant of class certification because plaintiffs had not shown that common questions predominated as to defendants' liability. *Id. at 236*. In so holding, the Court clarified that membership in the realty board, standing alone, was insufficient to impose liability. *Id. at 233*. Rather, "in order for a member of a trade association to become . . . liable in a treble damage case he must **[*1160]** have 'knowingly, intentionally and actively participated in an individual capacity in the scheme.'" *Id. at 232* (citation omitted).

The key difference between *Kline* and this case is that in *Kline* plaintiffs did not allege that the realty board itself was created to effectuate a pre-existing agreement to violate antitrust laws. Here, by contrast, plaintiffs allege that UPGI and UPGA were formed for the sole purpose of managing potato supply and fixing prices. *See, e.g., DPC* ¶ 3. Further, defendants **[**43]** allege that the grower defendants were directly involved in the meetings and agreements leading to the formation of the cooperatives. This allegation - essentially, that UPGI and UPGA formalized an underlying *§ 1* conspiracy - is supported with "evidentiary factual" allegations. For example, plaintiffs allege that UPGA's website articulates its "Vision" as follows: "We will manage national potato supply so as to positively affect grower profitability." *Id.* ¶ 198; *see also id.* ¶ 164. As for UPGI, because it believed it had Capper-Volstead immunity, UPGI's stated corporate purpose is "to stabilize potato prices and supplies in the State of Idaho and to work with similar cooperatives in other states having similar purposes.'" *Id.* ¶ 171; *see also id.* ¶ 200 ("Our efforts are targeted at supply management in order to help growers receive a reasonable price for their crop.").

As such, these defendants did not merely join an extant trade association and then choose whether or not to follow suggested guidelines; rather, plaintiffs alleged that they first agreed to the conspiracy outlined in the complaint, and then created the trade associations to formalize and implement that agreement. *Kline* **[**44]** is thus inapposite.

Kendall does not support the grower defendants' membership theory either. In that case, plaintiffs alleged that a group of credit card companies and banks conspired to fix two separate fees related to credit card transactions - an interchange fee and a merchant discount fee. *Kendall, 518 F.3d at 1046*. Regarding the interchange fee, the bank defendants successfully argued that plaintiffs had not plausibly alleged that the banks conspired to fix the interchange fee. *Id. at 1048*. Rather, according to the banks, Visa and MasterCard set these fees and the banks chose to adopt them. *See id.* This prompted the Ninth Circuit to invoke *Kline* in dismissing the complaint against the banks:

> Regarding the allegations that the Banks conspired to fix the interchange fee, merely charging, adopting or following the fees set by a Consortium [Mastercard or Visa] is insufficient as a matter of law to constitute a violation of the Sherman Act. In *Kline*, we held that membership in an association does not render an association's members automatically liable for antitrust violations committed by the association.

Id. at 1048 (internal citation to *Twombly* omitted).

A handful of grower defendants **[**45]** argue that they are in an analogous position to the bank defendants in *Kendall. See Larsen-Driscoll-Rigby Mot. Memo.*, Dkt. 75-1, at 7-8; *Hearing Transcript*, Dkt. 151, at 208-12. These defendants point out that the bank defendants in *Kendall* were owner-members of Visa (which defendants liken to a "cooperative"), just as the potato growers here are members of cooperatives. *See Larsen-Driscoll-Rigby Reply*, Dkt. 130, at 4. They also argue that the interchange fee in *Kendall* was "enforced in a mandatory way on all members [and] could not be varied, ..." *Hearing Transcript*, Dkt. 151, at 209; *see also, e.g., Larsen-Driscoll-Rigby Reply*, Dkt. 130, at 4-5.

[*1161] These grower defendants then proceed to argue that they are just like the banks: They may have planted fewer potatoes because UPGI and UPGA had mandatory acreagereduction (and other rules), but being a member of that cooperative, and merely adopting or following cooperative rules cannot give rise to *§ 1* liability under *Kendall* and *Kline. See, e.g., Hearing Transcript*, Dkt. 151, at 210 (at oral argument counsel asserted that "the mere fact that some member of the institution is required to charge or adopt or follow the fees - or in this **[**46]** case it would be the acreage limitation rules or other practices set down by the association - does not, as a matter of law - the Ninth Circuit's term - give rise to a claim.").

This argument has two problems. First, although the *Kendall* plaintiffs alleged that the banks participated in the management of, and held a propriety interest in Visa and MasterCard, the banks successfully argued that they did not conspire to set the interchange fee. *See* *Kendall, 518 F.3d at 1048* (holding that although plaintiffs alleged that the banks actively participated "in an individual capacity in the scheme to fix the interchange fee or the merchant discount fee, this was nothing more than a conclusory statement."). Here, by contrast, plaintiffs have provided evidentiary factual allegations that the moving grower defendants met and agreed to the scheme alleged in the complaint. Now, of course, whether that can be proven remains to be seen - either at trial or in the context of a motion for summary judgment. But, for purposes of a motion to dismiss, it is sufficient that the plaintiffs have alleged that the defendants met and agreed to the scheme.

Second, the grower defendants' argument that the interchange **[**47]** fees were "enforced in a mandatory way" was not part of the Ninth Circuit's holding and appears to be controverted by the record in that case. In district court proceedings, Visa and MasterCard repeatedly asserted that each network permitted member banks to opt out of the default interchange fees and apply different arrangements between particular acquirers and issuers. [11] The Ninth Circuit did not find to the contrary on appeal.

Kendall is thus distinguishable. Among other things, plaintiffs have plausibly alleged that the growers themselves came together and agreed to reduce potato supply and stabilize prices. Such allegations were not present in *Kendall*.

(2).*The Who-What-Where-When Argument*

In addition to arguing that their "mere membership" in the cooperatives cannot form the basis for liability, the moving grower defendants argue that plaintiffs have not sufficiently connected each individual defendant to the alleged conspiracy. To resolve this argument requires the Court to resolve the parties' underlying dispute as to the correct pleading standard in antitrust cases following the Supreme Court's decision in *Bell Atlantic Corp. v.* ***[*1162]*** *Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* and the Ninth Circuit's decision in *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042 (9th Cir. 2008)*. The parties have fundamentally different views of these cases. In particular, the parties dispute how detailed an antitrust complaint must be in answering the "basic questions: who, did what, to whom (or with whom), where, and when?" *Id. at 1047*. The Court will explore *Twombly* and *Kendall* in some detail before turning to the allegations **[**49]** in this case.

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[11] *See* Answering Brief of Defendants-Appellees Mastercard International Inc. and Visa U.S.A. Inc., *Kendall, 518 F.3d 1042* (available at 2006 WL 2378330, at *16, *19); *see also* Defendant Visa U.S.A. Inc.'s Miscellaneous Administrative Request for Leave to File a Motion for Summary Judgment, *Kendall v. Visa U.S.A. Inc.*, Case No. C04-4275-JSW (N.D. Cal. Mar. 11, 2005), at 1 ("Visa *does* allow its members to 'opt out' of Visa's default interchange rates, ..."); MasterCard's Proposed Motion for Summary Judgment, *Kendall District Court Dkt.* 53-1, at 7 ("Although MasterCard sets default interchange rates for the convenience of its members, no rules require them to use them. . . . In fact, MasterCard's members can opt out of the default interchange rates in at least **[**48]** three ways: . . . .").

(a)*Twombly* and *Kendall*

In *Twombly*, the plaintiffs alleged that a group of telephone companies - the Baby Bells [12] - were engaging in "parallel behavior." In other words, they were not competing. But that's all plaintiffs alleged to support their inference that the Baby Bells must have entered into an illegal conspiracy. The core allegation was simply that

> [i]n the absence of any meaningful competition between the [defendants] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [other carriers] within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

Id. at 551, 127 S. Ct. 1955, 167 L. Ed. 2d 929.

The problem with this allegation is that *§ 1* of the Sherman Act does not require sellers to compete; it just forbids their agreeing not to compete. Further, the Supreme Court found that the Baby Bells had "tremendous independent economic incentive to resist 'sharing' and to forego entering one another's markets at the pain of being forced to subsidize a competing long distance carrier by sharing equipment." *In re Packaged Ice Antitrust Litig., 723 F. Supp. 2d 987, 1004 (E.D. Mich. 2010)* (citing *Twombly, 550 U.S. at 566*).

Thus, the *Twombly* complaint merely alleged a fact - parallel behavior - that was equally consistent with two competing inferences: (1) an inference that the defendants were conspiring and; (2) an inference that market conditions enabled them to avoid competing without having to agree not to compete. The Court concluded that without more, this independent, economically self-motivated behavior was not enough to sustain a conspiracy claim. Instead, the Court held that allegations of parallel conduct must be placed in a factual context that **[**51]** "plausibly suggests" an agreement. *Id. at 556-57*.

In footnote 10 of its opinion, the Court explained just how barren the complaint was. *Id. at 565 n.10*. In this oft-cited footnote, the Court explained that Twombly's conspiracy allegations, standing alone, probably would not even provide the defendants the notice required by *Rule 8*. *Id. at 565 n.10*. Indeed, the only specific thing Twombly did to show a conspiracy was to identify "the seven-year span in which the *§ 1* violations were supposed to have occurred . . . ." *Id.* Otherwise, the pleadings "mentioned **[*1163]** no specific time, place, or person involved in the alleged conspiracies." *Id.* As a result, it furnished "no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when or where the illicit agreement took place." *Id.* A defendant seeking to respond to such a complaint "would have little idea where to begin." *Id.*

Less than a year after the Supreme Court handed down *Twombly*, the Ninth Circuit decided *Kendall*. In reciting the new plausibility standard announced in *Twombly*, the *Kendall* Court cited *Twombly*'s footnote 10, stating that Supreme Court "suggested that to allege an agreement between antitrust **[**52]** co-conspirators, the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies,' to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." *Id. at 1047* (citing *Twombly, 550 U.S. at 565 n.10*). Notably, the *Kendall* complaint was as barren as *Twombly*'s. In dismissing the complaint, the Court found that even after conducting discovery, "the complaint does not answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Id. at 1048*.

In the wake of *Twombly* and *Kendall*, antitrust defendants have relied on footnote 10 and the who-what-where-when language in *Kendall* to argue that complaints filed against them are deficient - even when complaints contain

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[12] The Baby Bells, as they were known, were regional telephone companies that were the successors to the Bell Operating Companies **[**50]** that AT&T had been forced to divest in settlement of the government's antitrust suit against it. *See* *Twombly, 550 U.S. at 548, 550 n.1*.

detailed "evidentiary factual" allegations connecting them to the alleged conspiracy. *See, e.g., In re Packaged Ice Antitrust Litig., 723 F. Supp. 2d at 1008* ("Defendants continue to sound the who, what, when and where refrain throughout their briefs . . . ."). Many courts have rejected such arguments (including district courts within the Ninth Circuit), concluding that the Supreme Court did not impose the elaborate "who-what-where-when" **[**53]** pleading requirement defendants insisted upon. [13]

(b)*Plaintiffs' Who-What-Where-When Allegations*

Turning to plaintiffs' allegations in this case, the Court finds that plaintiffs have alleged sufficient evidentiary facts connecting the moving grower defendants to the alleged **[**54]** conspiracy. [14] This complaint does answer the basic who-what-where-when question. Specifically: *Who?* Twenty-three growers, including the moving grower defendants. What? Met and agreed to reduce potato supply and fix prices. *When?* Fall 2004. *Where?* An office in Blackfoot, Idaho.

Because these basic questions are answered, and the defendants have supplied additional factual detail regarding the activities **[*1164]** of the group thereafter (albeit not on a defendant-by-defendant basis), the moving defendants have "an idea of where to begin" in responding to the complaint. *See Kendall, 518 F.3d at 1047*.

Some defendants argue that the language in the complaint suggesting that the defendants "signed onto" or "participated" in the supply-reduction/price-fixing scheme are "conclusory allegations" that "must be disregarded." *Joint Reply*, Dkt. 134, at 11. In a vacuum, such terms would be conclusory. But that is not so here. Plaintiffs have supported **[**55]** these allegations with sufficient factual detail. As noted, the moving grower defendants attended the 2004 meeting and agreed to reduce supply of and fix prices for potatoes.

As for the subsequent conduct of these defendants, at this stage plaintiffs do not need to provide elaborately detailed who-what-where-when facts for every single act that the moving grower defendants allegedly took to implement the scheme. Yet this is what defendants seem to demand. For example, in the *Larsen-Driscoll-Rigby* motion, defendants take issue with the following allegation, and, in particular, the use of the disjunctive "and/or":

> All Defendants involved in potato growing and selling operations herein . . . . were direct participants in the supply reduction scheme outlined herein and followed acreage reductions, participated in the bid-buy-down program, participated in and utilized information obtained from marketing calls and packing reports, *and/or* reduced the domestic supply of potatoes for the express purposes of fixing, raising, maintaining *and/or* stabilizing prices.

DPC ¶ 246 (emphasis added). These defendants argue that they do not have proper notice of what they allegedly did, asking: "Did Larsen **[**56]** 'participate' in the bid buy-down program? Or 'utilize' information from marketing calls and packing reports? Or both? What about Driscoll? Rigby?" *Larsen-Driscoll-Rigby Mot. Memo.*, Dkt. 75-1, at 9. Defendants go on to state that the "obvious explanation is that plaintiffs don't know." *Id.*

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[13] *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1183 (N.D. Cal. 2009)* ("Contrary to defendants' suggestions, neither *Twombly* nor the Court's prior order requires elaborate fact pleading."); *In re Packaged Ice, 723 F. Supp. 2d at 1005* ("*Twombly* imposed no such requirement); *In re Southeastern Milk Antitrust Litig., 555 F. Supp. 2d 934 (E.D. Tenn. 2008)* (holding sufficient complaints that "while not answering all specific questions about 'who, what, when and where,' do put defendants on notice concerning the basic nature of their complaints against the defendants and the grounds upon which their claims exist"); *see also Starr v. Sony BMG Entm't, 592 F.3d 314, 325 (2d Cir. 2010)*; *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007)* (plaintiffs need not plead "specific back-room meetings between specific actors at which specific decisions were made").

[14] Pleasant Valley is an exception. Additionally, plaintiffs' allegations relating to various Wada entities makes it unclear which particular Wada entity is alleged to have joined the purported conspiracy. Issues specific to these defendants are discussed below.

Defendants ask too much. Plaintiffs have alleged - with the requisite factual specificity - the moving grower defendants' agreement to reduce potato supply and fix and elevate potato prices. This adequately describes their basic role in the alleged scheme. The level of factual detail defendants demand here is more appropriately reserved for summary judgment. *See, e.g., In re Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011, 1022 (N.D. Cal. 2010)*; *In re Static Random Access Memory (SRAM) Litig., 580 F. Supp. 2d 896 (N.D. Cal. 2008)* ("Defendants . . . rely upon the standard for a motion for summary judgment."). The Court will therefore deny the following grower defendants' motions to dismiss: (1) Blaine Larsen Farms; (2) Cornelison Farms; (3) Keith Cornelison; (4) Michael Cranney; (5) Driscoll Potatoes, Inc.; (6) Lance Funk; (7) Blaine Larsen; (8) Raybould Brothers Farms, LLC; (9) Snake **[**57]** River Plains Potatoes, Inc.; and (10) Rigby Produce, Inc. As explained next, the Court will grant the Pleasant Valley and Wada entities' motions to dismiss, although plaintiffs will be given leave to amend the complaint.

(3).*Pleasant Valley and the Wada Entities*

Unlike the other moving grower defendants, Pleasant Valley argues that plaintiffs have not sufficiently connected it to the Fall 2004 meeting where the alleged conspiracy originated. [15] Typically, plaintiffs **[*1165]** allege that a particular individual attended the meeting, and that the individual is "of" an entity defendant. For example, plaintiffs assert that "Lorraine Driscoll (of Driscoll Potatoes)" attended "the initial UPGI meeting" and "explicitly signed on to the supply-reduction and price-fixing scheme . . . ." *DPC* ¶ 170. Elsewhere, plaintiffs usually allege that the entity defendant "is a founding member of UPGI." *See, e.g., id.* ¶ 102 ("Driscoll Potatoes is a founding member of UPGI"). Plaintiffs were not entirely consistent in this regard; but, for the most part, the moving grower defendants did not take issue with this particular aspect of the pleading. That is, the entity defendants did not contend that the individuals who **[**58]** attended the meeting were not connected to them, or that the named individual did *not* attend the meeting on their behalf.

As already noted, Pleasant Valley is an exception. Plaintiffs allege that Pleasant Valley is a "founding member of UPGI." *DPC* ¶ 111. That allegation, in turn, rests on the allegation that Kim Wahlen attended the Fall 2004 meeting and "signed on to" the conspiracy alleged in the complaint. *Id.* ¶ 170. There are no allegations to indicate Mr. Wahlen's relationship to Pleasant Valley, or his ability to act on behalf of that entity. Rather, Plaintiffs connect Mr. Wahlen to Pleasant Valley only with the word *of. See id.* (identifying "Kim Wahlen (of Pleasant Valley Potato)").

This allegation - basically, the word "of," - is not sufficient to plausibly allege that Mr. Wahlen had the authority to, or did, act on Pleasant Valley's behalf, or attend that meeting on Pleasant Valley's behalf. *Cf. Acosta Orellana v. Croplife Int'l, 711 F. Supp. 2d 81, 112 (D.D.C. 2010)* **[**59]** (formulaic recitations of the essential elements of agency will not suffice). Plaintiffs have therefore failed to allege facts connecting Pleasant Valley to the scheme outlined in the complaint and dismissal with leave to amend is appropriate.

The Court also takes judicial notice of UPGI's articles of incorporation, which do not list Pleasant Valley as a founding member. *See Fed. R. Evid. 201(b)*; *MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986)*. As certified public records kept by the Secretary of State in Idaho, the articles fall directly within the category of documents the Ninth Circuit generally considers proper for judicial notice. *Weisman, 803 F.2d at 504*. This Court may consider the articles as part of a *12(b)(6)* motion without converting that motion to one for summary judgment. *Id.*

Various Wada entities make a related argument. In essence, these defendants contend that plaintiffs named them as defendants only because they carry the Wada name and because Albert Wada, the individual, is an alleged "mastermind" of the conspiracy.

[15] During oral argument, Pleasant Valley's counsel asserted that Pleasant Valley is a packing shed only, and that it does not even grow potatoes. For purposes of this motion, however, the Court must assume the truth of plaintiff's allegation that Pleasant Valley is a grower.

Plaintiffs name the following Wada entities as defendants: (1) Wada Farms, Inc.; (2) Wada Farms Potatoes, Inc.; (3) Wada Van-Orden Potatoes, **[**60]** Inc.; and (4) Wada Farms Marketing Group, LLC. *DPC* ¶¶ 30-32, 45. Plaintiffs then define the first three entities as "Wada Farms," and then allege that "Wada Farms through Albert Wada, played a critical role in the formation of UPGI and UPGA and the implementation of the supply reduction conspiracy." *Id.* ¶ 38; *see also id.* ¶ 170 (alleging that "Albert Wada (*of Wada Farms*)" attended "the initial UPGI meeting" and "explicitly signed on to the supply **[*1166]** reduction and price-fixing scheme . . . .") (emphasis added). Plaintiffs also allege that "Defendant Albert Wada is the Chairman and former CEO of Wada Farms." *Id.* ¶ 38. In context, it is not clear if plaintiffs are alleging that Mr. Wada is the chairman and former CEO of all three entities.

These allegations do not allow the reader to figure out why each corporate entity has been named as a defendant, or what its connection to the underlying scheme is. With three entities lumped together as one ("Wada Farms"), the complaint fails to sufficiently connect each corporate defendant to the scheme. Plaintiffs will be given leave to amend in order to clarify how each entity is allegedly connected to the scheme.

As for Wada Farms Marketing, plaintiffs **[**61]** allege that it is the " [16] sales and marketing arm of Wada Farms" and that it "participated in and benefitted from the conspiracy." *Id.* ¶ 49. Plaintiffs further assert that "Wada Farms controls Wada Farms Marketing and Wada Farms Marketing acted pursuant to that control." *Id.* ¶ 50; *see also id.* ¶ 51 ("Wada Farms Marketing acted as Wada Farms' agent.").

Plaintiffs attempt to connect all marketer defendants to the complaint with allegations such as these: "Idaho marketing calls were implemented" and prior to these calls "participating warehouses would log on the UPGI web-page and provide information on capacity, stocks and pack-outs. These data along with other information . . . were discussed and . . . summarized . . . on the internet to assist with 'flow-control' and prevent potatoes from being shipped when prices were too low." *Id.* ¶ 190.

These allegations do not sufficiently connect Wada Farms Marketing to the scheme. The control allegations are too **[**62]** conclusory, and the other allegations do not specifically implicate Wada Farms Marketing. The Court will dismiss the complaint as to Wada Farms Marketing but will grant plaintiffs leave to file an amended complaint to allege how Wada Farms Marketing is connected to the scheme.

B. Licensor Defendants - Dole's Motion to Dismiss

Dole Food Company Inc. and Dole Fresh Vegetables are named as licensor defendants. *See DPC* ¶¶ 52-66; *IPC* ¶¶ 132-45. These defendants do not grow or sell their own potatoes. Rather, Dole Fresh Vegetables licenses Wada Farms Marketing the right to place the DOLE® label on Wada-grown potatoes. This licensing® relationship has been in existence for roughly 15 years.

The Dole defendants contend that because this is all they do (that is, license their brand name [17]) they should be dismissed from this action. More specifically, Dole argues that plaintiffs fail to sufficiently allege it participated in the price-fixing/supply-reduction conspiracy alleged in the complaint. Dole also argues that plaintiffs fail to properly plead an agency relationship that would give rise to vicarious liability.

[*1167] (1).***Direct Participation***[18]

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[16] As its name suggests, Wada Farms Marketing is more accurately characterized as a marketer defendant. Nonetheless, the Court will address Wada Farms Marketing here, given the similarity of its argument to the other Wada entity defendants.

[17] The Court refers to both Dole entities as "Dole" herein. To be clear, however, **[**63]** Dole Fresh Vegetables, not Dole Food Company Inc., is the licensor. Although the parties dispute whether plaintiffs can "impute" the license to Dole Food Company Inc., the Court does not need to resolve this question to decide Dole's motion.

As to Dole's allegedly direct participation in the scheme, there are just a few allegations. Both complaints allege: "During the Class Period, Dole Fresh Vegetables participated in the supply-restriction and price-fixing scheme . . . alleged herein." *DPC* ¶ 52; *IPC* ¶ 133; *see also DPC* ¶ 246; *IPC* ¶ 268 (alleging, parenthetically, that Dole Food was a "direct participant in the supply reduction scheme outlined herein . . . .").

These conclusory statements are not amplified with sufficient evidentiary factual allegations. Plaintiffs do not allege, for example, **[**64]** that Dole attended the supply-reduction meetings described in the complaint. Nor do plaintiffs allege that Dole "signed on" to any supply-reduction agreement reached at those meetings. Instead, the complaint rests almost entirely on the existence of the licensing arrangement described above.

But the fact that Dole entered into a licensing agreement several years before the alleged conspiracy began does not sufficiently link Dole to the conspiracy. Nor are there any other allegations in the complaint that would allow the Court to infer that Dole directly participated in the alleged conspiracy. Although the allegations need not include elaborate detail, the complaint must allege that each individual defendant joined the conspiracy and played some role in it. After all, the hallmark of an antitrust conspiracy is a "common scheme designed to achieve an unlawful objective." *Monsanto, 465 U.S. at 764*, and each individual defendants' conscious commitment to that scheme.

(2).*Agency Theory of Liability*

Given the deficiency of the direct-liability allegations, plaintiffs are left with their agency allegations. *See generally Am. Soc. of Mech. & Elec. Eng'rs v. Hydrolevel, 456 U.S. 556, 569, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)* **[**65]** (defendants may be held liable for Sherman Act violations under an agency theory of liability). As with other allegations in the complaint, plaintiffs are not permitted to rest on conclusory allegations to properly plead an agency relationship. *See Acosta Orellana, 711 F. Supp. 2d at 112* (formulaic recitations of the essential elements of agency will not suffice); *Millar v. Pitman Bd. of Educ., 2011 U.S. Dist. LEXIS 63962, 2011 WL 2417141 (D.N.J. June 13, 2011)* (citing cases); *Imageline, Inc. v. CafePress.com, Inc., 2011 U.S. Dist. LEXIS 39828, 2011 WL 1322525, at *4 (C.D. Cal. Apr. 6, 2011)* ("To sufficiently plead an agency relationship, a plaintiff must allege facts demonstrating the principal's control over its agent.").

The principles of agency law at issue here - actual authority and apparent authority - are well settled: "Actual authority consists of powers which a principal directly confers upon an agent, as well as those the principal causes or permits the agent to believe he or she possess." 2A C.J.S. *Agency* § 133; *see also Restatement (Third) Agency § 2.01* (2006); *Sun Microsystems, Inc. v. Hynix Semiconductor Inc., 622 F. Supp. 2d 890, 899 (N.D. Cal. 2009)* (federal common law of agency applies, as guided by principles set forth in **[**66]** the Restatement of Agency). Apparent authority focuses on third parties. It arises when a third party reasonably believes that the putative agent had authority **[*1168]** to act on behalf of the principal and that belief can be traced to the principal's own manifestations. *See Restatement (Third) Agency § 2.03* & *cmts. c*, *d*. Apparent authority is "basically an estoppel principle which operates in favor of third parties seeking to bind a principal for unauthorized acts of its agents." 2A C.J.S. *Agency* § 391.

Plaintiffs' complaints contain brief, conclusory allegations that the "Wada Defendants acted as the Dole Defendants' agent in participating in the price-fixing and capacity reduction scheme alleged herein." *DPC* ¶ 62; *IPC* ¶ 133. The more specific factual allegations intended to support these allegations arise out of the licensor-licensee relationship. *See DP Opp.*, Dkt. 110, at 57 (arguing that "the Dole Defendant's relationship with the Wada Defendants goes well beyond that of traditional licensorlicensee"). For example, plaintiffs allege that "Wada Farms Marketing holds the exclusive marketing agreement for potatoes, onions, and sweet potatoes sold under the national Dole label" and

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[18] For purposes of this motion, the Court assumes, without deciding, that Dole may be liable as a direct participant in the scheme. *See generally Am. Soc. of Mech. & Elec. Eng'rs v. Hydrolevel, 456 U.S. 556, 569, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)* (non-profit, standard-setting association liable for *§ 1* violation of Sherman Act; the association did not produce or sell the mechanical device at issue).

that due **[**67]** to this relationship, the Wada Defendants "enjoyed frequent contact with and supervision from the Dole representatives." *DPC* ¶¶ 47, 61; *see IPC* ¶ 135, 141.

Plaintiffs also allege that "[a]s licensor of the potatoes sold by the Wada Defendants, the Dole Defendants had control over many aspects of the marketing, selling, packaging, quality and branding of these potatoes." *DPC* ¶ 61; *see IPC* ¶ 135, 141. They go on to quote the following statement from the Wada Farms' website that discusses the Dole/Wada relationship:

> Our relationship with Dole started approximately 15 years ago based on a mutual commitment to provide the highest quality products and service to every customer. The Dole brand has been around for over a century and means the finest, highquality products. Through Wada Farms Marketing Group, Dole will continue to meet customers' expectations by consistently providing potatoes and onions that meet the highest standard. With the combined program and experience of Wada Farms, there are unlimited opportunities with the National Dole label for potatoes, onions, and sweet potatoes. For Wada and Dole, anything less is unacceptable.

DPC ¶ 47; *see IPC* ¶ 78 **[**68]** (same quote, with minor omissions).

Plaintiffs allege that through this webpage, along with other, unspecified "representations to various third parties and the public," Dole and Wada "confirmed" that "Wada was acting on Dole's behalf and as Dole's agent in the production, marketing and sales of Dole potatoes." *DPC* ¶ 64; *IPC* ¶ 143.

But neither the website statement nor any of the other allegations supports the sweeping conclusion that Dole invested the Wada defendants with actual or apparent authority "to act on Dole's behalf, including by reducing the supply of Dole-branded potatoes . . . ." *DPC* ¶ 63. The allegations in this regard are benign (such as the allegation that Dole was in frequent contact with Dole) or conclusory (such as the allegation that Dole "supervised" or otherwise "controlled" Wada [19]). Moreover, **[*1169]** Dole does not grow or sell potatoes. Consequently, under the facts alleged in this complaint, it does not seem plausible that Dole would be in a position to "control" the potato growers.

At most, plaintiffs' allegations show that Dole and Wada have united interests on particular issues, such as their "mutual commitment to provide the highest quality products and service to every customer." *DPC* ¶ 47; *IPC* ¶ 78. But the mere fact that Dole and Wada have some united interests is not enough to plausibly suggest that one is the agent of the other. There must be some indication that one entity is directing the other. *See* *Acosta Orellana v. Croplife Int'l, 711 F. Supp. 2d 81, 115 (D.D.C. 2010)* ("Regardless of how united [two parties] might be with respect to any particular issue, there can be no principal-agent relationship absent **[**70]** some indication that the position of one of the entities was taken *at the direction of the other*.'") (citation omitted). Here, plaintiffs' agency allegations regarding Dole are far too conclusory for this Court to infer that Wada was acting as Dole's agent, and the string of authorities plaintiffs cite, *see DP Opp.*, Dkt. 110, at 50-52, does not support a contrary conclusion.

In sum, plaintiffs have failed to sufficiently allege that Dole participated - either directly or indirectly - in the alleged conspiracy. Dismissal of the *§ 1* claim against Dole is thus appropriate.

The Court will also dismiss the indirect purchasers' state-law claims against Dole. In its moving papers, Dole asserted that if the conspiracy claim against it fails, all of the indirect purchasers' state-law claims necessarily fail in that they expressly hinge on pleading conspiracy. *Dole Mot. Memo.*, Dkt. 88-1, at 13-14. Plaintiffs apparently concede the point; they did not respond to that argument.

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[19] This particular allegation is contained in the direct-purchaser complaint. *See DPC* ¶ 63 ("Throughout the Class Period, the Dole Defendants exercised actual or apparent authority over the **[**69]** Wada Defendants as those Wada entities publicly and repeatedly announced their intentions to reduce potato supplies nationwide and encouraged competitors to do the same. The Dole Defendants invested authority in the Wada Defendants to act on Dole's behalf, *including by reducing the supply of Dole-branded potatoes, despite knowing of the Wada Defendants' efforts to restrict potato supplies and fix prices nationwide with their co-conspirators*) (emphasis added). The later-filed indirect-purchaser complaint omits the italicized language. *See IPC* ¶ 142.

Finally, given the weakness of the allegations against Dole, the complaint against Dole will be dismissed with prejudice. *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("a district **[**71]** court must retain the power to insist upon some specificity in pleading before allowing a massive factual controversy to proceed").

C. Marketing Defendant - Potandon's Motion to Dismiss

Potandon Produce L.L.C. sells potatoes and onions to major retailers, club stores, wholesalers, produce distributors and restaurant chains. *IPC* ¶ 88. The company is owned by five prior Pillsbury managers and "six grower/shippers." *Id.* Potandon is the marketing agent for several Idaho potato growers, including defendant Larsen Farms. *Id.* ¶ 89.

(1).*Direct Participation*

Potandon argues that it is peripheral to any conspiracy alleged in this action because it does not grow potatoes. Plaintiffs, however, insist that Potandon was directly involved in the conspiracy because Potandon participated in the "flow-control" measures alleged in the complaint. *See DP Opp.*, Dkt. 110, at 35. Per the plaintiffs, flow control is exactly what it sounds like - controlling the number of potatoes that flow into the marketplace. Plaintiffs allege that flow-control efforts include basic monitoring of the marketplace and then reducing supply when deemed necessary by, for example, donating potatoes to food banks or imposing "shipping **[**72]** holidays" in which potato-packing **[*1170]** operations shut down for eight or more hours. *See DPC* ¶¶ 189-91, 209-210.

The problem with plaintiffs' theory is that their flow-control and related allegations are not specifically directed at Potandon. Counsel essentially conceded this point at oral argument. *See Hearing Transcript*, Dkt. 151, at 263.

Plaintiffs also argue that the Court should simply infer Potandon's direct involvement based on the Potandon's size and role in the industry. Plaintiffs allege that Potandon is the largest potato marketer in North America, controlling 25% of the Idaho potato market. *DPC* ¶¶ 72, 77. Thus, according to plaintiffs, the Court should just understand that "the conspiracy could not have operated without Potandon's direct and significant involvement given its size and role." *DP Opp.*, Dkt. 110, at 36.

This argument is contrary to cases holding that an antitrust plaintiff must "allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join in." *In re Elec. Carbon Prods., 333 F. Supp. 2d at 311-12*. Under this standard, plaintiff's **[**73]** allegation that Potandon directly participated in the alleged conspiracy is insufficient.

(2).*Liability as Marketing Agent*

In addition to claiming that Potandon was directly involved in the conspiracy, Plaintiffs allege Potandon is liable as a marketing agent for certain of the grower defendants.

A marketing agent is not liable for the acts of its alleged principal in a *§ 1* conspiracy unless the agent (1) had "knowledge of its supplier's purpose to restrain trade," (2) "intended to restrain trade itself rather than simply earn its usual and customary commission," and (3) contribute[d] materially to the restraint." 7 Herbert Hovenkamp & Philip E. Areeda, *Fundamentals of* ***Antitrust Law*** ¶ 1474c (3d ed. 2010). A defendant that does not meet each of these requirements "does not share a 'conscious commitment to a common scheme designed to achieve an unlawful objective,' as the Supreme Court has required. *Id.* (quoting *Monsanto, 465 U.S. at 764*).

Plaintiffs have wholly failed to plead two of these requirements - knowledge and material contribution. Instead, plaintiffs ask the Court to infer facts supporting Potandon's alleged knowledge of and material contribution to the alleged conspiracy. *See,* ***[**74]*** *e.g., DP Opp.*, Dkt. 110, at 39. As for the third requirement - intent - plaintiffs rely on a conclusory allegation, along with allegations that do not mention or otherwise implicate Potandon. *See id.* (citing *DPC* ¶¶ 80, 186, 189, 214).

These allegations are deficient. The three elements articulated above must be pled, and those ultimate allegations must be supported with evidentiary factual allegations.

(3).*Corporate Control and Ownership Theories of Liability*

In addition to claiming that Potandon is liable as a direct participant or as a marketing agent for a conspirator, plaintiffs suggest that Potandon is liable by virtue of its corporate ownership structure. In that regard, plaintiffs allege:

> Potandon is owned and/or controlled by its suppliers and has conspired with its potato growers to assist in efforts to reduce potato supplies and fix prices and has directly profited from the price fixing scheme detailed herein.

DPC ¶ 80.

This allegation is not sufficient to connect Potandon to the alleged conspiracy. **[*1171]** The allegation that Potandon "conspired with its potato growers" is a bare conclusion. And Potandon - a separate corporate entity - cannot be implicated in the conspiracy based solely **[**75]** on the fact that one of its owners is an alleged conspirator. *See* *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 341 n.44 (3d Cir. 2010)*. Plaintiffs have not plausibly alleged that Potandon's separate corporate status should be ignored under any alter ego or agency theory of liability. *Cf. Hinds County v. Wachovia Bank, 708 F. Supp. 2d 348, 367 (S.D.N.Y. 2010)* (finding that plaintiffs had "plausibly alleged" that the legal fiction separating two corporate defendants "was illusory as to the transactions at issue . . . .").

Allen v. Dairy Farmers of America, Inc., 748 F. Supp. 2d 323 (D. Vt. 2010), which the parties discuss at some length, supports dismissal of the complaint against Potandon. In *Allen*, dairy farmers sued various entities in the milk industry for antitrust violations. The defendants included a cooperative of dairy farmers; the cooperative's exclusive marketing agent; and two large milk bottlers, including defendant HP Hood LLC. *Id. at 330-31*. The allegations against Hood were based on little more than (1) Hood was a large milk bottler, (2) another defendant (the dairy farmers' cooperative) had a 15% ownership interest in Hood, (3) an allegation that the cooperative **[**76]** "exercised control over all of the milk supplied to Hood; . . ." and (4) an allegation, "wholly devoid of facts" that Hood benefitted from the underlying conspiracy. *Id. at 333-34*. Based on these allegations - which failed to "alleged any *facts* regarding Hood's alleged agreement to conspire" - the district court granted Hood's motion to dismiss. *Id. at 334* (emphasis in original).

The allegations against Potandon are similarly lacking; they are based primarily on Potandon's relative size, the fact that a grower defendant partially owns the company, and conclusory allegations of control and benefit. *Hood* thus supports Potandon's position.

The Court rejects plaintiffs' argument that Potandon is more analogous to the marketing agent sued in *Allen*. Among other things, the *Allen* complaint contained sufficient factual allegations for the court to conclude that the dairy farmers' cooperative and its marketing agent "acted as one." *Id. at 344*. There are no such allegations here. Dismissal of the complaint against Potandon is therefore appropriate.

At oral argument, however, plaintiffs indicated that, if given leave to amend, they intend to name Potandon as a direct participant in the flow-control **[**77]** measures described above. The Court will grant the motion to dismiss, without prejudice to plaintiffs filing an amended complaint.

Finally, the Court rejects Potandon's argument that the Cooperative Marketing Act ("CMA"), *7 U.S.C. § 455*, provides it with a separate and distinct form of immunity. *See Potandon Mot. Memo.*, Dkt. 76-1, at 17-19. *Section 5 of the CMA* allows cooperatives to use a common agent to "acquire, exchange, interpret, and disseminate" various types of information, including, for example, market information and information regarding "past, present, and prospective crop[s]." *7 U.S.C. § 455*. On its face, the CMA does not expressly state that the cooperative at issue must be a Capper-Volstead cooperative. *See id.* Potandon therefore argues that the CMA immunizes it from Sherman Act liability - even if the cooperatives Potandon serves are not Capper-Volstead cooperatives.

Potandon's argument fails based on the language of the CMA. To be sure, the CMA does not expressly state that "Capper-Volstead **[*1172]** cooperatives" may share market information though a common agent. But Congress did copy the entire, cumbersome definition of a Capper-Volstead cooperative and then paste it into **[**78]** the CMA, just before the language stating what such a cooperative "may" do. *Section 5 of the CMA* provides that

> *Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged*, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them.

7 U.S.C. § 455 (emphasis added).

The italicized language precisely describes a Capper-Volstead cooperative. For ease of reference, here again is the description of a Capper-Volstead cooperative, as found in *7 U.S.C. § 291*:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively **[**79]** processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged.

Given this duplicate language, it seems obvious that Congress intended the CMA to apply to Capper-Volstead cooperatives. Further, when it passed the CMA, Congress stated that "nothing contained in this chapter is intended, nor shall be construed, to modify, or repeal any of the provisions of *sections 291* or *292* of [the Capper-Volstead Act]." *7 U.S.C. § 457*; *see also* Christine A. Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity, The Antitrust Source*, Dec. 2010, at 2 n.10 (The CMA "authorizes Capper-Volstead-type cooperatives to acquire and exchange 'past, present, and prospective crop, market, statistical, economic, and other similar information.'"). Consequently, the CMA does not provide a separate immunity for Potandon.

D. Dehydrator Defendants

The "dehydrator" defendants include United II, R.D. Offutt, and Idahoan Foods, LLC. Plaintiffs allege that these defendants participated in a 2007 joint venture whereby "R.D. Offutt partnered with Defendant United II to create . . . Idahoan Foods." *DPC* ¶ 117.

The deal allegedly included **[**80]** the following components: (1) UPGI formed United II, which is a second cooperative made up of some UPGI members; (2) R.D. Offutt contributed potato processing plants to the venture; (3) United II and R.D. Offutt own Idahoan Foods, which is a limited liability company; (4) Idahoan Foods acquired a company (Idaho Fresh-Pak) that had four dehydration plants; and (5) United II's growerowners supply all the potatoes for Idahoan Foods' Idaho and Nevada plants. *Id.* ¶¶ 27-29, 118-20, 315-20; *IPC* ¶ 47, 153-55; *see also Hearing Transcript*, Dkt. 151, at 160.

Plaintiffs allege that Idahoan Foods was created as part of the overarching scheme to reduce the supply of potatoes that made their way to the market. As plaintiffs put it, the "joint venture enabled potato growers to offload surplus potatoes and further reduce supplies and thereby further facilitated **[*1173]** and contributed to the price-fixing scheme alleged." *DPC* ¶ 118; *see also id.* ¶ 124; *IPC* ¶¶ 47-48, 157-58, 280, 315. In related allegations, plaintiffs allege that UPGI explicitly and publicly stated the joint venture's purpose. *See, e.g., DPC* ¶ 315; *IPC* ¶ 328. For example, the complaint alleges:

- "UPGI also discussed this venture in its March **[**81]** 2007 newsletter and stated **United of Idaho [UPGI] feels that the current dehy strategy being implemented is critical to United's overall mission of supply management."** *DPC* ¶ 319; *IPC* ¶ 332 (emphasis in complaints)

- "In December of 2007, UPGI announced the new 'Idahoan Fresh Potato Plan' as part of this venture and as a means to further control supplies and fix prices where UPGI proposed that growers sell 100% of their potatoes to Idahoan Fresh." *DPC* ¶ 320; *IPC* ¶ 333.

The dehydrator defendants argue that - notwithstanding allegations regarding UPGI's intentions for the joint venture - plaintiffs have alleged nothing more than a lawful, vertically integrated, pro-competitive agreement. Plaintiffs counter that they are not concerned with the vertical elements of the joint venture; rather, they are focused on a horizontal, price-fixing component within this vertical arrangement.

(1).*United II and R.D. Offutt - The Joint Venture Partners*

As such, plaintiffs initially focus on the fact that both joint venture partners grow potatoes: R.D. Offutt is a large, North-Dakota-based grower, with 60,000 acres devoted to potatoes. *DPC* ¶ 127-30. United II is comprised of some UPGI members, all of whom **[**82]** grow potatoes. Plaintiffs next contend that these growers came together to figure out how they could divert fresh potatoes out of the fresh-potato market. The theory was explained during oral argument as follows:

> It all started with an agreement between Offutt and UPGI to initiate this program, this conduct in order to divert fresh potatoes out of the fresh potato market. And that was the key.
>
> So what you have is a horizontal arrangement between UPGI and its member growers on the one hand, and Offutt, an enormous grower, on the other, a horizontal agreement. And that's the genesis of the plan: How are we going to set up a mechanism, which ultimately had some vertical components, but the key to it was the initiation of a horizontal agreement, which Offutt was a key participant.

Hearing Transcript, Dkt. 151, at 161.

Facts supporting this theory, however, are not alleged in the complaint. In particular, plaintiffs have not alleged facts showing that "it all started with an agreement between Offutt and UPGI."

The factual allegations relating to United II are, mainly, that it is a cooperative made up of UPGI growers who wished to participate in the dehydration venture. Plaintiffs also allege **[**83]** that "UPGI, its members, and co-conspirators have conspired and colluded with 'United II' - a non-grower, vertically integrated potato purchaser, to assist with supply-restriction efforts." *DPC* ¶ 257(h); *IPC* ¶ 5(viii).

As for R.D. Offutt, plaintiffs allege that in 2004, the company sent a representative to a November 2004 meeting regarding the formation of national and regional cooperatives. *DPC* ¶ 173. Unlike many other grower defendants, R.D. Offutt is not alleged to have joined any cooperative in 2004. Plaintiffs also allege that in connection with "shutting down potato processing plants as part of this venture, Paul Noah, **[*1174]** an R.D. Offutt official in North Dakota stated that "[i]n essence, there is excess capacity in the industry." *Id.* ¶ 125.

Plaintiffs contend that these allegations - combined with the fact of the joint venture agreement - support an inference that R.D. Offutt agreed to the over-arching conspiracy described in the complaint. In particular, plaintiffs assert that R.D. Offutt must have been aware of UPGI's overall goals for the venture. But these facts are not sufficient to infer that R.D. Offutt viewed the transaction the same way UPGI did, or that it entered the transaction **[**84]** for these reasons. This is particularly true because there is an obvious alternative explanation for R.D. Offutt's participation in the venture - namely, that R.D. Offutt wanted to acquire potatoes for dehydration plants. As such, it becomes difficult for the Court to infer R.D. Offutt's larger agreement to the underlying conspiracy.

On this point, courts disagree as to whether the complaint itself needs to exclude the possibility of independent action, and the Ninth Circuit has yet to rule on this precise issue. Some courts, including the Third and Sixth Circuits, hold that if plaintiffs do not allege direct evidence of an agreement to restrain trade, they must allege "sufficient circumstantial evidence tending to exclude the possibility of independent conduct." *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc., 648 F.3d 452, 2011 WL 2462833, at *4 (6th Cir. June 22, 2011)*; *see also* *In re Ins. Brokerage, 618 F.3d at 322-23* (conspiracy allegations deficient "if there are 'obvious alternative explanation[s]' for the facts alleged.") (quoting *Twombly, 550 U.S. at 567*). Others hold that "despite the need to show some factual context supporting a plausible inference of conspiracy, **[**85]** at the motion to dismiss stage a plaintiff need not allege facts that fully exclude 'independent self-interested conduct as an explanation for defendant's parallel behavior." *LaFlamme v. Societe Air France, 702 F. Supp. 2d 136, 151 (E.D.N.Y. 2010)* (citing *Starr v. Sony BMG Entm't, 592 F.3d 314, 325 (2d Cir. 2010))*.

To a certain extent, these decisions are reconcilable. As the Court sees it, plaintiffs must allege facts *tending* to exclude independent action, but they need not allege facts that *fully* exclude it. The standard is properly viewed as a fluid one; that is, if plaintiffs allege strong circumstantial evidence of an agreement, there is less of a need to allege facts negating an obvious, independent reason for defendants' conduct. This reading of the cases is in accord with *Twombly*'s holding, where the Supreme Court "[a]cknowledg[ed] that parallel conduct' between two businesses "was consistent with an unlawful agreement, [but] nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Iqbal, 129 S. Ct. at 1950* (as quoted in *Watson Carpet, 648 F.3d 452, 2011 WL 2462833, at *4)*.

Here, **[**86]** plaintiffs rely on circumstantial evidence to show that R.D. Offutt agreed to the overarching conspiracy alleged in the complaint - mainly UPGI's statements and the fact of the dehydration venture. Those factual allegations (even in combination with the more specific allegations described above) are weak in terms of suggesting that R.D. Offutt itself consciously committed to the conspiracy, particularly in view of the fact that there is an obvious alternative, independent explanation for R.D. Offutt's entry into the joint venture agreement. At most, plaintiffs have pled that R.D. Offutt had an opportunity to join the conspiracy. Such allegations are insufficient to "nudge plaintiffs' **[*1175]** claims across the line from the conceivable to the plausible." *Twombly, 550 U.S. at 570*; *cf.* *In re Fla. Cement & Concrete Antitrust Litig., 746 F. Supp. 2d 1291 (S.D. Fla. 2010)* ("the opportunity to conspire does not on its own or when paired with parallel conduct suggest Defendants entered an agreement to fix prices"); *Hinds County v. Wachovia Bank, 620 F. Supp. 2d 499 (S.D.N.Y. 2009)* (participation in trade associations or conferences cannot support allegations of a conspiracy). The complaints against **[**87]** R.D. Offutt will be dismissed.

Because the complaint fails to plausibly allege the dehydration agreement contained, as one of its component parts, a horizontal agreement whereby R.D. Offutt entered the underlying conspiracy, the allegations against the remaining dehydrator defendants collapse.

Turning first to R.D. Offutt's joint-venture partner, plaintiffs have not put forth sufficient evidentiary facts supporting the allegation that United II itself consciously committed itself to any underlying, horizontal conspiracy. Some of its members may well have, as the Court has determined that the complaint plausibly alleges that certain grower defendants joined the alleged conspiracy. But this does not necessarily bring United II into the fold.

In sum, the complaint plausibly alleges that UPGI viewed the dehydration venture as a key part of its supply-management efforts. What the complaint does not do is allege that United II and R.D. Offutt joined the underlying conspiracy. The complaint against these defendants will therefore be dismissed with leave to amend.

(2).*The Joint Venture LLC - Idahoan Foods*

The complaint against the joint venture LLC itself, Idahoan Foods, LLC, will also be dismissed **[**88]** because there are no evidentiary factual allegations tying Idahoan to the scheme alleged in the complaint other than the fact of the dehydration joint venture agreement. All plaintiffs have alleged at this point is that Idahoan purchases potatoes from some members of an alleged "potato cartel." That, in and of itself, does not give rise to antitrust liability. *See Rick-Mik Enters. v. Equilon Enters., LLC, 532 F.3d 963 (9th Cir. 2008)*. Further, as with R.D. Offutt, Idahoan has obvious independent, economically self-motivated reasons for entering into the transaction - to purchase potatoes. The facts pled do not allow the court to reasonably infer that Idahoan *itself* conspired with the potato growers to reduce supply or fix prices.

The Court will therefore grant Idahoan Foods' motions to dismiss, with leave to file an amended complaint.

3. INDIRECT PURCHASER CLAIMS

Defendants make three arguments why the Indirect Purchaser Plaintiffs ("IP" Plaintiffs) claims should be dismissed: (1) federal law pre-empts the IP Plaintiffs state law claims; (2) the IP Plaintiffs do not have standing under the laws of the states where they have not been injured; and (3) the IP Plaintiffs do not have standing **[**89]** to pursue antitrust claims.

With respect to the pre-emption argument, the IP Plaintiffs agree that they are not seeking application of state antitrust laws beyond what Capper-Volstead immunizes for federal antitrust liability. With respect to standing under the laws of states where they have not been injured, Plaintiffs have agreed to amend their complaint to add plaintiffs in those states. Therefore, the only issue remaining is whether the IP Plaintiffs have standing to pursue antitrust claims.

[*1176] There is no doubt that the IP Plaintiffs must establish antitrust standing. But what is required to allege enough facts to survive a motion to dismiss is less clear. Defendants initially argued that the factors listed by the Supreme Court in *Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("*AGC*") provide the Court with the best approach to determine antitrust standing, and that the Court should apply those factors. Plaintiffs countered that the Court should reject any suggestion that the Court read limitations derived from federal law into state indirectpurchaser statutes in the absence of authority from the states' legislatures and **[**90]** courts. At oral argument, defense counsel modified their approach, and suggested that the Court ignore *AGC* particularly, or whether or not each state applies it, and focus on the following common denominators: (1) causation; (2) remoteness; and (3) injury.

At this stage of the litigation, the Court agrees with defense counsel's suggestion. This makes sense in light of the Court's indication to the parties at oral argument that it would be receptive to an amended complaint. Accordingly, the Court will grant the motion to dismiss, and instruct Plaintiffs to re-plead. In doing so, Plaintiffs need to be more specific about the plaintiffs and the product. The Court notes that some of what plaintiffs must plead was covered in the briefs and at oral argument, but the pleadings must match the statements made by counsel in the briefs and during oral argument.

4. CLAIMS AGAINST UPGC

UPGC makes three arguments why the Court should dismiss the claims against it: (1) UPGC is an agency and instrumentality of a foreign state and is thus immune from the jurisdiction of any court in the United States pursuant to the Foreign Sovereign Immunities Act (the "FSIA"); (2) antitrust immunity under the Cooperative **[**91]** Marketing Act ("CMA"); and (3) the act of state doctrine warrants dismissal because a foreign sovereign granted UPGC authority to engage in the acts deemed unlawful by Plaintiffs.

Although the claims against UPGC are not barred by either the FSIA or the CMA, they are barred by the Act of State Doctrine. The Court will briefly explain why the first two arguments fail, and then explain why the claims must be dismissed under the Act of State Doctrine.

A. *FSIA*

Under the FSIA, a "foreign state" is immune from the jurisdiction of the federal and state courts of the United States unless it falls within an exception. *28 U.S.C. § 1604*. A "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in *[§ 1603(b)]*." *28 U.S.C. § 1603(a)*. An agency or instrumentality of a foreign state is:

> Any entity -
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined **[**92]** in *section 1332(c)* and *(d)* of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). The parties dispute whether UPGC fulfills the second element. The Court agrees with Plaintiffs that the **[*1177]** second element is not fulfilled because UPGC is not an organ of a foreign state.

An organ of a foreign state "engages in a public activity on behalf of the foreign government." *Cal. Dep't of Water Res. v. Powerex Corp., 533 F.3d 1087, 1098 (9th Cir. 2008)*. In determining whether an entity is an organ of a foreign state, courts consider whether the entity engages in a public activity on behalf of the foreign government. To make this determination, courts examine the following factors: (1) the circumstances surrounding the entity's creation; (2) the purpose of its activities; (3) its independence from the government; (4) the level of government financial support; (5) its employment policies; and (6) its obligations and privileges under state law. *Id.; see also Patrickson v. Dole Food Company, 251 F.3d 795, 807 (9th Cir. 2001)*. An entity may have some autonomy from the foreign government and still be its organ. *Patrickson, 251 F.3d at 807*.

First, with respect to the circumstances **[**93]** surrounding its creation, UPGC asserts that it is nothing more than a forum through which its member agencies implement the powers granted by Canada's provinces. UPGC suggests that this case is similar to *Cal. Dep't of Water Res. v. Powerex Corp.*, where the Ninth Circuit held that the circumstances surrounding Powerex's creation weigh in favor of finding Powerex to be an organ of British Columbia. *Powerex, 533 F.3d at 1099*. In so holding, the court explained that Powerex was a wholly owned subsidiary of BC Hydro, which was created by the British Columbia Hydro and Power Authority Act. Powerex owed its very existence to the Province, which instructed BC Hydro to establish a subsidiary that would assist it with its sovereign functions.

UPGC contends that similarly, the provincial governments created the member agencies, and those agencies created UPGC to assist them with their sovereign functions. The Court finds a striking difference between the two. In *Powerex*, the Ninth Circuit explained that British Columbia's Minister of Energy, Mines, and Petroleum Resources notified BC Hydro that the Provincial Cabinet wanted a single agency to be responsible to market the export of power outside **[**94]** the province and that such an entity should be a wholly owned subsidiary of BC Hydro. *Id.* Powerex was incorporated within a month. *Id.*

Here, although the member agencies may have created UPGC, it does not owe its very existence to a province. A province did not instruct or direct the member agencies to establish UPGC or any other subsidiary that would assist it with its sovereign functions. According to the Amended Complaint, the entire UPGA Board of Directors met with key industry leaders in Canada and the United States, where more than 250 potato growers preliminarily approved the startup of a Canadian counterpart to the UPGA. Another meeting was later held in Toronto, Canada, where the UPGA board initiated the formation of UPGC. *Amended Complaint* ¶ 239, Dkt. 63. Accordingly, the circumstances surrounding the creation of UPGC weigh against finding that UPGC qualifies as an organ.

Second, the purpose of UPGC's activities also weighs against finding that it qualifies as an organ of government. UPGC argues that like Powerex, it helps immune entities fulfill the mission and goals dictated by Canada's provinces and statutes. However, the Ninth Circuit also noted that the Canadian province **[**95]** looked to Powerex to further other public policies. *Id. at 1100*. Powerex fulfills the goals of the Power for Jobs Development Act by supplying power on favorable terms to expanding businesses in British Columbia. **[*1178]** *Id.* It also played a role in treaty formation and implementation. *Id.* All of these activities were pursued for public purposes. *Id.*

That is not the case here. The allegations in the Amended Complaint are that the purpose of UPGC's activities is to disseminate information about the production and marketing of potatoes. UPGC does not dispute this.

Next, UPGC contends that it is controlled and funded by immune government entities. UPGC argues that because it consists of immune member agencies, is controlled by those agencies, and depends upon those agencies for funds, both the third and fourth factors support a finding of organ status. UPGC focuses its argument on the member agencies, arguing that since every member of UPGC's board of directors is a representative of an immune member agency, and because those board members are immune from suit, then UPGC should be immune from suit. UPGC also notes that the member agencies fund UPGC.

There is some merit in UPGC's argument. However, **[**96]** the Court cannot make the same finding as the Ninth Circuit did in *Powerex*. In that case, the court explained that Powerex was restrained by provincial regulations and directives applicable to government corporations, that the province could limit Powerex's ability to enter banking and other financial arrangements, and that Powerex's financial operations were reviewed by the province's comptroller general. The Ninth Circuit also noted that the province had sole beneficial ownership and control of Powerex.

These same indicators of government control are not present with regard to UPGC. Thus, at best this factor is a wash, and would likely tip in favor of not finding immunity were it the only factor the Court were to consider.

The final two factors, UPGC's employment policies and UPGC's obligations and privileges under state law, do not tip the scale in either direction. UPGC has one parttime employee, who is not a public servant. Employment of civil servants is indicative of an organ of government, but it is not dispositive. *Id. at 1102*. Moreover, it does not appear that any savings UPGC receives as a non-profit amounts to substantial financial support.

Based on an evaluation of all six **[**97]** factors, the Court finds that the scale tips decidedly in favor of finding that UPGC is not an organ of a foreign state.

The Court is also unpersuaded by UPGC's argument that it must be deemed an organ of a foreign state because each of its underlying member agencies are, themselves, organs of a foreign state. The Ninth Circuit has explained that Congress was exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions. *Gates v. Victor Fine Foods, 54 F.3d 1457, 1462 (9th Cir. 1995)*. The Ninth Circuit further noted in *Gates* that "[a] contrary reading of the statute could expand immunity far beyond what Congress intended." *Id.*

> As it is written, the Act provides potential immunity to entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision. To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the **[**98]** line, so long as the first corporation is an organ of the foreign state or political subdivision or **[*1179]** has a majority of its shares owned by the foreign state or political subdivision. Although such a broad view of sovereign immunity may very well be desirable, we cannot assume that Congress intended such a result when a literal reading of the statute leads to the opposite conclusion.

Id. UPGC's "organ of an organ of a foreign state" argument requires just such an expansion of immunity - one which the Ninth Circuit has found to be unsupported by a literal reading of the statute. Accordingly, UPGC is not entitled to FSIA immunity.

B. Cooperative Marketing Act

UPGC also contends that it is immune from antitrust liability pursuant to the CMA. As noted previously, *section 5 of the CMA* immunizes individuals and entities engaged in certain cooperative marketing activities including,

> [p]ersons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products **[**99]** of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them.

7 U.S.C. § 455.

Plaintiffs do not dispute that the CMA allows certain entities to engage in data-gathering and data-exchange, and that those entities may engage in direct interchange of information through an association or federation. However, Plaintiffs contend that UPGA's activities went much further and included conduct not immunized by the CMA - specifically, participating in and facilitating supply-restriction and price-fixing. Plaintiffs concede that UPGC collects and disseminates information, but that is not the sole basis of the claims against them. Plaintiffs allege that UPGC conspired with other defendants to reduce the supply of fresh and process potatoes for the purpose of artificially inflating their price. The CMA does not apply to these allegations.

C. The Act of State Doctrine

The classic statement of the Act of State Doctrine was made more than one **[**100]** hundred years ago in *Underhill v. Hernandez, 168 U.S. 250, 18 S. Ct. 83, 42 L. Ed. 456 (1897)*, when Justice Fuller stated that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Credit Suisse v. U.S. Dist. Court for Cent. Dist. of Cal., 130 F.3d 1342, 1346 (9th Cir. 1997)* (Citing *Underhill, 168 U.S. at 252*). The doctrine is "meant to facilitate the foreign relations of the United States . . . ." *Republic of Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988)*. It recognizes "the thoroughly sound principle that on occasion individual litigants may have to forgo decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of United States foreign policy." *Spectrum Stores, Inc. v. Citgo Petroleum Co., 632 F.3d 938, 954 (5th Cir. 2011)* (Internal quotations and citations omitted).

[*1180] UPGC contends that the Act of State Doctrine warrants dismissal **[**101]** because a foreign sovereign granted UPGC authority to engage in the acts deemed unlawful by Plaintiffs. The Act of State Doctrine bars judicial review of a claim if "(1) there is an official act of a foreign sovereign performed within its own territory; and (2) the relief sought or the defense interposed in the action would require a court in the United States to declare invalid the foreign sovereign's official act." *Credit Suisse, 130 F.3d at 1346* (Internal brackets and citation omitted). The burden of proving acts of state lies with the party asserting the applicability of the doctrine. *Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989)*.

Both elements are met in this case. First, the member agencies are foreign sovereigns which have performed official acts within their respective provinces. UPGC has provided evidence that only the member agencies have the power to dictate price, supply, quality, quantity, and exports of Canadian potatoes, and that the member agencies created UPGC simply to facilitate their cooperation and carry out their sovereign duties. Thus, to the extent any decisions were made to reduce the supply or export of Canadian potatoes, those decisions were **[**102]** made by the member agencies in their sovereign capacity.

Plaintiffs raise a concern about whether UPGC can assume the status of the member agencies in this case. But that makes no difference. The first element of the Act of State Doctrine is whether there is an official act of a foreign sovereign performed within its own territory, not whether the named defendant is the foreign sovereign who performed that official act. It makes no difference that the member agencies are not the named defendants in this case. The Act of State Doctrine prevents Plaintiffs from attacking the member agencies' sovereign supply-control decisions through UPGC. Unlike the FSIA, the relevant acts include any governmental acts whose validity would be called into question by adjudication of the suit, not just the acts of the defendants. *Spectrum Stores, 632 F.3d at 954*; *see also* *IAM v. OPEC, 649 F.2d 1354, 1359 (9th Cir. 1981)*. Moreover, "[t]he Act of State Doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity." *IAM, 649 F.2d at 1360*; *see also* *Honduras Aircraft Registry, Ltd. v. Honduras, 129 F.3d 543, 550 (11th Cir. 1997)* ("[T]here is no commercial exception **[**103]** to the Act of State Doctrine as there is under the FSIA.").

The second element is also met. Resolving Plaintiffs' claims would require the Court to declare the member agencies' sovereign acts invalid. In order for the plaintiffs to prevail on their claims against UPGC, the Court would need to conclude that, through UPGC, the member agencies' illegally agreed to reduce the supply and export of potatoes in their respective provinces. However, UPGC has shown that Canadian law expressly empowers the member agencies to cooperate and work with each other to regulate the marketing of potatoes within their respective provinces, and Plaintiffs have provided no evidence to the contrary. Thus, the Court would be forced to declare the member agencies' sovereign acts invalid in order to grant Plaintiffs' requested relief. Accordingly, the Act of State Doctrine bars this suit against UPGC.

5. Motion to Add Names to List of Custodians

Plaintiff Brigiotta's Farmland Produce and Garden Center, Inc. asks the Court to order Defendant Pleasant Valley Potato, Inc. to add Kim Wahlen to their custodian list pursuant to the Preservation **[*1181]** Order. As explained above, Plaintiffs allege that Pleasant Valley is a founding **[**104]** member of UPGI, based on the related allegation that Kim Wahlen attended the Fall 2004 meeting and "signed on to" the conspiracy alleged in the complaint. However, there are no allegations in the complaint to indicate Mr. Wahlen's relationship to Pleasant Valley, or his ability to act on behalf of that entity. Accordingly, the Court has determined that Plaintiffs have failed to allege facts connecting Pleasant Valley to the scheme outlined in the complaint and dismissal with leave to amend is appropriate.

For similar reasons, the Court will deny Plaintiffs' motion to add Kim Wahlen as a custodian. According to his affidavit, although Kim Wahlen is an owner and shareholder of Pleasant Valley, he owns a separate farm. *Wahlen Aff.*, Dkt. 142-2. He indicates that the documents for his farm are kept separate from documents for Pleasant Valley, and that he does not have control of Pleasant Valley documents. *Id.* Pleasant Valley also states that it has designated individuals within Pleasant Valley's corporate structure as record custodians, and that the entirety of Pleasant Valley's records are covered by those designations. Accordingly, there is no justification for designating Kim Wahlen as **[**105]** a record custodian for Pleasant Valley.

ORDER

IT IS ORDERED:

1. Defendant R.D. Offutt Co.'s Motion To Dismiss For Failure to State Claim (Dkt. 72) is **GRANTED with leave to amend**.

2. Defendant Pleasant Valley Potato, Inc.'s Motion to Dismiss (Dkt. 73) is **GRANTED with leave to amend**.

3. Motion to Dismiss Claims Against Blaine Larsen, Blaine Larsen Farms, Inc., Driscoll Potatoes, Inc., and Rigby Produce Inc., (Dkt. 75) is **DENIED**.

4. Potandon Produce L.L.C.'s Motion to Dismiss Amended Class Complaints (Dkt. 76) is **GRANTED with leave to amend**.

5. Defendant Idahoan Foods, LLC's Motions to Dismiss Direct Purchasers' First Amended Class Action Complaint and Indirect Purchasers' First Amended Class Action Complaint (Dkt. 77) is **GRANTED with leave to amend**.

6. Defendant United Potato Growers of Canada Motion to Dismiss (Dkt. 78) is **GRANTED**.

7. Motion to Dismiss Claims Against Certain Defendants and Defendant Associations (Dkt. 79) is **DENIED in part** and **GRANTED in part with leave to amend**.

8. Motion to Dismiss the Indirect Purchasers' Claims (Dkt. 82) is **GRANTED with leave to amend**.

9. Motion to Dismiss Based on the Capper-Volstead Act and Related Statutes (Dkt. 85) is **DENIED**.

10. Dole Food Company, Inc. **[**106]** And Dole Fresh Vegetables, Inc.'s Joint Motion to Dismiss Direct Purchasers' First Amended Class Action Complaint and Indirect Purchasers' First Amended Class Action Complaint (Dkt. 88) is **GRANTED**.

11. Plaintiff Brigiotta's Farmland Produce and Garden Center, Inc.'s Motion to Add Names to Defendant Pleasant Valley Potato, Inc.'s List of Custodians (Dkt. 120) is **DEEMED MOOT**.

12. Plaintiff Brigiotta's Farmland Produce and Garden Center, Inc.'s Corrected Motion and Memorandum in Support to Add Names to **[*1182]** Defendant Pleasant Valley Potato, Inc.'s List of Custodians (Dkt. 122) is **DENIED**.

13. Plaintiffs shall file their amended complaints on or before **January 13, 2012**.

DATED: **December 2, 2011**

/s/ B. Lynn Winmill

B. LYNN WINMILL

Chief U.S. District Court Judge

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Kyne v. Ritz-Carlton Hotel Co., L.L.C.

United States District Court for the District of Hawaii

December 2, 2011, Decided; December 2, 2011, Filed

Civ. No. 08-00530 ACK-RLP

Reporter

835 F. Supp. 2d 914 *; 2011 U.S. Dist. LEXIS 138738 **

ELIZABETH VALDEZ KYNE, CHAD KRUZIC, and ADAM BOROWIEC, on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE RITZ-CARLTON HOTEL COMPANY, L.L.C., dba THE RITZ-CARLTON, KAPALUA, Defendant.

Subsequent History: Motion granted by, Settled by, Dismissed by *Kyne v. Ritz-Carlton Hotel Co., L.L.C., 2014 U.S. Dist. LEXIS 132897 (D. Haw., Sept. 22, 2014)*

Prior History: *Kyne v. Ritz-Carlton Hotel Co., 2011 U.S. Dist. LEXIS 138755 (D. Haw., Dec. 2, 2011)*

Core Terms

service charge, employees, Plaintiffs', preempted, customers, hotel, asserts, wages, implied contract, certification, allegations, quotations, parties, tips, motion to dismiss, preemption, certified question, tip income, state law, legislative history, distributed, amended complaint, food and beverage, summary judgment, questions, state-law, unfair methods of competition, business relationship, defendant's conduct, district court

Counsel: **[**1]** For Elizabeth Valdez Kyne, on behalf of themselves and all others similarly situated, Chad Kruzic, on behalf of themselves and all others similarly situated, Adam Borowiec, on behalf of themselves and all others similarly situated, Plaintiffs: Ashley K Ikeda, Lori K. Aquino, LEAD ATTORNEYS, Weinberg Roger & Rosenfeld, Honolulu, HI; David A. Rosenfeld, LEAD ATTORNEY, Weinberg Roger & Rosenfeld, Alameda, CA; Harold L. Lichten, Hillary Schwab, Shannon Liss-Riordan, LEAD ATTORNEYS, PRO HAC VICE, Lichten & Liss-Riordan, P.C., Boston, MA.

For Ritz-Carlton Hotel Company, LLC, The, doing business as Ritz-Carlton, Kapalua, The, Defendant: Barry W. Marr, Richard M. Rand, LEAD ATTORNEYS, Marr Jones & Wang LLLP, Honolulu, HI.

Judges: Alan C. Kay, Senior United States District Judge.

Opinion by: Alan C. Kay

Opinion

[*919] **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS, GRANTING DEFENDANT'S REQUEST TO STAY PROCEEDINGS AS MODIFIED, AND ADMINISTRATIVELY CLOSING THIS CASE**

FACTUAL BACKGROUND[1]

Plaintiffs Elizabeth Valdez Kyne, Chad **[**2]** Kruzic, and Adam Borowiec ("Plaintiffs"), brought suit on behalf of a similarly situated class against the Ritz-Carlton Hotel Company, L.L.C., d/b/a the Ritz-Carlton, Kapalua ("Defendant" or "Hotel"). Am. Compl. ¶¶ 3-6. Plaintiffs have all worked as food and beverage servers for at the Ritz-Carlton, Kapalua, in Maui, Hawaii. Id. ¶ 3.

Plaintiffs' Amended Complaint alleges that the Ritz Carlton provides food and beverage services throughout the Hotel, including in its banquet department, its **[*920]** restaurants, and through room service. Id. ¶ 5. Plaintiffs allege that Defendant has added a preset service charge to customers' bills for food and beverage served at the Hotel, but that Defendant has not remitted the total proceeds of the service charge as tip income to the employees who serve the food and beverages. Id. ¶¶ 6-9. Instead, Plaintiffs allege that Defendant has had a policy and practice of retaining for themselves a portion of these service charges (or using it to pay managers or other non-tipped employees who do not serve food and beverages), without disclosing to the Hotel's customers that the services charges are not remitted in full to the employees who serve the food and beverages. **[**3]** [2] Id. ¶¶ 8-9. Plaintiffs assert that therefore customers are misled into believing the entire service charge is distributed to the employees that serve them, and as a result, customers who would otherwise leave an additional gratuity do not do so. Id. ¶ 10.

Plaintiffs' Amended Complaint asserts five counts. In Count I, Plaintiffs allege that Defendant's conduct violates Hawaii Revised Statutes ("H.R.S.") *§ 481B-14*, and that pursuant to *§ 481B-4*, such violation constitutes an unfair method of competition or unfair and deceptive act or practice within the meaning of *H.R.S. § 480-2*. In Count II, Plaintiffs allege that Defendant's conduct constitutes unlawful intentional interference with contractual and/or advantageous relations. In Count III, Plaintiffs allege that Defendant's conduct constitutes a breach of two implied contracts. In Count IV, Plaintiffs allege that Defendant has been unjustly **[**4]** enriched at Plaintiffs' expense under state common law. In Count V, Plaintiffs allege that as a result of Defendant's conduct, they have been deprived of income that constitutes wages, which is actionable under *H.R.S. §§ 388-6*, *388-10*, and *388-11*.

PROCEDURAL BACKGROUND

On November 24, 2008, Plaintiffs filed a Class Action Complaint. Doc. No. 1. There were a number of similar cases filed in this Court, and on February 11, 2009, Plaintiffs moved to consolidate or alternatively for assignment of all the related cases to one judge pursuant to *Local Rule 40.2*. [3] Doc. No. 25. On April 8, 2009, this Court adopted the

[1] The facts as recited in this Order are for the purpose of disposing of the current motion and are not to be construed as findings of fact that the parties may rely on in future proceedings.

[2] The Collective Bargaining Agreement ("CBA") between the Hotel and its employees provided that employees shall receive at least 93% of the guaranteed service charge. Def.'s Response to Pls.' CSF Ex. A, § 7.h. There does not appear to be a dispute that Defendant kept 7% of service charges it imposed.

[3] There are at least seven other similar cases that food and beverage service employees have filed against their employers in this District Court between November 21, 2008, and May 13, 2010. These actions are: Davis v. Four Seasons Hotel, Ltd., Civ. No. 08-00525 HG-BMK (D. Haw. Nov. 21, 2008) (hereafter "Davis I"); Apana v. Fairmont Hotels & Resorts (U.S.) Inc., Civ. No. 08-00528 JMS-LEK (D. Haw. Nov. 24, 2008); Villon v. Marriott Hotel Servs., Inc., Civ. No. **[**5]** 08-00529 LEK-RLP (D. Haw. Nov. 24, 2008); Wadsworth v. KSL Grand Wailea Resort, Inc., Civ. No. 08-00527 ACK-LEK (D. Haw. Nov. 24, 2008); Lara v. Renaissance Hotel Operating Co., Civ. No. 08-00560 LEK-RLP (D. Haw. Dec. 10, 2008); Rodriguez v. Starwood Hotels & Resorts Worldwide, Inc., 09-00016 LEK-RLP (D. Haw. Jan. 9, 2009); and Flynn v. Fairmont Hotels & Resorts, Inc., Civ. No. 10-00285 DAE-LEK (D. Haw. May 13, 2010).

Magistrate Judge's Findings and Recommendation that the similar cases not be consolidated. *2009 U.S. Dist. LEXIS 29719, 2009 WL 975753 (Doc. No. 31)*. [4]

On July 9, 2009, the Court stayed this case in light of Judge Gillmor's certification to the Hawaii Supreme Court of a question of law that was also important to **[*921]** the instant case. [5] See Doc. No. 42. The Hawaii Supreme Court answered the certified question on March 29, 2010. See *Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 228 P.3d 303 (Haw. 2010)* (hereafter "Davis II"). Accordingly, on April 19, 2010, Plaintiffs filed a motion to lift the stay and a motion to file an amended complaint. Doc. Nos. 44 & 45. The Magistrate Judge granted both motions **[**6]** on June 22, 2010. Doc. No. 54. Plaintiffs filed their Amended Complaint on June 28, 2010. Doc. No. 56.

Meanwhile, on May 11, 2011, Plaintiffs filed a Motion to Certify Class. Doc. No. 76. On July 18, 2011, the Court adopted the Magistrate Judge's Findings and Recommendation that the Court grant Plaintiffs' motion and certify the class as "all non-managerial food and beverage service employees who, since November 24, 2002, have worked at banquets, functions, small parties, room service, and other events at the Ritz-Carlton, Kapalua, where a service charge was imposed and where a part of that service **[**7]** charge was kept by the Defendant without adequate disclosure to customers." *Doc. No. 91, 2011 U.S. Dist. LEXIS 77814* ; *2011 U.S. Dist. LEXIS 78031, 2011 WL 2940444 (Doc. No. 93)*.

On May 11, 2011, Defendant filed a Motion to Dismiss Plaintiffs' Amended Class Action Complaint ("Defendant's Motion to Dismiss"). Doc. No. 81. The Motion was accompanied by a supporting memorandum ("Def.'s MTD Mem."). Id. Plaintiffs filed an opposition on October 26, 2011 ("Pls.' Opp'n"). Doc. No. 100. On November 2, 2011, Defendant filed a reply ("Def.'s Reply"). Doc. No. 104.

Plaintiffs filed a Motion for Partial Summary Judgment on May 11, 2011 ("Plaintiffs' Motion for Summary Judgment"). Doc. No. 78. The Motion was accompanied by a supporting memorandum ("Pls.' MSJ Mem.") and a concise statement of facts ("Pls.' CSF"). Doc. Nos. 79 & 80. On October 26, 2011, Defendant filed an opposition ("Def.'s Opp'n") and a response to Plaintiffs' CSF ("Def.'s Response to Pls.' CSF"). Doc. Nos. 101 & 102. Plaintiffs filed a reply on November 2, 2011 ("Pls.' Reply"). Doc. No. 103.

On November 9, 2011, Defendant filed a supplement to its Motion to Dismiss, attaching a copy of the Hawaii Supreme Court's order on the question certified to it by Judge Kobayashi in **[**8]** Villon v. Marriot Hotel Services, Inc., CV-08-00529 LEK-RLP, Doc. No. 130 (Oct. 12, 2011), and Rodriguez v. Starwood Hotels & Resorts Worldwide, Inc., CV-09-00016 LEK-RLP, Doc. No. 139 (Oct. 12, 2011). Doc. No. 105 Ex. A.

On November 16, 2011, the Court held a hearing on Defendant's request to stay proceedings, Plaintiffs' Motion for Partial Summary Judgment, and Defendant's Motion to Dismiss. [6] The Court will address Plaintiffs' motion in a separate order.

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[4] In that Findings and Recommendation, the magistrate judge found that reassignment to the same district judge was not warranted, but that the cases should be reassigned to one magistrate judge for more efficient case management. See Doc. No. 29.

[5] Judge Gillmor certified the following question:

> Where plaintiff banquet server employees allege that their employer violated the notice provision of *H.R.S. § 481B-14* by not clearly disclosing to purchasers that a portion of a service charge was used to pay expenses other than wages and tips of employees, and where the plaintiff banquet server employees do not plead the existence of competition or an effect thereon, do the plaintiff banquet server employees have standing under *H.R.S. § 480-2(e)* to bring a claim for damages against their employer?

See *Davis I, Civ. No. 08-00525 HG-LEK, Doc. No. 75, 2009 U.S. Dist. LEXIS 47519*.

[6] Plaintiffs' counsel, who reside in Boston, requested that the hearing be continued from October until November 14, 2011, to allow the case to be heard on the same day as Wadsworth, Civ. No. 08-00527 ACK-RLP, a case in which the parties are represented by the same counsel as in this case. See Doc. No. 96. The Court found it advisable to hold the hearings on different

[*922] STANDARD

Federal Rule of Civil Procedure 12(b)(6) ("*Rule 12(b)(6)*") permits dismissal of a complaint that fails "to state a claim upon which relief can be granted." Under *Rule 12(b)(6)*, review is generally limited to the contents of the complaint. *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*; **[**9]** *Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996)*. Courts may also "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*. Documents whose contents are alleged in a complaint and whose authenticity is not questioned by any party may also be considered in ruling on a *Rule 12(b)(6)* motion to dismiss. See *Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994)*, overruled on other grounds by *Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)*. If a court converts a motion to dismiss into a motion for summary judgment, the court must give the parties notice and a reasonable opportunity to supplement the record. *Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1408 (9th Cir. 1995)*.

On a *Rule 12(b)(6)* motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Fed'n of African Am. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996)*. However, conclusory allegations **[**10]** of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss. See *Sprewell, 266 F.3d at 988*; *Nat'l Assoc. for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000)*; *In re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996)*. Moreover, the court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint. *Sprewell, 266 F.3d at 988*.

In summary, to survive a *Rule 12(b)(6)* motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citations and quotations omitted). "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not **[**11]** do." Id. (internal citations and quotations omitted). Dismissal is appropriate under *Rule 12(b)(6)* if the facts alleged do not state a claim that is "plausible on its face." *Id. at 570*. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id. (quoting *Fed. R. Civ. P. 8(a)(2)*).

"Dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any **[*923]** amendment." *Harris v. Amgen, Inc., 573 F.3d 728, 737 (9th Cir. 2009)* (internal quotation marks omitted). "But courts have discretion to deny leave to amend a complaint for futility, and futility includes the inevitability of a claim's defeat on summary judgment." *Johnson v. Am. Airlines, Inc., 834 F.2d 721, 724 (9th Cir.1987)* (citations and internal quotation marks omitted).

DISCUSSION

The Court will **[**12]** first address Defendant's request that this Court stay proceedings in this case while the Hawaii Supreme Court considers a certified question in a similar case. The Court will then address Defendant's Motion to Dismiss Plaintiffs' Amended Complaint.

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days, but rescheduled the hearing for November 16, 2011, to accommodate Plaintiffs' counsel and their travel needs. See Doc. No. 95.

I. Defendant's Request to Stay Proceedings

On May 11, 2010, in alternative to its Motion to Dismiss, Defendant asked this Court to certify the following question to the Hawaii Supreme Court: "May employees use H.R.S. §[ ]388-6 to seek damages for alleged violations of the obligations created by H.R.S. §[]481B-14 when the employees have not stated a claim under H.R.S. §[]481B-14?" Def.'s MTD Mem. at 24.

Subsequently, on October 12, 2011, Judge Kobayashi certified three questions to the Hawaii Supreme Court in two similar cases, Villon v. Marriot Hotel Services, Inc., CV-08-00529 LEK-RLP, Doc. No. 130 (Oct. 12, 2011), and Rodriguez v. Starwood Hotels & Resorts Worldwide, Inc., CV-09-00016 LEK-RLP, Doc. No. 139 (Oct. 12, 2011). As relevant here, Judge Kobayashi certified the following question:

> May food or beverage service employees of a hotel or restaurant bring a claim against their employer based on alleged violation of Haw. Rev. Stat. § 481B-14 **[**13]** by invoking Haw. Rev. Stat. §§ 388-6, 388-10, and 388-11 and without invoking Haw. Rev. Stat. §§ 480-2 or 480-13? [7]

Villon, CV-08-00529 LEK-RLP, Doc. No. 130; Rodriguez, CV-09-00016LEK-RLP, Doc. No. 139.

On November 8, 2011, the Hawaii Supreme Court issued an "Order on Certified Question," ordering the parties to submit briefing with respect to this question, but stated that it was ordering such action "without conclusively determining whether this court will answer" the certified question. See Def.'s **[**14]** Supplemental Filing, Doc. No. 105 Ex. A.

Defendant acknowledges that Judge Kobayashi's certification renders Defendant's request for this Court to certify the question moot. Def.'s Opp'n at 21. Defendant requests, however, that the Court administratively close this case pending a decision by the Hawaii Supreme Court. Id. Defendant asserts that proceeding with the case at this time would be an inefficient use of judicial resources. Id. at 22. Defendant further asserts that because Plaintiffs' counsel are also the counsel for the plaintiffs in Villon, they will have a full opportunity to brief the issue before the Hawaii Supreme Court, and that Plaintiffs will not be prejudiced because "they will have the **[*924]** benefit of the Hawaii Supreme Court's opinion on this critical issue." Id.

Plaintiffs oppose Defendant's request, asserting that a stay "would impede the orderly course of justice by thwarting the expedient resolution of this case." Pls.' Reply at 15. Specifically, Plaintiffs point out that this case is three years old and has already been stayed once pending certification of another question to the Hawaii Supreme Court. Id.

A district court has discretion to certify a question to a state **[**15]** supreme court. Riordan v. State Farm Mut. Auto Ins. Co., 589 F.3d 999, 1009 (9th Cir. 2009). The Ninth Circuit has explained that it "request[s] certification not because a difficult legal issue is presented but because of deference to the state court on significant state law matters," and that it has "an obligation to consider whether novel state law questions should be certified." Kremen v. Cohen, 325 F.3d 1035, 1037-38 (9th Cir. 2003). The Supreme Court has noted that certification does, "in the long run save time, energy, and resources and helps build a cooperative judicial federalism." Lehman Bros. v. Schein, 416 U.S. 386, 390-91, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974).

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[7] Judge Kobayashi also certified the following questions:

> (1) "If food or beverage service employees of a hotel or restaurant are entitled to enforce Haw. Rev. Stat. § 481B-14 through Haw. Rev. Stat. §§ 388-6, 388-10, and 388-11, what statute of limitations applies?" and (2) "May food and beverage service employees of a hotel or restaurant bring a claim under Haw. Rev. Stat. § 480-2(e) for an alleged violation of Haw. Rev. Stat. § 481B-14, where those employees have alleged that their employer's conduct has caused them injury that resulted from an unfair method of competition?"

The Hawaii Supreme Court declined to accept these two questions. See Def.'s Supplemental Filing, Doc. No. 105 Ex. A.

In *Bellotti v. Baird, 428 U.S. 132, 96 S. Ct. 2857, 49 L. Ed. 2d 844 (1976)*, the Supreme Court held that the district court should have certified questions concerning the meaning of a state statute where potential interpretations of the statute would have avoided or substantially modified the constitutional challenge at issue. *Id. at 146-51* ("In deciding this case, we need go no further than the claim that the District Court should have abstained pending construction of the statute by Massachusetts courts."). The Supreme Court has also admonished both the Ninth Circuit and the **[**16]** district court for failure to certify a novel state law question. See *Arizonans for Official English v. Arizona, 520 U.S. 43, 76-77, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* ("Both lower federal courts in this case refused to invite the aid of the Arizona Supreme Court because they found the language of Article XXVIII [of the Arizona Constitution] 'plain.' . . . A more cautious approach was in order."). With this admonishment in mind, the Ninth Circuit has certified a state law question to the Washington Supreme Court when the parties unanimously opposed certification. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 294 F.3d 1085, 1086 (9th Cir. 2002)*. The Ninth Circuit has also recognized that a certified question need not raise a constitutional issue. See *Kremen, 325 at 1038 n.1, 1042*. (certifying a question related to the tort of conversion). Nonetheless, the Ninth Circuit has held that "[e]ven where state law is unclear, resort to the certification process is not obligatory." *Riordan, 589 F.3d at 1009*.

It is also within the discretion of a district court to stay proceedings in its own court. *Lockyer v. Mirant Corp., 398 F.3d 1098, 1109 (9th Cir. 2005)*. This District Court has recognized that:

> A party **[**17]** seeking a stay . . . 'must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one case be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.'

*Davis I, Civ. No. 08-00525 HG-BMK, 2011 U.S. Dist. LEXIS 121846, 2011 WL 5025485, at *2 (D. Haw. Oct. 20, 2011)* (quoting *Lockyer, 398 F.3d at 1109*).

In *Davis I, Civ. No. 08-00525 HG-BMK, F. Supp. 2d , 810 F. Supp. 2d 1145, 2011 U.S. Dist. LEXIS 96340, 2011 WL 3841075 (D. Haw. Aug. 26, 2011)*, Judge Gillmor similarly considered whether to stay the case in light of the same question **[*925]** certified to the Hawaii Supreme Court in Villon and Rodriguez. Judge Gillmor denied the defendant's request to stay the case, determining that the case was over three years old and had already been stayed once for ten months pending the Hawaii Supreme Court's ruling on a certified question; that although the plaintiffs had previously requested certification of that question, the defendant had opposed certification and had an opportunity to submit briefing on the questions to be submitted; and that it was unclear **[**18]** whether the certification of the questions would have any impact on the ultimate resolution of the case. *Davis I, 2011 U.S. Dist. LEXIS 121846, 2011 WL 5025485, at *2*. Judge Gillmor further explained that the Hawaii Supreme Court may decline the certification and that the ultimate impact of the resolution of the instant question might have was unclear. Id.

Similarly, this case is nearly three years old and has already been stayed once pending resolution of a certified question by the Hawaii Supreme Court. Since Judge Gillmor's order in Davis I, however, the Hawaii Supreme Court has ordered briefing on the question potentially dispositive of the instant motion. See Def.'s Supplement, Doc. No. 105 Ex. A. Although more likely now, it does remain unclear when or if the Hawaii Supreme Court will answer the certified question because the court expressly declined to "conclusively determine" whether it would do so. Id. Also in contrast to the circumstances present in Davis I, Defendant has not previously opposed certification of the *§ 388-6* issue. In summary, in Davis I, the plaintiffs, who are represented by the same counsel as Plaintiffs in this case, had requested certification to the Hawaii Supreme Court of the issue **[**19]** now before the Court, and the defendant in that case had opposed such certification; [8] whereas, in this case, Defendant now requests such certification and Plaintiffs oppose it.

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[8] The defendant in Davis I is not represented by Defendant's counsel in this case.

Significantly, neither the Court nor the parties were able to find an appellate decision approving of a lower court continuing with a case when a state supreme court had accepted a certified question on an important issue of law in that case. It would be inefficient and a waste of resources to continue to trial and potentially the appellate process, and then have the Hawaii Supreme Court issue a decision inapposite to this Court's ruling. With this consideration in mind, and in deference to the Hawaii Supreme Court, who has ordered briefing on the certified question, the Court will stay the effect of the instant order, and administratively close the case, pending resolution of the question certified in Villon and Rodriguez.

Defendant's request to stay this case is GRANTED as modified.

II. Motion to Dismiss

Defendant moves to dismiss all counts of Plaintiffs' Amended Complaint, on the grounds that Plaintiffs' claims are preempted by **[**20]** Federal Labor Law and they fail to state claims upon which relief may be granted. Def.'s MTD Mem. at 1. The Court will first discuss preemption, followed by whether Plaintiffs' allegations state a plausible claim.

A. Preemption

Defendant argues that Plaintiffs' claims require interpretation of the terms of a collective bargaining agreement ("CBA") and therefore the claims are preempted by *Section 301* of the Labor Relations Management Act, *29 U.S.C. § 185(a)* ("*Section 301*"), and accordingly should be dismissed for lack of subject matter jurisdiction. Def.'s MTD Mem. at 30. Defendant also **[*926]** asserts that *H.R.S. § 481B-14* is preempted by the National Labor Relations Act ("NLRA"), pursuant to *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 140-41 (1976)* ("Machinists"), because Congress intended to leave questions regarding the allocation of service charges under a CBA unregulated. Def.'s MTD Mem. at 33.

1. *Section 301* Preemption

Section 301 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between ay such labor **[**21]** organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). In enacting this statute, Congress charged federal courts with a "mandate . . . to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985)*. Thus, "a suit in state court alleging a violation of a provision of a labor contract must be brought under *§ 301* and resolved by reference to federal law. A state rule that purports to define the meaning or scope of a term in a contract suit is therefore pre-empted by federal labor law." *Id. at 210*. The Supreme Court has explained, however, that in order to give the policies behind *Section 301* their proper range, the pre-emptive effect of *§ 301* must extend beyond suits alleging contract violations. Id. Therefore,

> questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such **[**22]** questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of *§ 301* by relabeling their contract claims as claims for tortious breach of contract.

Id. at 211. The Supreme Court in Lueck was careful though to clarify that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by *§ 301* or other provisions of the federal labor law. . . . In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." Id. at 212.

The Supreme Court revisited this issue just a few years after Lueck in Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). Lingle has become a touchstone in the analysis of § 301 preemption. There, the Supreme Court held that although an employee was covered by a collective bargaining agreement that provided a contractual remedy for discharge without **[**23]** just cause, the employee could still maintain her state-law remedy for retaliatory discharge. See id. at 401. The Supreme Court explained that in order to resolve the plaintiff's state law retaliatory discharge claim there was no need to interpret any term of the collective bargaining agreement. Id. at 407. Therefore, the Supreme Court concluded that "the state-law remedy [was] 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption **[*927]** purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." Id. at 407.

In practice, however, the "demarcation between preempted claims and those that survive § 301's reach is not . . . a line that lends itself to analytical precision." Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 691 (9th Cir. 2001). Nevertheless, the Ninth Circuit has established guidelines to aid in this process based upon the Supreme Court's preemption decisions. See Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1060 (9th Cir. 2007).

First, a court must determine whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not **[**24]** by a CBA. Id. at 1059-60. As a part of this analysis, the Court must consider the "legal character of a claim, as 'independent' of rights under the collective-bargaining agreement [and] not whether a grievance arising from 'precisely the same set of facts' could be pursued." Id. at 1060 (citing Livadas v. Bradshaw, 512 U.S. 107, 123, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)). Moreover, a defendant's reliance upon a CBA as an aspect of a defense is not enough to "inject[ ] a federal question into an action that asserts what is plainly a state-law claim." Id.

Second, even if a right exists independently of the CBA, a court must consider whether the claim is nevertheless "substantially dependent on analysis of a collective-bargaining agreement." Id. at 1059-60. To determine whether a state law right is "substantially dependent" on the terms of a CBA, the court must examine whether a claim can be resolved by "looking to" a CBA rather than "interpreting" the CBA. Id. In Livadas, the Supreme Court made it clear that "when the meaning of contract terms is not the subject of dispute, the bare fact that a [CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." Livadas, 512 U.S. at 124. **[**25]** The Ninth Circuit has also explained, as part of this analysis, if a waiver of the state law right at issue is asserted (and a waiver of that right is permissible), a court may look to a CBA to determine whether it contains a clear and unmistakable waiver of that right without triggering Section 301 preemption. See Cramer, 255 F.3d at 692. Finally, a court may look to a CBA to determine damages without triggering the need for preemption. See Lingle, 486 U.S. at 413 n. 12 ("A collective-bargaining agreement may, of course, contain information such as rate of pay . . . that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled."); Livadas, 512 U.S. at 125, ("[T]he mere need to 'look to' the collective-bargaining agreement for damages computation is no reason to hold the state-law claim defeated by § 301."); Burnside, 491 F.3d at 1073.

As Defendant recognizes, this Court previously addressed the same arguments in a similar case, Wadsworth v. KSL Grand Wailea Resort, Inc., __ F. Supp. 2d __, Civ. No. 08-00527 ACK-RLP, 818 F. Supp. 2d 1240, 2010 U.S. Dist. LEXIS 131205, 2010 WL 5146521 (D. Haw. Dec. 10, 2010). In Wadsworth the Court discussed Defendant's arguments in detail and concluded **[**26]** that, with the exception of the portion of Count III seeking recovery for an implied contract between the plaintiffs and the defendants, the same claims alleged here were not preempted by Section 301 because the claims did not involve interpretation of the CBA. [9] Defendant has **[*928]** not alleged any

[9] Defendant states that "[w]hile Defendant recognizes this Court's previous ruling in Wadsworth regarding preemption, Defendant wishes to preserve its argument that Plaintiffs' claims are preempted by federal labor law." Def.'s Reply at 15.

facts or made any arguments that distinguish Plaintiffs' claims in this case from those made by the plaintiffs in Wadsworth. Thus, the Court adopts the reasoning in *Wadsworth* as its reasoning in this case, and concludes that Plaintiffs' claim for breach of an implied contract between Plaintiffs and Defendant is preempted under federal labor law, and the remainder of Plaintiffs' claims are not preempted. See *Wadsworth, 2010 U.S. Dist. LEXIS 131205, 2010 WL 5146521, at *6-14*. The Court will nonetheless briefly address each count.

i. Count I

In short, the Court concludes that Count I, Plaintiffs' unfair methods of competition claim, is not preempted under *Section 301* because Plaintiffs are not **[**27]** enforcing a right conferred only by the CBA, but rather an independent right conferred by state law. Defendant makes the blanket assertion that the Court will need to interpret the CBA in resolving this claim. Def.'s MTD Mem. at 31. Resolution of Plaintiffs' state law claim, however, is not dependent on any provision contained in the CBA and will not require interpretation of the CBA. See *Wadsworth, 2010 U.S. Dist. LEXIS 131205, 2010 WL 5146521, at *8-9*. Therefore Count I is not preempted by *Section 301*.

ii. Count II

In Count II, Plaintiffs assert that Defendant's conduct constitutes unlawful intentional interference with contractual and/or advantageous business relationships that exists between the employees and Defendant's customers. Am. Compl. Count II. Again this state-law claim is independent of any right conferred by the CBA. The CBA plainly does not confer or deny Plaintiffs the right to maintain business relations with customers. There is no indication that any interpretation of the terms or provision of the CBA is needed to support or defend against this claim, and thus Count II is not preempted by *Section 301*.

iii. Count III

With respect to Count III, Plaintiffs recognize this Court has previously concluded **[**28]** that a claim for breach of an implied contract between an employer and employee is preempted by *Section 301*. Thus, Plaintiffs are only pursuing this count to the extent it asserts an implied contract between Defendant and its customers, with Plaintiffs as third party beneficiaries. Pls.' Opp'n at 20 n.6. Any such an implied contract would be independent of the CBA and not require any interpretation of the terms of the CBA. Accordingly, Plaintiffs' breach of an implied contract claim is not preempted to the extent that they allege there is an implied contract between Defendant and its customers, to which Plaintiffs assert they are third party beneficiaries.

Defendant's Motion to Dismiss is GRANTED with respect to the portion of Count III that seeks recovery for an implied contract between Plaintiffs and Defendant.

iv. Count IV

Defendant asserts that Count IV, Plaintiffs' unjust enrichment claim, is preempted by *Section 301* because the CBA expressly authorizes the Hotel to retain a portion of the service charges. Def.'s MTD Mem. at 32. Under Hawaii law, there are two required elements for an unjust enrichment claim - (1) a plaintiff must show that he or she has conferred a benefit upon **[**29]** the defendant and second, that the retention of that benefit was unjust. *Wadsworth, 2010 U.S. Dist. LEXIS 131205, 2010 WL 5146521, at *11*. This claim is based upon *§ 481B-14*, and although the CBA may need to be referenced regarding Defendant's defense, no interpretation of the CBA is required and thus Count IV is not preempted by Section 301. Moreover, **[*929]** there does not appear to be any dispute that the CBA provides that the Hotel may keep 7% of the service charges.

v. Count V

Count V, Plaintiffs' claim pursuant to Chapter 388 is similarly not preempted by *section 301*. This claim is asserting a state-law right that is independent of any right conferred by the CBA. The CBA will not need to be interpreted in resolving this claim and thus it is not preempted by *Section 301*. See *2010 U.S. Dist. LEXIS 131205, [WL] at *13-14*.

2. Machinists Preemption

In Machinists, the U.S. Supreme Court described the circumstances in which the NLRA will preempt an otherwise valid state law. Under Machinists, state activity may be restricted "on the theory that pre-emption is necessary to further Congress['s] intent that 'the conduct involved be unregulated because [it should be] left to be controlled by the free play of economic forces.'" *Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 19-20, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987)* **[**30]** (second alteration in original) (internal quotations omitted) (quoting *Machinists, 427 U.S. at 140*). In considering Machinists preemption, the Supreme Court has explained that states may pass laws that set minimum labor standards because they do not "encourage or discourage employees in the promotion of their interests collectively," which are the subject of federal regulation under the NLRA. *Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)*. The Court further explained "that it cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Id. at 756-57*.

As with Defendant's arguments related to Section 301 preemption, the Court considered a nearly identical argument in Wadsworth that *§ 481B-14* is preempted by the NLRA pursuant to Machinists. See *Wadsworth, 2010 U.S. Dist. LEXIS 131205, 2010 WL 5146521, at *17-18*. The Court adopts its reasoning in *Wadsworth* as its analysis in this case. In sum, *§ 481B-14* is a law of general applicability which creates a minimum standard related to service charges for the entire hotel and restaurant industry. Consequently, **[**31]** *§ 481B-14* does not encourage or discourage employees in the promotion of their interest collectively, and is not the type of statute that the *Machinists* doctrine is intended to preempt. See *id. at *16*; see aslo *Dillingham Constr. N.A. v. County of Sonoma, 190 F.3d 1034, 1038-40 (9th Cir. 1999)* (concluding that a statute directed at certain workers was one of general applicability providing minimum protection for employees and thus was not preempted under Machinists); *Nat'l Broadcasting v. Bradshaw, 70 F.3d 69, 71-73 (9th Cir. 1995)* (holding that a California regulation that applied only to broadcast employees and established an overtime minimum benefit protection was not preempted under Machinists); *Rodriguez, Civ. No. 09-00016, Doc. No. 93, at 29, 2010 U.S. Dist. LEXIS 143698* (explaining that in passing *§ 481B-14*, "Hawai'i has done nothing more than use its broad authority to pass employment regulations to protect workers in the state," and that the provision "in no way limits the rights of self-organization or collective bargaining," and thus was not preempted under Machinists) (internal quotations omitted).

Thus, *§ 481B-14* is not preempted by the Machinists doctrine.

B. Failure to State a Claim

1. Count [32] I**

Count 1 is claim for unfair methods of competition brought pursuant to *§§ 481B-14*, *481B-4*, and *480-2*. Defendant asserts that Plaintiffs have not alleged facts describing **[*930]** the particular competition at issue and an adverse effect on that competition. Def.'s MTD Mem. at 3. Defendant asserts that although Plaintiffs repeatedly use the word "competitive" in the Amended Complaint, Plaintiffs fail to identify specific facts supporting the alleged competition. Id. Defendant contends that per the Hawaii Supreme Court's decision in Davis II, a plaintiff must plead the nature of competition to state a claim under *§ 480-2*, and therefore Count I does not state a claim upon which relief may be granted. Id. at 4.

Plaintiffs disagree with Defendant's characterization of the Hawaii Supreme Court's decision in Davis II. Pls.' Opp'n at 28. Plaintiffs assert that the Court ruled that plaintiffs must meet the "causation requirement" of the statute, which is similar to the requirement in the federal antitrust context, but that the court "specifically decided not to adopt" the test used in federal antitrust cases. Id. Instead, Plaintiffs assert the Hawaii Supreme Court held that "plaintiffs' pleadings 'should **[**33]** reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'" Id. Plaintiffs aver that they have met this burden, asserting that "the negative effect on competition is presumed to have occurred as a result of their employer's violation of *§ 481B-14*." Id. at 28-29.

This Court has already rejected similar arguments made by the plaintiffs in Wadsworth and adopts its analysis in *Wadsworth* with respect to Count I in full as its analysis here. Specifically, the Court reiterates that in Davis II, the Hawaii Supreme Court explained that a plaintiff may bring a claim of unfair methods of competition based on conduct that would also support a claim of unfair or deceptive acts or practices, but that in doing so, the nature of the competition must be sufficiently alleged in the complaint. See *Davis II, 228 P.3d at 315*. The court went on to state that "the existence of the competition is what distinguishes a claim of unfair or deceptive acts or practices from a claim of unfair methods of competition." *Id. at 317 n. 26* (internal quotations omitted). Thus, "[e]mployees are required to allege how [the Hotel's] conduct will negatively affect **[**34]** competition in order to recover on an unfair methods of competition claim." *Id. at 317-18*.

Hawaii's requirement that a plaintiff assert the nature of the competition is designed to serve the same purpose as the federal requirement that a plaintiff assert an antitrust injury. See *id. at 323* ("When examining *HRS § 480-2*, this court has recognized that '[t]he genesis of Hawai'i's consumer protection statute is in federal ***antitrust law***,' with a shared 'concern for the preservation of unrestrained economic competition and free trade.'") (alterations in original) (quoting *Cieri v. Leticia Query Realty, Inc., 80 Haw. 54, 905 P.2d 29, 34 (Haw. 1995))*. In Davis II, the Hawaii Supreme Court explained that it had previously "noted that the antitrust injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation." *Davis II, 228 P.3d at 323* (quoting *Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co. Inc., 91 Haw. 224, 982 P.2d 853, 883 n.31 (1999))*. Consequently, Plaintiffs' argument that they do not have to plead an antitrust injury is without merit.

Plaintiffs' allegations related to competition include that (1) "the defendant has gained an **[**35]** unfair competitive advantage over competitor hotels that comply with *Section 481B-14* because the defendant is able to reduce the published cost of its food and beverages by improperly profiting from the imposition of a service charge that its customers would believe is used in full to pay gratuity for its food and **[*931]** beverage service employees"; (2) that Defendant and Plaintiffs compete for the amount customers are willing to pay for food and beverage services and therefore "[b]y not disclosing to customers that service charges are not paid in full to the wait staff employees, the defendant gains an improper competitive advantage over the plaintiffs by retaining portions of the service charge which customers believe are being provided in full to the plaintiffs as tip income"; and (3) that Plaintiffs' injuries flow from Defendant's anti-competitive acts and are "inextricably intertwined" with those acts. Am. Compl. ¶¶ 11-13.

These pleadings are insufficient because (1) although Plaintiffs allege harm to competitors, they have not alleged harm to competition; (2) merely alleging competition between hotels that results in lower prices to consumers does not give rise to antitrust injury, instead **[**36]** Plaintiffs must show how these lower prices are predatory; (3) Plaintiffs have offered no authority supporting their allegation that they were "competing" with Defendant for tips, that there is a competitive market for tips, that Defendant was part of this market, or that Defendant's actions regarding service charges had a negative effect on any such market; and (4) Plaintiffs' conclusory statements that their injuries are "inextricably intertwined" with Defendant's anticompetitive acts does not establish that Defendant's actions have caused any negative effect on competition. See *Wadsworth, 2010 U.S. Dist. LEXIS 131205, 2010 WL 5146521, at *21-26*.

Consequently, Plaintiffs have not adequately alleged the nature of competition and Count I is DISMISSED without prejudice.

2. Count II

In Count II, Plaintiffs assert a claim for intentional interference with contractual and/or business relations. Defendant asserts that Plaintiffs fail to state a viable claim because any business relationship could "only be by virtue of *H.R.S. § 481B-14*." Def.'s MTD Mem. at 27. Defendant also contends that Plaintiffs have not alleged a business relationship between themselves and the customers or prospective advantage or expectancy that **[**37]** would mature in the future. Id.

Hawaii recognizes two separate torts: (1) tortious interference with contractual relations and (2) the tort of intentional or tortious interference with prospective business advantage. *Meridian Mortg. Inc. v. First Hawaiian Bank, 109 Haw. 35, 122 P.3d 1133, 1145-46 (Haw. App. 2005)*; *Robert's Hawaii Sch. Bus, Inc., 982 P.2d at 887-88*. Among other elements, tortious interference with contractual relations requires a contract between the plaintiff and a third party and a defendant's knowledge of the contract. *Meridian, 122 P.3d at 1143*. Because Plaintiffs have not alleged the existence of a contract between themselves and customers of the Hotel, the Court will focus on a tortious interference with prospective business advantage claim.

To state a claim for tortious interference with prospective business advantage, a plaintiff must allege: (1) the existence of a valid business relationship or a prospective advantage or expectancy that is reasonably probable of maturing into a future economic benefit to the plaintiff; (2) knowledge of the relationship, advantage, or expectancy by the defendant; (3) purposeful intent to interfere with the relationship, advantage or expectancy; **[**38]** (4) legal causation between the act of interference and the impairment of the relationship, advantage, or expectancy; and (5) actual damages. See *id. at 1145-46*.

Plaintiffs have alleged that they served Defendant's customers, that the customers paid the service charge, and **[*932]** that the customers expected that the entirety of the service charge would be distributed to Plaintiffs. Am. Compl. ¶¶ 3, 6, 9-10. In Rodriguez, the Court dismissed the same claim with nearly identical factual allegations. The Court held that "[w]ith only the widest of latitudes can this Court conclude that Plaintiffs alleged in their Second Amended Complaint that the Defendant knew of these relations," but that the plaintiffs had failed to allege that the defendant had intentionally interfered with these relations. *Rodriguez, Civ. No. 09-000016 DAE-LEK, Doc. No. 93, at 60 (D. Haw. Dec. 29, 2010)*. The Court therefore dismissed the claim. Likewise, in Davis I, the Court dismissed an identical claim because the plaintiffs had not alleged that the defendants had intentionally interfered with any potential business relationship between the plaintiffs and the defendants' customers. *Davis I, Civ. No. 08-00525 HG-BMK, Doc. No. 125, at 35-36, 2011 U.S. Dist. LEXIS 112386 (D. Haw. Sept. 30, 2010)*. **[**39]** Here too, Plaintiffs have not asserted that Defendant intentionally interfered with the allegedly advantageous expectancy or business relationship between Plaintiffs and Defendant's customers.

Plaintiffs have therefore failed to allege sufficient facts to support their claim and Count II is DISMISSED without prejudice.

3. Count III

Plaintiffs' third count asserts that "the defendant has breached an implied contract with its customers that the employees would receive this money, for which the employees are third party beneficiaries." [10] Am. Compl. Count III.

To state a claim for breach of an implied contract, a plaintiff must allege the breach of "an agreement in fact," which is not expressed, but "is implied or presumed" based upon the actions of the parties. *Durette v. Aloha Plastic Recycling, Inc., 105 Haw. 490, 100 P.3d 60, 74 (Haw. 2004)*; *Kemp v. State of Haw. Child Support Enforcement*

[10] As discussed above, Plaintiffs are no longer pursuing their claim for breach of an implied contract between Plaintiffs and Defendant. See Pls.' Opp'n at 20 n.6.

Agency, 111 Haw. 367, 141 P.3d 1014, 1038 (Haw. 2006). "Generally, third parties do not have enforceable contract rights. The **[**40]** exception to the general rule involves intended third-party beneficiaries." Ass'n of Apartment Owners of Newtown Meadows v. Venture 15, Inc., 115 Haw. 232, 167 P.3d 225, 262 (Haw. 2007) (internal quotations omitted). Thus, "a prime requisite to the status of 'third party beneficiary under a contract is that the parties to the contract must have intended to benefit the third party, who must be something more than a mere incidental beneficiary." Id. (internal quotations omitted).

Plaintiffs allege that by imposing a service charge, Defendant and Defendant's customers had an implied contract that the serving employees would receive the service charge. Plaintiffs further assert that Defendant has breached this implied contract through withholding service charges. This claim is unlikely to survive a summary judgment motion. See Davis I, Civ. No. 08-00525, Doc. No. 183, at 12-13, 2011 U.S. Dist. LEXIS 122009 (granting summary judgment for the defendant on a similar claim because the plaintiffs were unable to point to evidence of actions taken by the hotel and its customers that would imply a mutual intent to form a contract requiring the hotel to remit the total service charges to employees). At this stage of the proceeding, however, **[**41]** Plaintiffs' allegations are sufficient to state a claim upon which relief may be granted. See Rodriguez, Civ. No. 09-000016 DAE-LEK, Doc. No. 93, at 53, 2010 U.S. Dist. LEXIS 143698 (D. Haw. Dec. 29, 2010) (determining a similar claim with similar allegations stated a plausible claim).

[*933] As discussed above, Count III is preempted to the extent it asserts a breach of an implied contract between Plaintiffs and Defendant, and therefore dismissed to that extent, but Defendant's Motion to Dismiss Count III is DENIED to the extent it asserts a claim for breach of an implied contract between Defendant and Defendant's customers.

4. Count IV

In Count IV, Plaintiffs assert that "the defendant's conduct as set forth above constitutes unjust enrichment under state common law." Am. Compl. Count IV. There are two elements a plaintiff must show to establish an unjust enrichment claim under Hawaii law. Wadsworth, 2010 U.S. Dist. LEXIS 131205, 2010 WL 5146521, at *11. First, a plaintiff must show that he or she has conferred a benefit upon the defendant and second, that the retention of that benefit was unjust. Id. Plaintiffs have alleged that Defendant's conduct of assessing and partially retaining a service charge at events where Plaintiffs serve food and beverages, **[**42]** which customers expect and intend to be distributed to Plaintiffs, results in unjustly enriching Defendant.

Defendant alleges that Plaintiffs cannot show any such retention was unjust because the CBA, negotiated by Defendant and Plaintiffs' union, allows Defendant to retain a portion of service charges. The Court cannot consider the CBA in deciding the motion to dismiss as it is not a proper subject of judicial notice and the Amended Complaint does not refer to it. See Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). [11] Instead, the Complaint alleges that "the defendant has a policy and practice of retaining" a portion of the service charges. Am. Compl. ¶ 8. Although it is questionable whether this claim would survive summary judgment, the facts as alleged in the Complaint state a plausible unjust enrichment claim.

Consequently, Defendant's motion to dismiss Count IV is DENIED.

5. Count V

In Count V, Plaintiffs assert that **[**43]** as a result of Defendant's unlawful failure to remit the entire proceeds of food and beverage service charges to the food and beverage servers, Defendant is liable to Plaintiffs under Chapter 388. Am. Compl. Count V. Whether Plaintiffs have stated a plausible claims turns on a question of statutory

[11] The Court declines to convert Defendant's Motion to Dismiss into a motion for summary judgment.

interpretation - whether an employee may recover under H.R.S. §§ 388-6, 388-10, and 388-11, for the failure of a hotel to distribute service charges to employees when the hotel did not make disclosures required by H.R.S. § 481B-14. [12]

i. Legal Framework

The Court has diversity jurisdiction over this case pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). See Am. Compl. ¶ 2. In Davis II, the Hawaii Supreme Court addressed whether employees have standing to enforce § 481B-14 through § 480-2(e), but declined to consider whether §481B-14 is enforceable through §§ 386-6, 388-10, and 388-11 because "it [was] beyond the scope of the certified question." 228 P.3d at 308 n.12. **[**44]** Because the instant issue raises a question not yet decided by the Hawaii Supreme **[*934]** Court, this Court, "sitting in diversity, must use [its] best judgment to predict how the Hawaii Supreme Court would decide [the] issue." Burlington Ins. Co. v. Oceanic Design & Constr., Inc., 383 F.3d 940, 944 (9th Cir. 2004) (alterations in original) (internal quotations omitted).

The Hawaii Supreme Court instructs that "[w]hen construing a statute, the starting point is the language of the statute itself." State v. Batson, 99 Haw. 118, 53 P.3d 257, 259 (Haw. 2002) (internal quotation omitted). A court "must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose." Id. (internal quotations omitted). When statutes appear to relate to the same subject matter, the Hawaii Supreme Court uses a three-step approach to interpret those statutes.

> First, legislative enactments are presumptively valid and should be interpreted [in such a manner as] to give them effect. Second, [l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another. **[**45]** Third, where there is a "plainly irreconcilable" conflict between a general and a specific statute concerning the same subject matter, the specific will be favored. However, where the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored.

Batson, 99 Haw. 118, 53 P.3d 257, 259 (alterations in original) (internal quotations and citations omitted).

The Hawaii Supreme Court has explained: "It is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning. Instead, our sole duty is to give effect to the statute's plain and obvious meaning." T-Mobile USA v. Cnty. of Hawaii Planning Comm'n, 106 Haw. 343, 104 P.3d 930, 939-40 (Haw. 2005) (internal quotations omitted).

In Count V, Plaintiffs seek to recover unpaid service charges pursuant to H.R.S. § 388-6, titled "Withholding of wages." Section 388-6 provides that: "No employer may deduct, retain, or otherwise require to be paid, any part or portion of any compensation earned by any employee except where required by federal or state statute or by court process or when **[**46]** such deductions or retentions are authorized in writing by the employee." [13] Chapter 388 defines wages, in relevant part, as follows:

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[12] Because this statutory question is at issue in Plaintiffs' Motion for Summary Judgment, the Court will also address the arguments made in the parties' summary judgment briefing related to the statutory interpretation issue here.

[13] Defendant asserts in a footnote of its reply supporting its motion to dismiss that because Plaintiffs' union agreed that the Hotel could keep seven percent of the banquet service charges, there is an authorization in writing that "dooms [Plaintiffs'] claim." Def.'s Reply at 3 n.1. As discussed earlier, the Court cannot consider the CBA in deciding this Motion to Dismiss. The Court declines to convert the Motion to Dismiss to a motion for summary judgment (which would have required notice of the Court's intention and an opportunity for the parties to supplement the record). In any event, the Court has previously rejected this argument in Wadsworth. "[I]f under state law a waiver of rights is permissible, 'the **[**47]** CBA must include clear and unmistakable language waiving the covered employee's state right for a court to even consider whether it could be given effect.'" Wadsworth, 2010 U.S. Dist. LEXIS 131205, 2010 WL 5146521, at *8 (quoting Valles v. Ivy Hill Corp., 410 F.3d 1071, 1076 (9th Cir. 2005)). The Court specifically concluded that although § 388-6 appears to contain a partial waiver provision, "Defendants

> **[*935]** "Wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation. . . . but shall not include tips or gratuities of any kind, provided that for the purposes of *section 388-6*, "wages" shall include tips or gratuities of any kind.

H.R.S. § 388-1.

"Any employer who fails to pay wages in accordance with [Chapter 388] without equitable justification" is liable to the unpaid employee for twice the amount of the unpaid wages. *H.R.S. § 388-10*. *Section 388-11* provides an employee or class of employees with a cause of action to recover unpaid wages.

Pursuant to *§ 481B-4*, if a person violates a provision of Chapter 481B, the person is deemed to have engaged in an unfair method of competition. One such provision, *§ 481B-14*, requires that:

> Any hotel or restaurant that applies **[**48]** a service charge for the sale of food or beverage services shall distribute the service charge directly to its employees as tip income or clearly disclose to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

ii. The Parties' Arguments

Defendant argues that Count V does not state a plausible claim because Plaintiffs have no "inchoate right" to service charges and "if they have a claim to [service charges], it could only be by virtue of *H.R.S. §[]481B-14*." Def.'s MTD Mem. at 13. Defendant asserts that consequently, if Plaintiffs cannot assert a claim under *§ 481B-14*, there is nothing to remedy and a claim under Chapter 388 cannot stand. Id. Defendant asserts that improperly retained service charges are not "compensation earned," and that instead, service charges are property of the hotel that imposes them in contrast to tips. Def.'s Opp'n at 6. Defendant elaborates that the CBA contains the amount of service charges Plaintiffs are entitled to receive, and thus that amount is the only service charges that Plaintiffs "earned," and that "[a]ny payments above that are not earned," but "a penalty imposed **[**49]** by *H.R.S. §[]481B-14*." Id. Defendant relies heavily on the legislative history of *§ 481B-14*. Def.'s MTD Mem. at 7-14. Defendant asserts, inter alia, that because the legislature initially intended to amend Chapters 387 and 388, but chose to ultimately add a new section regarding service charges in Chapter 481B, *§ 481B-14* is enforceable exclusively through Chapter 480. Id. at 10-11. Defendant avers that Plaintiffs erroneously rely on the title of H.B. No. 2123, the bill that eventually became *§ 481B-14*, which is "Relating to wages and Tips of Employees." Def.'s Reply at 11-13. Defendant argues that the title is insignificant because the Hawaii Legislative Drafting Manual indicates that each bill gets a title and that titles should not be amended. Id. at 11.

Plaintiffs point out that "*section 388-1* defines 'wages' as 'compensation for labor services rendered by an employee,' including, for purposes of *§ 388-6*, 'tips or gratuities of any kind.'" Pls.' Reply at 3. Plaintiffs assert that, therefore, service charges that must be distributed as "tip income," "plainly mean" the same thing as "compensation earned" as used in *§ 388-6*. Id. Plaintiffs assert that the plain language of the statutes **[**50]** renders a resort to legislative history unnecessary, and that in any event, the legislative history supports Plaintiffs' interpretation of the statute. Id. at 8. Plaintiffs aver that the title of H.B. No. 2123, "Relating to Wages and Tips of Employees," is "pivotal," because *Article III, section 15* states that: "No law shall be passed except by bill. Each law shall embrace **[*936]** but one subject, which shall be expressed in its title." Id. at 8-9. "Given the title of the law and this mandate of the Hawaii Constitution that the title express the law's subject, it is impossible to see how this Act was not intended to protect the wages and tips of employees." Id. at 9.

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have not come forth with any evidence that there has been any clear and unmistakable waiver in the CBA as they are required to if they seek to assert a party has waived a state-law right." *2010 U.S. Dist. LEXIS 131205, [WL] at *14*. Here too, Defendant has not shown that there has been a clear and unmistakable waiver in the CBA.

Plaintiffs additionally contend that the title supports that *§ 481B-14* and *§ 388-6* can be read in pari materia. Id. Plaintiffs assert that "[s]imply put, *§ 481B-14* deals with distribution of 'tip income' and *§ 388-6* deals with the withholding of wages and other compensation, including tips," and thus the two provisions deal with similar subjects. Id. Plaintiffs further contend that if the legislature did not intend for employees to be able to bring an action seeking payment of service charges under *§ 388-6*, there would no reason **[**51]** for the final version of *§ 481B-14* to require that, where a clear disclosure is not made, the service charge be distributed "directly to its employees as tip income. . . ." Id. at 10. Plaintiffs assert this is "especially so" because the phrase "as tip income" was added after the proposed bill had been moved to Chapter 481B. Id.

iii. Application

Again, the Court considered this identical issue in an order issued today in Wadsworth. Both Defendant and Plaintiffs are represented by the same counsel in Wadsworth, and the parties have not made any arguments that were not made in that case. The Court will adopt its reasoning in that case as its reasoning here. *See Wadsworth*, Civ. No. 08-00527 ACK-RLP, Order Denying Defendants' Motion to Dismiss, Granting Defendants' Request to Stay Proceedings as Modified, and Administratively Closing this Case. In sum, the Court found that pursuant to the plain language of *§§ 388-6*, *388-10*, *388-11*, and *481B-14*, employees can recover service charges that a hotel imposed without making a clear disclosure that the charges were not distributed to employees as tips or wages. Because *§ 481B-14* and *§ 388-6* address the same subject matter, compensation of employees, **[**52]** the statutes can be read in pari materia, i.e., applied with reference to each other. Defendant's argument that the Court must ignore the title of H.B. No. 2123 is not persuasive. Significantly, after noting the title of H.B. No. 2123 was "Relating to Wages and Tips of Employees," the Hawaii Supreme Court stated that "although we believe the title is instructive in that it appears to reflect the legislature's concern that employees may not always be receiving the service charges imposed by their employers, we do not believe it is dispositive of the issue of whether the legislature intended to afford Employees standing to sue for *HRS § 481B-14* violations." *Davis II, 228 P.3d at 313* (emphasis added). Although the title is not dispositive of the issue whether the two provisions here consider the same subject matter, it, along with the Hawaii Supreme Court's discussion in Davis II, provide further support for the Court's conclusion that the statutes both refer to employee compensation and thus can be read in pari materia.

Section 481B-14 requires hotels to distribute service charges to employees as "tip income." *Section 388-6* provides that employers cannot retain "compensation earned" by **[**53]** employees and *§ 388-1* provides that, for purposes of Chapter 388, **"**'[w]ages' means compensation for labor or services rendered by an employee . . . for the purposes of *section 388-6*, 'wages' shall include tips or gratuities of any kind." (emphasis added). Employees earn "tip income" that is distributed from service charges made without the requisite disclosure by serving at the relevant events. This "tip income" qualifies as "compensation earned" under *§ 388-6*, and thus is recoverable pursuant to *§ 388-10*, **[*937]** which provides for penalties against "[a]ny employer who fails to pay wages in accordance with [Chapter 388] without equitable justification," and *§ 388-11*, which provides a cause of action to recover unpaid wages. [14]

Because under Hawaii law the Court need not look past the **[**54]** plain language, it is unnecessary to consult the legislative history of *§ 481B-14* here. Nonetheless, the Court alternatively holds that the legislative history, as interpreted by the Hawaii Supreme Court in Davis II, allows Plaintiffs to recover for unpaid service charges imposed without the requisite disclosure set forth in *§ 481B-14*, through a claim brought pursuant to *§§ 388-6*, *388-10*, and *388-11*.

In Davis II, the Hawaii Supreme Court performed an in depth review of the legislative history of *§ 481B-14*, and determined that "[i]n sum, the legislative history of H.B. No. 2123 indicates that the legislature was concerned that

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[14] At the hearing, Defendant asserted that the CBA provided Defendant with an equitable justification for retaining a portion of the service charges. Again, the Court cannot consider the CBA in deciding this Motion to Dismiss. Nonetheless, the CBA would not provide an equitable justification for violating state law; Defendant could have complied with both the CBA and state law by making the requisite disclosures.

when a hotel or restaurant withholds a service charge without disclosing to consumers that it is doing so, both employees and consumers can be negatively impacted." *Davis II, 228 P.3d at 314* (emphasis added). This Court agrees with Judge Gillmor's analysis in Davis I, that:

> The legislative history of *section 481B-14* reflects a desire to prevent service workers from being deprived of tip income. To the extent that the legislative history of *section 481B-14* is relevant to the question of whether employees may sue for unpaid wages under *section 388-6* based on violations **[**55]** of *section 481B-14*, that legislative history, as interpreted by the Hawaii Supreme Court in Davis, provides support for the idea that employees may do so.

*Davis I, 2010 U.S. Dist. LEXIS 131205, 2011 WL 3841075, at *8* (internal citations omitted).

Defendant's Motion to Dismiss with respect to Count V is DENIED.

CONCLUSION

For the foregoing reasons the Court (1) GRANTS in part and DENIES in part Defendant's Motion to Dismiss, and (2) GRANTS Defendant's request to stay the case as modified.

Specifically, Counts I, II, and III, to the extent Count III seeks recovery for an implied contract between Defendant and Plaintiffs, are DISMISSED.

The Court orders a stay of all proceedings pending a decision by the Hawaii Supreme Court on the question of law certified to it by Judge Kobayashi in Villon v. Marriot Hotel Services, Inc., CV-08-00529 LEK-RLP, Doc. No. 130 (Oct. 12, 2011), and Rodriguez v. Starwood Hotels & Resorts Worldwide, Inc., CV-09-00016 LEK-RLP, Doc. No. 139 (Oct. 12, 2011). The Clerk of Court is directed to administratively close this action without prejudice to any party. The closing is administrative only and thus has no effect on the procedural or substantive rights of any party or any limitations period. Any **[**56]** party may move to reopen the case after the Hawaii Supreme Court rules, and the parties shall promptly inform this court in writing of the disposition in Judge Kobayashi's case, at which time the stay will be automatically dissolved if not earlier. The instant order will not go into effect until after the Hawaii Supreme Court rules on **[*938]** the question of law certified to it in Villon and Rodriguez.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 2, 2011.

/s/ Alan C. Kay

Alan C. Kay

Sr. United States District Judge

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Lynn v. Friedenthal

United States District Court for the Central District of California, Western Division

December 2, 2011, Decided; December 2, 2011, Filed

No. CV 09-08717-PSG (VBK)

Reporter

2011 U.S. Dist. LEXIS 150811 *; 2011 WL 6960823

LAURA LYNN, Plaintiff, v. ALAN FRIEDENTHAL, et al., Defendants.

Subsequent History: Adopted by, Motion granted by, Claim dismissed by *Lynn v. Friedenthal, 2012 U.S. Dist. LEXIS 1949 (C.D. Cal., Jan. 6, 2012)*

Prior History: *Lynn v. Friedenthal, 2011 U.S. Dist. LEXIS 24148 (C.D. Cal., Mar. 8, 2011)*

Core Terms

alleges, Pleadings, plaintiff's claim, rights, Defendants', motion for judgment, Noerr-Pennington Doctrine, Recommendation, deprivation, proceedings, conspiracy, visitations, monitored, litigation privilege, motion to dismiss, free speech, cause of action, Notice, constitutional right, color of state law, missing child, custody, posters, state actor, communications, appointed, conspired, statute of limitations, ex parte application, civil rights action

LexisNexis® Headnotes

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

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

Judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)* is appropriate when, even if all material facts in the non-moving party's pleadings are true, the moving party is entitled to judgment as a matter of law. The standard applied on a *Rule 12(c)* motion for judgment on the pleadings is essentially the same as that applied on a *Rule 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted.

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

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

Under *Fed. R. Civ. P. 12(b)(6)*, a complaint must be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state a claim upon which relief can be granted, factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact). While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. In other words, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.

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

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

HN3[] Motions to Dismiss, Failure to State Claim

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state the claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant acted unlawfully. The complaint must contain factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Where the well-pled facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. A well-pled complaint may proceed even if it appears that a recovery is very remote and unlikely.

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

HN4[] Pro Se Litigants, Pleading Standards

Pro se pleadings are liberally construed.

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

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

HN5[] Motions to Dismiss, Failure to State Claim

Generally, review is limited to the contents of the complaint. However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss. Also, a court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment. Allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party. The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > General Overview

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > General Overview

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN6[] Procedural Matters, Costs & Attorney Fees

A *42 U.S.C.S. §§ 1983*, *1985* and *1988* cause of action arises from the deprivation of the plaintiff's constitutional rights.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > State Court Decisions

HN7[] **Subject Matter Jurisdiction, Federal Questions**

Federal district courts may exercise only original jurisdiction; they may not exercise appellate jurisdiction over state court decisions. This rule arises from the juxtaposition of two statutes: *28 U.S.C.S. § 1331*, giving district courts original jurisdiction over civil actions arising under federal law, and *28 U.S.C.S. § 1257*, giving the United States Supreme Court the right to review final judgments rendered by the highest court of a state. The rule applies even when the challenge to the state court's decision is based on alleged deprivations of federally protected rights.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Rooker-Feldman Doctrine

HN8[] **Full Faith & Credit, Rooker-Feldman Doctrine**

A federal plaintiff may not avoid the Rooker-Feldman bar by styling an attack on a state court's ruling as a civil rights action. In determining whether a civil rights action is such an attack, the court must determine whether the federal plaintiff's claims are inextricably intertwined with the state court's ruling. A federal claim is inextricably intertwined with the state court's ruling when a district court must scrutinize the state court's application of the law. Put another way, a federal claim is inextricably intertwined with the state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN9[] **Fundamental Freedoms, Freedom of Speech**

To establish a *First Amendment* retaliation claim, a plaintiff must show that: (i) she was engaged in a constitutionally protected activity, (ii) that the defendants' actions would chill a person of ordinary firmness from continuing to engage in the protected activity, and (iii) that the protected activity was a substantial or motivating factor in the defendant's conduct.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN10[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington Doctrine, which arose in the context of ***antitrust law***, holds that those who petition the government for redress are generally immune from liability. The Noerr-Pennington Doctrine extended to the approach of citizens to administrative agencies and to the courts. The Doctrine is well established under California law and has been applied to bar liability for activities undertaken in the course of representing a client in litigation. The immunity applies no matter how a plaintiff chooses to characterize a purported cause of action if, as here, the acts which necessarily underlie the purported cause of action are taken in the course of presenting a matter in a court of law. Obviously, the principle of constitutional law that bars litigation arising from injuries received as a consequence of *First Amendment* petitioning activity should be applied regardless of the underlying cause of action asserted by the plaintiffs citation. To hold otherwise would effectively chill the defendants' First Amendment rights citation.

Governments > Legislation > Statute of Limitations > Time Limitations

Legal Ethics > Client Relations > General Overview

Legal Ethics > Professional Conduct > General Overview

HN11[] **Statute of Limitations, Time Limitations**

Cal. Code Civ. Proc. § 340.6 governs the statute of limitations for all actions (other than actual fraud) regarding an attorney's alleged wrongful act or omission, regardless of the theory pled.

Governments > Legislation > Statute of Limitations > Time Limitations

Legal Ethics > Client Relations > General Overview

Legal Ethics > Professional Conduct > General Overview

HN12[] **Statute of Limitations, Time Limitations**

See Cal. Code Civ. Proc. § 340.6.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN13[] **Standing, Injury in Fact**

Plaintiffs in the federal courts must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction. Abstract injury is not enough. It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN14[] **Protection of Rights, Section 1983 Actions**

See 42 U.S.C.S. § 1983.

Civil Rights Law > ... > Section 1983 Actions > Elements > Causal Relationship

Civil Rights Law > ... > Section 1983 Actions > Elements > General Overview

HN15[] **Elements, Causal Relationship**

In order to state a claim under *42 U.S.C.S. § 1983*, a plaintiff must allege that: (1) the defendant was acting under color of state law at the time the complained-of act was committed; and (2) the defendant's conduct deprived plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. The plaintiff also must establish causation, by demonstrating that each defendant personally was involved in the constitutional violation, or that there was a sufficient causal connection between the defendant's wrongful conduct and the constitutional violation. The inquiry into causation must be individualized to focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation.

Civil Rights Law > ... > Section 1983 Actions > Elements > Causal Relationship

HN16[] **Elements, Causal Relationship**

Liability may be imposed on an individual defendant under *42 U.S.C.S. § 1983* only if the plaintiff can show that the defendant proximately caused the deprivations of his federally protected rights of which he complains.

Civil Rights Law > ... > Section 1983 Actions > Elements > General Overview

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

HN17[] **Section 1983 Actions, Elements**

To state a claim under *42 U.S.C.S. § 1983*, the plaintiff must allege a violation of her constitutional rights and show that the defendant's actions were taken under color of state law. That the defendant act under color of state law is a jurisdictional requisite for a *§ 1983* action. Similarly, a plaintiff basing a cause of action on alleged constitutional violations must show that the actions complained of are fairly attributable to the government.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

HN18[] **Elements, Color of State Law**

Generally, private actors are not acting under color of state law. In order to determine whether a private actor acts under color of law for *42 U.S.C.S. § 1983* purposes, the court looks to whether the conduct causing the alleged deprivation of federal rights is fairly attributable to the state. Conduct may be fairly attributable to the state where (1) it results from a governmental policy and (2) the defendant is someone who fairly may be said to be a governmental actor.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

HN19[] **Elements, Color of State Law**

Any services performed by attorney defendants in connection with an underlying custody dispute could not constitute actions under color of state law.

Civil Rights Law > Protection of Rights > Immunity From Liability > Judicial & Quasi-Judicial Functions

Governments > Courts > Judges > Judicial Immunity

HN20[] **Immunity From Liability, Judicial & Quasi-Judicial Functions**

The litigation privilege shields any publication or broadcast made in any judicial proceeding. *Cal. Civ. Code § 47(b)*. The absolute immunity under *§ 47(b)* litigation privilege extended to communications with some relation to judicial proceedings and extends to the steps taken thereafter in execution on the judgment.

Civil Rights Law > Protection of Rights > Immunity From Liability > Judicial & Quasi-Judicial Functions

Governments > Courts > Judges > Judicial Immunity

HN21[] **Immunity From Liability, Judicial & Quasi-Judicial Functions**

Communications with some relation to judicial proceedings are absolutely immune from tort liability by the litigation privilege. It is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. The litigation privilege is absolute and bars all causes of action other than a claim for malicious prosecution, including those asserted in federal court. It has also been regularly applied in federal courts. The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. Courts have given the privilege an expansive reach and held that the privilege is absolute, even in cases in which the result in inequitable. Any doubt as to whether the privilege applies is resolved in favor of applying it.

Civil Rights Law > Protection of Rights > Immunity From Liability > Judicial & Quasi-Judicial Functions

Governments > Courts > Judges > Judicial Immunity

HN22[] **Immunity From Liability, Judicial & Quasi-Judicial Functions**

Pleadings and process in a case are generally viewed as privileged communications. Indeed, even allegedly false or perjurous pleadings and declarations have been held to be covered by the litigation privilege. A declaration functions as written testimony, is a communication, not conduct and is exactly the sort of communication that privilege is designed to protect.

Civil Rights Law > ... > Elements > Color of State Law > Joint Ventures

HN23[] **Color of State Law, Joint Ventures**

A conspiracy claim brought under *42 U.S.C.S. § 1983* requires proof of an agreement or meeting the minds to violate constitutional rights and an actual deprivation of constitutional rights. To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy.

Civil Rights Law > ... > Elements > Color of State Law > Joint Ventures

HN24[] **Color of State Law, Joint Ventures**

To state a claim for conspiracy, a plaintiff must allege specific facts showing two or more persons intended to accomplish an unlawful objective of causing the plaintiff harm and took some concerted action in furtherance thereof. To state a claim for conspiracy under *42 U.S.C.S. § 1983*, a plaintiff must allege facts showing agreement of the alleged conspirators to deprive him of his rights. A conspiracy allegation, even if established, does not give rise to a liability under *§ 1983* unless there is a deprivation of civil rights.

Civil Rights Law > ... > Elements > Color of State Law > Joint Ventures

HN25[] **Color of State Law, Joint Ventures**

A valid claim for conspiracy between private parties and the government to violate constitutional rights requires an agreement or meeting of the minds. Further, the acts of the private parties must be sufficiently intertwined with a violating government actor amounting to more than near acquiescence.

Counsel: [*1] Laura Lynn, Plaintiff, Pro se, Pacific Beach, CA.

For Kenneth P. Sherman, Carlson, Deklerk, Sherman and Rale, Defendants: Susan S Baker, Nemecek & Cole, Sherman Oaks, CA.

Judges: VICTOR B. KENTON, UNITED STATES MAGISTRATE JUDGE.

Opinion by: VICTOR B. KENTON

Opinion

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Philip S. Gutierrez, United States District Judge, pursuant to *28 U.S.C. §636* and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On November 25, 2009, Laura Lynn (hereinafter "Plaintiff") filed a Complaint entitled "Complaint for Immediate Injunctive and Other Relief." Plaintiff brought this action for injunctive relief, compensatory and punitive damages pursuant to *42 U.S.C. §1983* and *18 U.S.C. §§241* and *242*. (Complaint at 3.) Plaintiff named as Defendants Alan H. Friedenthal, individually and in his official capacity as Commissioner of the Superior Court of the State of California, Los Angeles; Steff R. Padilla, individually and in her official capacity as Commissioner of the Superior Court of the State of California, Los Angeles; the Superior Court of the State of California, **[*2]** Los Angeles; Michael Howard; Helen A. Lynn; Kenneth P. Sherman; Carlson, De Klerk, Sherman and Rale, and Does 1-9. (Complaint at 1-5.)

On April 20, 2010, the Court issued an Order re Dismissal with Leave to Amend.

On May 19, 2010, Plaintiff filed a "First Amended Complaint" pursuant to *42 U.S.C. §§1983*, *1985* and *1988*.

On July 19, 2010, Defendants Commissioner Friedenthal, Commissioner Padilla and the Superior Court of the County of Los Angeles filed a "Notice of Motion and Motion to Dismiss Plaintiff's First Amended Complaint by Defendants Commissioner Friedenthal, Commissioner Padilla and the Superior Court of California, County of Los Angeles; Memorandum of Points and Authorities in Support Thereof [*F.R. Civ. P. Rules 12(b)(1)* and *(6)*]."

On August 17, 2010, Plaintiff filed "Plaintiff's Request for Judicial Notice" and "Plaintiff's Opposition to Motion to Dismiss."

On August 31, 2010, Defendants Commissioners Friedenthal and Padilla and the Superior Court filed a "Reply to Plaintiff's Opposition to the Defendants' Motion to Dismiss First Amended Complaint."

On October 12, 2010, Defendants Kenneth P. Sherman and Carlson, De Klerk, Sherman & Rale filed an Answer to Plaintiff's First Amended **[*3]** Complaint.

On February 9, 2011, United States Magistrate Judge Victor B. Kenton issued a Report and Recommendation recommending that Defendants Commissioner Friedenthal, Commissioner Padilla and the Los Angeles County Superior Court's Motion to Dismiss be granted.

On March 8, 2011, United States District Judge Philip S. Gutierrez issued an "Order Accepting and Adopting the Report and Recommendation of United States Magistrate Judge" and "Judgment" was entered dismissing Defendants Commissioner Friedenthal, Commissioner Padilla, the Los Angeles County Superior Court and Michael Howard with prejudice.

On May 25, 2011, Defendants Kenneth P. Sherman, Carlson, De Klerk, Sherman & Rale filed a "Notice of Motion and Motion for Judgment on the Pleadings as to Plaintiff's First Amended Complaint by Defendants Kenneth P. Sherman, and Carlson, De Klerk, Sherman & Rale; Memorandum of Points and Authorities in Support Thereof" and "Request for Judicial Notice in Support of Motion for Judgment on the Pleadings as to Plaintiff's First Amended Complaint" (hereinafter referred to as "RJN").

On May 31, 2011, the Court issued a Minute Order ordering Plaintiff to file an Opposition or Statement of Non-Opposition **[*4]** to Defendants' Motion for Judgment on the Pleadings.

On June 24, 2011, Plaintiff filed "Response to Notice of Motion and Motion for Judgment on the Pleadings as to Plaintiff's First Amended Complaint by Defendants Kenneth P. Sherman and Carlson, De Klerk, Sherman and Rale" (hereinafter referred to as "Opposition").

On July 7, 2011, Defendants filed a "Reply in Support of Motion for Judgment on the Pleadings as to Plaintiff's First Amended Complaint by Defendants Kenneth P. Sherman, and Carlson, De Klerk, Sherman and Rale; Memorandum of Points and Authorities in Support Thereof" (hereinafter referred to as "Reply").

Having reviewed the allegations in Plaintiff's First Amended Complaint, Defendants Kenneth P. Sherman and Carlson, De Klerk, Sherman & Rale's Motion for Judgment on the Pleadings, Plaintiff's Opposition and Defendants' Reply, the Court hereby recommends that Defendants' Motion for Judgment on the Pleadings be granted.

STATEMENT OF FACTS

Plaintiff was a party to a contentious custody dispute in Los Angeles County Superior Court Case No. PD 016769. (FAC at ¶ 17.) In July of 2007, Defendant Kenneth P. Sherman, a partner in the law firm of Carlson, De Klerk, Sherman and Rale, was **[*5]** appointed by Defendant Commissioner Friedenthal to represent Plaintiff's two minor sons, S.L. and B.L., in the custody proceedings. (FAC, ¶¶ 11, 12, 38.) Defendant Commissioner Friedenthal placed the children, B.L. and S.L., in the custody of their paternal grandparents, Helen and Jim Lynn. (FAC, ¶ 39.) Plaintiff alleges that her warnings regarding the grandparents' unfitness to care for the children were foreshadowed by the fact that her son, S.L., later chose to live on the streets instead of with his father. (FAC, ¶¶ 39, 41.) Plaintiff alleges that Defendants Commissioner Friedenthal and Kenneth P. Sherman predicted that this would happen to S.L. (FAC, ¶ 41.)

Plaintiff alleges that in December of 2007 Defendant Kenneth P. Sherman failed to return any of her phone calls while she was attempting to regain custody of her son, B.L., with whom she had only limited visitation rights. (FAC, ¶¶ 40, 49.) On December 21, 2007, Defendant Kenneth P. Sherman applied, ex parte, for an Order to Show Cause why Plaintiff's visitations with her children should not be professionally monitored. (FAC, ¶ 49; RJN, Exhibit ["Ex."] 1.) The ex parte application was supported by the declaration of Helen Lynn, **[*6]** who, along with Jim Lynn, had custody of B.L. at that time. Helen Lynn declared that, among other recent problems, B.L. had become "belligerent and verbally assaultive" after spending the weekend with Plaintiff, and had "talked about killing [Helen] and killing himself." (RJN, Ex. 1, p. 7, ¶ 9.)

Plaintiff alleges that the ex parte application was motivated by her admitted actions on December 19, 2007, wherein she hung missing children posters around her in-laws' neighborhood regarding M.S. and L.S., Jim and Helen Lynn's other grandchildren. (FAC, ¶¶ 18, 48, 52.) Defendant Commissioner Friedenthal was upset with Plaintiff for hanging missing children posters of M.S. and L.S. (Plaintiff's ex-husband's sister's children). Defendant Commissioner Friedenthal said if they were not her children she had no business hanging missing children posters. (FAC at ¶¶ 49-50.)

Defendant Commissioner Friedenthal granted the ex parte application and ordered that Plaintiff's visitations be professionally monitored at her expense. (FAC ¶¶ 50, 51; RJN, Ex. 2, p. 43.) Plaintiff alleges that the hanging of the missing children posters of M.S. and L.S., is free speech and that the conspiracy between Helen Lynn **[*7]** and Defendant Kenneth P. Sherman to violate Plaintiff's protected speech is in violation of *42 U.S.C. §§ 1983* and *1985*. (FAC, ¶¶ 50, 53.)

Defendant Kenneth P. Sherman continued to represent Plaintiff's son B.L. until the attorney Defendants made a motion to be relieved as counsel which was granted by the Court on July 16, 2008. Thereafter, attorney E. Scott Clarke was appointed to represent B.L. (FAC ¶62.)

PLAINTIFF'S CAUSES OF ACTION

Plaintiff alleges the following causes of action:

1. Violation of the rights of Plaintiff under the *First* and *Fourteenth Amendments of the United States Constitution* and *42 U.S.C. §§1983*, *1985* and *1988*, wherein Plaintiff claims that Defendants Commissioner Friedenthal and the Superior Court threatened retaliation if Plaintiff exercised her free speech;

2. Violation of Plaintiff's rights under the *First* and *Fourteenth Amendments of the United States Constitution* and *42 U.S.C. §§1983* and *1985* against Defendants Commissioner Padilla and the Los Angeles County Superior Court. Plaintiff alleges that "Facebook" postings violated her free speech and caused emotional distress;

3. Violation of Plaintiff's rights under the *First*, *Fifth* and *Fourteenth Amendments of the United States Constitution* **[*8]** and *42 U.S.C. §§1983*, *1985* and *1988* wherein Plaintiff alleges Defendants Helen Lynn, Kenneth P. Sherman and Carlson De Klerk, Sherman & Rale violated Plaintiff's free speech rights;

4. Violation of Plaintiff's rights under the *First* and *Fourteenth Amendments of the United States Constitution* and *42 U.S.C. §§1983* against Defendant Michael Howard;

5. Negligent infliction of emotional distress and denial of rights under the *Fifth Amendment of the United States Constitution* against Defendant Los Angeles County Superior Court for failure to supervise a Commissioner;

6. Negligent infliction of emotional distress and denial of constitutional rights of the *First* and *Fifth Amendments of the United States Constitution* and in violation of *42 U.S.C. §1983* against Doe Defendants; and
7. Civil conspiracy against Defendants Helen Lynn, Kenneth P. Sherman, and Carlson, De Klerk, Sherman & Rale wherein Plaintiff alleges that those Defendants conspired to deprive Plaintiff of child support by false pretense. (FAC at ¶¶ 105-126.)

DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants Kenneth P. Sherman, and Carlson, De Klerk, Sherman & Rale contend that Plaintiff's First Amended Complaint should be dismissed **[*9]** on the following grounds: (1) Plaintiff's civil rights action is barred by the Rooker-Feldman [1] doctrine; (2) Plaintiff's claims are barred by the absolute immunity provided by the Noerr-Pennington Doctrine; (3) Plaintiff's claims against the attorney Defendants are barred by the one-year statute of limitations on actions against attorneys arising out of the performance of professional services; (4) Plaintiff's civil conspiracy claim is barred by the absolute litigation privilege; (5) Plaintiff lacks Article III standing; and (6) Plaintiff's *42 U.S.C. § 1983* claim fails because attorney Defendants were not state actors acting under color of state law.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff contends that her civil rights action is not barred by the Rooker-Feldman Doctrine; Plaintiff's claims are not barred by the absolute immunity provided by the Noerr-Pennington Doctrine; the one-year statute of limitations on actions against attorneys arising out of the performance of professional **[*10]** services is tolled until Plaintiff knows about the actual conspiracy to commit fraud and the disclosure of the illegitimate communications between Defendants that were not subject to the attorney-client privilege and from the last occurrence of damage pursuant to the conspiracy; *California Civil Code 47* absolute litigation privilege does not apply to *42 U.S.C. § 1983* or *§ 1985* claims; *Civil Code 47* absolute litigation privilege does not apply because the tortious conduct was not relegated to the judicial proceedings; Plaintiff does not lack Article III standing; and non-state actors can be acting under color of law when acting in concert with state actors.

DEFENDANTS' REPLY

Defendants in their Reply contend that Plaintiff's civil rights claims are barred by the Rooker-Feldman Doctrine; Plaintiff's reliance on McDonald [2] is misplaced and all of Plaintiff's claims are barred by the absolute immunity provided by the Noerr-Pennington Doctrine; Plaintiff admits that she suffered actual injury on December 21, 2007 such that her claims are absolutely barred by the one-year statute of limitations embodied in *California Code of Civil Procedure § 340.6*; the absolute litigation privilege bars Plaintiff's **[*11]** claims for civil conspiracy; Plaintiff's opposition confirms that she lacks Article III standing; and Plaintiff's response does not provide any authority under which the attorney Defendants can be considered "state actors" for the purpose of Plaintiff's *42 U.S.C. § 1983* claims.

LEGAL STANDARD

A. Motion for Judgment on the Pleadings.

HN1[] Judgment on the pleadings pursuant to *Rule 12(c)* is appropriate when, even if all material facts in the non-moving party's pleadings are true, the moving party is entitled to judgment as a matter of law. *Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002)*, overruled on other grounds by *United States v. Aukai, 497 F.3d 955 (9th Cir. 2007)*. The standard applied on a *Rule 12(c)* motion for judgment on the pleadings is essentially the same as that applied on a *Rule 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted. See, *Hal Roach Studios, Inc. v. Richard Feiner & Co,, Inc., 896 F.2d 1542, 1550 (9th Cir. 1989)*.

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[1] See *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L. Ed. 2d 206 (1983)*; *Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L. Ed. 362 (1923)*.

[2] *McDonald v. Smith, 472 U.S. 479, 105 S.Ct. 2787, 86 L. Ed. 2d 384 (1985)*.

HN2[] Under Federal Rule of Civil Procedure Rule 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail "to state a claim upon which **[*12]** relief can be granted." Fed.R.Civ.P. 12(b)(6). To survive a motion to dismiss for failure to state a claim upon which relief can be granted, "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (citations omitted). In other words, "(t)hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

HN3[] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state the claim to relief that is plausible on its face.'" *Iqbal, 129 S.Ct. at 1949* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when the **[*13]** plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*(citing *Twombly, 550 U.S. at 556*.) "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant acted unlawfully." (Id.) The Complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S.Ct. at 1949*. "[W]here the well-pled facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' -'that the pleader is entitled to relief.'" (*Id. at 1950* [quoting *Fed.R.Civ.P. 8(a)(2)* (internal brackets omitted). "[A] well-pled complaint may proceed even if it appears that a recovery is very remote and unlikely." *Twombly, 550 U.S. at 556, 127 S.Ct. 1955* (quoting *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L. Ed. 2d 90 (1974))*.

HN4[] Pro se pleadings are liberally construed. *Ortez v. Washington County, 88 F.3d 804, 807 (9th Cir. 1996)*. HN5[] Generally, review is limited to the contents of the **[*14]** complaint. *Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994)*. However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss. *Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1997)*. Also, a court may take judicial notice of "matters of public record" without converting a motion to dismiss into a motion for summary judgment. *Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)*. Allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party. *Clegg v. Cult Awareness Network, 18 F.3d at 754*. "The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.)* (citations omitted), amended by *275 F.3d 1187 (2001)*.

DISCUSSION

For all of the following reasons, Defendants' Motion for Judgment on the Pleadings should be granted.

A. Plaintiff's Civil Rights Action is Barred by the Rooker-Feldman [*15] Doctrine.

Plaintiff alleges in Count III that "Defendants Helen A. Lynn and Kenneth P. Sherman, Doe 6 and the partnership of Carlson, De Klerk, Sherman & Rale conspired with a state actor [i.e., Commissioner Friedenthal and the Los Angeles County Superior Court] to violate the Plaintiff's right to free speech, the posting of missing children posters, by intimidating and oppressing the Plaintiff by requesting the court to order monitored visitation with her child. HN6[] A *42 U.S.C. 1983*, *1985* and *1988* cause of action arises from the deprivation of the Plaintiff's constitutional rights. The Defendants' action caused severe emotional distress due to the loss of her constitutionally guaranteed right to a parent-child relationship, as well as the restriction to her *First Amendment* right to free speech." (FAC, ¶ 117.)

HN7[] Federal District Courts may exercise only original jurisdiction; they may not exercise appellate jurisdiction over state court decisions. *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L. Ed. 2d 206 (1983)*; *Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L. Ed. 362 (1923)*; *Dubinka v. Judges of the Superior Court, 23 F.3d 218, 221 (9th Cir. 1994)*. This rule **[*16]** arises from the juxtaposition of two statutes: *28 U.S.C. §1331*, giving District Courts original jurisdiction over civil actions arising under federal law, and *28 U.S.C. §1257*, giving the United States Supreme Court the right to review final judgments rendered by the highest court of a state. *Dubinka at 221*. The rule applies even when the challenge to the state court's decision is based on alleged deprivations of federally protected rights. *Allah v. Superior Court, 871 F.2d 887, 891 (9th Cir. 1989)*.

HN8[] A federal Plaintiff may not avoid the Rooker-Feldman bar by styling an attack on a state court's ruling as a civil rights action. *Branson v. Nott, 62 F.3d 287, 291 (9th Cir. 1995)*, cert. denied, *516 U.S. 1009, 116 S. Ct. 565, 133 L. Ed. 2d 491 (1995)*; *Worldwide Church of God v. McNair, 805 F.2d 888, 893 n. 4*. In determining whether a civil rights action is such an attack, the Court must determine whether the federal Plaintiff's claims are "inextricably intertwined" with the state court's ruling. *District of Columbia Court of Appeals v. Feldman 460 U.S. 462, 482 n. 16, 103 S.Ct. 1303, 75 L. Ed. 2d 206 (1983)*; *Dubinka v. Judges of the Superior Court, 23 F.3d 218, 221 (9th Cir. 1994)*. A federal claim is inextricably intertwined with the state court's **[*17]** ruling when a district court must scrutinize the state court's application of the law. *Dubinka at 222*. Put another way, a "federal claim is inextricably intertwined with the state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25, 107 S.Ct. 1519, 95 L. Ed. 2d 1 (1987)* (Marshall, J., concurring.)

Plaintiff alleges that the attorney Defendants and Helen Lynn conspired with Defendant Commissioner Friedenthal and violated Plaintiff's right to free speech. (FAC, ¶ 117.) It appears that Plaintiff, unhappy with the Los Angeles County Superior Court's rulings, is attempting to circumvent the decisions of the Los Angeles County Superior Court by filing a civil rights action. This is improper; rather, Plaintiff should appeal the Los Angeles County Superior Court's rulings through the state court system.

Plaintiff further alleges that Defendants' actions in ordering Plaintiff's visitations with her son be monitored violated her constitutional rights and restricted her *First Amendment* right to free speech. (FAC, ¶ 117.) However, *HN9*[] "[t]o establish a *First Amendment* retaliation claim ... a plaintiff **[*18]** must show that: (i) [she] was engaged in a constitutionally protected activity, (ii) that the defendants' actions would chill a person of ordinary firmness from continuing to engage in the protected activity, and (iii) that the protected activity was a substantial or motivating factor in the defendant's conduct." *Pinard v. Clatskanie School Dist. 6J, 467 F.3d 755, 770 (9th Cir. 2006)*; *Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999)*.

In order to analyze Plaintiff's civil rights violations based on the allegations contained in ¶ 117 of the FAC, this Court necessarily would have to determine whether the Los Angeles County Superior Court's decision was correct. Specifically, this Court would need to render a decision on whether Defendant Commissioner Friedenthal's alleged orders prohibiting Plaintiff from posting missing children posters in her former in-laws' neighborhood and requiring Plaintiff's visits with her son, B.L., to be professionally monitored, were correct. Consequently, any claims arising out of these allegations are inextricably intertwined with the Los Angeles County Superior Court's rulings, and are barred by the Rooker-Feldman Doctrine as **[*19]** a matter of law.

B. Plaintiff's Claims Are Barred by the Absolute Immunity Provided by the Noerr-Pennington Doctrine.

HN10[] The Noerr-Pennington Doctrine, which arose in the context of ***antitrust law***, holds that those who petition the government for redress are generally immune from liability. *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 92 S.Ct. 609, 30 L. Ed. 2d 642 (1972)*[the Noerr-Pennington Doctrine extended to "the approach of citizens ... to administrative agencies ... and to the courts"]. The Doctrine is well established under California law and has been applied to bar liability for activities undertaken in the course of representing a client in litigation. *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn., 136 Cal. App. 4th 464,* *478-79, 39 Cal. Rptr. 3d 43 (2006)*. The immunity applies no matter how a plaintiff chooses to characterize a purported cause of action if, as here, the acts which necessarily underlie the purported cause of action are taken in the course of presenting a matter in a court of law. In *Ludwig v. Superior Court, 37 Cal.App.4th 8, 21-22, fn. 17, 43 Cal. Rptr. 2d 350 (1995)*, the Court explained, "obviously, the principle of constitutional law that bars litigation arising **[*20]** from injuries received as a consequence of *First Amendment* petitioning activity [should be applied] regardless of the underlying cause of action asserted by the plaintiffs [citation]. [T]o hold otherwise would effectively chill the defendants' *First Amendment* rights [citation]." *Ludwig, 37 Cal.App.4th at 21-22, fn. 17* (quoting *Hi-Top Steel Corp. v. Lehrer, 24 Cal.App.4th 570, 577-78, 29 Cal. Rptr. 2d 646 (1994)*.

In *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Ass'n., supra*, the Court analyzed the applicability of the Noerr-Pennington Doctrine to bar liability based upon conduct undertaken in the course of litigating lien claims. In holding that the complaint was subject to being stricken insofar as the Noerr-Pennington Doctrine completely barred plaintiff's claims, the court concluded, "[t]he gravamen of plaintiff's action arises from the activity of defendants in litigating lien claims ..." *Premier, 136 Cal. App. 4th at 477*. Holding that the right of litigants and their counsel to present their positions in a court of law constitutes the essence of petitioning activity, the court dismissed the claim in its entirety.

Plaintiff in her Opposition relies on *McDonald v. Smith, 472 U.S. 479, 105 S.Ct. 2787, 86 L. Ed. 2d 384 (1985)* **[*21]** for the proposition that the Noerr-Pennington Doctrine does not apply to her case. Plaintiff argues that libelous and damaging falsehoods in petitions to Government officials are not protected by the Noerr-Pennington Doctrine. Plaintiff's reliance on McDonald, however, is mistaken. The attorney Defendants are being sued by Plaintiff for their conduct associated with litigation on behalf of Plaintiff's minor sons, B.L. and S.L. Plaintiff's claims against Defendants Kenneth P. Sherman, and the law firm Carlson, De Klerk, Sherman & Rale are based on their petitioning activities in the custody dispute. The gravamen of Plaintiff's Complaint is that after the attorney Defendants were appointed by the Court to represent Plaintiff's sons, they conspired with the Court and others to deprive her of her constitutional right to free speech and a parent-child relationship. However, the attorney Defendants' conduct cannot be characterized as libel, such that McDonald would apply.

Plaintiff also contends that the attorney Defendants have been sued as a result of their activities on behalf of Defendant Helen Lynn and her daughter Crystal Lynn Strelioff (Opposition at 15) and therefore are not protected **[*22]** by the Noerr-Pennington Doctrine. However, the attorney Defendants did not represent either Helen Lynn or Crystal Lynn Strelioff.

The attorney Defendants have the right to present their positions and their clients' positions in a court of law. The attorney Defendants are protected by the Noerr-Pennington Doctrine because their representation of Plaintiff's minor sons, B.L. and S.L., in the underlying action was petitioning activity. The attorney Defendants were appointed by Defendant Commissioner Friedenthal to advocate for their clients, S.L. and B.L. Plaintiff's claims are therefore barred under the Noerr-Pennington Doctrine as a matter of law.

C. Plaintiff's Claims Against the Attorney Defendants Are Barred by the One-Year Statute of Limitations on Actions Against Attorneys Arising out of the Performance of Their Professional Services.

HN11[] *California Code of Civil Procedure § 340.6* governs the statute of limitations for all actions (other than actual fraud) regarding an attorney's alleged wrongful act or omission, regardless of the theory pled. ***HN12***[] *Section 340.6* provides that:

> "(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance **[*23]** of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. ... in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that ...:
> (1) The plaintiff has not sustained actual injury."

In July of 2007, Defendant Kenneth P. Sherman was appointed by Defendant Commissioner Friedenthal to represent Plaintiff's two minor sons, B.L. and S.L., in the custody proceedings. (FAC, ¶¶ 11, 12, 38.) As noted by Plaintiff in her Opposition, Defendant Kenneth P. Sherman was relieved as attorney of record on July 16, 2008. (Opposition at 1.)

Plaintiff was aware of the facts giving rise to her claim against the attorney Defendants by December 21, 2007. At that time, Defendant Kenneth P. Sherman is alleged to have: "[f]iled an Application for Order and Supporting Declaration dated December 19, 2007 in order to effect the ex parte order to require a monitor for Laura's visits. Mr. Sherman did not speak **[*24]** to Laura about the 'facts' he alleged. Mr. Sherman made his recommendations based on double hearsay (what Helen said B.L. said Laura said) and the act of hanging the missing children posters." (FAC, ¶ 52.) On that date, Defendant Commissioner Friedenthal issued a temporary order requiring Plaintiff's visits with her son, B.L., to be monitored. (RJN, Ex. 2 at p. 2: 15-26.)

Plaintiff alleges that "Defendants Helen A. Lynn and Kenneth P. Sherman, Doe 6 and the partnership of Carlson, De Klerk, Sherman & Rale conspired with a state actor to violate Plaintiff's right to free speech, the posting of missing children posters, by intimidating and oppressing the Plaintiff by requesting the Court to order monitored visitation with her child." (FAC, ¶ 117.) Plaintiff further alleges that "[t]he Defendants' actions caused severe emotional distress due to the loss of her constitutionally guaranteed right to a parent-child relationship, as well as the restriction to her *First Amendment* right to free speech." (Id.)

Based on Plaintiff's allegations, her rights were infringed upon by the Los Angeles County Superior Court's December 21, 2007 order requiring her visits to be professionally monitored. (FAC, **[*25]** ¶ 51; RJN, Ex. 2.) There is no question but that the December 21, 2007 Order caused Plaintiff to suffer "actual injury" sufficient to end any tolling of the one-year statute of limitations. Plaintiff was therefore required to file her action against the attorney Defendants within one year thereafter, or by no later than December 21, 2008. Plaintiff's Complaint filed on or about November 25, 2009 was filed more than 11 months after the statute of limitations expired.

D. Plaintiff Lacks Article III Standing.

Defendants Kenneth P. Sherman and Carlson, De Klerk, Sherman & Rale contend that Plaintiff lacks standing under Article III to bring this action. As stated in *O'Shea v. Littleton, 414 U.S. 488, 493-94, 94 S.Ct. 669, 38 L. Ed. 2d 674 (1974)*, ***HN13***[] "Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.' ... Abstract injury is not enough. It must be alleged that the Plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. ... The injury or threat of injury must be both 'real and immediate,' not 'conjectural' **[*26]** or 'hypothetical.'" (Citations omitted.)

Here, there is no "current controversy" between Plaintiff, and the attorney Defendants. As conceded in Plaintiff's FAC, the attorney Defendants were relieved as counsel for Plaintiff's sons, B.L. and S.L., in July of 2008, more than a year before Plaintiff filed her original Complaint. (FAC, ¶ 62; Opposition at 1.) Moreover, the only alleged misconduct of the attorney Defendants amounted to their ex parte application seeking professional monitoring of Plaintiff's visitations with her son, B.L., in December of 2007. Since the attorney Defendants' withdrawal from the underlying custody dispute, there has been no act or omission of the attorney Defendants alleged by Plaintiff to cause Plaintiff injury. Plaintiff does not have any present injury in fact and therefore, does not have Article III standing to proceed with this action against the attorney Defendants.

E. Plaintiff Has Failed To State A Claim Against Each Defendant Under *Section 1983*.

HN14[] *42 U.S.C. §1983* provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state... subjects, or causes to be subjected, any citizen of the United States or other **[*27]** person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

HN15[] In order to state a claim under §1983, Plaintiff must allege that: (1) Defendant was acting under color of state law at the time the complained-of act was committed; and (2) Defendant's conduct deprived Plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L. Ed. 2d 420, (1981)*, overruled on other grounds by *Daniels v. Williams, 474 U.S. 327, 330-31, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)*; *Jensen v. City of Oxnard, 145 F.3d 1078, 1082 (9th Cir.)*, cert. denied, *525 U.S. 1016, 119 S. Ct. 540, 142 L. Ed. 2d 449 (1998)*.

Plaintiff also must establish causation, by demonstrating that each Defendant personally was involved in the constitutional violation, or that there was a sufficient causal connection between the Defendant's wrongful conduct and the constitutional violation. *Redman v. County of San Diego, 942 F.2d 1435, 1446-47 (9th Cir. 1991)*(en banc), cert. denied, *502 U.S. 1074, 112 S. Ct. 972, 117 L. Ed. 2d 137 (1992)*; *Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989)*. **[*28]** "The inquiry into causation must be individualized to focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy 844 F.2d 628, 633 (9th Cir. 1988)*.

HN16[] Liability may be imposed on an individual defendant under §1983 only if the plaintiff can show that the defendant proximately caused the deprivations of his federally protected rights of which he complains. *Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988)*; *Harris v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981)*.

HN17[] To state a claim under Title 42 U.S.C. §1983, the plaintiff must allege a violation of her constitutional rights and show that the defendant's actions were taken under color of state law. *West v. Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L. Ed. 2d 40 (1988)*; *Gritchen v. Collier, 254 F.3d 807, 812 (9th Cir.2001)*. That the defendant act under color of state law is "'a jurisdictional requisite for a §1983 action.'" Id. (quoting *West v. Atkins, 487 U.S. 42, 46, 108 S.Ct. 2250, 101 L. Ed. 2d 40 (1988))*. Similarly, a plaintiff basing a cause of action on alleged constitutional violations must show that the "actions complained of are 'fairly attributable' **[*29]** to the government." *Morse v. North Coast Opportunities, Inc., 118 F.3d 1338, 1340 (9th Cir. 1997)*.

HN18[] Generally, private actors are not acting under color of state law. See *Price v. Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991)*. In order to determine whether a private actor acts under color of law for §1983 purposes, the Court looks to whether the conduct causing the alleged deprivation of federal rights is fairly attributable to the State. Id. (citing *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982))*. Conduct may be fairly attributable to the State where (1) it results from a governmental policy and (2) the defendant is someone who fairly may be said to be a governmental actor. *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)*; see also *Sutton v. Providence St. Joseph Medical Center, 192 F.3d 826, 839 (9th Cir. 1999)*. Defendants Kenneth P. Sherman and Carlson, De Klerk, Sherman & Rale are not state actors.

Here, Plaintiff has failed to set forth sufficient facts against Defendants Kenneth P. Sherman and the law firm of Carlson, De Klerk, Sherman and Rale to state a civil rights cause of action under 42 U.S.C. §1983. Defendants Kenneth P. **[*30]** Sherman and Carlson, De Klerk, Sherman and Rale are not "state actors." Plaintiff's FAC against the attorney Defendants must be dismissed because Defendant Kenneth P. Sherman was not "acting under color of state law." Here, the attorney Defendants were appointed by Defendant Commissioner Friedenthal to represent Plaintiff's minor children in a custody dispute. (FAC, ¶¶ 11, 38.) The attorney Defendants did not represent Plaintiff, nor did they owe any duty to her. The attorney Defendants only owed a duty to the children to act in their best interests with respect to the custody proceedings. Consequently, the attorney Defendants could not and did not act under color of state law at any time during the custody proceedings when they communicated with Helen Lynn, Plaintiff, or the Court; when they filed the ex parte application seeking monitored visitations with B.L.; or when they allegedly chose to ignore Plaintiff's phone calls and work with Helen in drafting a declaration for the ex parte application. As a private attorney appointed by the court, Defendant Kenneth P. Sherman was still acting as a private actor. Additionally, HN19[] any services performed by the attorney Defendants in connection **[*31]** with the underlying custody dispute could not constitute actions under color of state law. See *Franklin v. Oregon, 662 F.2d 1337, 1345 (9th Cir. 1981)*.

F. Plaintiff's Civil Conspiracy Claim Is Barred by the Litigation Privilege Set Forth in Civil Code *§ 47(b)*.

Plaintiff in the seventh count of the FAC alleges, in a single sentence, that "Helen Lynn, Kenneth P. Sherman, Carlson, De Klerk, Sherman & Rale and Doe 6 conspired to defraud the Plaintiff of child support by false pretense ." (FAC, ¶ 126.) ***HN20***[] "The litigation privilege shields any 'publication or broadcast' made in any ... judicial proceeding." *A. F. Brown Elec. Contractor, Inc. v. Rhino Electric Supply, Inc., 137 Cal.App.4th 1118, 1126, 41 Cal. Rptr. 3d 1 (2006)*; see also *California Civil Code § 47(b)*. All of Plaintiff's claims against the attorney Defendants are absolutely privileged as communications in legal proceedings which have some connection or logical relation to the legal proceedings. In *Rusheen v. Cohen, 37 Cal.4th 1048, 39 Cal. Rptr. 3d 516, 128 P.3d 713 (2006)*, the California Supreme Court explained that the absolute immunity under Civil Code *§ 47(b)* litigation privilege extended to communications "with some relation" to judicial proceedings **[*32]** and extends to the steps taken thereafter in execution on the judgment.

Thus, ***HN21***[] "communications with 'some relation' to judicial proceedings" are "absolutely immune from tort liability" by the litigation privilege. *Rubin v. Green, 4 Cal.4th 1187, 1193, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993)*. It is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." (*Id. at 1057*.) The litigation privilege is absolute and bars all causes of action other than a claim for malicious prosecution, including those asserted in federal court. *Rohde v. Wolf, 154 Cal.App.4th 28, 38, 64 Cal.Rptr.3d 348 (2007)*. It has also been regularly applied in federal courts. "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action [Citations]." *Silberg v. Anderson, 50 Cal.3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365 (1990)*. See *Morales v. Cooperative of Am. Physicians, Inc., 180 F.3d 1060, 1062 (9th Cir. 1999)*. Courts have given the privilege an expansive reach **[*33]** and held that the privilege is absolute, even in cases in which the result in inequitable. *Doctors' Co. Ins. Servs. v. Superior Court, 225 Cal.App.3d 1284, 1294, 275 Cal. Rptr. 674 (1990)*. Any doubt as to whether the privilege applies is resolved in favor of applying it. *Adams v. Superior Court, 2 Cal.App.4th 521, 529, 3 Cal. Rptr. 2d 49 (1992)*.

HN22[] "Pleadings and process in a case are generally viewed as privileged communications." *Navellier v. Sletten, 106 Cal.App.4th 763, 770, 131 Cal. Rptr. 2d 201 (2003)*. Indeed, even allegedly false or perjurous pleadings and declarations have been held to be covered by the litigation privilege. See *Pollock v. University of Southern California, 112 Cal.App.4th 1416, 1431, 6 Cal. Rptr. 3d 122 (2003)*(A declaration "functions as written testimony," is a "communication, not conduct" and "is exactly the sort of communication that privilege is designed to protect").

Thus, Plaintiff's conspiracy claim only alleges conduct by the attorney Defendants arising out of the representation of Plaintiff's minor sons B.L. and S.L. in the family court action, namely, their alleged interference with Plaintiff's claim for child custody. As such, the attorney Defendants' **[*34]** conduct is absolutely privileged. Indeed, the conduct alleged by Plaintiff relates solely to communications and recommendations to a court relating to issues under consideration by that court. As such, Plaintiff's claims against the attorney Defendants are barred.

Further, ***HN23***[] a conspiracy claim brought under *§ 1983* requires proof of an "agreement or meeting the minds to violate constitutional rights." *Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002)*, quoting *United Steelworkers of America v. Phelps Dodge, 865 F.2d 1539, 1540, 1541 (9th Cir. 1989)*(citation omitted), and an actual deprivation of constitutional rights. *Hart v. Parks, 450 F.3d 1059, 1071 (9th Cir. 2006)*(quoting *Woodrum v. Woodward County, Oklahoma, 866 F.2d 1121, 1126 (9th Cir. 1989)*. "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." *Franklin, 312 F.3d at 441*, quoting *United Steel Workers, 865 F.2d at 1541*.

HN24[] To state a claim for conspiracy, Plaintiff must allege specific facts showing two or more persons intended to accomplish an unlawful objective of causing Plaintiff harm and took some concerted action **[*35]** in furtherance thereof. *Gilbrook v. City of Westminster, 177 F.3d 839 (9th Cir. 1999)*; *Burns v. County of King, 883 F.2d 819, 822 (9th Cir. 1989)*(conclusory allegations of conspiracy insufficient to state a valid *§ 1983* claim); see also *Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998)*(to state a claim for conspiracy under *§ 1983*, Plaintiff must allege facts showing agreement of the alleged conspirators to deprive him of his rights. A conspiracy allegation, even if established, does not give rise to a liability under *§ 1983* unless there is a deprivation of civil rights.).

HN25[] A valid claim for conspiracy between private parties and the government to violate constitutional rights requires an agreement or "meeting of the minds." *Adickes v. S.H. Kress and Co., 398 U.S. 144, 158, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*. Further, the acts of the private parties must be "sufficiently intertwined" with a violating government actor amounting to more than "near acquiescence." *Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983)*. Accordingly, Plaintiff has failed to state a civil conspiracy claim and the attorney Defendants must be dismissed.

RECOMMENDATION

For all of the foregoing reasons, **IT IS RECOMMENDED** that the District Court issue **[*36]** an Order: (1) approving and adopting this Report and Recommendation; (2) granting Defendants Kenneth P. Sherman and Carlson, De Klerk, Sherman & Rale's Motion for Judgment on the Pleadings; and (3) directing that an Order be entered dismissing these Defendants from this action with prejudice.

DATED: December 2, 2011

/s/ VICTOR B. KENTON

UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

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Lopez v. GMAC Mortg.

United States District Court for the Eastern District of California

December 5, 2011, Decided; December 5, 2011, Filed

CASE NO. CV F 11-1795 LJO JLT

Reporter
2011 U.S. Dist. LEXIS 139436 *; 2011 WL 6029875

CARMEN LOPEZ, Plaintiff, vs. GMAC MORTGAGE, et al., Defendants.

Core Terms

borrower, lender, allegations, rescission, trust deed, notice, constructive fraud, fraudulent, fiduciary, foreclosure, motion to dismiss, circumstances, obligor, unfair, fails, cause of action, modification, consumer, fiduciary relationship, business practice, equitable tolling, misrepresentation, violations, discovery, mortgage, foreclosure sale, particularity, obligations, default, limitations period

Counsel: **[*1]** For Carmen Lopez, Plaintiff: Michael Anthony Younge, Law Office of Michael A. Younge, Anaheim Hills, CA.

For GMAC Mortgage, LLC, Executive Trustee Services, LLC, Defendants: Joedat Hani Tuffaha, Severson & Werson, Irvine, CA.

Judges: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

ORDER ON DEFENDANTS' F.R.Civ.P. 12 MOTION TO DISMISS

(Doc. 5.)

INTRODUCTION

Defendants GMAC Mortgage, LLC ("GMAC") and Executive Trustee Services, LLC ("ETS") seek to dismiss as legally barred and time barred plaintiff Carmen Lopez' ("Ms. Lopez"') claims arising out of the defaulted loan for and foreclosures on her Bakersfield property ("property"). Ms. Lopez filed no papers to oppose timely GMAC and ETS' (collectively "defendants"') F.R.Civ.P. 12(b)(6) motion to dismiss. This Court considered defendants' F.R.Civ.P. 12(b)(6) motion to dismiss on the record and VACATES the December 15, 2011 hearing, pursuant to Local Rule 230(c), (g). For the reasons discussed below, this Court DISMISSES this action against defendants.

BACKGROUND

Ms. Lopez' Loan And Property Foreclosure

On October 3, 2007, Ms. Lopez financed the property's purchase with a $233,494 loan from GMAC. A Deed of Trust ("DOT") was recorded on **[*2]** October 5, 2007 to secure the loan. [1] The DOT names ETS as trustee and Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary, acting solely as nominee for lender GMAC.

On August 28, 2009, a Substitution of Trustee was recorded whereby ETS became DOT trustee.

In early 2010, Ms. Lopez experienced difficulties making her monthly loan payments and attempted to obtain a loan modification with GMAC. GMAC rejected Ms. Lopez' partial payment and told her they could not accept such payments because she was under review for loan modification.

On May 3, 2010, ETS recorded a Notice of Default and Election to Sell under Deed of Trust which indicated that Ms. Lopez was $36,582.62 in arrears as of April 30, 2010.

In June 2010, plaintiff attempted again to work out a loan modification but never received the loan application as promised. In August 2010, GMAC informed Ms. Lopez that she did not qualify for loan modification and that ETS proceeded toward property foreclosure.

In August 2010, Ms. Lopez again attempted to obtain loan modification and provided GMAC requested **[*3]** financial documents. On September 21, 2010, MERS assigned its beneficial interest under the DOT to GMAC, and a corresponding Assignment of Deed of Trust was recorded on October 1, 2010. In February 2011, GMAC declined Ms. Lopez for loan modification.

On May 12, 2011, a Notice of Trustee's Sale for the property was recorded. On August 24, 2011, the property's foreclosure sale occurred, and GMAC became record title owner of the property. A Trustee's Deed upon Sale was recorded on August 30, 2011.

Ms. Lopez' Claims

On September 15, 2011, prior to removal to this Court, Ms. Lopez filed her Verified Complaint ("complaint") to allege California statutory and common law claims which will be addressed below. The complaint alleges that "GMAC failed to act as reasonable lender by placing the Plaintiff in a risky unreasonable and unaffordable loan." The complaint accuses GMAC of knowing that once the loan became unaffordable, Ms. Lopez "would be forced to either refinance or have a foreclosure" and of failing "to disclose the terms and risks of the Subject Loan in any meaningfully [sic] way." The complaint seeks damages of "loss money and property," a declaration that the foreclosure sale is void **[*4]** and unenforceable, an injunction to evict Ms. Lopez, rescission of the promissory note and foreclosure sale, and punitive damages.

DISCUSSION

F.R.Civ.P. 12(b)(6) **Motion To Dismiss Standards**

Defendants fault the complaint's failure to allege factual claims that "give rise to a valid claim" given the complaint's speculative and conclusory allegations which are unclear as to "which defendants are being named under each claim."

---

[1] Documents pertaining to Ms. Lopez' loan and property foreclosure were recorded with the Kern County Official Records.

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*; *Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997)*. A *F.R.Civ.P. 12(b)(6)* dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)*; *Graehling v. Village of Lombard, Ill., 58 F.3d 295, 297 (7th Cir. 1995)*. A *F.R.Civ.P. 12(b)(6)* **[*5]** motion "tests the legal sufficiency of a claim." *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*.

In addressing dismissal, a court must: (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-338 (9th Cir. 1996)*. Nonetheless, a court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citation omitted). A court "need not assume the truth of legal conclusions cast in the form of factual allegations," *U.S. ex rel. Chunie v. Ringrose, 788 F.2d 638, 643, n. 2 (9th Cir.1986)*, and must not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated . . . laws in ways that have not been alleged." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L. Ed. 2d 723 (1983)*. A court need not permit an **[*6]** attempt to amend if "it is clear that the complaint could not be saved by an amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*.

A "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)* (internal citations omitted). Moreover, a court "will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes, 181 F.R.D. 629, 634 (S.D. Cal. 1998)*. In practice, a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly, 550 U.S. at 562, 127 S. Ct. at 1969* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*.

In *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937,1949, 173 L. Ed. 2d 868 (2009)*, the U.S. Supreme Court explained:

> . . . a complaint must contain sufficient factual matter, **[*7]** accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. (Citations omitted.)

After discussing *Iqbal*, the Ninth Circuit Court of Appeals summarized: "In sum, for a complaint to survive [dismissal], the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)* (quoting *Iqbal, 556 U.S. 662, 129 S.Ct. at 1949*).

The U.S. Supreme Court applies a "two-prong approach" to address dismissal:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that **[*8]** states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the

> complaint has alleged - but it has not "show[n]"-"that the pleader is entitled to relief." *Fed. Rule Civ. Proc. 8(a)(2)*.
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. 662, 129 S.Ct. at 1949-1950.

Moreover, a plaintiff suing multiple defendants "must allege the basis of his claim against each defendant to satisfy *Federal Rule of Civil Procedure 8(a)(2)*, **[*9]** which requires a short and plain statement of the claim to put defendants on sufficient notice of the allegations against them." *Gauvin v. Trombatore, 682 F.Supp. 1067, 1071 (N.D. Cal. 1988)*. "Specific identification of the parties to the activities alleged by the plaintiffs is required in this action to enable the defendant to plead intelligently." *Van Dyke Ford, Inc. v. Ford Motor Co., 399 F.Supp. 277, 284 (D. Wis. 1975)*.

A"complaint may be dismissed under *Rule 12(b)(6)* when its own allegations indicate the existence of an affirmative defense." *Quiller v. Barclays American/Credit, Inc., 727 F.2d 1067, 1069 (11th Cir. 1984)*. For instance, a limitations defense may be raised by a *F.R.Civ.P. 12(b)(6)* motion to dismiss. *Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980)*; *see Avco Corp. v. Precision Air Parts, Inc., 676 F.2d 494, 495 (11th Cir. 1982)*, *cert. denied*, *459 U.S. 1037, 103 S. Ct. 450, 74 L. Ed. 2d 604 (1982)*. A *F.R.Civ.P. 12(b)(6)* motion to dismiss may raise the limitations defense when the statute's running is apparent on the complaint's face. *Jablon, 614 F.2d at 682*. If the limitations defense does not appear on the complaint's face and the trial court accepts matters outside the **[*10]** pleadings' scope, the defense may be raised by a motion to dismiss accompanied by affidavits. *Jablon, 614 F.2d at 682*; *Rauch v. Day and Night Mfg. Corp., 576 F.2d 697 (6th Cir. 1978)*.

For a *F.R.Civ.P. 12(b)(6)* motion, a court generally cannot consider material outside the complaint. *Van Winkle v. Allstate Ins. Co., 290 F.Supp.2d 1158, 1162, n. 2 (C.D. Cal. 2003)*. Nonetheless, a court may consider exhibits submitted with the complaint. *Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987)*;*Van Winkle, 290 F.Supp.2d at 1162, n. 2*. In addition, a "court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)*. A court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir.2003)*. Such consideration prevents "plaintiffs from surviving a *Rule 12(b)(6)* motion by deliberately omitting **[*11]** reference to documents upon which their claims are based." *Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)*. [2] A "court may disregard allegations in the complaint if contradicted by facts established by exhibits attached to the complaint." *Sumner Peck Ranch v. Bureau of Reclamation, 823 F.Supp. 715, 720 (E.D. Cal. 1993)* (citing *Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.1987))*.

With these standards in mind, this Court turns to defendants' challenges to Ms. Lopez' claims.

Failure To Tender

Common Law And Equitable Claims

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[2] "We have extended the 'incorporation by reference' doctrine to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)* (citing *Parrino, 146 F.3d at 706*).

Defendants raise Ms. Lopez' failure to tender amounts owed on her loan as a global defense to the complaint's claims in that their "crux" "is a challenge to the foreclosure sale" which invokes **[*12]** equitable principles.

"A tender is an offer of performance made with the intent to extinguish the obligation." *Arnolds Management Corp. v. Eischen, 158 Cal.App.3d 575, 580, 205 Cal.Rptr. 15 (1984)* (citing *Cal. Civ. Code, § 1485*; *Still v. Plaza Marina Commercial Corp., 21 Cal.App.3d 378, 385, 98 Cal.Rptr. 414 (1971))*. "A tender must be one of full performance . . . and must be unconditional to be valid." *Arnolds Management, 158 Cal.App.3d at 580, 205 Cal.Rptr. 15*. "Nothing short of the full amount due the creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount." *Rauer's Law etc. Co. v. S. Proctor Co., 40 Cal.App. 524, 525, 181 P. 71 (1919)*.

A defaulted borrower is "required to allege tender of the amount of [the lender's] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure." *Abdallah v. United Savings Bank, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (1996)*, *cert. denied*, *519 U.S. 1081, 117 S. Ct. 746, 136 L. Ed. 2d 684 (1997)*. In *FPCI RE-HAB 01 v. E & G Investments, Ltd., 207 Cal.App.3d 1018, 1021, 255 Cal.Rptr. 157 (1989)*, the California Court of Appeal explained:

> . . . generally "an action to set aside **[*13]** a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security." . . . . This rule . . . is based upon the equitable maxim that a court of equity will not order a useless act performed. . . . "A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust." . . . The rationale behind the rule is that if plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the plaintiffs. (Citations omitted.)

An action to set aside a foreclosure sale, unaccompanied by an offer to redeem, does not state a cause of action which a court of equity recognizes. *Karlsen v. American Sav. & Loan Assn., 15 Cal.App.3d 112, 117, 92 Cal.Rptr. 851 (1971)*. The basic rule is that an offer of performance is of no effect if the person making it is not able to perform. *Karlsen, 15 Cal.App.3d at118, 92 Cal.Rptr. 851* (citing *Cal. Civ. Code, § 1495*). Simply put, if the offeror "is without the money necessary to make the offer good and knows it" the tender **[*14]** is without legal force or effect. *Karlsen, 15 Cal.App.3d at118, 92 Cal.Rptr. 851* (citing several cases). "It would be futile to set aside a foreclosure sale on the technical ground that notice was improper, if the party making the challenge did not first make full tender and thereby establish his ability to purchase the property." *United States Cold Storage v. Great Western Savings & Loan Assn., 165 Cal.App.3d 1214, 1224, 212 Cal.Rptr. 232 (1985)*. "A cause of action 'implicitly integrated' with the irregular sale fails unless the trustor can allege and establish a valid tender." *Arnolds Management, 158 Cal.App.3d at 579, 205 Cal.Rptr. 15*.

"It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.2d 673 (1934)*; *see* *Mix v. Sodd, 126 Cal.App.3d 386, 390, 178 Cal.Rptr. 736 (1981)* ("a mortgagor in possession may not maintain an action to quiet title, even though the debt is unenforceable"); *Aguilar v. Bocci, 39 Cal.App.3d 475, 477, 114 Cal.Rptr. 91 (1974)* (trustor is unable to quiet title "without discharging his debt"). "A party may not without payment of the debt, enjoin a **[*15]** sale by a trustee under a power conferred by a deed of trust, or have his title quieted against the purchaser at such a sale, even though the statute of limitations has run against the indebtedness." *Sipe v. McKenna, 88 Cal.App.2d 1001, 1006, 200 P.2d 61 (1948)*.

Moreover, to obtain "rescission or cancellation, the rule is that the complainant is required to do equity, as a condition to his obtaining relief, by restoring to the defendant everything of value which the plaintiff has received in the transaction. . . . The rule applies although the plaintiff was induced to enter into the contract by the fraudulent representations of the defendant." *Fleming v. Kagan, 189 Cal.App.2d 791, 796, 11 Cal.Rptr. 737 (1961)*. "A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust." *Karlsen, 15 Cal.App.3d at 117, 92 Cal.Rptr. 851*. Analyzing "trust deed nonjudicial foreclosure sales issues in the context of common law contract principles" is "unhelpful" given "the comprehensive statutory scheme regulating nonjudicial foreclosure sales." *Residential Capital v. Cal-Western Reconveyance Corp., 108 Cal.App.4th 807, 820, 821, 134 Cal.Rptr.2d 162 (2003)*.

"The **[*16]** rules which govern tenders are strict and are strictly applied." *Nguyen v. Calhoun, 105 Cal.App.4th 428, 439, 129 Cal.Rptr.2d 436 (2003)*. "The tenderer must do and offer everything that is necessary on his part to complete the transaction, and must fairly make known his purpose without ambiguity, and the act of tender must be such that it needs only acceptance by the one to whom it is made to complete the transaction." *Gaffney v. Downey Savings & Loan Assn., 200 Cal.App.3d 1154, 1165, 246 Cal.Rptr. 421 (1988)*. The debtor bears "responsibility to make an unambiguous tender of the entire amount due or else suffer the consequence that the tender is of no effect." *Gaffney, 200 Cal.App.3d at 1165, 246 Cal.Rptr. 421*.

Neither the complaint nor record references Ms. Lopez' tender of indebtedness or meaningful ability to do so. The complaint merely alleges that Ms. Lopez "would like to keep the property if the Defendants . . . are willing to consider a reasonable loan modification." An offer to negotiate a loan modification is not a tender. The record's silence on Ms. Lopez' tender of or ability to tender amounts outstanding is construed as her concession of inability to do so. Without Ms. Lopez' **[*17]** meaningful tender, Ms. Lopez seeks empty remedies, not capable of being granted and the complaint's purported claims are doomed.

Truth In Lending Act

The complaint's first claim alleges that the "risks of the loan were not clearly communicated to the Plaintiff by the Defendant GMAC, a clear violation" of the Truth in Lending Act ("TILA"), *15 U.S.C. §§ 1601, et seq.* Under TILA, the "voiding of a security interest may be judicially conditioned on debtor's tender of amount due under the loan." *American Mortgage Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007)*.

15 U.S.C. § 1635(b) governs the return of money or property when a borrower has rescinded effectively:

> . . . Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the **[*18]** creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

12 C.F.R. § 226.23(d) addresses rescission effects and provides:

> (2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.
>
> (3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, **the consumer shall tender the money or property to the creditor** or, where the latter would **[*19]** be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation. (Bold added.)

Neither TILA nor its Regulation Z, 12 C.F.R. §§ 226, et seq., "'establishes that a borrower's mere assertion of the right of rescission has the automatic effect of voiding the contract.'" *Yamamoto v. Bank of New York, 329 F.3d 1167, 1172 (9th Cir. 2003)* (quoting *Large v. Conseco Financing Servicing Corp., 292 F.3d 49, 54-55 (1st Cir. 2002))*. The Ninth Circuit, relying on *Large*, explained:

> Instead, the "natural reading" of the language of *§ 1635(b)* "is that the security interest becomes void when the obligor exercises a right to rescind that is available in the particular case, either because the creditor acknowledges that the right of rescission is available, or because the appropriate decision maker has so determined. . . . Until such decision is **[*20]** made the [borrowers] have only advanced a claim seeking rescission."

Yamamoto, 329 F.3d at 1172 (quoting *Large, 292 F.3d at 54-55*)).

A rescission notice is not automatic "without regard to whether the law permits [borrower] to rescind on the grounds asserted." *See Yamamoto, 329 F.3d at 1172*. Entertaining rescission automatically "makes no sense . . . when the lender contests the ground upon which the borrower rescinds." *Yamamoto, 329 F.3d at 1172*. "In these circumstances, it cannot be that the security interest vanishes immediately upon the giving of notice. Otherwise, a borrower could get out from under a secured loan simply by *claiming* TILA violations, whether or not the lender had actually committed any." *Yamamoto, 329 F.3d at 1172* (italics in original).

Moreover, although *15 U.S.C. § 1635(b)* "provides for immediate voiding of the security interest and return of the money within twenty days of the notice of rescission, we believe this assumes that the notice of rescission was proper in the first place." *In re Groat, 369 B.R. 413, 419 (Bankr. 8th Cir. 2007)*. A "court may impose conditions on rescission that assure that the borrower meets her obligations once the creditor has performed **[*21]** its obligations." *Yamamoto, 329 F.3d at 1173*. The Ninth Circuit has explained that prior to ordering rescission based on a lender's alleged TILA violations, a court may require borrowers to prove ability to repay loan proceeds:

> As rescission under *§ 1635(b)* is an on-going process consisting of a number of steps, there is no reason why a court that may alter the sequence of procedures after deciding that rescission is warranted, may not do so before deciding that rescission is warranted when it finds that, assuming grounds for rescission exist, rescission still could not be enforced because the borrower cannot comply with the borrower's rescission obligations no matter what. Such a decision lies within the court's equitable discretion, taking into consideration all the circumstances including the nature of the violations and the borrower's ability to repay the proceeds. If, as was the case here, it is clear from the evidence that the borrower lacks capacity to pay back what she has received (less interest, finance charges, etc.), the court does not lack discretion to do before trial what it could do after.

Yamamoto, 329 F.3d at 1173 (affirming summary judgment for lender in absence of **[*22]** evidence that borrowers could refinance or sell property); *see American Mortgage, 486 F.3d at 821* ("Once the trial judge in this case determined that the [plaintiffs] were unable to tender the loan proceeds, the remedy of unconditional rescission was inappropriate."); *LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir. 1974)* (under the facts, loan rescission should be conditioned on the borrower's tender of advanced funds given the lender's non-egregious TILA violations and equities heavily favoring the lender). [3]

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[3] The Fourth Circuit Court of Appeals agrees with the Ninth Circuit that *15 U.S.C. § 1635(b)* does not compel a creditor to remove a mortgage lien in the absence of the debtor's tender of loan proceeds:

> Congress did not intend to require a lender to relinquish its security interest when it is now known that the borrowers did not intend and were not prepared to tender restitution of the funds expended by the lender in discharging the prior obligations of the borrowers.

Powers v. Sims & Levin, 542 F.2d 1216, 1221 (4th Cir. 1976).

The complaint does not address conditions precedent to permit rescission under TILA. The complaint is not a timely, valid rescission notice. "Clearly it was **[*23]** not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest." *American Mortgage, 486 F.3d at 820-821*. Without Ms. Lopez' meaningful tender, the complaint's claims, including those referencing TILA, are doomed.

TILA Limitations Periods

Defendants fault the complaint's TILA claim as time barred.

Damages Limitations Period

A TILA damages claim is subject to *15 U.S.C. § 1640(e)*, which provides that an action for a TILA violation must proceed "within one year from the date of the occurrence of the violation." "TILA requires that any claim based on an alleged failure to make material disclosures be brought within one year from the date of the occurrence of the violation." *Hallas v. Ameriquest Mortg. Co., 406 F.Supp.2d 1176, 1183 (D. Or. 2005)*. The limitations period runs from the date of a transaction's consummation which is the time that a consumer becomes contractually obligated on a credit transaction. *Monaco v. Bear Stearns Residential Mortgage Corp., 554 F.Supp.2d 1034, 1039 (C.D. Cal. 2008)*. The Ninth Circuit noted in *Meyer v. Ameriquest Mortgage Co., 342 F.3d 899, 902 (9th Cir. 2003)*:

> The **[*24]** failure to make the required disclosures occurred, if at all, at the time the loan documents were signed. The [plaintiffs] were in full possession of all information relevant to the discovery of a TiLA violation and a *§ 1640(a)* damages claim on the day the loan papers were signed.

Ms. Lopez consummated her loan on October 3, 2007 and filed her complaint on September 15, 2011, nearly four years after her loan transaction, to render a TILA damages claim time barred.

Rescission Limitations Period

To the extent that the complaint pursues a TILA rescission claim, it too is time barred. TILA's "buyer's remorse" provision allows borrowers three business days to rescind, without penalty, a consumer loan that uses their principal dwelling as security. *Semar v. Platte Valley Federal Sav. & Loan Ass'n, 791 F.2d 699, 701 (9th Cir. 1986)*;*15 U.S.C. § 1635(a)*. TILA rescission may be extended up to three years if the lender fails to comply with TILA disclosure requirements. *Semar, 791 F.2d at 701-702*; *15 U.S.C. § 1635(f)*.

15 U.S.C. § 1635(f) addresses the outer most limit to seek rescission:

> An obligor's right of rescission **shall expire three years after the date of consummation of the transaction** or upon **[*25]** the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor . . . (Bold added.)

The U.S. Supreme Court has described as "manifest" Congress' intent to prohibit rescission after the three-year period has run:

> *Section 1635(f)*, however, takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the "right of rescission [under the Act] shall expire" at the end of the time period. It talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous. There is no reason, then, even to resort to the canons of construction that we use to resolve doubtful cases, such as the rule that the creation of a right

> in the same statute that provides a limitation is some evidence that the right was meant to be limited, not just the remedy. *See* *Midstate Horticultural Co., supra, at 360, 64 S. Ct., at 130*; **[*26]** *Burnett, supra, at 427, n. 2, 85 S. Ct., at 1054 n. 2*; *Davis v. Mills, 194 U.S. 451, 454, 24 S.Ct. 692, 693-694, 48 L.Ed. 1067 (1904)*.

Beach v. Ocwen Fed. Bank, 523 U.S. 410, 417, 419, 118 S.Ct. 1408, 140 L. Ed. 2d 566 (1998); *Miguel v. Country Funding Corp., 309 F.3d 1161, 1164 (9th Cir. 2002)* ("*§ 1635(f)* is a statute of repose, depriving the courts of subject matter jurisdiction when a *§ 1635* claim is brought outside the three-year limitation period").

The complaint alleges, and matters subject to judicial notice reflect, that Ms. Lopez' loan was consummated on October 3, 2007 to render a TILA rescission remedy expired prior to the September 15, 2010 filing of the complaint. TILA rescission is time barred.

Equitable Tolling

Apparently recognizing that TILA claims are time barred, Ms. Lopez in her complaint appears to invoke equitable tolling and alleges: "There may be a number of factors that affect the tolling of a statute of limitations. In many cases, the discovery of the harms starts the statute running. . . Here, the discovery of the harm came well after the loan was originated." Nonetheless, the complaint lacks allegations of facts to excuse Ms. Lopez' earlier discovery of TILA violations with due **[*27]** diligence and to demonstrate concealment of material facts as to the loan agreements.

"Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim." *Santa Maria v. Pacific Bell, 202 F.3d 1170, 1178 (9th Cir. 2000)*. The Ninth Circuit Court has explained:

> Unlike equitable estoppel, equitable tolling does not depend on any wrongful conduct by the defendant to prevent the plaintiff from suing. Instead it focuses on whether there was excusable delay by the plaintiff. If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing until the plaintiff can gather what information he needs. . . . However, equitable tolling does not postpone the statute of limitations until the existence of a claim is a virtual certainty.

Santa Maria, 202 F.3d at 1178 (citation omitted).

Courts are reluctant to invoke equitable tolling:

> A statute of limitations is subject to the doctrine of equitable tolling; therefore, relief from strict construction of a statute of limitations is readily available **[*28]** in **extreme cases** and gives the court latitude in a case-by-case analysis. . . . The equitable tolling doctrine has been applied by the Supreme Court in certain circumstances, but it has been applied sparingly; for example, the Supreme Court has allowed equitable tolling when the statute of limitations was not complied with because of defective pleadings, when a claimant was tricked by an adversary into letting a deadline expire . . . Courts have been generally unforgiving, however, when a late filing is due to claimant's failure "to exercise due diligence in preserving his legal rights." . . .

Scholar v. Pac. Bell, 963 F.2d 264, 267-268 (9th Cir. 1992) (bold added; citations omitted).

To rely on delayed discovery of a claim, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Fox v. Ethicon Endo-Surgery, Inc., 35 Cal.4th 797, 808, 27 Cal.Rptr.3d 661, 110 P.3d 914 (2005)* (quoting *McKelvey v. Boeing North American, Inc., 74 Cal.App.4th 151, 160, 86 Cal.Rptr.2d 645 (1999))*. "[T]o **[*29]** adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." *Fox, 35 Cal.4th at 809, 27 Cal.Rptr.3d 661*.

The doctrine of delayed discovery requires a plaintiff to plead facts showing an excuse for late discovery of the facts underlying his cause of action. *Prudential Home Mortgage Co. v. Superior Court, 66 Cal.App.4th 1236, 1247, 78 Cal.Rptr.2d 566 (1998)*. The plaintiff must show that it was not at fault for failing to discover or had no actual or presumptive knowledge of facts sufficient to put it on inquiry. *Prudential Home, 66 Cal.App.4th at 1247, 78 Cal.Rptr.2d 566*. As to sufficiency of delayed discovery allegations, a plaintiff bears the burden to "show diligence" and "conclusory allegations" will not withstand dismissal. *Fox, 35 Cal.4th 797, 808, 27 Cal.Rptr.3d 661*.

The complaint broadly references that "a number of factors" may "affect tolling of a statute of limitations." No allegation identifies specific withheld disclosures. The complaint **[*30]** lacks allegations that the lender defendants prevented Ms. Lopez to compare what documents she received to the TILA disclosure requirements. *See Hubbard v. Fidelity Federal Bank, 91 F.3d 75, 79 (9th Cir. 1996)* (no evidence suggested that lender concealed its alleged breach). Nothing suggests that Ms. Lopez lacked information relevant to discovery of a TILA violation when her loan was consummated. The complaint offers nothing to demonstrate that despite Ms. Lopez' due diligence, she was unable to obtain information of a TILA violation. The complaint is silent as to her purported due diligence. The complaint is conclusory as to alleged TILA violations and support for tolling. The complaint's conclusory allegations are insufficient to invoke equitable tolling or delayed discovery and in turn to defeat the limitations defense. Ms. Lopez' TILA claim is time barred and subject to dismissal.

Constructive Fraud

The complaint bases its (third) constructive fraud claim on GMAC's failure "to disclose how much and how soon the interest rate (and, therefore, the monthly payment) would increase after the teaser rate of Plaintiffs [sic] subprime ARM expired."

GMAC As Lender

In *Salahutdin v. Valley of California, Inc., 24 Cal.App.4th 555, 562, 29 Cal.Rptr.2d 463 (1994)*, **[*31]** the California Court of Appeal explained constructive fraud:

> Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship. . . . [A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent. (Citation and internal punctuation omitted).

"Unlike actual fraud, constructive fraud depends on the existence of a fiduciary relationship of some kind, and this must be alleged." *Younan v. Equifax Inc., 111 Cal.App.3d 498, 516-517,169 Cal.Rptr. 478 (1980)*. "It is essential to the operation of the doctrine of constructive fraud that there exist a fiduciary **[*32]** or special relationship." *Peterson Development Co. v. Torrey Pines Bank, 233 Cal.App.3d 103, 116, 284 Cal.Rptr. 367 (1991)*. Constructive fraud elements are: (1) a fiduciary relationship; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive; and (4) reliance and resulting injury (causation). *Younan, 111 Cal.App.3d at 516-517, n. 14,169 Cal.Rptr. 478*.

Defendants point to the absence of fiduciary relationship between Ms. Lopez and GMAC as original lender and servicer of Ms. Lopez' loan and DOT beneficiary.

A fiduciary relationship arises "between parties to a transaction wherein one of the parties is . . . duty bound to act with the utmost good faith for the benefit of the other party." *Herbert v. Lankershim, 9 Cal.2d 409, 483, 71 P.2d 220 (1937)*. A fiduciary relationship "ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent." *Herbert, 9 Cal.2d at 483, 71 P.2d 220*.

Nonetheless "no fiduciary **[*33]** relationship is established merely because 'the parties reposed trust and confidence in each other.'" *Girard v. Delta Towers Joint Venture, 20 Cal.App.4th 1741, 1749, 26 Cal.Rptr.2d 102 (1993)* (quoting *Worldvision Enterprises, Inc. v. American Broadcasting Companies, Inc., 142 Cal.App.3d 589, 595, 191 Cal.Rptr. 148 (1983))*. To be charged with a fiduciary obligation, a person must knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law. *City of Hope Nat. Medical Center v. Genentech, Inc., 43 Cal.4th 375, 385, 75 Cal. Rptr. 3d 333, 181 P.3d 142 (2008)*.

"California courts have not extended the 'special relationship' doctrine to include ordinary commercial contractual relationships" *Martin v. U-Haul Co. of Fresno, 204 Cal.App.3d 396, 412, 251 Cal.Rptr. 17 (1988)* (citations omitted). "The relationship between a lending institution and its borrower-client is not fiduciary in nature." *Nymark v. Heart Fed. Savings & Loan Assn., 231 Cal.App.3d 1089, 1093, n. 1, 283 Cal.Rptr. 53 (1991)* (citing *Price v. Wells Fargo Bank, 213 Cal.App.3d 465, 476-478, 261 Cal.Rptr. 735 (1989))*. A commercial lender is entitled to pursue its **[*34]** own economic interests in a loan transaction. *Nymark, 231 Cal.App.3d at 1093, n. 1, 283 Cal.Rptr. 53*(citing *Kruse v. Bank of America, 202 Cal.App.3d 38, 67, 248 Cal.Rptr. 217 (1988))*.

Absent "special circumstances" a loan transaction is "at arms-length and there is no fiduciary relationship between the borrower and lender." *Oaks Management Corp. v. Superior Court, 145 Cal.App.4th 453, 466, 51 Cal.Rptr.3d 561 (2006)* ("the bank is in no sense a true fiduciary"); *see* *Downey v. Humphreys, 102 Cal. App. 2d 323, 332, 227 P.2d 484 (1951)* ("A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such."). "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Nymark, 231 Cal.App.3d at 1096, 283 Cal.Rptr. 53*.

The complaint alleges no facts to support a fiduciary relationship between Ms. Lopez and GMAC. The complaint's mere reference to a constructive fraud elements is insufficient to impose a fiduciary relationship on GMAC. The complaint fails to allege existence of a fiduciary or confidential relationship **[*35]** with requisite specificity to warrant dismissal of the constructive fraud claim against GMAC.

ETS As Trustee

Defendants contend that ETS as DOT trustee owes no fiduciary or similar duties to support a constructive fraud claim.

"Financing or refinancing of real property is generally accomplished in California through a deed of trust. The borrower (trustor) executes a promissory note and deed of trust, thereby transferring an interest in the property to the lender (beneficiary) as security for repayment of the loan." *Bartold v. Glendale Federal Bank, 81 Cal.App.4th 816, 821, 97 Cal.Rptr.2d 226 (2000)*. A deed of trust "entitles the lender to reach some asset of the debtor if the note is not paid." *Alliance Mortgage Co. v. Rothwell, 10 Cal.4th 1226, 1235, 44 Cal.Rptr.2d 352, 900 P.2d 601 (1995)*.

If a borrower defaults on a loan and the deed of trust contains a power of sale clause, the lender may non-judicially foreclose. *See* *McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231, 236-237, 286 P. 693 (1930)*.

An "ordinary trust deed conveys the legal title to the trustee only so far as may be necessary to the execution of the trust." *Lupertino v. Carbahal, 35 Cal.App.3d 742, 748, 111 Cal.Rptr. 112 (1973)*. A **[*36]** deed of trust "carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt." *Lupertino, 35 Cal.App.3d at 748, 111 Cal.Rptr. 112* (quoting *Bank of Italy, etc. Assn. v. Bentley, 217 Cal. 644, 656, 20 P.2d 940 (1933))*. The California Court of Appeal has explained a deed of trust trustee's limited authority:

> The trustee under a deed of trust "is not a true trustee, and owes no fiduciary obligations; [it] merely acts as a common agent for the trustor and beneficiary of the deed of trust. [The trustee's] only duties are: (1) upon default to undertake the steps necessary to foreclose the deed of trust; or (2) upon satisfaction of the secured debt to reconvey the deed of trust." (*Vournas v. Fidelity National Title Ins. Co. (1999) 73 Cal.App.4th 668, 677, 86 Cal.Rptr.2d 490*.) Consistent with this view, California courts have refused to impose duties on the trustee other than those imposed by statute or specified in the deed of trust. As our Supreme Court noted in *I.E. Associates v. Safeco Title Ins. Co. (1985) 39 Cal.3d 281, 216 Cal.Rptr. 438, 702 P.2d 596*, "The rights and powers of trustees in nonjudicial **[*37]** foreclosure proceedings have long been regarded as strictly limited and defined by the contract of the parties and the statutes.... [¶] ... [T]here is no authority for the proposition that a trustee under a deed of trust owes any duties with respect to exercise of the power of sale beyond those specified in the deed and the statutes." (*Id. at pp. 287-288, 216 Cal.Rptr. 438, 702 P.2d 596*.)

Heritage Oaks Partners v. First American Title Ins. Co., 155 Cal.App.4th 339, 345, 66 Cal.Rptr.3d 510 (2007);

"The trustee in nonjudicial foreclosure is not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary. . . . The scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist." *Kachlon v. Markowitz, 168 Cal.App.4th 316, 335, 85 Cal.Rptr.3d 532 (2008)* (citations omitted). "The similarities between a trustee of an express trust and a trustee under a deed of trust end with the name. . . . [T]he trustee under a deed of trust does not have a true trustee's interest in, and control over, the trust property. Nor is it bound by the fiduciary duties that characterize a true trustee." **[*38]** *Monterey SP Partnership v. WL Bangham, 49 Cal.3d 454, 462-463, 261 Cal. Rptr. 587, 777 P.2d 623 (1989)*.

A "trustee has a general duty to conduct the sale 'fairly, openly, reasonably, and with due diligence,' exercising sound discretion to protect the rights of the mortgagor and others." *Hatch v. Collins, 225 Cal.App.3d 1104, 1112, 275 Cal.Rptr. 476 (1990)*(citation omitted).

The complaint lacks facts to support necessary elements for a constructive fraud claim against ETS, whose role is limited to the DOT trustee. The constructive fraud claim is subject to dismissal.

Misrepresentation

The complaint's (eighth) misrepresentation claim alleges the GMAC "made false representations to Plaintiff in order to induce Plaintiff to obtain the Subject Loan because the Subject Loan was presumably more profitable to Defendant GMAC."

Defendants attack the misrepresentation claim as lacking sufficient particularity to satisfy *F.R.Civ.P. 9(b)*.

Fraud Elements

The elements of a California fraud claim are: (1) misrepresentation (false representation, concealment or nondisclosure); (2) knowledge of the falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. **[*39]** *Lazar v. Superior Court, 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 (1996)*. The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance. *Cadlo v. Owens-Illinois, Inc., 125 Cal. App. 4th 513, 519, 23 Cal. Rptr. 3d 1 (2004)*.

"[T]o establish a cause of action for fraud a plaintiff must plead and prove in full, factually and specifically, all of the elements of the cause of action." *Conrad v. Bank of America, 45 Cal.App.4th 133, 156, 53 Cal.Rptr.2d 336 (1996)*. There must be a showing "that the defendant thereby intended to induce the plaintiff to act to his detriment in reliance upon the false representation" and "that the plaintiff actually and justifiably relied upon the defendant's misrepresentation in acting to his detriment." *Conrad, 45 Cal.App.4th at 157, 53 Cal.Rptr.2d 336*. "The absence of any one of these required elements will preclude recovery." Wilhelm v. Pray, Price, Williams & Russell, 186 Cal.App.3d 1324, 1332, 231 Cal.Rptr. 355 (1986).

Particularity Pleading Standard

F.R.Civ.P. 9(b) requires a party to "state with particularity the circumstances constituting fraud." [4] In the Ninth Circuit, "claims for fraud **[*40]** and negligent misrepresentation must meet Rule 9(b)'s particularity requirements." Neilson v. Union Bank of California, N.A., 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003). A court may dismiss a claim grounded in fraud when its allegations fail to satisfy F.R.Civ.P. 9(b)'s heightened pleading requirements. Vess, 317 F.3d at 1107. [5] A motion to dismiss a claim "grounded in fraud" under F.R.Civ.P. 9(b) for failure to plead with particularity is the "functional equivalent" of a F.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim. Vess, 317 F.3d at 1107. As a counter-balance, F.R.Civ.P. 8(a)(2) requires from a pleading "a short and plain statement of the claim showing that the pleader is entitled to relief."

F.R.Civ.P. 9(b)'s heightened pleading standard "is not an invitation to disregard Rule 8's requirement of simplicity, directness, and clarity" and "has among its purposes the avoidance of unnecessary discovery." McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996). F.R.Civ.P 9(b) requires "specific" allegations of fraud "to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985). "A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." Neubronner v. Milken, 6 F.3d 666, 671-672 (9th Cir. 1993) (internal quotations **[*42]** omitted; citing Gottreich v. San Francisco Investment Corp., 552 F.2d 866, 866 (9th Cir. 1997)). The Ninth Circuit has explained:

> Rule 9(b) requires particularized allegations of the circumstances *constituting* fraud. The time, place and content of an alleged misrepresentation may identify the statement or the omission complained of, but these circumstances do not "constitute" fraud. The statement in question must be false to be fraudulent. Accordingly, our cases have consistently required that circumstances indicating falseness be set forth. . . . [W]e [have] observed that plaintiff must include statements regarding the time, place, and *nature* of the alleged fraudulent activities, and that "mere conclusory allegations of fraud are insufficient." . . . The plaintiff must set forth what is false or misleading about a statement, and why it is false. In other words, the plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading. . . .
>
> In certain cases, to be sure, the requisite particularity might be supplied with great simplicity.

In Re Glenfed, Inc. Securities Litigation, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in **[*43]** original) *superseded by statute on other grounds as stated in* Marksman Partners, L.P. v. Chantal Pharm. Corp., 927 F.Supp. 1297 (C.D. Cal. 1996); *see* Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997) (fraud allegations must be accompanied by "the who, what, when, where, and how" of the misconduct charged); *see* Neubronner, 6 F.3d at 672 ("The complaint must specify facts as the times, dates, places, benefits received and other details of the alleged fraudulent activity.")

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[4] F.R.Civ.P. 9(b)'s particularity requirement applies to state law causes of action: "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the *circumstances* of the fraud must be stated with particularity is a federally imposed rule." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003) (quoting Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1995)(italics **[*41]** in original)).

[5] "In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)." Vess, 317 F.3d at 1103-1104.

In a fraud action against a corporation, a plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal.App.4th 153, 157, 2 Cal.Rptr.2d 861 (1991).

F.R.Civ.P. 9(b) "does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" Swartz v. KPMG LLP, 476 F.3d 756, 764-765 (9th Cir. 2007) (quoting Haskin v. R.J. Reynolds Tobacco Co., 995 F.Supp. 1437, 1439 (M.D. Fla.1998)). **[*44]** In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, "identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme." Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir.1989). "To state a claim of fraudulent conduct, which carries substantial reputational costs, plaintiffs must provide each and every defendant with enough information to enable them 'to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with.'" Pegasus Holdings v. Veterinary Centers of America, Inc., 38 F.Supp.2d 1158, 1163 (C.D. Cal. 1998) (quoting In re Worlds of Wonder Sec. Litig., 694 F.Supp. 1427, 1433 (N.D. Cal.1988)).

The complaint's conclusory allegations fail to meet Rule 9(b)'s strict standard. The complaint lacks precise allegations as to what defendants, through specifically identified and authorized agents or representatives, allegedly promised or represented. The complaint lacks facts to support fraud elements let alone the who, what, when, when and how of alleged misconduct. Defendants correctly challenge the complaint's "generalized, global pleading in the context of fraud claims." The **[*45]** complaint relies on mere notions of false advise and promises regarding loan refinancing and modification. Given the multiple defendants and their differing roles, such allegations are insufficient to warrant dismissal of the complaint's claims sounding in fraud.

Breach Of Implied Covenant Of Good Faith And Fair Dealing

The complaint's fourth claim alleges that "in violation of the contract and of the implied covenant of good faith and fair dealing . . . GMAC unfairly interfered with Plaintiff [sic] rights to receive promised benefits under the contracts by refusing to refinance and charging unconscionable monthly payments."

Defendants challenge the complaint's lack of allegations to support a claim for breach of the implied covenant of good faith and fair dealing in that no implied covenant precluded defendants to commence non-judicial foreclosure.

"There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." Kransco v. American Empire Surplus Lines Ins. Co., 23 Cal.4th 390, 400, 97 Cal.Rptr.2d 151, 2 P.3d 1 (2000) (quoting Comunale v. Traders & General Ins. Co., 50 Cal.2d 654, 658, 328 P.2d 198 (1958)). **[*46]** The "implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." Pasadena Live, LLC v. City of Pasadena, 114 Cal.App.4th 1089, 1093-1094, 8 Cal.Rptr.3d 233 (2004) (citation omitted). The "scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." Carma Developers (Cal.), Inc. v. Marathon Development California, Inc., 2 Cal.4th 342, 373, 6 Cal.Rptr.2d 467, 826 P.2d 710 (1992). "[T]he implied covenant will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." Wolf v. Walt Disney Pictures and Television, 162 Cal.App.4th 1107, 1120, 76 Cal.Rptr.3d 585 (2008). "The covenant 'cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.'" Agosta v. Astor, 120 Cal.App.4th 596, 607, 15 Cal.Rptr.3d 565 (2004) (quoting Guz v. Bechtel Nat. Inc. 24 Cal.4th 317, 349-350, 100 Cal.Rptr.2d 352, 8 P.3d 1089 (2000)).

The **[*47]** complaint fails to allege or identify a contract or contract provision to invoke an implied covenant to impose on the defendants liability for alleged wrongs. Defendants merely exercised their DOT rights to pursue non-judicial foreclosure. The complaint lacks an alleged breach to invoke the implied covenant of good faith and fair dealing. Ms. Lopez is unable to resort to an implied covenant to manufacture defendants' obligations which do not exist. The complaint's claim for breach of implied covenant of good faith and fair dealing is subject to dismissal.

California Civil Code Section 2923.5

The complaint's (fifth) claim alleges that defendants failed to satisfy pre-foreclosure obligations under *California Civil Code section 2923.5* ("*section 2923.5*") by failing to contact or attempt to contact Ms. Lopez "in a good faith effort to prevent foreclosure."

Section 2923.5(a)(1) prohibits a mortgagee, trustee, beneficiary or authorized agent to "file a notice of default pursuant to *Section 2924* until 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g)." *Section 2923.5(a)(2)* requires a "mortgagee, **[*48]** beneficiary or authorized agent" to "contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." *Section 2923.5(b)* requires a default notice to include a declaration "from the mortgagee, beneficiary, or authorized agent" of compliance with *section 2923.5*, including attempt "with due diligence to contact the borrower as required by this section."

Defendants note that *section 2923.5* offers no post-foreclosure relief. The California Court of Appeal has explained:

> There is nothing in *section 2923.5* that even hints that noncompliance with the statute would cause any cloud on title after an otherwise properly conducted foreclosure sale. We would merely note that under the plain language of *section 2923.5*, read in conjunction with *section 2924g*, the only remedy provided is a postponement of the sale before it happens.

Mabry v. Superior Court, 185 Cal.App.4th 208, 235, 110 Cal.Rptr.3d 201 (2010); *see also* *Knapp v. Doherty, 123 Cal.App.4th 76, 94, 20 Cal.Rptr.3d 1 (2004)*: ("slight procedural irregularity in the service of the Sale Notice did not cause any injury to Borrowers. They had notice of **[*49]** the original sale date; the trustee's sale did not go forward until almost one year after the date noticed. There was no prejudicial procedural irregularity.")

Defendants are correct that *section 2923.5* supports no post-foreclosure claim or relief for Ms. Lopez to warrant dismissal of a claim premised on *section 2923.5*.

Negligence

The complaint's (sixth) claim alleges "GMAC breached their [sic] duty of care to Plaintiff to act as reasonable lender."

Duty Of Care

Defendants argue that the claim fails in the absence of their cognizable duty to support negligence. Defendants point out that a lender/borrower relationship fails to impose an actionable duty of care on defendants.

"The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the plaintiff's injury." *Mendoza v. City of Los Angeles, 66 Cal.App.4th 1333, 1339, 78 Cal.Rptr.2d 525 (1998)* (citation omitted). "The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for negligence." *Nymark v. Heart Fed. Savings & Loan Assn., 231 Cal.App.3d 1089, 1095, 283 Cal.Rptr. 53 (1991)*. **[*50]** "[A]bsent a duty, the defendant's care, or lack of care, is irrelevant." *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc., 49 Cal.App.4th 472, 481, 56 Cal.Rptr.2d 756 (1996)*. "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide." *Vasquez v. Residential Investments, Inc., 118 Cal.App.4th 269, 278, 12 Cal.Rptr.3d 846 (2004)* (citation omitted).

"The 'legal duty' of care may be of two general types: (a) the duty of a person to use ordinary care in activities from which harm might reasonably be anticipated [, or] (b) [a]n affirmative duty where the person occupies a particular relationship to others. . . . In the first situation, he is not liable unless he is actively careless; in the second, he may be liable for failure to act affirmatively to prevent harm." *McGettigan v. Bay Area Rapid Transit Dist., 57 Cal.App.4th 1011, 1016-1017, 67 Cal.Rptr.2d 516 (1997)*.

There is no actionable duty between a lender and borrower in that loan transactions are arms-length. A lender "owes no duty of care to the [borrowers] in approving their loan. Liability to a borrower for negligence arises only when the lender **[*51]** 'actively participates' in the financed enterprise 'beyond the domain of the usual money lender.'" *Wagner v. Benson, 101 Cal.App.3d 27, 35, 161 Cal.Rptr. 516 (1980)* (citing several cases). "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Nymark, 231 Cal.App.3d at 1096, 283 Cal.Rptr. 53*; *see* *Meyers v. Guarantee Sav. & Loan Assn., 79 Cal. App. 3d 307, 312, 144 Cal. Rptr. 616 (1978)* (no lender liability when lender did not engage "in any activity outside the scope of the normal activities of a lender of construction monies").

"Public policy does not impose upon the Bank absolute liability for the hardships which may befall the [borrower] it finances." *Wagner, 101 Cal.App.3d at 34, 161 Cal.Rptr. 516*. The success of a borrower's investment "is not a benefit of the loan agreement which the Bank is under a duty to protect." *Wagner, 101 Cal.App.3d at 34, 161 Cal.Rptr. 516* (lender lacked duty to disclose "any information it may have had"). "It is simply not tortious for a commercial lender to lend money, take collateral, or to **[*52]** foreclose on collateral when a debt is not paid." *Sierra-Bay Fed. Land Bank Assn. v. Superior Court, 227 Cal.App.3d 318, 334, 277 Cal.Rptr. 753 (1991)*.

As to DOT trustees, the "scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist." *Kachlon, 168 Cal.App.4th 316, 335, 85 Cal.Rptr.3d 532 (2008)* (citations omitted).

The complaint insufficiently attempts to allege GMAC's cognizable a duty of care let alone its breach. Ms. Lopez lacks a negligence claim based on a lender/borrower relationship, particularly in the absence of a duty to forego foreclosure or to provide loan modification or refinancing. "No such duty exists" for a lender "to determine the borrower's ability to repay the loan. . . . The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's." *Renteria v. United States, 452 F. Supp. 2d 910, 922-923 (D. Ariz. 2006)* (borrowers "had to rely on their own judgment and risk assessment to determine whether or not to accept the loan"). "A commercial lender is not to be regarded as the guarantor of a borrower's success **[*53]** and is not liable for the hardships which may befall a borrower." *Sierra-Bay Fed. Land Bank Assn. v. Superior Court, 227 Cal.App.3d 318, 334, 277 Cal.Rptr. 753 (1991)*. Defendants owed no duty of care to Ms. Lopez arising from her default, property foreclosure, and loan modification or refinancing attempts. The complaint lacks facts of special circumstances to impose duties on defendants in that the complaint depicts an arms-length transaction, nothing more. The complaint fails to substantiate a special lending relationship or an actionable breach of duty to substantiate a negligence claim. The negligence claim fails.

Limitations Defense

Moreover, the negligence claim is susceptible to the two-year limitations period of California Code of Civil Procedure section 339(1). The complaint alludes to GMAC's purported unreasonableness two years prior to the complaint's September 15, 2011 filing.

California Statutory Unfair Lending Practices

The complaint's sixth claim alleges that GMAC violated "California's anti-predatory lending statutes, *Fin. Code 4970-4979.8*, by steering, counseling and directing Plaintiffs [sic] to accept a loan product that has a specified risk grade less favorable than **[*54]** another risk grade for which they [sic] could have qualified."

An initial question is whether Ms. Lopez' loan is a "covered loan" under *subsection (b) of California Financial Code section 4970* ("*section 4970*"). *Section 4970(b)* provides:

> "Covered loan" means a consumer loan in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association in the case of a mortgage or deed of trust, and where one of the following conditions are met:
> (1) For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction will exceed by more than eight percentage points the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.
> (2) The total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount.

The complaint fails to allege facts that Ms. Lopez' loan meets *section 4970(b)* conditions. *See Nool v. HomeQ Servicing, 653 F.Supp.2d 1047, 1054 (E.D. Cal. 2009)* **[*55]** (dismissing a *section 4970* claim for failure to allege "covered loan" conditions). In absence of necessary facts to establish a covered loan, the complaint's sixth claim fails. *See Fortaleza v. PNC Financial Services Group, Inc., 642 F.Supp.2d 1012, 1020 (N.D. Cal. 2009)* (dismissing a claim under *California Financial Code, §§ 4973, et seq.*, in that plaintiff "failed to identify either the specific statutory provision pursuant to which plaintiff brings suit, or the specific conduct undertaken by either [defendant] in alleged violation of an applicable statutory provision").

Furthermore, the complaint's sixth claim is untimely in that California Code of Civil Procedure section 340 provides a one-year limitations period for statutes such as *California Financial Code sections 4970-4979.8*. *See DeLeon v. Wells Fargo Bank, N.A., 729 F.Supp.2d 1119, 1128-1129 (N.D. Cal. 2010)*. Ms. Lopez' claims arise out of her loan origination and accrued at the loan's October 3, 2007 closing to render the September 15, 2011 complaint filing untimely for claims under *California Financial Code sections 4970-4979.8*.

Unfair Business Practices

The complaint's second claim alleges that GMAC engaged in business practices **[*56]** to violate "*Business and Professions Code section 17200, et. Seq.* [sic] by making untrue and misleading statement [sic] and by causing untrue or misleading statements to be made by the mortgage broker, with the intent to induce Plaintiff to enter the Subject Loan."

Defendants fault the complaint's failure to allege a predicate legal violation to support a claim under California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code, §§ 17200, et seq.*

"Unfair competition is defined to include 'unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising.'" *Blank v. Kirwan, 39 Cal.3d 311, 329, 216 Cal.Rptr. 718, 703 P.2d 58 (1985)* (quoting *Cal. Bus. & Prof. Code, § 17200*). The UCL establishes three varieties of unfair competition - "acts or practices which are unlawful, or unfair, or fraudulent." *Shvarts v. Budget Group, Inc., 81 Cal.App.4th 1153, 1157, 97 Cal.Rptr.2d 722 (2000)*. An "unlawful business activity" includes anything that can properly be called a business practice and that at the same time is forbidden by law. *Blank, 39 Cal.3d at 329, 216 Cal.Rptr. 718* (citing *People v. McKale, 25 Cal.3d 626, 631-632, 159 Cal.Rptr. 811, 602 P.2d 731 (1979))*. **[*57]** "A business practice is 'unlawful' if it is 'forbidden by law.'" *Walker v. Countrywide Home Loans, Inc., 98 Cal.App.4th 1158, 1169, 121 Cal.Rptr.2d 79 (2002)* (quoting *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992))*.

The UCL prohibits "unlawful" practices "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1994)*. The UCL "thus creates an independent action when a business practice violates some other law." *Walker, 98 Cal.App.4th at 1169, 121 Cal.Rptr.2d 79*. According to the California Supreme Court, the UCL "borrows" violations of other laws and treats them as unlawful practices independently actionable under the UCL. *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992)*.

A fellow district court has explained the borrowing of a violation of law other than the UCL:

> To state a claim for an "unlawful" business practice under the UCL, a plaintiff must assert the violation of any other law. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)* **[*58]** (stating, "By proscribing 'any unlawful' business practice, *section 17200* 'borrows' violations of other law and treats them as unlawful practices that the unfair competition law makes independently actionable.") (citation omitted). Where a plaintiff cannot state a claim under the "borrowed" law, she cannot state a UCL claim either. *See, e.g., Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal.App.4th 700, 718, 113 Cal.Rptr.2d 399 (2001)*. Here, Plaintiff has predicated her "unlawful" business practices claim on her TILA claim. However, as discussed above, Plaintiff's attempt to state a claim under TILA has failed. Accordingly, Plaintiff has stated no "unlawful" UCL claim.

Rubio v. Capital One Bank, 572 F.Supp.2d 1157, 1168 (C.D. Cal. 2008).

"Unfair" under the UCL "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cal-Tech Communications, 20 Cal.4th 163 at 187, 83 Cal.Rptr.2d 548*. The "unfairness" prong of the UCL "does not give the courts a general license to review the fairness **[*59]** of contracts." *Samura v. Kaiser Found. Health Plan, 17 Cal.App.4th 1284, 1299, 22 Cal. Rptr. 2d 20 & n. 6 (1993)*.

The "fraudulent" prong under the UCL requires a plaintiff to "show deception to some members of the public, or harm to the public interest," *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F.Supp.2d 1099, 1121 (C.D. Ca. 2001)*, or to allege that "members of the public are likely to be deceived." *Medical Instrument Development Laboratories v. Alcon Laboratories, 2005 U.S. Dist. LEXIS 41411, 2005 WL 1926673, at *5 (N.D. Cal. 2005)*.

"A plaintiff alleging unfair business practices under these statutes [UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc., 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708 (1993)*.

The complaint fails to establish that defendants engaged in unlawful, unfair or fraudulent business practices under the UCL. In the absence of violation of a borrowed law, a UCL claim fails in that it cannot rest on alleged irregularities in the loan transaction or foreclosure proceedings. The complaint lacks viable statutory or common law claims. The complaint lacks reasonable particularity of facts to **[*60]** support a UCL claim. Reliance on other invalid claims alleged in the complaint fails to support a viable UCL claim. The UCL claim lacks particularity of fraudulent circumstances, such as a misrepresentation, for a UCL claim, especially given failure of fraud-sounding claims, as discussed above. The complaint lacks facts to describe how consumers were deceived. The complaint lacks facts to hint at a wrong subject to the UCL to warrant the UCL claim's dismissal.

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. DISMISSES with prejudice this action against defendants; and
2. DIRECTS the clerk to enter judgment in favor of defendants GMAC Mortgage, LLC and Executive Trustee Services, LLC and against plaintiff Carmen Lopez and to close this action.

IT IS SO ORDERED.

Dated: December 5, 2011

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE

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New York v. Intel Corp.

United States District Court for the District of Delaware

December 7, 2011, Decided

Civ. No. 09-827-LPS

Reporter

2011 U.S. Dist. LEXIS 140329 *; 2011-2 Trade Cas. (CCH) P77,711

STATE OF NEW YORK, by, Attorney General Eric T. Schneiderman, Plaintiff, v. INTEL CORPORATION, Defendant.

Subsequent History: Motion granted by, Claim dismissed by *New York v. Intel Corp., 2011 U.S. Dist. LEXIS 140422 (D. Del., Dec. 7, 2011)*

Prior History: *New York v. Intel Corp., 2011 U.S. Dist. LEXIS 51193 (D. Del., May 12, 2011)*

Core Terms

consumers, parens patriae, Donnelly Act, damages, attorney general, treble damages, quasi-sovereign, entities, permits, courts, behalf of the people, Executive Law, injunctive, contends

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

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

Under *Fed. R. Civ. P. 12(c)*, after the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings. A motion for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)*, alleging a failure to state a claim upon which relief can be granted, is analyzed under the same standard as a *Rule 12(b)(6)* motion to dismiss.

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

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

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

Fed. R. Civ. P. 12(b)(6) permits a court to dismiss all or part of an action for failure to state a claim upon which relief can be granted. In deciding a motion to dismiss, all well-pleaded allegations of the complaint must be taken as true and interpreted in the light most favorable to the plaintiffs, and all inferences must be drawn in favor of them. A *Rule 12(b)(6)* motion to dismiss should be granted only if the plaintiff is unable to articulate enough facts to state a claim to relief that is plausible on its face. A plaintiff is required, by *Fed. R. Civ. P. 8(a)(2)*, to provide the grounds of his entitlement to relief, which requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

In deciding motions to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. A document forms the basis of a claim if the document is integral to or explicitly relied upon in the complaint. The purpose of this rule is to avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal of that claim by failing to attach the relied upon document. Further, considering such a document is not unfair to a plaintiff because, by relying on the document, the plaintiff is on notice that the document will be considered.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Public Enforcement, State Civil Actions**

See *N.Y. Gen. Bus. Law § 342*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Public Enforcement, State Civil Actions**

See *N.Y. Gen. Bus. Law § 342-a*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] **Public Enforcement, State Civil Actions**

See *N.Y. Gen. Bus. Law § 342-b*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Public Enforcement, State Civil Actions**

No express statutory authority permits New York to bring treble damages claims on behalf of individuals under the Donnelly Act. *N.Y. Gen. Bus. Law § 340 et seq.*

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] Public Enforcement, State Civil Actions

See *N.Y. Exec. Law § 63(1)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] Public Enforcement, State Civil Actions

See *N.Y. Exec. Law § 63(12)*.

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Judges: Leonard P. Stark, U.S. District Judge.

Opinion by: Leonard P. Stark

Opinion

MEMORANDUM OPINION

/s/ Leonard P. Stark

STARK, U.S. District Judge:

Pending before the Court is the Motion under *Rule 12(c)* for dismissal of New York's Donnelly Act Damages Claim on Behalf of Consumers (Docket Item ("D.I.") 161 and, hereinafter, the "Donnelly Consumer Motion") filed by defendant Intel Corporation ("Intel" or "Defendant"). For the reasons discussed below, the Court will grant the motion.

I.BACKGROUND

Plaintiff, the **[*2]** State of New York ("Plaintiff" or "New York"), filed the complaint ("Complaint") in this action on November 4, 2009 against Intel. (D.I. 1) The Complaint alleges:

> Intel has engaged in a systematic worldwide campaign of illegal, exclusionary conduct to maintain its monopoly power and prices in the market for x86 microprocessors, the "brains" of Personal Computers ("PCs"). By exacting exclusive or near-exclusive agreements from large computer makers ("Original Equipment Manufacturers" or "OEMs") in exchange for payments totaling billions of dollars, and threatening retaliation against any company that did not heed its wishes, Intel robbed its competitors of the opportunity to challenge Intel's dominance in key segments of the market. This illegal behavior was highly detrimental to consumers, competition, and innovation.

(*Id.* ¶ 1; *see also id.* ¶¶ 2-9, 252 (discussing, *inter alia*, Intel's alleged behavior and consumer harm, including "depriv[ing] New York consumers ... of innovative technology and compell[ing] them to pay prices above competitive levels")) Plaintiff asserts violations of *Section 2* of the federal Sherman Act, *15 U.S.C. § 2* (Claim One), and two state statutes — (1) New York's **[*3]** ***antitrust law*** (the "Donnelly Act"), *N.Y. Gen. Bus. Law § 340 et seq.* (Claim Two), and (2) *Section 63(12) of New York's Executive Law*, *N.Y. Exec. Law § 63(12)* (the "Executive Law"), a statute permitting New York's Attorney General to seek relief with respect to certain "repeated fraudulent or illegal acts" (Claims Three and Four). (*See* D.I. 1)

As to its state-based Donnelly Act claims, Plaintiff, as *parens patriae*, seeks redress on behalf of New York consumers-at-large, specifically natural persons and governmental entities. [1] Of particular relevance here is Claim Two of the Complaint, whereby Plaintiff, under color of New York law, "as the duly constituted officer authorized to represent . . . consumers" and "sue[] on behalf of . . . New York consumers who purchased x86 CPUs or x86 CPU-containing products directly or indirectly from [Intel]," seeks to recover, under the Donnelly Act, "treble damages on behalf of all New York consumers who suffered directly or indirectly as a result of Intel's illegal conduct." (D.I. 1 ¶¶ 14, 263, Prayer for Relief; *see also* D.I. 162 at 1 & n.1)

Intel answered the Complaint on January 5, 2010. (D.I. 14) On May 27, 2011, Intel filed its Donnelly Consumer Motion, seeking dismissal of Plaintiff's Donnelly Act treble damages claim on behalf of individual New York consumers. (D.I. 161) By its motion, Intel submits that New York is simply vested with the power to assert this treble damages claim on behalf of consumers, as such a claim is rooted in neither statutory nor common law. (*See* D.I. 162 at 1; D.I. 220 at 1) Intel contends the Donnelly Act does not bestow authority upon New York to sue for damages on behalf of consumers; rather, the Act confines New York, when filing suit on behalf of its citizens, to requests for penalties and injunctive relief. (*See* D.I. 162 at 1, 3-4; D.I. 220 at 1; Tr. at 16-18) Moreover, Intel continues, New York cannot ground its request for relief under the cloak of other statutory authority, or on a *parens patriae* theory, "because a sovereign has no *parens patriae* right to recover damages on behalf of particular individuals for harm done to those individuals." (D.I. **[*5]** 162 at 1; *see also id.* at 4-9; D.I. 220)

After briefing on the motion was completed, the Court heard argument on October 27, 2011 (*see* Transcript of October 27, 2011 hearing (D.I. 247) (hereinafter "Tr.")).

II. LEGAL STANDARDS

A. Motion to Dismiss - *Fed. R. Civ. P. 12(c)*

HN1[] Under *Federal Rule of Civil Procedure 12(c)*, "[a]fter the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings." A motion for judgment on the pleadings pursuant to *Federal Rule of Civil Procedure 12(c)*, alleging a failure to state a claim upon which relief can be granted, is analyzed under the same standard as a *Rule 12(b)(6)* motion to dismiss. *See* *Turbe v. Gov't of Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1991)*.

B. Motion to Dismiss - *Fed. R. Civ. P. 12(b)(6)*

HN2[] *Federal Rule of Civil Procedure 12(b)(6)* permits a court to dismiss all or part of an action "for failure to state a claim upon which relief can be granted." "In deciding a motion to dismiss, all well-pleaded allegations of the complaint must be taken as true and interpreted in the light most favorable to the plaintiffs, and all inferences must be drawn in favor of them." *McTernan v. City of York, 577 F.3d 521, 526 (3d Cir. 2009)* **[*6]** (internal citation and

[1] New York sought to amend its Complaint on December 9, 2010 to amend the term "consumers" to include not only **[*4]** natural persons and governmental entities but also small and medium businesses. (*See* D.I. 87) That request was denied. (*See* D.I. 154)

quotation marks omitted). A *Rule 12(b)(6)* motion to dismiss should be granted only if the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *see also* *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. A plaintiff is required, by *Fed. R. Civ. P. 8(a)(2)*, to provide the "grounds of his entitle[ment] to relief," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (internal quotation marks omitted).

The Third Circuit has explained:

> ***HN3***[] In deciding motions to dismiss pursuant to *Rule 12(b)(6)*, courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. A document forms the basis of a claim if the document is integral to or explicitly relied upon in the complaint. The purpose of this rule is to avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal of that claim by failing **[*7]** to attach the relied upon document. Further, considering such a document is not unfair to a plaintiff because, by relying on the document, the plaintiff is on notice that the document will be considered.

Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir. 2004) (internal citations and quotation marks omitted) (abrogated in part on other grounds by *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*; *see also* *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)*.

III. DISCUSSION

Intel filed its Donnelly Consumer Motion seeking dismissal of New York's Donnelly Act treble damages claim on behalf of consumers. (D.I. 161) Intel highlights the language of the Donnelly Act, which, it contends, limits the State to bringing on behalf of "the people" only claims for penalties or injunctive relief. (D.I. 162 at 3) The statute provides:

> ***HN4***[] The attorney-general may bring an action in the name and in behalf of the people of the state against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, foreign or domestic, ***to restrain and prevent the doing in this state of any act*** herein declared to be illegal, or any act in, toward **[*8]** or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited, wherever the same may have been made. In such an action, the court may award to the plaintiff ***a sum not in excess of twenty thousand dollars as an additional allowance.***

N.Y. Gen. Bus. Law § 342 (emphasis added). Another provision of the statute states:

> ***HN5***[] In lieu of any penalty otherwise prescribed for a violation of a provision of this article and in addition to an action pursuant to section three hundred forty-two of this article, the attorney-general may bring an action in the name and in behalf of the people of the state against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, foreign or domestic, ***to recover a penalty in the sum specified in section three hundred forty-one*** of **[*9]** this article for the doing in this state of any act herein declared to be illegal, or any act in, toward or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited, wherever the same may have been made. The action must be brought within three years after the commission of the act upon which it is based.

N.Y. Gen. Bus. Law § 342-a (emphasis added). Finally, *N.Y. Gen. Bus. Law § 342-b* provides:

> ***HN6***[] In addition to existing statutory authority to bring such actions on behalf of the state and public authorities, the attorney general may also bring action on behalf of any political subdivision or public authority of the state upon the request of such political subdivision or public authority ***to recover damages for violations of section three hundred forty of this article, or to recover damages provided for by federal law for violations of the federal antitrust laws.*** In any class action the attorney general may bring on behalf of these or other subordinate governmental entities, any governmental entity that does not affirmatively exclude

itself from the action, upon due notice thereof, shall be deemed to have requested to be treated as a member of **[*10]** the class represented in that action. The attorney general, on behalf of the state of New York, shall be entitled to retain from any moneys recovered in such actions the costs and expenses of such services.

(Emphasis added).

Based on these statutory provisions, Intel contends:

> the Donnelly Act does not authorize New York to bring a damages claim for harm done to private parties. . . . Notably, the Donnelly Act specifically permits New York to seek damages for harms that "the state" itself has sustained (and also permits non-state public entities and consumers to seek damages for harms they sustained themselves). *See* *N.Y. Gen. Bus. Law § 340(5)*. The Donnelly Act further allows New York to bring suit for damages on behalf of harms suffered by non-state public entities, but only "upon the request[s]" of such entities. . . . The Donnelly Act includes no similar provision authorizing New York to sue for damages on behalf of consumers.

(D.I. 162 at 3; *see also* Tr. at 16-18)

Courts considering the issue before the Court have agreed with Intel's reading of the Donnelly Act. For instance, in *In re Dynamic Random Access Memory Antitrust Litig. (In re DRAM)*, **[*11]** the Northern District of California held:

> [T]he [Donnelly] Act itself does not authorize the [New York] Attorney General to pursue damages claims on behalf of natural persons. To be sure, the Act does contemplate that the Attorney General may file claims "in behalf of the people of the state . . ." *See* *N.Y. Gen. Bus. Law § 342*. However, the Act specifically limits such claims to those seeking injunctive relief, or civil penalties under the Act. *See id.* at *§ 342-a*. By contrast, the separate provision of the Act that expressly governs the Attorney General's ability to pursue damages claims under the Act, unambiguously limits such actions to those "on behalf of any political subdivision or public authority of the state." *See id.* at *§ 342-b*. Presumably, the legislature knew how to include language granting the Attorney General the right to sue "in behalf of the people of the state" in the Act's damages relief provision, as it did so with respect to the provisions allowing actions for injunctive relief and civil penalties. Accordingly, the court concludes that the legislature's failure to include similar language in the provision authorizing damages suits was deliberate. As such, plaintiff **[*12]** may not assert a claim for monetary damages under the Act on behalf of natural persons.

*2007 U.S. Dist. LEXIS 67948, 2007 WL 2517851, *8 (N.D. Cal. Aug. 31, 2007)*; *see also* *New York v. Feldman, 210 F. Supp. 2d 294, 303 n.4 (S.D.N.Y. 2002)* ("The [Donnelly] Act does not authorize [New York] to recover damages on behalf of the people."); *see also* *People v. Gold Medal Farms, Inc., 113 Misc. 2d 574, 578, 449 N.Y.S.2d 618 (N.Y. Sup. Ct. 1982)* (examining text of Donnelly Act to determine state's statutorily mandated authority). The Court is persuaded that ***HN7***[] no express statutory authority permits New York to bring treble damages claims on behalf of individuals under the Donnelly Act.

New York seeks to distinguish *In re DRAM*based on the fact it predates more recent state-law authority, particularly *New York v. Liberty Mutual Ins. Co., 52 A.D.3d 378, 861 N.Y.S.2d 294 (1st Dept. 2009)*. Yet federal courts have adhered to *In re DRAM* even after having the benefit of New York's subsequent authority. In *In re TFT-LCD (Flat Panel) Antitrust Litig.*, the Northern District of California adopted *In re DRAM's* conclusion and reasoning. *See* *2011 U.S. Dist. LEXIS 88723, 2011 WL 3475408, at *4-6 (N.D. Cal. Aug. 9, 2011)*. Indeed, the *TFT-LCD* court explicitly rejected New York's reliance on *Liberty Mutual*, **[*13]** explaining that *Liberty Mutual's* treatment of the issue is "exceedingly brief" and "does not discuss what relief would be available" in a *parens patriae* damages suit on behalf of individuals. *2011 U.S. Dist. LEXIS 88723, 2011 WL 3475408, at *6*. [2]

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[2] Subsequent to the Court's hearing on Intel's Donnelly Consumer Motion, the parties apprised the Court that the *TFT-LCD* court denied New York's motion to reconsider the holding regarding the State's *parens patriae* damages claim. (*See* D.I. 255; D.I. 256) In reaffirming its original decision, the Northern District of California emphasized that "the New York legislature has 'unambiguously' restricted the state's ability to seek such damages to actions 'on behalf of any political subdivision or public

New York insists that New York courts have allowed *parens patriae* treble damages actions under the Donnelly Act. (*See* D.I. 213 at 1, 7-10) Intel responds that New York failed to invoke the *parens patriae* theory in its Donnelly Act claim. Intel further contends that "New York's suit for treble damages on behalf of consumers in connection with individual computer **[*14]** purchases is the prototypical example of a claim brought to vindicate private interests and therefore cannot be maintained under New York's common-law *parens patriae* authority." (D.I. 162 at 4 n.3, 5; *see also* In re Dram, 2007 U.S. Dist. LEXIS 67948, 2007 WL 2517851, at *8-9 (rejecting notion that subject suit could be premised on state's general common law powers when there "is no broadly recognized common law *parens patriae* right to pursue monetary damages claims, and cases discussing the common law *parens patriae* right have generally been limited to cases seeking injunctive or other equitable relief")) Intel further submits that a *parens patriae* claim can only be brought on behalf of the State as a whole to protect a "quasi-sovereign interest," and cannot be asserted to vindicate the "interests of particular private parties." (D.I. 162 at 4; *see also* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982))

In support of its position, Intel cites a decision of the Court of Appeals of New York adopting *Snapp's* "quasi-sovereign interest" standard for measuring New York's common-law *parens patriae* authority. (*See* D.I. 162 at 4; People v. Grasso, 11 N.Y.3d 64, 69 n.4, 893 N.E.2d 105, 862 N.Y.S.2d 828 (2008) ("*Parens patriae* is a common-law **[*15]** standing doctrine that permits the state to commence an action to protect a public interest, like the safety, health or welfare of its citizens. To invoke the doctrine, the Attorney General must prove a quasi-sovereign interest distinct from that of a particular party and injury to a substantial segment of the state's population."); *see also* New York ex rel. Abrams v. Seneci, 817 F.2d 1015, 1017 (2d Cir. 1987) (denying New York's assertion of standing to sue in representative capacity on behalf of individuals under *parens patriae* theory to recover treble damages, explaining "[a] State that sues as *parens patriae* must seek to redress an injury to an interest that is separate from the interests of particular individuals"); *id.* ("Where the complaint only seeks to recover money damages for injuries suffered by individuals, the award of money damages will not compensate the state for any harm done to its quasi-sovereign interests. Thus, the state as *parens patriae* lacks standing to prosecute such a suit.")).

New York responds that the New York Attorney General is permitted to recover its state law Donnelly Act damages for injury to consumers because New York has a "quasi-sovereign interest **[*16]** in maintaining a competitive marketplace." (D.I. 213 at 3) Specifically, Plaintiff insists it meets the three-prong test of *Grasso.* (*See id.* at 1-2) As New York summarizes: "'[T]he three factors that normally determine whether a quasi-sovereign interest is sufficiently important to permit standing are (1) the size of the segment of the population that has been adversely affected, (2) the magnitude of the harm inflicted, and (3) the practical ability of those injured to obtain complete relief without intervention by the sovereign.' 72 Am. Jur. 2d States, Etc. § 91 (2011)." (D.I. 213 at 4) Here, New York contends its claim vindicates a quasi-sovereign interest since computers can be found in nearly every home, so virtually all New Yorkers are affected by the claim; the magnitude of harm is large in terms of dollar amount and populace affected, and competition and innovation are risked; and, it would be impractical for individuals to seek relief without sovereign intervention. (*See id.* at 4)

In *Grasso*, the Court observed: "In varying contexts, courts have held that a state has a quasi-sovereign interest in protecting the integrity of the marketplace." 11 N.Y.3d at 69 n.4. Here, however, **[*17]** the Court agrees with Intel that New York is suing to recover treble damages on behalf of certain New York consumers, in order to recover overcharges those consumers allegedly paid while purchasing computers containing microprocessors, and this ground for relief seeks to vindicate particular private interests. (D.I. 162 at 6-9)

Finally, New York offers that, "[i]ndependent of its common law authority, New York may also bring its Donnelly Act claim on behalf of consumers by virtue of separate statutes." (D.I. 213 at 10; *see also* Tr. at 50) In particular, New York cites Executive Law Section 63(1) [3] as authorizing the Attorney General to "[p]rosecute and defend all actions

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authority of the state.'" In re TFT-LCD (Flat Panel) Antitrust Litig., 2011 U.S. Dist. LEXIS 88723, 2011 WL 5573930, at *1 (N.D. Cal. Nov 16, 2011).

[3] NY Exec. Law § 63(1) provides:

> **HN8**[] The attorney-general shall:

and proceedings in which the State is interested." (D.I. 213 at 10) Additionally, New York cites to Executive Law *Section 63(12)* [4] as authorizing the Attorney General to sue "in the name of the people of the State of New York" when any person shall "[e]ngage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting, or transaction of business." (*Id.* at 10-11) New York submits that courts have determined that these two statutory provisions constitute **[*18]** "express state statutory authority [allowing the Attorney General] to represent consumers in a capacity that is the functional equivalent of *parens patriae* authority." (*Id.* at 11)

However, the Executive Law permits New York to recover *compensatory* damages for harms to individuals arising from repeated violations of the Donnelly Act. (*See* Tr. at 16) (counsel for Intel stating, "I think everyone is mindful that there is authority with the Executive Law, *Section 63* [(12)], that they can bring single compensatory damage, Donnelly Act-type claims but not the treble damages under *342-b*.") It does not permit New York to bring *treble* damages claims on behalf of consumers.

IV. CONCLUSION

For the reasons set forth above, the Court will grant Intel's Donnelly Consumer Motion. A separate Order, consistent with this Memorandum Opinion, will be entered.

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> Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state, but this section shall not apply to any of the military department bureaus or military offices of the state. No action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instrumentality of the state, without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein if in his opinion the interests of the state so warrant.

[4] *NY Exec. Law § 63(12)* provides:

> ***HN9***[] Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate **[*19]** persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which **[*20]** affects more than one person.

LexisNexis

New York v. Intel Corp.

United States District Court for the District of Delaware

December 7, 2011, Decided

Civ. No. 09-827-LPS

Reporter

2011 U.S. Dist. LEXIS 141186 *; 2011-2 Trade Cas. (CCH) P77,713

STATE OF NEW YORK, by, Attorney General Eric T. Schneiderman, Plaintiff, v. INTEL CORPORATION, Defendant.

Prior History: New York v. Intel Corp., 2011 U.S. Dist. LEXIS 140422 (D. Del., Dec. 7, 2011)

Core Terms

microprocessors, statute of limitations, purchases, Donnelly Act, indirect, summary judgment, class action, Executive Law, damages, genuine, cause of action, non-moving, tolling, summary judgment motion, limitations period, occurring, shorter

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Judges: Leonard P. Stark, U.S. District Judge.

Opinion by: Leonard P. Stark

Opinion

MEMORANDUM OPINION

/s/ Leonard P. Stark

STARK, U.S. District Judge:

Pending before the Court is the Motion for Partial Summary Judgment on Statute of Limitations Grounds (Docket Item ("D.I.") 166 and, hereinafter, the "Summary Judgment Motion") filed by defendant Intel Corporation ("Intel" or "Defendant"). For the reasons discussed below, the Court will grant the motion.

I. BACKGROUND

Plaintiff, the State of New York ("Plaintiff" **[*2]** or "New York"), filed the complaint ("Complaint") in this action on November 4, 2009 against Intel. (D.I. 1) The Complaint alleges:

> Intel has engaged in a systematic worldwide campaign of illegal, exclusionary conduct to maintain its monopoly power and prices in the market for x86 microprocessors, the "brains" of Personal Computers ("PCs"). By exacting exclusive or near-exclusive agreements from large computer makers ("Original Equipment Manufacturers" or "OEMs") in exchange for payments totaling billions of dollars, and threatening retaliation against any company that did not heed its wishes, Intel robbed its competitors of the opportunity to challenge Intel's dominance in key segments of the market. This illegal behavior was highly detrimental to consumers, competition, and innovation.

(*Id.* ¶ 1; *see also id.* ¶¶ 2-9 (discussing, *inter alia,* Intel's alleged behavior and resulting harm)) Plaintiff asserts violations of *Section 2* of the federal Sherman Act, *15 U.S.C. § 2* (Claim One), and two state statutes - (1) New York's ***antitrust law*** (the "Donnelly Act"), *N.Y. Gen. Bus. Law § 340 et seq.* (Claim Two), and (2) *Section 63(12) of New York's Executive Law*, *N.Y. Exec. Law § 63(12)* (the "Executive **[*3]** Law"), a statute permitting New York's Attorney General to seek relief with respect to certain "repeated fraudulent or illegal acts" (Claims Three and Four). (*See* D.I. 1)

New York's claims essentially fall into two categories: direct and indirect. (*See* D.I. 167 at 1-2; D.I. 215 at 1) "The direct claims allege that Intel overcharged OEMs for microprocessors, and that the OEMs assigned to New York any antitrust claims that they might have under assignment clauses in New York's computer purchase contracts." (D.I. 167 at 1; *see also* D.I. 1 ¶ 251) New York asserts its direct claims under both the Sherman and Donnelly Acts. (D.I. 167 at 1; *see* D.I. 1 ¶¶ 258, 261) The indirect claims assert that computer purchasers incurred indirect overcharges "because OEMs passed on microprocessor overcharges to consumers in the computer market." (D.I. 167 at 1) New York attempts to present these indirect claims not only on its own behalf, as well as on behalf of its local governments and agencies (as computer purchasers themselves) (so-called "Indirect Proprietary Claims"), but also on behalf of New York consumers who purchased computers (so-called "Indirect Representative Claims"). (*See* D.I. 167 at 1-2; **[*4]** D.I. 1 ¶¶ 261-63, 268, 272) The indirect claims asserted by New York are brought solely pursuant to state law. (*See* D.I. 167 at 2; D.I. 1 ¶¶ 261-63, 268, 272)

As to its state-based Donnelly Act and Executive Law claims, Plaintiff, as *parens patriae,* seeks redress on behalf of New York consumers-at-large, including natural persons and governmental entities. Specifically, in Claim Two of its Complaint, New York seeks to recover treble damages under the Donnelly Act on four separate grounds: (i) for harms allegedly suffered by the State itself as a purchaser of computers containing Intel microprocessors; (ii) as assignee of the claims previously owned by the OEMs that purchased Intel microprocessors; (iii) on behalf of New York non-state local entities that purchased computers containing Intel microprocessors; and (iv) on behalf of New York consumers who purchased computers containing Intel microprocessors. (*See* D.I. 1 ¶¶ 14, 259-63 and Prayer for Relief) Plaintiff's Executive Law claims seek to recover damages sustained as a result of Intel's alleged violations on behalf of "all natural persons." (*See id.*) The Complaint alleges anticompetitive conduct dating back to 2001. (*See* D.I. 167 **[*5]** at 2; *see also* D.I. 1 ¶¶ 257, 260, 266, 270; D.I. 168, Declaration of Daniel S. Floyd, dated May 16, 2011 ("Floyd Decl."), at Nos. 14 & 15)

Intel answered the Complaint on January 5, 2010. (D.I. 14) On May 27, 2011, Intel filed its Summary Judgment Motion, seeking summary judgment on the basis that several of New York's claims fall outside the applicable limitations period. (D.I. 166) Specifically, Intel contends it is entitled to judgment on (a) direct Sherman Act damages claims for OEM microprocessor purchases occurring before November 4, 2005; (b) direct Donnelly Act and Executive Law damages and penalties claims for OEM microprocessor purchases occurring before November 4, 2006; and (c) all indirect damages and penalties claims based on computer purchases occurring before November 4, 2006. [1] (*See id.* at 1; D.I. 167)

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[1] The parties clarified at the October hearing that "November 4th" is the operative date, not "November 3rd," as some documents had erroneously stated. (*See* Tr. at 3, 5, 27-28, 56, 58)

After briefing on the motion was completed, the Court heard argument on October 27, 2011 (*see* Transcript of October 27, 2011 hearing (D.I. 247) (hereinafter "Tr.")).

II. LEGAL STANDARDS

"The **[*6]** court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See* *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 n. 10, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. An assertion that a fact cannot be - or, alternatively, is - genuinely disputed must be supported either by citing to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials," or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Fed. R. Civ. P. 56(c)(1)(A)* & *(B)*. If the moving party has carried its burden, the nonmovant must then "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita, 475 U.S. at 587* (internal quotation marks **[*7]** omitted). The Court will "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*.

To defeat a motion for summary judgment, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita, 475 U.S. at 586*; *see also* *Podohnik v. U.S. Postal Service, 409 F.3d 584, 594 (3d Cir. 2005)* (stating party opposing summary judgment "must present more than just bare assertions, conclusory allegations or suspicions to show the existence of a genuine issue") (internal quotation marks omitted). However, the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment;" and a factual dispute is genuine only where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id. at 249-50* (internal citations omitted); **[*8]** *see also* *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (stating entry of summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). Thus, the "mere existence of a scintilla of evidence" in support of the non-moving party's position is insufficient to defeat a motion for summary judgment; there must be "evidence on which the jury could reasonably find" for the non-moving party. *Anderson, 477 U.S. at 252*.

III. DISCUSSION

Intel seeks summary judgment on New York's claims that fall outside the applicable limitations period. The Court will grant Intel's motion.

A. Sherman Act

With respect to New York's Sherman Act damages claims for microprocessor purchases, there appears to be no real dispute that claims arising before November 4, 2005 are time-barred. New York acknowledges that "[a]s to its Sherman Act direct purchaser claims, New York does not dispute that the applicable statute of limitations is four years, extending back from the November [4], 2009 filing of its complaint." (D.I. 215 at 1; *see also* Tr. at 27)

B. Donnelly [*9] Act and Executive Law

With respect to New York's Donnelly Act and Executive Law damages and penalties claims for microprocessor purchases occurring before November 4, 2006, Intel contends there were no other proceedings operating to toll the limitations period. Intel further asserts that these claims are barred under Delaware's Borrowing Statute, *10 Del. C. § 8121*, which requires the Court to apply the shorter of Delaware's statute of limitations or the statute of limitation of the state in which the claim arose. (*See* D.I. 166 at 1; D.I. 167 at 2-4; D.I. 218 at 2-6) Specifically, Delaware's Borrowing Statute provides:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of ***whichever is shorter,*** the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.

10 Del. C. § 8121 (emphasis **[*10]** added).

The statute of limitations for antitrust claims under the Delaware Antitrust Act is three years. *See* *6 Del. C. § 2111* ("Any action to enforce this chapter shall be forever barred unless commenced within 3 years after the cause of action accrued. For purposes of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of such violation.").

New York asks the Court to apply New York's longer statutes of limitations: four years for the Donnelly Act claims, and six years for the Executive Law claims. New York contends these longer periods apply because the injury was suffered in New York, and the Complaint was filed here out of the interest of efficiency [2] rather than forum shopping. (*See* D.I. 215 at 2, 4-6; *see also* Tr. at 10-11, 28-29, 31-32, 56-57) The Court agrees with Intel, however, that the Borrowing Statute limits all of New York's state-law claims (both Donnelly Act and Executive Law claims) to a three-year recovery period.

In reaching this conclusion, the Court must - as even New York concedes - "begin with the literal language of the [B]orrowing [S]tatute." (Tr. at 28) The language of the statute is clear. As between New York's and Delaware's statutes of limitations, the Court is to apply "whichever is shorter," which here is Delaware's three year statute of limitations. The statute contains no exception for when a party chooses to file suit in Delaware for purported "efficiency" reasons and Delaware's statute of limitations is shorter than the limitations period of the state in which the claim arose. New York, for whatever reason, chose to file in Delaware, so its claims must be analyzed pursuant to Delaware's forum laws. Those laws, again, require the application of **[*12]** the shorter limitations period of three years.

With respect to New York's indirect damages and penalties claims based on computer purchases occurring before November 4, 2006, New York argues that, "as to the natural persons for whom New York is seeking damages under its Donnelly Act *parens patriae* and Executive Law claims, the statute of limitations was tolled by the filing of a class action complaint containing Donnelly Act claims of which they were potential members at least as early as July 13, 2005." (D.I. 215 at 2; *see also id.* at 7-16) New York insists that the class action tolling doctrine *under American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*, applies here under both Delaware or New York law. (*See* D.I. 215 at 2, 7-16; *see also* Tr. at 33-36)

Intel replies that the tolling doctrines on which New York relies are inapplicable here. In Intel's view, *American Pipe* provides for tolling only for a class action that follows an earlier class action that was denied because of lack of an adequate class representative. *See also* *Yang v. Odom, 392 F.3d 97 (3d Cir. 2004)*. The instant action, Intel

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[2] New York explains that its filing in Delaware is particularly efficient because Delaware is also the site of a pending multi-district litigation, *In re Intel Corp. Microprocessor Antitrust Litig.,* MDL Docket No. 05-1717-LPS. **[*11]** (*See* D.I. 215 at 6) Also pending in this district is the member suit brought by Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd. against Intel Corporation and Intel Kabushiki Kaisha, alleging antitrust claims under the Sherman Act and violations of the California Business and Professions Code. *See Advanced Micro Devices, Inc. v. Intel Corp.,* C.A. No. 05-441 (D. Del.) (filed June 27, 2005).

contends, is not a class action, and the previously filed class action against Intel, *see Paul v. Intel Corp.,* C.A. No. 05-485 (D. Del. (filed July 12, 2005) **[*13]** , was not defeated due to lack of an adequate class representative. (*See* Tr. at 57; *see also* D.I. 218 at 1, 6-10)

The Court agrees with Intel's analysis *of American Pipe* and its non-applicability to this case. The instant case is not a class action. Moreover, there has been no determination in the earlier (and still pending) class action that there was an inadequate class representative. Therefore, the statute of limitations was not tolled.

IV. CONCLUSION

For the reasons set forth above, the Court will grant Intel's Summary Judgment Motion. A separate Order, consistent with this Memorandum Opinion, will be entered.

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[Allen v. Dairy Farmers of Am., Inc.](#)

United States District Court for the District of Vermont

December 9, 2011, Decided; December 9, 2011, Filed

Case No. 5:09-cv-230

Reporter

279 F.R.D. 257 *; 2011 U.S. Dist. LEXIS 141898 **; 2012-1 Trade Cas. (CCH) P77,759

ALICE H. ALLEN, LAURANCE E. ALLEN, d/b/a Al-lens Farm, GARRET SITTS, RALPH SITTS, JONATHAN HAAR and CLAUDIA HAAR, on behalf of themselves and all others similarly situated, Plaintiffs, v. DAIRY FARMERS OF AMERICA, INC., and DAIRY MARKETING SERVICES, LLC, Defendants.

Subsequent History: Class certification granted by, Motion granted by *Allen v. Dairy Farmers of Am., Inc., 2012 U.S. Dist. LEXIS 164718 (D. Vt., Nov. 19, 2012)*

Prior History: *Allen v. Dairy Farmers of Am., Inc., 2011 U.S. Dist. LEXIS 90846 (D. Vt., Aug. 15, 2011)*

Core Terms

farmers, milk, dairy, class certification, prices, cooperatives, Declaration, raw, conspiracy, Grade, adverse impact, suppression, proposed class, premiums, processing plant, alleged conspiracy, class member, variables, antitrust, coconspirators, allegations, damages, class action, Sherman Act, processors, regression, variation, certify, opined, antitrust violation

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For Garret Sitts, on behalf of himself and all others similarly situated, Donna Hall, on behalf of herself and all others simiilarly situated, Claudia Haar, on behalf of herself and all others similarly situated, Jonathan Haar, on behalf of himself and all others similarly situated, Ralph Sitts, on behalf of himself and all others similarly situated, Plaintiffs: Andrew D. Manitsky, Esq., Gravel and Shea, Burlington, VT; Daniel A. Small, Esq., Emmy L. Levens, Esq., PRO HAC VICE, Benjamin D. Brown, Esq., Brent W. Johnson, Esq., Kit A. Pierson, Cohen Milstein Sellers & Toll PLLC, Washington, DC; George F. Farah, Esq., Cohen Milstein Sellers & Toll PLLC, New York, NY; Gregory J. Commins, Jr., Robert G. Abrams, Esq., PRO HAC VICE, Terry L. Sullivan, Esq., Baker & Hostetler LLP, Washington, DC; Robert L. Green, Esq., PRO HAC VICE, Howrey, LLP, Washington, DC.

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For Vermont Attorney General's Office, also known as Attorney General, Office of the, Amicus: Robert F. McDougall, Vermont Office of the Attorney General, Montpelier, VT.

Judges: Christina Reiss, Chief United States District Judge.

Opinion by: Christina Reiss

Opinion

[*259] OPINION AND [4] ORDER DENYING WITHOUT PREJUDICE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

(Doc. 206)

This matter came before the court on September 26, 2011 for a hearing on Plaintiffs' Motion for Class Certification (Doc. 206). The parties completed their post-hearing filings on October 12, 2011.

Plaintiffs, Alice H. Allen and Laurance E. Allen, d/b/a Al-lens Farm, Garret Sitts and Ralph Sitts, and Jonathan and Claudia Haar (collectively, "Plaintiffs") ask the court to certify a class to pursue the allegations contained in Plaintiffs' Amended Complaint on a class action basis. They contend that they have met all of the requirements of *Fed. R. Civ. P. 23*, and that a class action is the most appropriate mechanism for resolving this lawsuit.

Defendants, Dairy Farmers of America, Inc. ("DFA") and Dairy Marketing Services, LLC ("DMS") (collectively, "Defendants"), oppose class certification on three principal grounds. First, they claim this lawsuit lacks common questions of fact and law and that, to the extent there are some common questions, they do not predominate over questions affecting only individual members of the class. Second, they contend the claims of Plaintiffs' proposed class representatives **[**5]** are not typical of the class. And third, they assert that neither Plaintiffs' proposed class representatives nor proposed class counsel can adequately represent the diverse and conflicting interests of the proposed class.

I. The Amended Complaint.

Plaintiffs' Amended Complaint alleges five causes of action: (1) conspiracy to monopolize/monopsonize in violation of *§ 2* of the Sherman Act;[1] (2) attempt to monopolize/monopsonize **[*260]** in violation of *§ 2* of the Sherman Act;

[1] *Section 2* of the Sherman Act makes it an **[**6]** offense to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States[.]" *15 U.S.C. § 2*. *Section 2* "forbids both monopolization and attempted monopolization." *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97*

(3) unlawful monopoly/monopsony in violation of *§ 2* of the Sherman Act; (4) price fixing in violation of *§ 1* of the Sherman Act;[2] and (5) conspiracy to restrain trade in violation of *§ 1* of the Sherman Act. In support of these claims, the Amended Complaint contains 286 paragraphs of allegations that assert a vast array of anticompetitive acts by Defendants including that from at least as early as 2001, DFA and DMS and their coconspirators engaged in a wide-ranging conspiracy at both the processor and cooperative levels to fix, stabilize, and artificially depress prices for raw Grade A milk and to allocate markets within Federal Milk Market Order 1 ("Order 1") among the coconspirators.

Plaintiffs seek monetary damages in an amount which "represent[s] the additional amount Plaintiffs and other members of the Class would have received from the sale of raw Grade A milk in the absence of the violations alleged." (Doc. 117 at 83.) Plaintiffs further seek treble damages under *Section 4* of the Clayton Act. *15 U.S.C. § 15*.

In addition to their request for monetary relief, Plaintiffs seek multi-faceted injunctive relief that includes a request for an order: (1) enjoining Defendants from entering into full supply agreements; (2) enjoining Defendants from entering into agreements not to compete for the purchase of raw Grade A milk; (3) enjoining Defendants from forcing dairy farmers in Order 1 to market their milk through DMS in order to gain access to processing plants; (4) enjoining Defendants from continuing their conspiracy to engage in price-fixing and price suppression, and (5) requiring Defendants to divest their processing plants **[**8]** in order to restore competition. (*Id.* at 80-83, 96.)

With less specificity, Plaintiffs also seek injunctive relief that will prevent Defendants from continuing to conspire and/or contract to "unlawfully allocate the market, refuse to compete and to fix, reduce, stabilize or maintain at artificially depressed values the over-order premiums paid by processors in the Northeast for raw Grade A milk[.]" (*Id. at 90-91*.)

II. Plaintiffs' Proposed Class Action.

Plaintiffs' proposed product market is raw Grade A milk. Their proposed geographic market is Order 1 covering areas in Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia. Plaintiffs define the proposed class as follows:

> All dairy farmers, whether individuals, entities or members of cooperatives, who produced and pooled raw Grade A milk in Order 1 during any time from January 1, 2002 to the present. Defendants and Defendants' Coconspirators are excluded from the Class.

(Doc. 206 at 16.) They identify "Defendants' Coconspirators [who] are excluded from the Class" as: Dean Foods ("Dean"), HP Hood LLC ("Hood"), National Dairy Holdings **[**9]** ("NDH"), Farmland Dairies LLC ("Farmland"), Kraft, Dairylea Cooperative, Inc. (Dairylea"), St. Albans Cooperative Creamery, Inc. ("St. Albans"), Agri-Mark, Inc. ("Agri-Mark"), Land O'Lakes, Inc. ("LOL"), and Maryland and Virginia Milk Producers Cooperative Association, Inc. ("MDVA").

(2d Cir. 1998). In order to establish a *§ 2* violation for completed monopolization, a plaintiff must show that the defendant: "(1) possessed monopoly power in the relevant market; and (2) willfully acquired or maintained that power." *Id.* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. "[A]n action under *section 2* of the Sherman Act for attempting to monopolize a market will lie only where there is anticompetitive conduct, a specific intent to monopolize *and* a dangerous probability that monopoly will be achieved." *Int'l Distrib. Ctrs., Inc., v. Walsh Trucking Co., Inc., 812 F.2d 786, 791 (2d Cir. 1987)*.

[2] *Section 1* of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States[.]" *15 U.S.C. § 1*. To establish a claim under *§ 1*, a plaintiff **[**7]** must show: "(1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade[.]" *Tops Mkts., Inc., 142 F.3d at 95-96*.

Plaintiffs propose that the following individuals be named class representatives: (1) Plaintiffs Alice H. Allen and Laurance E. Allen who do business as the Al-lens Farm, which is located in Wells River, Vermont. From January 1, 2002 to present, Al-lens Farm sold, through DMS, raw grade A milk to raw Grade A milk processing plants in Order 1. They now sell organic milk, which Plaintiffs concede is not included in the definition of the proposed product market; (2) **[*261]** Plaintiffs Ralph Sitts and Garret Sitts who, as part of a partnership, operate a dairy farm in Franklin, New York. Their dairy farm was a member of DFA from 1998 until 2007. From January 1, 2002 to present, their partnership sold, through DMS, raw Grade A milk to raw Grade A milk processing plants in Order 1; (3) Plaintiffs Jonathan Haar and Claudia Haar, who operate a dairy farm in West Edmeston, New York. Their dairy farm has been a member of **[**10]** DFA from 2000 to the present. From January 1, 2002 to present, their dairy farm sold, through DMS, raw Grade A milk to raw Grade A milk processing plants in Order 1.

III. The Nature of Plaintiffs' Claims.

Before embarking on an analysis of Plaintiffs' class certification motion, the court briefly sets forth the legal framework for Plaintiffs' claims against DFA and DMS. Under the Sherman Act, Plaintiffs have alleged both horizontal and vertical restraints of trade as well as a combination of the two.[3] They allege a conspiracy of dairy cooperatives and milk processors to fix, stabilize, and suppress the prices for raw Grade A milk that dairy farmers receive from both their cooperatives and their processors. In other words, Plaintiffs allege a dual level of price fixing and price suppression for dairy farmers who produce and pool their milk in Order 1.[4]

Despite its broad language, the Sherman Act only prohibits conduct that "*unreasonably* restrain[s] trade." *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* (emphasis in original). Courts thus analyze the legality of contracts or agreements that allegedly restrain trade using one of two frameworks: either a *per se* approach or the "rule of reason." *See* *Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256, 263 (2d Cir. 2001)*.

Courts apply the *per se* rule in limited circumstances where the agreement at issue is of the sort that has proven so "manifestly anticompetitive" in the past that, "because of [its] pernicious effect on competition and lack of any redeeming value [it is] conclusively presumed **[**12]** to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use." *Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (internal quotation omitted). Generally, there is a presumption against applying the *per se* rule. *See* *Bus. Elecs. Corp. v. Sharps Elecs. Corp., 485 U.S. 717, 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; *Bogan v. Hodgkins, 166 F.3d 509, 514 (2d Cir. 1999)*.

All other contracts and agreements are subject to a rule of reason analysis. A court conducting a rule of reason analysis should consider "all of the circumstances of [the] case," including the nature of the market and market participants involved, in order to determine whether the agreement at issue has an actual adverse effect on competition. *GTE Sylvania, 433 U.S. at 49*.

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[3] "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*.

[4] The court in *In re Se. Milk Antitrust Litig.* concluded **[**11]** a similar list of acts "are not manifestly anti-competitive, do not always or almost always tend to restrict competition or decrease output, do not always have an adverse impact on the market and are not, in and of themselves, illegal." *Se. Milk, 2011 U.S. Dist. LEXIS 76552, 2011 WL 2749587, at *10 (E.D. Tenn. July 14, 2011)*. Thus, "[t]he essence of plaintiffs' argument . . . is that defendants have used a series of legal, potentially competitive practices to accomplish an unlawful effect on prices and markets." *Id.*

Although Plaintiffs characterize some of the conspirators' agreements as *per se* violations of the antitrust laws, their proof in support of this conclusion is decidedly scant.[5] For example, although Plaintiffs allege an unlawful conspiracy to engage in price fixing through Greater Northeast Milk Marketing **[*262]** Association ("GNEMMA")[6] and its predecessors, they do not establish that all price fixing **[**13]** by GNEMMA is unlawful *per se.* This distinction is important because in the absence of *per se* violations, Plaintiffs' claims are subject to a rule of reason analysis:

> Under this test plaintiff bears the initial burden of showing that the challenged conduct has had an *actual* adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Insisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors.

Capital Imaging Assocs., 996 F.2d at 543. Accordingly, in a rule of reason analysis, Plaintiffs must demonstrate that DFA's and DMS's alleged violations of the Sherman Act had an actual adverse effect on competition as a whole in Order 1.

IV. Class Certification Standards.

Plaintiffs, as the parties seeking certification, "bear[] the burden of establishing the existence of all four *Rule 23(a)* requirements, often referred to as the criteria of 'numerosity, commonality, typicality, and adequacy.'" *Bourlas v. Davis Law Assocs., 237 F.R.D. 345, 350 (E.D.N.Y. 2006)* (citations omitted); *see also* *Fed. R. Civ. P. 23(a)*.[7] If Plaintiffs satisfy this burden, they must also establish that their proposed class action is one of the three types of class action suits identified in *Rule 23(b)*.

A district court must undertake a "rigorous analysis" and "assess all of the relevant evidence admitted at the class certification stage [to] determine whether each *Rule 23* requirement has been met[.]" *In re Initial Pub. Offerings Secs. Litig., 471 F.3d 24, 33, 42 (2d Cir. 2006)* ("*IPO*"). Class certification requires "significant proof" in support of generalized claims. *See* *Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. As a result, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* (quoting *Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558, 83 S. Ct. 520, 9 L.*

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[5] At oral argument, Plaintiffs emphasized that if established, their allegations will demonstrate that DFA and DMS have violated consent decrees, their "core" policies, and their own antitrust guidelines. However, none of these claims is actionable by Plaintiffs, and Plaintiffs do not claim otherwise.

[6] GNEMMA is a common marketing agency formed under **[**14]** the Capper-Volstead Act, *7 U.S.C. § 291 (2006)*. "The Capper-Volstead Act removed from the proscription of antitrust laws cooperatives formed by certain agricultural producers that otherwise would be directly competing with each other in efforts to bring their goods to market." *Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 822, 98 S. Ct. 2122, 56 L. Ed. 2d 728 (1978)*. Accordingly, it grants dairy cooperatives antitrust immunity with regard to price-fixing agreements with other dairy farmers provided the agreement meet certain requirements.

[7] *Fed. R. Civ. P. 23(a)* provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members **[**15]** only if:
>
> > (1) the class is so numerous that joinder of all members is impracticable [numerosity];
> >
> > (2) there are questions of law or fact common to the class [commonality];
> >
> > (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and
> >
> > (4) the representative parties will fairly and adequately protect the interests of the class [adequacy].

Ed. 2d 523 (1963)). Where "significant proof" is lacking, class certification should be denied. **[**16]** *See* *Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1269 (11th Cir. 2009)* (prohibiting courts from being "generous or forgiving" of failures of proof when performing rigorous analysis).

In *IPO,* the Second Circuit held that in order to satisfy the "rigorous analysis" standard, "the district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each *Rule 23* requirement has been met." *IPO, 471 F.3d at 32-42*. It recently summarized the task as follows:

> (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to **[*263]** rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge **[**17]** should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.

Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 251 (2d Cir. 2011) (quoting *IPO, 471 F.3d at 41*).

The court thus examines each *Rule 23(a)* requirement to determine whether Plaintiffs have sustained their burden of proof. Only then may it turn to whether *Rule 23(b)* and *(c)* have been satisfied.

V. Whether Plaintiffs Satisfy *Fed. R. Civ. P. 23(a)*'s Requirements.

Numerosity

Although there is no rigid test for numerosity, in determining whether a class is so numerous that joinder of all class members is impracticable, joinder is "generally presumed to be impracticable when a putative class exceeds 40 members." *Menkes v. Stolt-Nielsen S.A., 270 F.R.D. 80, 90 (D. Conn. 2010)* (citing *Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997))*; *see also* *In re Am. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996)* **[**18]** ("When class size reaches substantial proportions . . . the impracticability requirement is usually satisfied by numbers alone.").

Here, the proposed settlement class consists of approximately 9,000 dairy farmers, dispersed throughout several states and judicial districts. The court finds that joinder of each of these dairy farmers as a party to this case would be difficult, inconvenient, and expensive, and would unduly complicate and delay the resolution of this lawsuit. Joinder is thus impracticable, and the numerosity requirement has been satisfied. DFA and DMS do not argue to the contrary.

Commonality

Rule 23(a)(2) requires a party seeking class certification to establish that there are questions of law and fact common to the class. Plaintiffs allege that the commonality requirement is satisfied by common proof of the existence, scope, activities, participants and duration of the alleged conspiracy. As acts in furtherance of the conspiracy, Plaintiffs allege (a) an agreement between DFA and Dairylea to create DMS in order to bring non-DFA members under its control; (b) DFA's purchase of eleven divested bottling plants previously owned by Dean and Suiza, thereby allowing Dean and Suiza **[**19]** to merge; (c) Dean's agreements with DMS and DFA to allow Dean to circumvent Department of Justice safeguards in exchange for Dean's assistance in helping DMS acquire monopoly/monopsony power; (d) market allocation agreements between Agri-Mark, Dean, DFA, and DMS; (e) long-term supply agreements between Dean, DFA, and DMS; (f) actions to force Plaintiffs to market their product through DMS in order to gain access to bottling plants; (g) threatening haulers who worked with independent farmers; (h) cutting off access to bottling plants and boycotting independent dairy farmers; and (j) conspiring to engage in price-fixing and price suppression. (Doc. 117 at 84-86.) They contend that each of these allegedly anticompetitive acts will be established through common proof and that each putative class member "has a common interest in proving the existence, scope, effectiveness and impact of [those] conspirac[ies], as well as the appropriate injunctive and monetary relief to remedy the injury caused by the conspirac[ies]." (Doc. 206 at 20) (quoting *In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 510 (S.D.N.Y. 1996))*.

In support of their theory of liability, Plaintiffs rely upon the **[**20]** opinions of their expert **[*264]** witness Gordon Rausser, Ph.D.[8] In his Initial Declaration dated February 1, 2011, Dr. Rausser advanced opinions supported by facts that: (1) Grade A raw milk is the relevant product market and Order 1 is the relevant geographic market; (2) the structure and characteristics of Order 1 are conducive to the conspiracy alleged; (3) there is common evidence that collusion has occurred; and (4) DFA, DMS, and their co-conspirators' actions which are against their own interests may be explained by reference to common proof.

In response, DFA and DMS do not dispute that Plaintiffs can identify some common issues of fact and law with regard to their claims set forth in the Amended Complaint. They nonetheless contend that class certification must be denied on commonality grounds for two reasons.

First, they argue that competitive conditions, milk production, presence of non-conspirator processing plants, and DMS's market share vary so widely across Order 1 that the existence and exercise of monopsony power cannot be established across the entire region by common proof. In support of these arguments, they rely on the April 5, 2011 Expert Report of Joseph P. Kalt, Ph.D.[9] In his report, Dr. Kalt opined, among other things, that a plausible claim of common class-wide monopolization cannot be established by common **[**22]** proof because: (1) monopsonization is not feasible in unconcentrated markets and the presence of DFA, DMS, and their alleged coconspirators is highly uneven and unstable across Order 1; (2) proposed class members in Order 1 have access to non-conspirators' processing plants; and (3) an anti-farmer conspiracy by farmer owned and operated cooperatives is not plausible. With regard to implausibility, Dr. Kalt points out that Plaintiffs allege:

> [a] complex and novel theory of monopsonization (i.e. buyer monopolization) in which unlawful unilateral and conspiratorial conduct by up to three dozen or more farmer-owned and run dairy cooperatives has been suppressing the prices farmers in the northeastern United States receive for their raw milk for most of the last decade. The complexity and novelty here lies in the claim that so many cooperatives owned and run by farmers have acted to harm the very farmers who own and run those cooperatives.

(Doc. 281-1 at 25).

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[8] Dr. Rausser has a doctorate in the field of Agricultural Economics from the University of California at Davis and has completed post-doctorate studies at the University of Chicago's Department of Economics and Statistics. He is currently employed at the University of California at Berkeley where he teaches and advises graduate students in the Department of Agriculture and Resource Economics. He has received many awards and professional distinctions, has co-authored numerous publications, and has authored and edited others. He has given trial testimony in thirteen cases in the previous four years and deposition testimony in many others. The court **[**21]** deems him qualified to provide an expert witness declaration in this case, and DFA and DMS do not argue otherwise. Dr. Rausser is also an expert witness for the plaintiffs in the *Southeastern Milk*. The class action in *Southeastern Milk* was recently decertified to the extent it includes current or former members of DFA. *See* *In re Se. Milk Antitrust Litig., 2011 U.S. Dist. LEXIS 83196, 2011 WL 3205798, at *8-9 (E.D. Tenn. July 28, 2011)*

[9] Dr. Kalt is a professor of international political economy at the John F. Kennedy School of Government at Harvard University. He is also a senior economist with Compass Lexecon, an economics consulting firm with offices across the United **[**23]** States. His experience includes researching and teaching positions, numerous publications, and trial testimony in state, federal and international courts. He has also provided expert testimony on behalf of the defendants in two ongoing dairy industry antitrust cases. The court finds that for purposes of class certification, Dr. Kalt is qualified to provide an expert opinion. Plaintiffs do not challenge Dr. Kalt's qualifications but point out that he has never opined that a common adverse impact may be shown.

Although Dr. Kalt may be correct in some of his observations, they do not negate the existence of common facts to establish (or not establish) DFA's and DMS's alleged antitrust violations. Notwithstanding the complexities of a particular market, "[n]umerous courts have held that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present important common questions sufficient to satisfy the commonality requirement of *Rule 23(a)(2)*." *See* *NASDAQ, 169 F.R.D. at 509* (citing cases); *see also* *In re Visa Check/MasterMoney Antitrust* **[*265]** *Litig., 280 F.3d 124, 136 (2d Cir.2001)* (affirming district court's determination that common proof could be used to **[**24]** prove antitrust violations); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *3 (N.D. Cal. June 5, 2006)* ("[w]here an antitrust conspiracy has been alleged, courts have consistently held that 'the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.'"); 7A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice & Procedure § 1781, at 228 (3d ed. 2005) (noting that "whether a conspiracy exists is a common question"); 6 Alba Conte & Herbert Newberg, Newberg on Class Actions § 18.28, at 102 (4th ed. 2002) ("As a rule, the allegation of a price-fixing conspiracy is sufficient to establish predominance of common questions.").

Here, Plaintiffs have established that their factual claims against Defendants alleging antitrust violations, and Defendants' denial of those allegations, will be determined by reference to the same body of proof. Plaintiffs have thus satisfied the commonality requirement with regard to establishing the formation, duration and implementation of the alleged conspiracy.

DFA's and DMS's second challenge to commonality—that Plaintiffs cannot and have not shown common adverse **[**25]** impact—has greater traction. An essential element of Plaintiffs' antitrust claims is that the proposed class suffered a common adverse impact from the alleged antitrust violations. *See* *In re Urethane Antitrust Litig., 251 F.R.D. 629, 634 (D. Kan. 2008)* (holding that plaintiffs must establish "that the proposed class suffered injury from the alleged antitrust violation—an element commonly called 'impact.'"). This element can be "likened to the causation element in a negligence cause of action. The term means simply that the antitrust violation caused injury to the antitrust plaintiff." *Alabama v. Blue Bird Body Co. Inc., 573 F.2d 309, 317 (5th Cir. 1978)*.

In support of their theory of common adverse impact, Plaintiffs rely heavily upon a handful of documents and witnesses that they claim establish that the conspiracy has lowered milk prices for the entire market and established a uniform milk price for virtually all dairy farmers in Order 1. The stray statements Plaintiffs cite repeatedly in support of these claims are less compelling than Plaintiffs claim and are not an adequate substitute for a cogent theory of common adverse impact. DMS and DMA accurately identify some of the deficiencies **[**26]** in this proof in Defendants' Response to Plaintiffs' Post-Argument Supplemental Memorandum on Class Certification (Doc. 355 at 6-8).[10]

Plaintiffs more significantly rely upon an analysis of common adverse impact performed by their expert witness Dr. Rausser. Dr. Rausser's common adverse impact opinions in this case elude a simple explanation and have evolved significantly in the course of class certification briefing.[11] The court addresses Dr. Rausser's opinions in accordance with the four iterations Plaintiffs have proffered.

In his Initial Declaration dated February 1, 2011, Dr. Rausser opined that there is common impact on all members of the proposed class, and there is a workable methodology for computing class-wide damages. To support these opinions, he advanced a hypothetical "yardstick" for calculating damages using a regional bench mark "likely

[10] For example, Plaintiffs assert that Stephen Pyne, a former mid-level DMS executive, testified that "99% of the members of DFA, Dairylea, and St. Albans receive the same price for their milk as other members of the same cooperative." (Doc. 355 at 6). However, Mr. Pyne's actual testimony was that only 1% of farmers in Dairylea receive "special deals" or preferential treatment when there is no reason to distinguish them from other dairy farmer members.

[11] Dr. Rausser's Initial Declaration filed February 1, 2011 spanned 131 pages and was supported by 115 pages of exhibits. On June 13, 2011, Dr. Rausser submitted a ninety-five page Rebuttal Declaration, with over 700 **[**27]** pages of exhibits. He has since supplemented his Declaration with a sixteen page Supplemental Declaration dated July 15, 2011 with 273 pages of exhibits.

consisting of Federal Orders 32 and 33." (Doc. 206-1 at 135). He identified certain variables (which could be found in payroll data or data which is publicly available) that **[*266]** must be considered in determining whether raw Grade A milk prices had been fixed, stabilized or suppressed.[12] "[F]or the purpose of assessing price consistency, [Dr. Rausser] computed the milk price received by individual producers ***based only on the reported butterfat, protein, and other solids component prices*** available in the payroll database." (Doc. 206-1 at ¶ 222) (emphasis supplied). Dr. Rausser specifically removed "over order premiums" as part of his price comparison, opining that "[t]he formulaic premiums and deductions that are **[**28]** made available to Northeast farmers . . . are an extremely small part of the overall price and I have seen no evidence to suggest that they are subject to suppression or are in any way different than they would be in the but-for world." (*Id.* at ¶ 236). Dr. Rausser observed that "the announced over order premiums throughout Order 1 were implemented monthly by GNEMMA,"[13] and that although, to date, there was no evidence that this occurred by common agreement in Order 1, there was "clear evidence" of a "unanimous agreement by all processors" in the Southeast region. (Doc. 206-1 at ¶ 219). At the time of his Initial Declaration, Dr. Rausser's theory of common adverse impact remained largely hypothetical. *See id.* at ¶ 241 ("Although this data is not yet complete, it is sufficient to establish that a workable methodology can, in fact, be implemented to measure price suppression and calculate class-wide damages.").

The court cannot rely on the evidence of common adverse impact set forth in Dr. Rausser's Initial Declaration for three reasons. First, as Plaintiffs concede, Dr. Rausser erroneously examined the regulated component prices of raw Grade A milk as the proper unit of price comparison to determine adverse impact. Plaintiffs now claim that the *total price* of raw Grade A milk **[**30]** is the proper unit of comparison and concede that the regulated components pricing *was not impacted* by the alleged conspiracy. *See* Doc. 332-3 at 180; *see also* Doc. 281-6 (Rausser Dep. at 66-67, 78-80, 206). Second, although Dr. Rausser did not examine the impact of the alleged conspiracy on "over order premiums" other than to note that they appeared to have been artificially reduced by GNEMMA, Plaintiffs allege suppression of "over order premiums" as part of their damages. *See* Doc. 332-3 at 180 ("Plaintiffs do, however, contend that the over-order premiums they and all other members of the Class received during the class period were suppressed by virtue of defendants' wrongful conduct[.]"). And third, as acknowledged by Dr. Rausser in his Initial Declaration, his theory of common adverse impact was merely in the development stage and was not fully articulated.

The court thus turns to whether Dr. Rausser's opinions as set forth in his Rebuttal Declaration, his Supplemental Declaration, or as described in the class certification hearing advance a theory of common adverse impact that can withstand a "rigorous analysis."

In his June 13, 2011 Rebuttal Declaration, Dr. Rausser responded to **[**31]** Dr. Kalt's opinion that there are too many differences in cooperatives' structures, organization, management, degree of vertical integration, and local conditions to conclude that common proof could establish class-wide victimization of proposed class members in Order 1. He asserted that Dr. Kalt ignores real world facts, exaggerates the individualized nature of the industry, and overemphasizes differences in **[*267]** price. However, because DFA and DMS have no obligation to proffer a theory of common adverse impact, the court is more concerned with Dr. Rausser's theory of common adverse impact than Dr. Kalt's. Although Dr. Rausser does not concede that he analyzed the wrong component of price, he states:

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[12] Some of these variables were identified by Dr. Rausser and include the passage of time and geographic location (to account for structural changes in the relevant market), the regional population under the age of nineteen, the pounds of milk pooled in Order 1, the butterfat percentage **[**29]** of milk, the volume produced per farmer, and Class I utilization rates. At the time of his Initial Declaration, Dr. Rausser's model did "not take into account the potential effect of patronage refunds [which] represent annual credits that cooperatives provide to their members as a means of distributing the cooperative's profits." (Doc. 206-1 at ¶ 242). Dr. Rausser conceded that "[w]hether these 'refunds' can be deemed an additional payment for milk (and thus a potential offset against damages) depends upon the specifics of the program." *Id.*

[13] DFA and DMS contend that Plaintiffs and Dr. Rausser misunderstands GNEMMA and that the only premium that GNEMMA as a whole sets is the premium to charge customers for rbST-free raw milk. They contend that GNEMMA does not set "over order" premiums across Order 1. (Doc. 281-8 at 12.)

> Dr. Kalt criticized the uniformity analysis presented in my Initial Declaration for focusing on the component prices (butterfat, protein and other solids) that comprise the largest portion of the total payment received by proposed Class members. However, when the entire price is analyzed, rather than merely the components, the conclusion remains the same: prices are highly uniform.

(Doc. 312-1 at 79) (footnote omitted).

Similarly, without disclaiming his previous opinion that premiums paid to **[**32]** farmers did not appear to have been significantly impacted by the alleged conspiracy, Dr. Rausser opined that the suppression of over order premiums was a "facilitating mechanism" that results in common impact. (*Id.* at 72). Finally, Dr. Rausser stated that "[i]n response to Dr. Kalt's report, I have performed a regression analysis on the farmer payroll data that has been produced in this case in order to demonstrate that these common factors predominate in the pricing of milk in Order 1." (*Id.* at 92). Dr. Rausser describes his analysis as follows:

> Covering the time period from 2002 to 2010 and using around 530,000 data points, each one corresponding to a farmer's monthly milk deliveries, I have separately investigated the common factor regressions for four different price variables. The four variables are (i) the gross price; (ii) the mailbox price (which is the gross price minus deductions made by the cooperative for haulage and so on); (iii) the standardized gross price (which standardizes farmer's milk to the same percentage of butterfat, protein and other solids); and (iv) the standardized mailbox price (which again standardizes farmer's milk to the same percentage of butterfat, **[**33]** protein and other solids). . . . I have applied the same multivariate economic model to attempt to explain individual variation for each of these four prices, except that, when dealing with the two standardized prices, the model disregards the farmer's component percentages, since this adjustment has already been made. The common factors included in the model for non-standardized prices include:
> • Indicators of farm size in terms of total production (to capture the volume incentives in milk pricing);
> • Input costs due to alfalfa hay and diesel;
> • Butterfat, protein and other solids percentages of the farmer's milk;
> • Demand variables, such as State population, proportion of that population under the age of 19 (as more milk is consumed by children) and State per capita income:
> • The Class I Utilization Rate;
> • Indications of whether or not the farmer produces organic or rBST-free milk;
> • The Natural Agricultural Statistics Services reported prices for butter, cheese, dry whey and non-fat dry milk prices, which are used to set Class milk prices;
> • Cooperative and location indicator variables;
> • Seasonality.

(*Id.* at 92-93).

In testing the reliability of his multivariate analysis, Dr. Rausser pointed **[**34]** out that "[a]n important determinant of the success of the model is its 'explanatory power' as measured by the R-squared." (*Id.* at 93). R-squared "is a statistical representation of how much of the variation in prices is accounted for (or 'explained') by the common factors." *Id.* Dr. Rausser claimed that the "R-squared values for the regressions I have performed range from 89% to 94%." (*Id.* at 94).

On July 8, 2011, DFA and DMS filed the Reply Report of Dr. Kalt. Dr. Kalt noted that Dr. Rausser had offered a series of new opinions in his Rebuttal Declaration, several of which conflicted with his Initial Declaration. In addition, Dr. Kalt pointed out that Dr. Rausser's analysis now focused on the *total price* paid to farmers (including the regulated components). Dr. Kalt opined that the proper unit of comparison was the "market **[*268]** driven premiums," which Dr. Kalt characterized as that portion of the price for raw Grade A milk that was actually responsive to competition and thus susceptible to suppression. Dr. Kalt stressed the fundamental need to focus on the correct unit of comparison and to accurately reflect whether variations in that unit evidenced a common trend.

In response, Dr. Rausser **[**35]** filed a third "Supplemental Declaration" just days before the originally scheduled class certification hearing.[14] In his July 15, 2011 Supplemental Declaration, Dr. Rausser denied that he had offered any new opinions in his Rebuttal Declaration and claimed that he was instead merely correcting Dr. Kalt.[15] Dr. Rausser then proceeded to critique Dr. Kalt's criticism, concluding "Dr. Kalt's approach (relying on univariate analysis, eschewing all price variation as 'too much', and demanding perfection of a price prediction model) would not survive any market or any commodity." (Doc. 332-2 at 17). Dr. Rausser's disclaimer of any new opinions of adverse common impact in his Rebuttal Declaration is problematic because, taken at face value, this would leave the court with the flawed and partially formed opinions in his Initial Declaration. The court thus addresses whether Plaintiffs were able to clarify and reconcile Dr. Rausser's divergent opinions at the class certification hearing.

At the September 26th class certification hearing, Plaintiffs claimed that Dr. Rausser's common impact damages theory had become established proof. Indeed, Plaintffs asserted that "[d]amage results are statistically significant with a 99% confidence level." *See* Plaintiff's Exhibit 21 (citing Rausser 7/15/11 Supp. Decl. at ¶ 10). Plaintiffs nonetheless acknowledged that Dr. Rausser had started with the wrong unit of comparison and that he had initially opined that suppression would be found in the wrong component of price. *See* Sept. 26, 2011 Tr.; Doc. 358 at 58-59 ("[Dr.] Rausser started by looking for uniformity in the component price because that's where the suppression was found in the Southeast. Now what he found during that analysis was that the component prices in the Northeast—and, in fact, that's not where the suppression **[**37]** was. The suppression was in the total price, and in particular, in the premiums.").

Moreover, it became clear that Plaintiffs *do* rely upon the opinions offered by Dr. Rausser in his Rebuttal Declaration as the basis for their theory of common adverse impact. They argue that Dr. Rausser examined over 500,000 data points (data which Dr. Rausser characterizes as "unusually robust"), controlled for the approximately nineteen variables identified in his Rebuttal Declaration, and conducted a "uniformity analysis" to determine variability in prices paid to farmers. They rely on Dr. Rausser's conclusion that although some variability in pricing is inevitable, prices paid to farmers exhibit a high degree of uniformity, and that the coefficient of variation here is "extremely small" relative to "typical price variation found in the academic literature." In doing so, Plaintiffs did not attempt to explain why Dr. Rausser's opinions had changed so significantly, or why he nonetheless maintained that they had not.

At the class certification hearing, DFA and DMS challenged Plaintiffs' theory of common adverse impact on a number of grounds. First, they questioned the reliability of an analysis that **[**38]** initially focused on the wrong unit of comparison. Second, they asserted that because it is undisputed that approximately 85% of milk prices are the product of regulation that ensures uniformity, it is improper to credit this uniformity to the unlawful conspiracy without targeting that portion of the price that at least could be subject to manipulation. If the analysis examines the competitive premiums earned by dairy farmers, they contend that Dr. Rausser's alleged **[*269]** price uniformity disappears. For example, DFA and DMS point out that from 2002 to 2009, dairy cooperatives operating in Order 1 did not pay uniform premiums to their member dairy farmers, and that not only are premiums not uniform among the alleged coconspirators, they do not even reflect a uniform trend or high correlation. They also argue that there is obvious and substantial geographical dispersion in premiums earned by dairy farmers as evidenced by the counties in which each of the named Plaintiffs are located. They challenge Dr. Rausser's opinion that a 42 cent per cwt difference in premiums is "quite modest" when there is evidence that a 15 cent pay price difference is enough to cause a cooperative to lose or gain **[**39]** members.

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[14] At the parties' request, the class certification hearing was postponed twice.

[15] *See* Doc. 332-2 at 3 ("In his latest report, Dr. Kalt purports to be responding to 'new' analyses appearing four weeks earlier in **[**36]** my rebuttal declaration. This characterization is incorrect. Each and every one of the analyses in my rebuttal was a direct response to a critique advanced by Dr. Kalt in his initial report, and the large majority of them were devoted to correcting Dr. Kalt's own analyses and demonstrating that those analyses (once corrected) do not support his conclusions.").

With regard to processing plant prices, DFA and DMS argue that Dr. Rausser's data shows variability, not uniformity. Examining prices paid by DMS's plants with those owned by alleged coconspirators and other "fringe" processors, they assert that there are variations as much as $3.00 per cwt.

Finally, DFA and DMS pointed out that any analysis of price suppression is further complicated by the fact that DMS had a significantly lower market share in 2002 and 2003 before St. Albans and Land O'Lakes became affiliated with it, GNEMMA was not created until 2006, and, according to Plaintiffs' own responses to discovery, the members of the alleged conspiracy changed significantly over time which, if Plaintiffs are correct in their allegations, should have had a corresponding impact on prices which Plaintiffs have failed to demonstrate.

Plaintiffs sought to rebut Defendants' challenges by arguing: (1) the vast majority of the raw Grade A milk in Order 1 is supplied through the conspiracy (assuming one accepts Plaintiffs' definition of the multi-membered conspiracy); (2) 80% of processing plant capacity is primarily supplied by conspirators (again, same caveat); (3) 82% of non-pool capacity **[**40]** is primarily supplied by conspirators (same caveat); (4) it is very common in conspiracies for the operations of coconspirators to be unevenly distributed in the relevant market; (5) in most counties, there are zero or one processing facility that is not owned or supplied predominately or exclusively by the coconspirators (same caveat); and (6) the fact that there are county-by-county differences in processors is legally and factually irrelevant, even though Plaintiffs concede that one of their claims is that the conspiracy controlled dairy farmers' access to processing plants.

The parties' competing arguments arguably require the court to delve into the merits of many of Plaintiffs' complex and multi-dimensional allegations regarding how, when, and where the alleged conspiracy operated because Plaintiffs depend upon these allegations in claiming a common adverse impact. Here, the court need not engage in this arduous task because it is confronted with a clear failure of proof.

The Second Circuit has cautioned that *Rule 23(a)*'s requirements cannot be satisfied by "some showing" based upon an expert report that is not "fundamentally flawed." *See* *IPO, 471 F.3d at 40* ("[W]e can no longer **[**41]** continue to advise district courts that 'some showing' of meeting *Rule 23* requirements will suffice . . . or that an expert's report will sustain a plaintiff's burden so long as it is not 'fatally flawed[.]"). Instead, Plaintiffs must adduce "significant proof" of common impact that will withstand a "rigorous analysis." *Id. at 33, 42*; *Falcon, 457 U.S. at 160*. For the following reasons, Plaintiffs have not sustained this burden.[16]

First, although Plaintiffs concede that their expert focused on the wrong component of price, erroneously opined that the impact of the alleged conspiracy would be found in the component pricing, and disclaimed any significant impact of the conspiracy on premiums paid to farmers, Dr. Rausser has repeatedly stated that he has not abandoned the opinions he articulated in his Initial Declaration. Accordingly, Plaintiffs and their expert either have a significant difference of **[*270]** opinion regarding critical components of Plaintiffs' theory of common adverse impact or the court **[**42]** must rely on Dr. Rausser's fundamentally flawed Initial Declaration. *See* *IPO, 471 F.3d at 36* (noting that the Second Circuit has upheld denial of class certification where the expert's opinion was "fundamentally flawed"). If there is a third alternative, Plaintiffs have not identified it.

Second, the court remains unconvinced that the *total* price of milk is what must be examined to determine whether prices have been adversely impacted by the alleged conspiracy.[17] As Dr. Rausser concedes, prices for raw Grade A milk in Order 1 exhibit a high degree of uniformity for reasons that have nothing to do with the alleged conspiracy. *See* Doc. 312-1 at 98 ("In conclusion, milk pricing in Order 1 is highly uniform due to both the homogeneous nature of the product and the regulated structure of the industry."). To focus solely on total price may thus reflect a

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[16] The court does not regard this observation as a conclusive determination of the merits of Plaintiffs' causation and damages theory. *See* *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*.

[17] The court acknowledges that Plaintiffs need not prove their entire case to the court in order to obtain class certification, however, they must show that "whatever underlying facts are relevant to a particular *Rule 23* requirement have been established[.]" *IPO, 471 F.3d at 41*.

uniformity that is largely the product of regulation, and not necessarily the product of a conspiracy to suppress prices. Dr. Kalt opines that Dr. Rausser has examined the wrong component of price and that any analysis of common adverse impact must focus on the market driven premiums. In response to this criticism, Plaintiffs assert that "[a]s **[**43]** Dr. Rausser has made clear, even when the regression analysis focuses on the 'total price paid *minus* the Federal Order Uniform Price,' its explanatory power 'is still extremely high by professional standards.'" (Doc. 357 at 7 (citing Rausser July 15, 2011 Supplemental Decl. ¶ 9 and n. 14; Plaintiffs' Reply Memorandum at 10 (citing *Reference Manual on Scientific Evidence* (2d ed.) (Federal Judicial Center, 2000)). However, this is yet another opinion by Dr. Rausser that leaves in question the proper unit of comparison.

Third, because one of the central tenets of Plaintiffs' claims is that the alleged conspiracy controlled dairy farmers' access to processing plants, forcing them to join cooperatives against their will in order to gain access to those plants, Plaintiffs should be expected to set forth a theory of common adverse impact that takes into consideration the existence or non-existence of non-conspirator **[**44]** processing plants. Dr. Rausser's Initial Declaration did not address this variable and Plaintiffs, themselves, appear to address it only as an afterthought. *See* Doc. 354 at 10 ("Moreover, the only factor even hypothesized by Defendants as potentially biasing the result (the presence of non-conspirator processors in a county) can easily be accounted for in the regression and has no relevant impact on the results.") (citing Rausser July 15, 2011 Supplemental Decl. at ¶¶ 5, 12 & n.19).

Finally, neither Plaintiffs nor Dr. Rausser adequately address whether the final iteration of their theory of common adverse impact reflects the return on investment some dairy farmers may experience through joining cooperatives that own their own processing plants and return profits to their members based upon processing activities. DFA and DMS characterize this variable as dairy farmers who "benefited . . . or broken even" (Doc. 281-8 at 8) from the alleged price suppression.[18]

[*271] In response, Plaintiffs argue that they need only demonstrate that *a* common injury occurred, not the amount of injury suffered by each class member. *See* [*In re Urethane Antitrust Litig., 251 F.R.D. at 638*] (in deciding class certification motion, "the issue in the common impact analysis is the *fact,* **[**46]** not the amount of, injury.") (quoting [*In re Potash Antitrust Litig., 159 F.R.D. 682, 694 (D. Minn. 1995))*]. They further argue that whether some members of the proposed class may have received some benefit from a particular anticompetitive activity is factually and legally irrelevant. However, the court's concern is more subtle. A central tenet of Plaintiffs' Amended Complaint is that "[t]hrough acquisitions, mergers, supply agreements and closures of competitors' processing plants, Defendants secured control of the raw Grade A milk processing market in the Northeast" in order to "force independent dairy cooperatives and independent dairy farmers to join DFA or market their milk through DMS." (Doc. 117 at ¶ 84). Through Dr. Rausser, Plaintiffs proffer a regression analysis which they claim controls for all of the variables that may affect price. They further assert that they have gone beyond theory to established proof, and that "[d]amage results are statistically significant with a 99% confidence level." *See* Plaintiff's Exhibit 21. Dr. Rausser's formula, however, does not appear to account for any difference in the impact the alleged conspiracy may have had on dairy farmers whose cooperatives **[**47]** own their own processing plants versus dairy farmers whose cooperatives do not. In his Initial Declaration, Dr. Rausser recognized that profits distributed to cooperative members may be important in analyzing "price" but noted that his model did not take this into consideration. *See*

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[18] DFA and DMS more specifically describe the issue as follows:

> Moreover, the very economic theory of Plaintiffs' case precludes any claim of commonality. Plaintiffs insist that the suppression of farmers' prices resulted in supra-competitive **[**45]** profits for conspiring milk processors—by paying less for raw milk, processors were able to increase their margins and profits. But there are thousands of putative class members—e.g., the farmers who belong to the Agri-Mark coop in Vermont, and to the Upstate/Niagara coop in New York—whose cooperatives own their own milk processing plants, such that whatever profits those plants generate are returned to the coops' dairy farmer members. Depending on the extent to which their coops are vertically integrated into owning plants, these farmers would have *benefited* from the price suppression alleged by Plaintiffs (e.g., if their coops are net buyers of raw milk), or *broken even* (e.g., if their coops simply processed the milk produced by their farmers). Only by examining these farmers' individual circumstances can the impact of alleged antitrust violations, *if any,* be determined.

(Doc. 281-8 at 8).

Doc. 206-1 at ¶ 242. His subsequent opinions also do not appear to adequately reflect this variable. It thus seems premature to declare Plaintiffs' theory of common adverse impact not only finalized but conclusively proven.

In summary, although Dr. Rausser's multivariate regression analysis may ultimately prove to be an acceptable means of analyzing causation and damages in this case, the court cannot find it is presently sufficient to perform this task because too many uncertainties remain regarding what component of price is being analyzed and how. For purposes of class certification, the court thus finds that under Rule 23(a)(2), Plaintiffs have not sustained their burden of proffering "significant proof" that causation and damages may be established by common proof. *See* Falcon, 457 U.S. at 160 (class certification requires "significant proof" in support of generalized claims).

Whether, at this stage of **[**48]** the proceedings, Plaintiffs can ultimately prove common impact through Dr. Rausser's regression analysis does not end the court's class certification inquiry. The court has previously found that Plaintiffs' allegations regarding the conspiracy's formation, participants, duration and implementation are likely to be demonstrated by common proof. *See* NASDAQ, 169 F.R.D. at 509. Rule 23(a)(2) requires only that there be "questions of law or fact common to the class." "This requirement is not quantitative in nature; that is, it is possible to satisfy Rule 23(a)(2) where only a single issue is common to the members of the proposed class, as long as resolution of that issue will advance the litigation." *Shakhnes ex rel. Shakhnes v. Eggleston, 740 F. Supp. 2d 602, 624-25 (S.D.N.Y. 2010)*. Here, there are sufficient common questions of fact and law to satisfy the requirements of Rules 23(a)(2).

The court, *sua sponte,* noted the possibility of certifying some, but not all issues, for resolution on a class action basis. *See* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 226 (2d Cir. 2006) (holding a district court may certify a class as to specific issues even if it cannot do so with regard to the **[**49]** entire claim); *see also* MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.24 (issue classes "may enable a court to achieve economies of class action treatment for a portion of a case, the rest of which may either not qualify under Rule 23(a) or may be unmanageable as a class action."). Both parties, however, ask the court not to certify the class only as to certain issues as this may create more issues than it resolves. *See* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008) ("[I]n this case, given the number of questions that would remain for individual adjudication, issue certification would not reduce **[*272]** the range of issues in dispute and promote judicial economy.") (internal quotations and citation omitted), *abrogated in part by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008). The court is thus left with the conclusion that while Plaintiffs have satisfied the commonality requirement with regard to the conspiracy's formation, duration and implementation, class certification on those issues is not requested.

In the event Plaintiffs seek to re-file their motion for class certification at a later date and to facilitate appellate review, the court addresses the remaining Rule 23(a) **[**50]** requirements.

Typicality

Rule 23(a)(3) requires Plaintiffs' claims to be "typical" of the class. This requirement is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." In re Flag Telecom Holdings, Ltd. Secs. Litig., 574 F.3d 29, 35 (2d Cir. 2009) (citation and quotation marks omitted).

"[C]laims in antitrust price-fixing cases generally satisfy Rule 23(a)(3)'s typicality requirement" because typicality "in the antitrust context will be established by plaintiffs and all class members alleging the same antitrust violations by the defendants." In re Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 241 (E.D.N.Y. 1998) (citation and internal quotation marks omitted). Accordingly, "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." Robidoux v. Celani, 987 F.2d 931, 936-37 (2d Cir. 1993). "Sometimes the issues are plain enough from the pleadings to determine whether **[**51]** the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." Falcon, 457 U.S. at 160.

Here, Plaintiffs' proposed class representatives are all dairy farmers who have produced and pooled raw Grade A milk in Order 1 at some point during the alleged conspiracy. For purposes of typicality, the named Plaintiffs and the proposed class share a common interest in establishing that DFA and DMS committed the alleged antitrust violations, even if some members of the proposed class do not object to those activities. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d at 562 (lack of opposition to defendant's practices from some class members is irrelevant to class certification); Jacobi v. Bache & Co., Inc., 1972 U.S. Dist. LEXIS 15192, 1972 WL 560, at *2 (S.D.N.Y. Feb. 8, 1972) (because the "object of an anti-trust action is the restoration of competition to the industry involved: the fact that some members of the class may differ as to the desirability of a particular remedy for the anti-trust violation, or even desire the maintenance of the status quo" does not prevent **[**52]** class certification); In re New Motor Vehicles Canadian Export Antitrust Litig., 235 F.R.D. 127, 141 n.49 (D. Me. 2006) (instructing court to certify class despite "disapproval of the action by some class members"). It is thus well-established that "differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory." Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988).

Plaintiffs' claims in this case thus meet the typicality requirement of Rule 23(a)(3) to the extent they address the formation, duration, and implementation of the alleged conspiracy. The court does not, at this time, find that Plaintiffs' causation and damages claims meet the typicality requirement as it has found insufficient proof of a theory of common adverse impact.

Adequacy

Rule 23(a)'s adequacy requirement asks whether the class representatives will fairly and adequately protect the interests of the class. "Two factors generally inform whether class representatives satisfy the Rule 23(a)(4) requirement: "(1) absence of conflict and (2) assurance of vigorous prosecution." Robinson v. Metro-North Commuter **[*273]** R.R. Co., 267 F.3d 147, 170 (2d Cir. 2001) **[**53]** (quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions,* § 3.22, at 3-126 (3d ed. 1992)); *see also* Denney v. Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006) ("Adequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members."). This inquiry focuses on "uncovering 'conflicts of interest between named parties and the class they seek to represent.'" Flag, 574 F.3d at 35 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)).

A conflict must be "fundamental" to violate Rule 23(a)(4). *See* Flag, 574 F.3d at 35; Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1280 (11th Cir. 2000) (quoting 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1768 (2d ed. 1986) ("It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent."). In instances when a fundamental conflict does exist, the court may cure the conflict by dividing the class into separate "homogenous subclasses . . . with **[**54]** separate representation to eliminate conflicting interests of counsel." Ortiz v. Fibreboard Corp., 527 U.S. 815, 856, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999); *see also* In re Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 249-50 (2d Cir. 2011) (same).

DFA and DMS characterize the potential subclasses in this case as follows:

> [F]armers who belong to cooperatives associated with [DMS]; the farmers who have joined cooperatives with no association with DMS (such as Lanco, Fingerlakes Cooperative, and Producers Cooperative); the farmers who have chosen not to join *any* cooperative, but who market their milk independently to plants that have no connection to DMS; the farmers who have chosen to join cooperatives (such as Agri-Mark and Upstate Niagara) that have invested heavily in milk processing plants (the beneficiaries of any allegedly lower prices for

raw milk); and the farmers who have chosen to join cooperatives (such as Dairylea) that have minimal, if any, investment in plants.

(Doc. 281-8 at 6). Although DFA and DMS correctly assert that these subgroups of dairy farmers do not share identical interests in the litigation, the only *conflict* they identify is between farmers who are part of DMS and farmers **[**55]** who are not. *See* Doc. 281-8 at 7 ("It could not be clearer that the farmers who ultimately own, fund and support DMS have fundamentally different interests than those outside of DMS who would like to take opportunities, customers, and dollars away from them.").

As they further point out, however, because Plaintiffs seek not only a significant damages award against DFA and DMS, but ask the court to grant injunctive relief that would fundamentally alter how those entities do business, there is also a potential conflict between those who support and benefit from the activities of DFA and DMS, and those who do not.[19] In support of this claim, DFA and DMS have filed sworn declarations from nearly two dozen dairy farmers who assert that because they use DMS to bring their milk to market and seek to continue to do so, their interests are not aligned with dairy farmers who do not. These dairy farmers oppose both this lawsuit and the relief that it requests.[20] DFA and DMS cite *Pickett* as instructive of how this conflict must be resolved.

In *Pickett,* the trial court certified a class which included all cattle producers who sold feed cattle to the defendants on the spot **[*274]** market, as well as all cattle producers who have or previously had contracts and marketing agreements with the defendants. The plaintiffs in *Pickett* alleged that the contracts and marketing agreements allowed defendants to "depress the market at strategic times in order to force producers to accept artificially low prices[.]" *Id. at 1278*. In reversing the certification decision, the Eleventh Circuit concluded that the adequacy requirement of *Rule 23(a)(4)* was not satisfied because of a conflict within the class. *See* *id. at 1280* ("Thus, a class cannot be certified when its members have opposing interests or when it consists of **[**57]** members who benefit from the same acts alleged to be harmful to other members of the class."). The Eleventh Circuit further observed that the plaintiffs sought injunctive relief which would have prohibited defendants from using purchasing arrangements in the future, thereby imposing a restriction on the way defendants conducted business. *Id.* The court concluded that "under these circumstances, the [p]laintiff's could not possibly provide adequate representation" to the class as whole. *Id.*[21]

In this case, Plaintiffs seek monetary relief which, if awarded, must be paid by DFA and DMS and, in turn, paid to some extent by their members. Plaintiffs further seek injunctive relief that will materially transform the manner in which DFA and DMS do business.[22] As a result, DFA's and DMS's members may suffer harm which will not be shared by each of the proposed class representatives.

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[19] Plaintiffs assert that the facts before the court are no different than those considered by the court when it certified a settlement class for the purposes **[**56]** of the Dean Settlement. However, no member of the Dean Settlement Class could be said to occupy the status of both plaintiff and quasi-defendant. Here, individual dairy farmers including dairy farmer members of DMS would be pursuing relief against dairy farmer-owned DMS.

[20] With regard to the Dean Settlement, only a few dairy farmers opposed Dean's proposal to pay $30 million in order to settle all claims against it in this lawsuit.

[21] As Plaintiffs point out, on remand in *Pickett,* the District Court certified a narrower class than that proposed by the plaintiffs to address the conflict. *Pickett v. IBP, Inc., 2001 U.S. Dist. LEXIS 22453, 2001 WL 34886460 at, *10-11 (M.D. Ala. Dec. 26, 2001)*. A similar result is warranted here.

[22] As the court in *Southeastern Milk* found, Plaintiffs' **[**58]** challenges to DFA's full supply agreements pose a clear conflict because "injunctive relief preventing DFA and other Defendants from entering into full supply agreements is something at the very heart of plaintiffs' claims," and yet some DFA farmers claim "[t]he DFA supply agreements at issue in this case have guaranteed farmers a stable, secure and needed market for their raw milk, something especially essential to staying in business, especially for farmers in surplus areas and small farmers." *Se. Milk, 2011 U.S. Dist. LEXIS 83196, 2011 WL 3205798, at *3-4*.

Contrary to Plaintiffs' assertions, it is not enough to assume that all members of the class will ultimately benefit if the practices in Order 1 are materially altered. Certainly those members of DFA and DMS who contend that their organizations engage in lawful and beneficial activities on their behalf cannot be said to have their interests adequately represented by parties that seek to financially recover from, punish, and prohibit those very same activities.

Pursuant to *Rule 23(a)(4)*, the named plaintiffs must "possess the same interest[s] and suffer the same injur[ies] as the class members." *Amchem, 521 U.S. at 625-26* (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977))*. **[**59]** Here, the interests of the class clearly diverge, and the proposed class representatives cannot adequately represent all members of the class. There is thus a fundamental conflict within the proposed class created by Plaintiffs' request for injunctive and monetary relief which will adversely impact members of DFA and DMS while benefitting other members of the proposed class.[23]

Finding a fundamental conflict with regard to both the monetary and injunctive relief sought, the court must determine whether any conflict may be addressed by certifying subclasses as opposed to denying class certification **[**60]** entirely. In this case, adequacy of representation may be accomplished by certifying subclasses that consist of dairy farmers: (1) who belong to DFA and DMS; and (2) those who do not, with "separate representation **[*275]** [for each subclass] to eliminate conflicting interests of counsel." *Literary Works in Elec. Databases Copyright Litig., 654 F.3d at 249-50*; *see also* *Johnson, 2009 U.S. Dist. LEXIS 131701, 2011 WL 3876531, at *4*. As the Amended Complaint does not seek monetary or injunctive relief against alleged coconspirators who are not defendants in this lawsuit, no further subclasses appear to be warranted.

Having determined that a condition precedent to class certification is the creation of a subclass with separate counsel, the court proceeds no further in analyzing whether *Rule 23(a)(4)*'s remaining requirements have been satisfied.

The court also does not determine whether *Rule 23(b)*'s requirement that common questions of law and fact predominate over individual questions have been met. Such an analysis would be premature in light of the court's denial of class certification on *Rule 23(a)(2)* grounds.

CONCLUSION

For the foregoing reasons, the court DENIES WITHOUT PREJUDICE Plaintiffs' motion for class certification **[**61]** (Doc. 206).

Dated at Rutland, in the District of Vermont, this 9th day of December, 2011.

/s/ Christina Reiss

Christina Reiss, Chief Judge

United States District Court

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[23] The court in *Southeastern Milk* properly framed (and answered) the dispositive question as follows:

> Is there proof that the interests of the nominal plaintiffs are in conflict with, or antagonistic to, the interests of the DFA members of the class? In other words, are DFA members of the class entitled to class representatives who share their interests when making decisions about whether to invalidate business practices and seek a money judgment from the cooperative? On the current state of the record, the Court concludes that the answer to both question is "yes."

*Se. Milk, 2011 U.S. Dist. LEXIS 83196, 2011 WL 3205798, at * 7*.

FTC v. Phoebe Putney Health Sys.

United States Court of Appeals for the Eleventh Circuit

December 9, 2011, Decided

No. 11-12906

Reporter

663 F.3d 1369 *; 2011 U.S. App. LEXIS 24458 **; 2011-2 Trade Cas. (CCH) P77,722; 23 Fla. L. Weekly Fed. C 628

FEDERAL TRADE COMMISSION, Plaintiff - Appellant, STATE OF GEORGIA, Plaintiff, versus PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA, INC., PALMYRA PARK HOSPITAL, INC., HOSPITAL AUTHORITY OF ALBANY - DOUGHERTY COUNTY, Defendants - Appellees.

Subsequent History: US Supreme Court certiorari granted by *FTC v. Phoebe Putney Health Sys., 567 U.S. 933, 133 S. Ct. 28, 183 L. Ed. 2d 674, 2012 U.S. LEXIS 4852 (U.S., 2012)*

Reversed by, Remanded by *FTC v. Phoebe Putney Health Sys., 568 U.S. 216, 133 S. Ct. 1003, 185 L. Ed. 2d 43, 2013 U.S. LEXIS 1064 (U.S., 2013)*

Prior History: **[**1]** Appeal from the United States District Court for the Middle District of Georgia. D.C. Docket No. 1:11-cv-00058-WLS.

FTC v. Phoebe Putney Health Sys., 793 F. Supp. 2d 1356, 2011 U.S. Dist. LEXIS 70180 (M.D. Ga., 2011)

Core Terms

hospital authority, lease, powers, acquisition, authorities, anticompetitive, immunity, acquire, anticompetitive conduct, state-action, anticipated, articulated, subsidiary, projects, effects, monopoly

LexisNexis® Headnotes

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

Antitrust & Trade Law > Clayton Act > Scope

HN1[] **Regulated Practices, Monopolies & Monopolization**

See *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

HN2[] US Federal Trade Commission Actions, Judicial Review

See *15 U.S.C.S. § 45(c)*.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN3[] US Federal Trade Commission Actions, Remedial Powers

See *15 U.S.C.S. § 53(b)*.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN4[] Remedial Powers, Federal Trade Commission Act

Section 13(b) of the Federal Trade Commission Act allows courts to grant a preliminary injunction against defendants in an action brought by the Commission provided there is a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, granting the injunction would be in the public interest. *15 U.S.C.S. § 53(b)*.

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

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

HN5[] Standards of Review, De Novo Review

An appellate court reviews de novo a district court's order dismissing a complaint under *Fed. R. Civ. P. 12(b)(6)*. The appellate court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff; the court is not, however, bound to accept as true a legal conclusion couched as a factual allegation.

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

HN6[] Exemptions & Immunities, Parker State Action Doctrine

The doctrine of state-action immunity protects the states from liability under the federal antitrust laws. Relying on principles of federalism, the United States Supreme Court has refused to find in the antitrust laws an unexpressed purpose to nullify a state's control over its officers and agents. The same protection does not, however, extend automatically to municipalities or political subdivisions of the states. Political subdivisions are not themselves sovereign; they do not receive all the federal deference of the states that create them. But because political subdivisions are instrumentalities of the state, they may under some circumstances be entitled to state-action immunity. Thus, a political subdivision enjoys state-action immunity if it shows that, through statutes, the state generally authorizes it to perform the challenged action and that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct.

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

HN7[] Exemptions & Immunities, Parker State Action Doctrine

The requirement of a clearly articulated state policy for purposes of state-action immunity and federal ***antitrust law***, does not require the state legislature to expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. Instead, it is enough that such anticompetitive conduct is a "foreseeable result" of the legislation. And, "foreseeable anticompetitive effect" need not be one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation. The clear-articulation standard requires only that the anticompetitive conduct be reasonably anticipated.

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

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

HN8[] Parker State Action Doctrine, Local Governments & Private Parties

A court may not "look behind" governmental actions for perceived conspiracies to restrain trade for purposes of state-action immunity and federal ***antitrust law***. A court may not deconstruct the governmental process or probe the official "intent" to determine whether the government's decision-making process has been usurped by private parties.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Public Health & Welfare Law > Healthcare > General Overview

Healthcare Law > Business Administration & Organization > General Overview

HN9[] Antitrust Actions, Facilities

The Hospital Authorities Law, *O.C.G.A. § 31-7-70 et seq.*, evidently contemplates anticompetitive effects. Through that law, the Georgia legislature granted powers of impressive breadth to the hospital authorities. Those powers include the powers to "operate projects," *O.C.G.A. § 31-7-75(4)*, which include hospitals, *O.C.G.A. § 31-7-71(5)*; to construct, reconstruct, improve, alter, and repair projects, *O.C.G.A. § 31-7-75(5)*; to establish rates and charges for the services and use of the facilities of the authority, *O.C.G.A. § 31-7-75(10)*; to sue and be sued, *O.C.G.A. § 31-7-75(1)*; to exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein, *O.C.G.A. § 31-7-75(14)*; and to borrow money for any corporate purpose, *O.C.G.A. § 31-7-75(17)*.

Healthcare Law > Business Administration & Organization > General Overview

Public Health & Welfare Law > Healthcare > General Overview

HN10[] Healthcare Law, Business Administration & Organization

The Hospital Authorities Law, *O.C.G.A. § 31-7-70 et seq.*, authorizes the authorities generally to make and execute contracts and other instruments necessary to exercise their powers, *O.C.G.A. § 31-7-75(3)*, and to exercise any or all powers now or hereafter possessed by private corporations performing similar functions, *§ 31-7-75(21)*. To fulfill its mission to promote public health, the authority can in effect deploy any power a private corporation could in its stead. And it enjoys powers that private corporations do not. It may acquire by the exercise of the right of eminent domain any property essential to its purposes. *O.C.G.A. § 31-7-75(12)*. And although the Authority has no power to tax, *O.C.G.A. § 31-7-84(a)*, the statute authorizes local governments to impose a tax to cover some of the authority's expenses, *§ 31-7-84(a)-(b)*, freeing the authority to price its health services below cost.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Public Health & Welfare Law > Healthcare > General Overview

Healthcare Law > Business Administration & Organization > General Overview

HN11[] **Antitrust Actions, Facilities**

The Georgia legislature had granted hospital authorities the power to acquire by purchase, lease, or otherwise projects, *O.C.G.A. § 31-7-75(4)*, which include hospitals, *O.C.G.A. § 31-7-71(5)*, and the power to lease for operation by others any project, *§ 31-7-75(7)*. Moreover, in granting the power to acquire hospitals, the legislature must have anticipated that such acquisitions would produce anticompetitive effects. Foreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between them.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Public Health & Welfare Law > Healthcare > General Overview

Healthcare Law > Business Administration & Organization > General Overview

HN12[] **Exemptions & Immunities, Parker State Action Doctrine**

A 1993 amendment to the Hospital Authorities Law allows mergers between two hospital authorities when they exist within a single, high-population county, *O.C.G.A. §§ 31-7-72.1(a)*, *31-7-73(a)*, and declares that, in undertaking such mergers, hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia, *§ 31-7-72.1(e)*.

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

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

What matters for purposes of state-action immunity and federal ***antitrust law*** is whether anticompetitive effects were anticipated at the time the legislation was enacted.

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Judges: Before TJOFLAT and CARNES, Circuit Judges, and MICKLE,* District Judge.

Opinion by: TJOFLAT

Opinion

[*1372] TJOFLAT, Circuit Judge:

I.

A.

In 1941, the Georgia legislature enacted the Hospital Authorities Law, 1941 Ga. Laws 241 (codified as amended at *O.C.G.A. § 31-7-70 et seq*.). That statute creates a hospital authority, "a public body corporate and politic," for each city and county, *O.C.G.A. § 31-7-72(a)*, or for multiple cities or counties combined, id. *§ 31-7-72(d)*. The hospital authority does not become operative, however, unless the governing body of the city or county determines that the authority is needed for the delivery of hospital services. Id. *§ 31-7-72(a)*. **[**3]** Once such need is determined, the governing body appoints between five and nine individuals to manage the authority. Id.

Each authority is given broad powers to meet the public health needs of its community. Among those specified by the statute are the powers to "operate projects," id. *§ 31-7-75(4)*, which include hospitals, clinics, nursing homes, and other public health facilities, id. *§ 31-7-71(5)*;[1] to "acquire by purchase, lease, or otherwise . . . projects," id. *§ 31-7-75(4)*; to "construct, reconstruct, improve, alter, and repair projects," id. *§ 31-7-75(5)*; to "lease . . . for operation by others any project," id. *§ 31-7-75(7)*; to "establish rates and charges for the services and use of the facilities of the authority," id. *§ 31-7-75(10)*; to "exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein," id. *§ 31-7-75(14)*; and to "form and operate, either directly or indirectly, one or more networks of hospitals, physicians, and other health care providers and to arrange for the provision of health care services through such networks," id. *§ 31-7-75(27)*.

The statute also grants the authorities more general powers to "make plans for unmet needs of their respective communities," id. *§ 31-7-75(22)*, to "make and execute contracts and other instruments necessary to exercise the[ir] powers," id. *§ 31-7-75(3)*, and to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions," id. *§ 31-7-75(21)*. And, the statute makes clear, these enumerated powers—broad as

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* Honorable Stephan P. Mickle, United States District Judge for the Northern District of Florida, sitting by designation.

1 An authority may not, however, "operate or construct any project for profit." **[**4]** *O.C.G.A. § 31-7-77*.

they are—are not exhaustive: each authority has "all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article." Id. *§ 31-7-75*.[2]

[*1373] B.[3]

In 1941, the City of Albany and Dougherty County (in which the City is located) determined the need for a hospital authority in Dougherty County and established the Hospital Authority of Albany-Dougherty County (the "Authority"). After it was formed, the Authority acquired Phoebe Putney Memorial Hospital in Albany ("Memorial"). Until 1990, the Authority operated Memorial. That year, however, the Authority **[**6]** exercised its *§ 31-7-75(7)* power to lease the facility for operation by others; to such end, it formed two nonprofit corporations, Phoebe Putney Health System, Inc. ("PPHS") and, as a PPHS subsidiary, Phoebe Putney Memorial Hospital, Inc. ("PPMH"), and leased Memorial to PPMH.[4] Since 1990, PPMH has been operating the hospital.

PPMH's lease gives it the right to set the prices for the services Memorial provides. In exercising such right, however, PPMH is subject to the Hospital Authorities Law's proscription against charging prices greater than necessary to cover the cost of the services and provide reasonable reserves. See id. *§ 31-7-77*.

Memorial consists of 443 beds and offers, among other things, a full range of inpatient general acute-care services. Memorial's (and thus PPHS's and PPMH's) only real competitor is Palmyra Park Hospital, Inc. ("Palmyra"), a subsidiary of HCA, Inc. established in Albany in 1971.[5] Palmyra consists of 248 beds and provides essentially the **[**7]** same services as Memorial. Memorial controls 75 percent and Palmyra 11 percent of their geographic market.[6]

In December 2010, PPHS presented the Authority with a plan to acquire Palmyra's assets, i.e., the Palmyra hospital facility, with funds provided by PPHS[7] and to lease such assets to PPHS or a nonprofit PPHS subsidiary. The terms of the lease would be essentially the same as the Authority's PPMH lease.[8] The Authority approved **[*1374]** the plan to the extent that it called for the purchase of the Palmyra hospital and its temporary management by a

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[2] Each authority's exercise of these powers, however, is generally limited to its own city or county, or, under limited circumstances, only slightly beyond those boundaries. The statute defines an authority's "[a]rea of operation" as "the area within the city or county activating an authority," as well as "any other city or county in which the authority wishes to operate, provided the governing authorities and the board of any hospital authorities of such city and county request or approve such operation." Id. *§ 31-7-71(1)*. And the statute's definition **[**5]** of "project" suggests that an operation qualifies as a project only if it falls within the city or county in which the authority is located, within the authority's area of operation, or within a city or county whose governing bodies and hospital authority have approved the project. See id. *§ 31-7-71(5)*. An authority in a low-population county, however, may locate a project in a county contiguous to its area of operation. Id. *§ 31-7-89.1(d)*. The statute also sometimes allows projects as far as 12 miles from the city or county in which an authority is located. Id. *§ 31-7-72(f)*.

[3] The facts set out in subpart B are as reflected in the complaint in this case and are not materially disputed. In reciting the provisions of the Hospital Authorities Law we took judicial notice of such provisions.

[4] The Authority's contractual arrangement with PPMH and PPHS provides that, upon the termination or expiration of the lease to PPMH, both PPMH and PPHS are to be dissolved and their assets are to revert to the Authority.

[5] HCA, Inc. is a for-profit corporation that operates hospitals in twenty states.

[6] The geographic market for Memorial and Palmyra consists of Dougherty and five surrounding counties.

[7] PPHS would provide $195 million, and the Authority would use such funds to purchase Palmyra's assets. If the plan were not carried to fruition, PPHS would pay HCA, Inc. a fee of $35 million.

[8] The plan called for the cancellation of PPMH's Memorial lease and the execution of an instrument under which the Authority would lease both Memorial **[**8]** and Palmyra to PPHS or a PPHS subsidiary for a term of 40 years. Prior to the execution of this lease, the Authority would contract with a newly organized PPHS subsidiary, Phoebe North, Inc., to operate Palmyra.

subsidiary to be established by PPHS. In April 2011, the Authority approved the terms of the proposed lease to PPHS or its subsidiary.

II.

On April 19, 2011, the Federal Trade Commission (the "Commission") initiated an administrative proceeding to determine whether the Authority's purchase of Palmyra and subsequent lease to PPHS, or a PPHS subsidiary, would substantially lessen competition or tend to create a monopoly in the inpatient general acute-care hospital services market in Dougherty County and surrounding areas (the "relevant market") in violation of *section 7* of the Clayton Act, *15 U.S.C. § 18*. See *15 U.S.C. § 21(a)* (granting the Commission authority to enforce *section 7* of the Clayton Act). *Section 7* provides that ***HN1***[] "no person subject to the jurisdiction of the [Commission] shall acquire . . . the assets of another . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*. According to the Commission, the proceeding was to be held in September 2011. If a *section 7* violation were to be found, the Commission would issue **[**9]** a cease and desist order to prevent the Authority going forward with the plan to acquire the Palmyra hospital facility. The order would be subject to review in this court. *15 U.S.C. § 45(c)* (***HN2***[] "Any person, partnership, or corporation required by an order of the Commission to cease and desist . . . may obtain a review of such order in the [appropriate circuit] court of appeals of the United States.").

To prevent the consummation of the plan prior to the completion of the administrative proceeding, *FTC v. Univ. Health, Inc., 938 F.2d 1206, 1217 n.23 (11th Cir. 1991)* ("[O]nce an anticompetitive acquisition is consummated, it is difficult to 'unscramble the egg.'"), the Commission brought this action, on April 20, 2011, to obtain a preliminary injunction against the Authority, PPHS, PPMH, HCA, Inc., and Palmyra (collectively "Appellees"). See *15 U.S.C. § 53(b)* (***HN3***[] "Whenever the Commission has reason to believe (1) that any person, partnership, or corporation is violating, or is about to violate *[section 7]* . . . the Commission . . . may bring suit in a district court of the United States to enjoin any such act."). In order to demonstrate its likelihood of prevailing on the merits,[9] the Commission **[**10]** alleged that the Authority's purchase of Palmyra would create a monopoly in the relevant market.

The Appellees, in response, moved the district court to dismiss the Commission's complaint under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. They did not contest the Commission's claim that the acquisition of Palmyra and effective merger of Palmyra and Memorial would tend to create, if not actually create, a monopoly in the relevant market. Instead, they asserted that the "state-action doctrine" immunized the Authority and its operation of the two hospitals under the planned arrangement with PPHS from antitrust liability. The district court agreed that the Authority, PPHS, and PPMH were entitled to such immunity and dismissed **[*1375]** the Commission's complaint with prejudice. The Commission now appeals.

III.

HN5[] We review **[**11]** de novo a district court's order dismissing a complaint under *Rule 12(b)(6)*. *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010)*. We "accept[] the factual allegations in the complaint as true and construe[] them in the light most favorable to the plaintiff," id.; we are not, however, "bound to accept as true a legal conclusion couched as a factual allegation," *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986))*.

We agree with the Commission that, on the facts alleged, the joint operation of Memorial and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly. The question, then, is whether this anticompetitive conduct is immunized by the state-action doctrine.

A.

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[9] ***HN4***[] *Section 13(b)* of the Federal Trade Commission Act allows courts to grant a preliminary injunction against defendants in an action brought by the Commission provided there is a "proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, [granting the injunction] would be in the public interest." *15 U.S.C. § 53(b)*.

HN6[] The doctrine of state-action immunity protects the states from liability under the federal antitrust laws. In *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, the Supreme Court held that the Sherman Act did not subject the states to liability for anticompetitive conduct **[**12]** within their jurisdiction. *Id. at 352, 63 S. Ct. at 314*. Relying on principles of federalism, the Court refused to find in the antitrust laws "an unexpressed purpose to nullify a state's control over its officers and agents." *Id. at 351, 63 S. Ct. at 313*.

The same protection does not, however, extend automatically to municipalities or political subdivisions of the states. Political subdivisions, as the Supreme Court has explained, "are not themselves sovereign; they do not receive all the federal deference of the States that create them." *City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 412, 98 S. Ct. 1123, 1136, 55 L. Ed. 2d 364 (1978)* (plurality opinion). But because political subdivisions are "instrumentalities of the State," *id. at 413, 98 S. Ct. at 1137* (quoting *Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 287, 3 S. Ct. 211, 213, 27 L. Ed. 936 (1883))*, they may under some circumstances be entitled to state-action immunity. Thus, a political subdivision, like the Authority,[10] enjoys state-action immunity if it shows that, "through statutes, the state generally authorizes [it] to perform the challenged action" and that, "through statutes, the state has **[**13]** clearly articulated a state policy authorizing anticompetitive conduct." *FTC v. Hosp. Bd. of Dirs. of Lee Cnty., 38 F.3d 1184, 1187-88 (11th Cir. 1994)* (citing *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985))*.

HN7[] The requirement of a clearly articulated state policy, as the Supreme Court explained in Town of Hallie, does not require the state legislature to "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." *471 U.S. at 43, 105 S. Ct. at 1719*. Instead, it is enough that such anticompetitive conduct is a "foreseeable result" of the legislation. *Id. at 42, S. Ct. at 1718*. And, as we explained in Lee County, a "foreseeable anticompetitive effect" need not be "one that ordinarily occurs, **[*1376]** routinely occurs, or is inherently likely to occur as a result of the **[**14]** empowering legislation." *38 F.3d at 1188*. The clear-articulation standard "require[s] only that the anticompetitive conduct be reasonably anticipated." *Id. at 1190-91*.

B.

The Authority's immunity therefore turns on whether the state has authorized the Authority's acquisition[11] of Palmyra and, in doing so, clearly articulated a policy to displace competition.[12] See *Town of Hallie, 471 U.S. at 40, 105 S. Ct. at 1717*. That standard, as explained above, is satisfied as long as anticompetitive consequences were a

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[10] We held in *Crosby v. Hospital Authority of Valdosta and Lowndes County, 93 F.3d 1515 (11th Cir. 1996)*, that a hospital authority created by the Georgia Hospital Authorities Law, *O.C.G.A. § 31-7-70 et seq*., was, for purposes of state-action immunity, a political subdivision of the state. *93 F.3d at 1525*.

[11] For purposes of our state-action analysis, we consider all the anticipated stages of the plan approved by the Authority—the purchase of Palmyra's assets, as well as their temporary management by, and subsequent lease to, PPHS or a PPHS subsidiary—as parts of a single "acquisition" under the Clayton Act.

[12] The Commission would have us approach the state-action issue differently. It argues that this case involves no "genuine state action" at all. Appellant's Br. 24. According to the Commission, the challenged plan is, in substance, a transfer of control of a hospital **[**15]** from one private party to another—a transfer engineered by a private party and only rubber-stamped by a governmental entity. In the absence of genuine state action, the Commission insists, we can dispose of the immunity issue without even reaching the question whether the state authorized the transaction and clearly articulated a policy to displace competition.

The Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, forbids us to accept the Commission's argument. *HN8*[] We may not "look behind" governmental actions for "'perceived conspiracies to restrain trade.'" *Id. at 379, 111 S. Ct. at 1353* (quoting *Hoover v. Ronwin, 466 U.S. 558, 580, 104 S. Ct. 1989, 2001, 80 L. Ed. 2d 590 (1984))*. We may not "deconstruct[] . . . the governmental process" or "prob[e] . . . the official 'intent'" to determine whether the government's decision-making process has been usurped by private parties. *Id. at 377, 111 S. Ct. at 1352*. We therefore must reject the Commission's argument that because the plan at issue was formulated by PPHS and HCA, Inc. and presented by PPHS to the Authority, the plan's execution would constitute **[**16]** only private action.

foreseeable result of the statute authorizing the Authority's conduct. We conclude that in this case that standard is met.

HN9[] The Hospital Authorities Law, *O.C.G.A. § 31-7-70 et seq*., evidently contemplates anticompetitive effects, including just the sort of anticompetitive conduct challenged here. Through that law, the Georgia legislature granted powers of impressive breadth to the hospital authorities. Those powers include the powers to "operate projects," id. *§ 31-7-75(4)*, which include hospitals, id. *§ 31-7-71(5)*; to "construct, reconstruct, improve, alter, and repair projects," id. *§ 31-7-75(5)*; to "establish rates and charges for the services and use of the facilities of the authority," id. *§ 31-7-75(10)*; to "sue and be sued," id. *§ 31-7-75(1)*; to "exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein," id. *§ 31-7-75(14)*; and to "borrow money for any corporate purpose," id. *§ 31-7-75(17)*.

The statute, indeed, goes further. *HN10*[] It also authorizes the authorities more generally to "make and execute contracts and other instruments necessary to exercise the[ir] powers," id. *§ 31-7-75(3)*, and to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions," id. *§ 31-7-75(21)*. To fulfill its **[**17]** mission to promote public health, the Authority can in effect deploy any power a private corporation could in its stead. And it enjoys powers that private corporations do not. It may "acquire by the exercise of the right of eminent domain any property essential to **[*1377]** [its] purposes." Id. *§ 31-7-75(12)*. And although the Authority has no power to tax, id. *§ 31-7-84(a)*, the statute authorizes local governments to impose a tax to cover some of the Authority's expenses, see id. *§ 31-7-84(a)*-*(b)*, freeing the Authority to price its health services below cost.

Most important in this case, however, is *HN11*[] the Georgia legislature's grant of the power to "acquire by purchase, lease, or otherwise . . . projects," id. *§ 31-7-75(4)*, which, again, include hospitals, id. *§ 31-7-71(5)*, and the power to "lease . . . for operation by others any project," id. *§ 31-7-75(7)*. This grant makes clear that the Authority is authorized to acquire and lease Palmyra. Moreover, in granting the power to acquire hospitals, the legislature must have anticipated that such acquisitions would produce anticompetitive effects. Foreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between **[**18]** them. This case, therefore, is not materially different from Lee County, where we held that the Florida legislature must have anticipated that granting the power to acquire hospitals to a county hospital board of directors would likely diminish competition. *38 F.3d at 1191-92*.

The Commission argues that Lee County is distinguishable because the Florida statute in that case concerned the hospital board of only one county. See *id. at 1186*. For that reason, the Commission insists, the Florida legislature likely acted on detailed knowledge of the competitive conditions in that specific county. Here, by contrast, the Hospital Authorities Law applies statewide. We thus have no reason, according to the Commission, to believe that when the Georgia legislature enacted that statute, it was similarly familiar with competitive conditions in the geographic area affected by the Authority's acquisition of Palmyra.

Nevertheless, the Georgia legislature must have anticipated anticompetitive harm when it authorized hospital acquisitions by the authorities. It defies imagination to suppose the legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing **[**19]** acquisitions by the authorities could have no serious anticompetitive consequences. The legislature could hardly have thought that Georgia's more rural markets could support so many hospitals that acquisitions by an authority would not harm competition. We therefore conclude that, through the Hospital Authorities Law, the Georgia legislature clearly articulated a policy authorizing the displacement of competition.

The Commission also points to *HN12*[] a 1993 amendment to the Hospital Authorities Law. See Act of Apr. 13, 1993, sec. 1, *§ 31-7-72.1*, 1993 Ga. Laws 1020, 1020-22 (codified at *O.C.G.A. § 31-7-72.1*). That amendment allows mergers between two hospital authorities when they exist within a single, high-population county, *O.C.G.A. §§ 31-7-72.1(a)*, *31-7-73(a)*, and declares that, in undertaking such mergers, "hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia," id. *§ 31-7-72.1(e)*. According to the Commission, this amendment suggests that in 1993—more than fifty years after the original Hospital Authorities Law, 1941 Ga. Laws 241 (codified as amended at *O.C.G.A. §*

31-7-70 et seq.), **[**20]** was enacted—the Georgia legislature concluded that other provisions of the law, including those that authorize the authorities to acquire hospitals, did not clearly articulate a policy to displace competition. And, the Commission suggests, the legislature chose—again, in 1993—not to change that state of affairs.

HN13[] What matters, though, is whether anticompetitive effects were anticipated "at **[*1378]** the time the legislation was enacted." *Lee Cnty., 38 F.3d at 1192*. At that time—when the original Hospital Authorities Law created the authorities and empowered them to acquire hospitals, §§ 3, 5, 1941 Ga. Laws at 242-44—anticompetitive effects were indeed anticipated. The views of a much later legislature do not change that fact. See, e.g., *United States v. X-Citement Video, Inc., 513 U.S. 64, 77 n.6, 115 S. Ct. 464, 471 n.6, 130 L. Ed. 2d 372 (1994)* ("[T]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight . . . ."); *United States v. Sw. Cable Co., 392 U.S. 157, 170, 88 S. Ct. 1994, 2001, 20 L. Ed. 2d 1001 (1968)* ("[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have very **[**21]** little, if any, significance." (internal quotation marks omitted)). We accordingly conclude that the acquisition of Palmyra and its subsequent operation at the Authority's behest by PPHS are authorized pursuant to a clearly articulated state policy to displace competition.[13] The execution of the plan, consequently, is protected by state-action immunity.

IV.

For the reasons stated in part III, supra, the judgment of the district court is

AFFIRMED.

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[13] The Commission's argument that no such policy has been articulated also emphasizes that the Authority's acquisition of Palmyra was engineered by PPHS, with the Authority approving the transaction after little or no deliberation, and that it leaves PPHS in control of Palmyra. We reject the suggestion that such private influence, or such private benefit, somehow makes the transaction and its anticompetitive effects unforeseeable. This argument is no more than another manifestation of the Commission's insistence that we disregard City of Columbia's injunction against "deconstruction of the governmental process and probing of the official 'intent.'" *499 U.S. at 377, 111 S. Ct. at 1352*. See supra note 12.

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In re Chocolate Confectionary Antitrust Litig.

United States District Court for the Middle District of Pennsylvania

December 12, 2011, Decided

MDL DOCKET NO. 1935; Civil Action No. 1:08-MDL-1935

Reporter

2011 U.S. Dist. LEXIS 151516 *; 2011-2 Trade Cas. (CCH) P77,726; 2011 WL 6981200

IN RE: CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION. This Document Applies to: All Indirect Purchaser for Resale Class Actions

Subsequent History: Affirmed by, Motion denied by *In re Chocolate Confectionary Antitrust Litig., 2012 U.S. App. LEXIS 5757 (3d Cir. Pa., Mar. 20, 2012)*

Prior History: *In re Chocolate Confectionary Antitrust Litig., 2011 U.S. Dist. LEXIS 37026 (M.D. Pa., Apr. 4, 2011)*

Core Terms

Settlement, purposes, class member, antitrust, resale, notice, class action, purchasers, indirect, unfair, chocolate candy, subsidiaries, affiliates, provisions, approves

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For Lori Ann Hongach, on behalf of herself and all others similarly situated, Esther Naomi Lieberman, Eugenia Miceli, on behalf of herself and all others similarly situated, Plaintiffs: Barry C. Barnett, LEAD ATTORNEY, Susman Godfrey LLP, Dallas, TX; Daniel **[*13]** A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Rachel S. Black, LEAD ATTORNEY, Susman Godfrey, LLP - Seattle, Seattle, WA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Brookshire Brothers, Ltd., on behalf of itself and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA.

For Meijer, Inc., Meijer Distribution, Inc., Publix Super Markets, Inc., Plaintiffs: Anthony J. Bolognese, Joshua H. Grabar, LEAD ATTORNEYS, Bolognese& Associates, LLC, Philadelphia, PA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; David P. Germaine, LEAD ATTORNEY, VANEK VICKERS & MASINI PC, CHICAGO, IL; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Joseph M. Vanek, LEAD ATTORNEY, Vanek, Vickers & Masini, P.C., Chicago, IL; Linda P. Nussbaum, LEAD ATTORNEY, **[*14]** Grant & Eisenhofer P.A., New York, NY; Richard L. Coffman, LEAD ATTORNEY, The Coffman Law Firm, Beaumont, TX; Robert N. Kaplan, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Thomas Rode, on behalf of himself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Ronald J. Aranoff, Bernstein Liebhard & Lifshitz, LLP, New York, NY.

For CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Longs Drug Stores California, Inc., Plaintiffs: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Eric L. Bloom, Steven D.

Shadowen, LEAD ATTORNEYS, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Donald Webster, on behalf of himself **[*15]** and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Joshua D. Snyder, Kohn Swift & Graf PC, Philadelphia, PA; Marc H. Edelson, Edelson & Associates, LLC, Doylestown, PA; Michael J. Boni, Boni & Zack LLC, Bala Cynwyd, PA.

For Giant Eagle, Inc., a Pennsylvania Corporation, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Bernard D. Marcus, Marcus & Shapira, Pittsburgh, PA; Brian C. Hill, PRO HAC VICE, Moira Cain-Mannix, Marcus & Shapira LLP, Pittsburgh, PA.

For Debra L. Damaske, Shirley A. Dresen, Craig Stephenson, on behalf of himself and all others similarly situated, Lisa Blackwell, Linda K. Davis, Plaintiffs: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, **[*16]** Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Isabelle Dikland, on behalf of themselves and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Elizabeth K. Tripodi, Finkelstein Thomspon LLP, Washington, DC; Richard M. Volin, Finkelstein Thompson LLP, Washington, DC.

For Julia Isenhower, on behalf of herself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Joseph C. McCorquodale, PRO HAC VICE, McCorquodale & McCorquodale, Jackson, AL.

For Ben Lee Distributors, Inc., on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; David S. Stellings, New York, NY; Dean M. Harvey, **[*17]** Lieff Cabraser heimann & Bernstein LLP, San Francisco, CA.

For Seth E. Ellis, P.A., on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Kevin B. Love, Criden & Love, P.A., South Miami, FL.

For Cindy Elan-Mangano, on behalf of herself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; James S. Reece, Zelle Hofmann Voelbel & Mason LLP, Minneapolis, MN; Michael E. Jacobs, Zelle, Hofmann, Voelbel, Mason & Gette LLP, Minneapolis, MN; Richard M. Hagstrom, Zelle, Hofmann, Voelbe, Mason & Gette LLP, Minneapolis, MN.

For John Candido, on behalf of himself & all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Joseph M. Patane, Law Office of Joseph M. Patane, San Francisco, CA; Lauren Clare **[*18]** Russell, Mario N. Alioto, Trump Alioto Trump & Prescott, LLP, San Francisco, CA.

For Marcy Linder, on behalf of herself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Amber M. Nesbitt, Edward A. Wallace, Kenneth A. Wexler, Wexler Wallace LLP, Chicago, IL.

For NMJ Consultant Group, Inc., individually and on behalf of a class of all those similarly situated, Plaintiff: Christopher J. Cormier, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Hilary K. Ratway, LEAD ATTORNEY, Hausfeld LLP, Washington, DC; Michael D. Hausfeld, LEAD ATTORNEY, Hausfeld LLC, Washington, DC; Seth R Gassman, LEAD ATTORNEY, Labaton Sucharow LLP; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Jayne A. Goldstein, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA.

For Canteen Vending Company, individually and on behalf of a class of all those similarly situated, Plaintiff: Arthur N. Bailey, LEAD ATTORNEY, **[*19]** Arthur N. Bailey & Associates, Jamestown, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Tanya S Chutkan, William A. Isaacson, LEAD ATTORNEYS, Boies, Schiller & Flexner LLP, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Jones Vend and OCS Distributing, Inc., on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Bruce L. Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA.

For Russell Traub, individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Bonny E. Sweeney, Robbins Geller Rudman & Dowd LLP, San Diego, CA.

For C.W. Brower, Inc., on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, **[*20]** Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Clinton P Walker, Fred A Silva, Kathy L Monday, Damrell, Nelson, Schrimp, Pallios, Pacher & Silva, Modesto, CA; Roger M. Shrimp, Damrell, Nelson Schrimp, Pallios, Pacher & Silva, Modesto, CA.

For Treat America Limited, on behalf of itself and all others similarly situated, Plaintiff: Bernice Conn, LEAD ATTORNEY, Los Angeles, CA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph B. Smith, Michael C. Maher, LEAD ATTORNEYS, Steven R. Maher, The Maher Law Firm, Winter Park, FL; K. Craig Wildfang, LEAD ATTORNEY, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi LLP, Minneapolis, MN; Michael A. Geibelson, LEAD ATTORNEY, PRO HAC VICE, Robins Kaplan Miller & Ciresi LLP, Los Angeles, CA; Roman M. Silberfeld, LEAD ATTORNEY, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi LLP, Los Angeles, CA; Thomas J. Undlin, LEAD ATTORNEY, PRO HAC VICE, Minneapolis, MN; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Christopher H. Casey, Dilworth Paxson, LLP, Philadelphia, PA; Emily A. Jarvis, PRO HAC VICE, Robins, Kaplain, Miller & Ciresi L.L.P., Los Angeles, CA; Joseph U. Metz, **[*21]** Dilworth Paxson LLP, Harrisburg, PA; Joshua D. Wolson, Dilworth Paxson LLP, Philadelphia, PA.

For T. Levy Associates, trading as Beautyland, on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Adam S. Levy, The Haviland Law Firm LLC, Philadelphia, PA; Donald E Haviland, Haviland Hughes, LLC, Philadelphia, PA; Michael J. Lorusso, Haviland Hughes, L.L.C., Philadelphia, PA.

For Judith Bishop, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Kevin J. Miller, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Evans & figel, PLLC, Washington, DC; Kfir B. Levy, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC, Washington, DC; Richard A. Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Steven F. Benz, LEAD ATTORNEY, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, **[*22]** Harrisburg, PA.

For Eric Rodman Cohen, James Miles, Frank Gerencser, Sarah Allder, Timothy Duffy, Susan Jones, Donna Siler, Robert Allder, Douglas Dillard Glenn, Monica Browne, Layna M. Rose, Marlene Smith, Mike Davis, Plaintiffs: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Kevin J. Miller, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Evans & figel, PLLC, Washington, DC; Richard A. Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Steven F. Benz, LEAD ATTORNEY, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Timothy Emmer, Sarina Vlock, Amy K. Luminoso, Plaintiffs: Christopher P. Welsh, LEAD ATTORNEY, Welsh & Welsh, P.C., L.L.O., Omaha, NE; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Kevin J. Miller, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Evans & figel, PLLC, Washington, DC; Richard A. Saveri, LEAD **[*23]** ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Steven F. Benz, LEAD ATTORNEY, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Katherine Mary Ferlic, Plaintiff: Adam C. Belsky, Terry Gross, LEAD ATTORNEYS, Gross Belsky Alonso LLP, San Francisco, CA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Kevin J. Miller, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Evans & figel, PLLC, Washington, DC; Richard A. Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Steven F. Benz, LEAD ATTORNEY, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Mark Moynahan, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Kevin J. Miller, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Evans & figel, PLLC, Washington, **[*24]** DC; Richard A. Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Steven F. Benz, LEAD ATTORNEY, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Brian J. Barry, Law Offices of Brian Barry, Los Angeles, CA.

For Food Lion, LLC, Hannaford Bros. Co., Kash N' Karry Food Stores, Inc., individually and on behalf of a class of all those similarly situated, Plaintiffs: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Richard L. Wyatt, Jr., Todd M. Stenerson, LEAD ATTORNEYS, Hunton & Williams, Washington, DC; Sofia Luina, Torsten M. Kracht, LEAD ATTORNEYS, Hunton & Williams, LLP, Washington, DC; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For VME Distributors, Inc., Individually and on behalf of a class of all those similarly situated, Plaintiff: Allan Steyer, Jayne A. Peeters, LEAD ATTORNEYS, Steyer Lowenthal Boodrookas Alvarez **[*25]** & Smith LLP, San Francisco, CA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Michael D. Hausfeld, LEAD ATTORNEY, Hausfeld LLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Hilary K. Ratway, Hausfeld LLP, Washington, DC.

For Card & Party Mart II Ltd., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Michael D. Hausfeld, LEAD ATTORNEY, Hausfeld LLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Steven A. Kanner, Freed Kanner London & Millen LLC, Bannockburn, IL.

For Edward S Hesano, Individually and on behalf of all other similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Elizabeth A. McKenna, Milberg LLP, New York, NY; Paul F. Novak, Peter G Safirstein, Milberg LLP, New York, NY.

For Karin Jacobs, on Behalf of Herself and All Others Similarly Situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, **[*26]** DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Michael A. McShane, Audet & Partners, LLP, San Francisco, CA.

For Weis Markets, Inc., Individually and on behalf of a class of all those similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Mark R. Cuker, Williams Cuker Berezofsky, Philadelphia, PA.

For Cyrus T.G., d/b/a Alta Cucina, on behalf of himself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Gordon Ball, Ball & Scott, Knoxville, TN.

For Superior Office Snacks, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Michael J. Flannery, PRO HAC VICE, Carey & Danis, LLC, St. Louis, MO.

For Kelsey French, Pernell Larsen, Plaintiffs: Adam C. Belsky, Terry Gross, LEAD ATTORNEYS, Gross Belsky Alonso **[*27]** LLP, San Francisco, CA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Brookshire Grocery Company, United Supermarkets, L.L.C., Plaintiffs: Daniel H. Gold, LEAD ATTORNEY, Haynes and Boone, LLP, Dallas, TX; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Lawrence Andrew Gaydos, LEAD ATTORNEY, Haynes & Boone - Dallas, Dallas, TX; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For A - DIRECT PURCHASERS, Plaintiff: Bernice Conn, LEAD ATTORNEY, Los Angeles, CA; H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Michael D. Hausfeld, LEAD ATTORNEY, Hausfeld LLC, Washington, DC; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Bruce J. Wecker, Hausfeld LLP, San Francisco, **[*28]** CA; Hilary K. Ratway, Hausfeld LLP, Washington, DC; Kit A. Pierson, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Moira Cain-Mannix, Marcus & Shapira LLP, Pittsburgh, PA; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For B - INDIRECT PURCHASERS FOR RESALE, Plaintiff: Bernice Conn, LEAD ATTORNEY, Los Angeles, CA; H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Joseph U. Metz, LEAD ATTORNEY, Dilworth Paxson LLP, Harrisburg, PA; Roman M. Silberfeld, LEAD ATTORNEY, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi LLP, Los Angeles, CA; Steven R. Maher, LEAD ATTORNEY, PRO HAC VICE, The Maher Law Firm, Winter Park, FL; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For C - INDIRECT END USERS, Plaintiff: Bernice Conn, LEAD ATTORNEY, Los Angeles, CA; Christopher Lovell, LEAD ATTORNEY, Lovell Stewart Halebian, LLP, New York, NY; H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., **[*29]** Philadelphia, PA; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Kfir B. Levy, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC, Washington, DC; Steven F. Benz, LEAD ATTORNEY, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Andrew M. Hetherington, Kellogg, Huber Hansen Todd Evans & Figel PLLC, Washington, DC; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA.

For D - INDIVIDUAL PLAINTIFFS, Plaintiff: Bernice Conn, LEAD ATTORNEY, Los Angeles, CA; H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Moira Cain-Mannix, Marcus & Shapira LLP, Pittsburgh, PA; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For James Bell, Plaintiff: Joseph R. Gunderson, LEAD ATTORNEY, Gunderson Sharp & Walke LLP, Des Moines, IA; Jason D. Walke, Gunderson Sharp & Walke PC, Des Moines, IA.

For Corporate Services Group, SS Distributor, LLC, **[*30]** d/b/a JR Foodmart, GNC Properties, Inc, d/b/a Olive View AMPM, Coborn's Inc., Greater Tricities Services, LLC, GTS Refreshment Service, Food Express, Inc., All Star Services, Inc., The Konop Companies, Plaintiffs: Joseph U. Metz, LEAD ATTORNEY, Dilworth Paxson LLP, Harrisburg, PA; Roman M. Silberfeld, LEAD ATTORNEY, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi LLP, Los Angeles, CA; Steven R. Maher, LEAD ATTORNEY, PRO HAC VICE, The Maher Law Firm, Winter Park, FL.

For The Golub Corporation, Plaintiff: Eric L. Bloom, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA.

For Albertson's LLC, The Great Atlantic & Pacific Tea Company, Inc., HEB Grocery Company, LP, Plaintiffs: Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA.

For Supervalu Inc., Plaintiff: Joshua H. Grabar, LEAD ATTORNEY, Bolognese& Associates, LLC, Philadelphia, PA.

For Judith DePippo, Darlene Hewson, Madeline Robinson, Carl Fochf, Plaintiffs: Christopher Lovell, LEAD ATTORNEY, Lovell Stewart Halebian, LLP, New York, NY; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., **[*31]** Harrisburg, PA; Steven F. Benz, LEAD ATTORNEY, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For Melissa Bowie, Patricia Fast, Leslie Fuller, Plaintiffs: Christopher Lovell, LEAD ATTORNEY, Lovell Stewart Halebian, LLP, New York, NY; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Steven F. Benz, LEAD ATTORNEY, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Ivy L. Frignoca, Law Offices of Joe Bornstein, Portland, ME.

For North County Vending, Inc., NVC Arizona, Inc., Plaintiffs: Bernice Conn, LEAD ATTORNEY, Los Angeles, CA; Joseph U. Metz, LEAD ATTORNEY, Dilworth Paxson LLP, Harrisburg, PA; Roman M. Silberfeld, LEAD ATTORNEY, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi LLP, Los Angeles, CA; Steven R. Maher, LEAD ATTORNEY, PRO HAC VICE, The Maher Law Firm, Winter Park, FL.

For William Govostes, Plaintiff: Christopher Lovell, LEAD ATTORNEY, Lovell Stewart Halebian, LLP, New York, NY; Steven F. Benz, LEAD ATTORNEY, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For Diane Sandbothe, Carrie MacIntosh, Plaintiffs: Christopher Lovell, Lovell Stewart Halebian, LLP, New York, NY; Steven **[*32]** F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For Carl Fochs, Rene Lafferty, Plaintiffs: Christopher Lovell, Lovell Stewart Halebian, LLP, New York, NY; James J. McCarthy, Jr., McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For M.R. Williams, Inc., Movant: John H. Zollicoffer, Jr., Paul J. Stainback, Stainback, Satterwhite, Burnette & Zollicoffer, PLLC, Henderson, NC.

For The Hershey Company, Defendant: Brian M. English, LEAD ATTORNEY, Tompkins, McGuire, Wachenfeld & Barry, LLP, Newark, NJ; Jonathan D. Brightbill, LEAD ATTORNEY, Britt C. Grant, Craig S. Primis, Janakan L. Thiagarajah, Kirkland & Ellis LLP, Washington, DC; Thomas D. Yannucci, LEAD ATTORNEY, Kirkland & Ellis, Washington, DC; Alan R. Boynton, Jr., McNees, Wallace & Nurick, Harrisburg, PA; H. L. Montague, Jr., Berger & Montague, P.C., Philadelphia, PA; James P. DeAngelo, McNees Wallace & Nurick, Harrisburg, PA; Kimberly M. Colonna, Kimberly A. Selemba, McNees Wallace & Nurick LLC, Harrisburg, PA; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans **[*33]** & Figel, P.L.L.C., Washington, DC.

For Mars, Incorporated, Defendant: Brian J. McMahon, LEAD ATTORNEY, Gibbons PC, Newark, NJ; David Marx, Jr., LEAD ATTORNEY, Rachael V. Lewis, McDermott Will & Emery LLP, Chicago, IL; Frederick E. Blakelock, LEAD

ATTORNEY, Gibbons, P.C., Philadelphia, PA; Guy V. Amoresano, LEAD ATTORNEY, Gibbons, PC, Newark, NJ; Jennifer Mara, LEAD ATTORNEY, Gibbons, P.C., Newark, NJ; Michael F. Quinn, LEAD ATTORNEY, Gibbons P.C., Newark, NJ; Nicole L. Castle, Stefan M. Meisner, LEAD ATTORNEYS, McDermott Will & Emery LLP, Washington, DC; Thomas S. Brown, LEAD ATTORNEY, Gibbons P.C., Philadelphia, PA; H. L. Montague, Jr., Berger & Montague, P.C., Philadelphia, PA; Kimberly A. Selemba, McNees Wallace & Nurick LLC, Harrisburg, PA; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For Nestle U.S.A., Inc., Defendant: Carmine R. Zarlenga, LEAD ATTORNEY, PRO HAC VICE, Mayer Brown, Washington, DC; Gilbert S. Keteltas, LEAD ATTORNEY, PRO HAC VICE, Howrey LLP, Washington, DC; Joseph A. Ostoyich, LEAD ATTORNEY, Howrey & Simon, Washington, DC; Matthew M. Haar, LEAD ATTORNEY, Saul Ewing, **[*34]** LLP, Harrisburg, PA; Michael A. Finio, LEAD ATTORNEY, Emily H. Bensinger, Saul Ewing LLP, Harrisburg, PA; Peter E. Moll, LEAD ATTORNEY, Cadwalader, Wickersham & Taft LLP, Washington, DC; Adam L. Hudes, Veronica N. Berger, Mayer Brown LLP, Washington, DC; H. L. Montague, Jr., Berger & Montague, P.C., Philadelphia, PA; Kimberly A. Selemba, McNees Wallace & Nurick LLC, Harrisburg, PA; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For Cadbury Adams Canada, Inc., Cadbury PLC, Defendants: Bridget E. Montgomery, LEAD ATTORNEY, Eckert Seamans Cherin & Mellott, LLC, Harrisburg, PA; David J. Schertz, LEAD ATTORNEY, Harrisburg, PA; Dennis P. Orr, Jessica L. Kaufman, Thomas M Mueller, LEAD ATTORNEYS, Morrison & Foerster LLP, New York, NY; Leah A. Ramos, LEAD ATTORNEY, Morrison & Forester LLP, New York, NY; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For Hershey Canada, Inc., Defendant: Alan R. Boynton, Jr., LEAD ATTORNEY, McNees, Wallace & Nurick, Harrisburg, PA; Jonathan D. Brightbill, Thomas D. Yannucci, **[*35]** LEAD ATTORNEYS, Craig S. Primis, Kirkland & Ellis LLP, Washington, DC; H. L. Montague, Jr., Berger & Montague, P.C., Philadelphia, PA; Kimberly A. Selemba, McNees Wallace & Nurick LLC, Harrisburg, PA; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For Mars Snackfood US LLC, Defendant: David Marx, Jr., LEAD ATTORNEY, Rachael V. Lewis, McDermott Will & Emery LLP, Chicago, IL; Nicole L. Castle, Stefan M. Meisner, LEAD ATTORNEYS, McDermott Will & Emery LLP, Washington, DC; Frederick E. Blakelock, Gibbons, P.C., Philadelphia, PA; H. L. Montague, Jr., Berger & Montague, P.C., Philadelphia, PA; Kimberly A. Selemba, McNees Wallace & Nurick LLC, Harrisburg, PA; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Thomas S. Brown, Gibbons P.C., Philadelphia, PA.

For Cadbury Holdings Ltd., Defendant: Bridget E. Montgomery, LEAD ATTORNEY, Eckert Seamans Cherin & Mellott, LLC, Harrisburg, PA; Dennis P. Orr, Jessica L. Kaufman, Thomas M Mueller, LEAD ATTORNEYS, Morrison & Foerster LLP, New York, NY; Leah A. Ramos, **[*36]** LEAD ATTORNEY, Morrison & Forester LLP, New York, NY; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA; Steven F. Benz, Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC.

For Government of Canada, Intervenor Defendant: Bradley H. Blower, PRO HAC VICE, John P. Relman, LEAD ATTORNEYS, Relman & Dane, PLLC, Washington, DC; Katherine A. Gillespie, LEAD ATTORNEY, PRO HAC VICE, Relman & Dane & Colfax PLLC, Washington, DC; Joseph K. Goldberg, Law Office of Joseph K. Goldberg, Harrisburg, PA.

Judges: CHRISTOPHER C. CONNER, United States District Judge.

Opinion by: CHRISTOPHER C. CONNER

Opinion

FINAL JUDGMENT AND ORDER OF DISMISSAL GRANTING FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT WITH CADBURY PLC, CADBURY HOLDINGS LTD. AND CADBURY ADAMS CANADA, INC.

This Court having considered the Settlement Agreement executed on April 28, 2011, including all Exhibits thereto (the "Settlement Agreement") between the Plaintiffs and all members of the Settlement Class certified in the above-captioned case (collectively "Plaintiffs") and Defendants Cadbury plc, Cadbury Holdings, Ltd., and Cadbury Adams Canada, Inc. (collectively, "the Cadbury Defendants"), and having held a Fairness Hearing on December 12, **[*37]** 2011, and having considered all of the submissions and arguments with respect thereto, and otherwise being fully informed and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. This Final Judgment and Order of Dismissal incorporates herein and makes a part hereof, the Settlement Agreement, including the Exhibits thereto. Unless otherwise provided herein, the terms defined in the Settlement Agreement shall have the same meanings for purposes of this Final Judgment and Order of Dismissal.

2. The Court has personal jurisdiction over all Plaintiffs and the Cadbury Defendants, and has subject matter jurisdiction to approve the Settlement Agreement.

3. For purposes of the settlement with the Cadbury Defendants (and only for such purposes, without any impact upon the issues between any of the Plaintiffs and any of the non-settling Defendants), the Court finds that the requirements of *Rule 23 of the Federal Rules of Civil Procedure* have been satisfied with respect to the Settlement Class. At this settlement certification phase, and only for purposes of the settlement with the Cadbury Defendants, the Settlement Class is defined as:

> All persons and entities **[*38]** who indirectly purchased Chocolate Candy for resale in, or for delivery into any state that has enacted a statute extending standing (or standing to assert claims which could be denominated to be antitrust claims in any state), to indirect purchasers for resale asserting claims under state or local antitrust, unfair competition, consumer protection, unfair practices, trade practice, or civil conspiracy law, including but not limited to the states of Arizona, California, the District of Columbia, Florida, Guam, Hawaii, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, Nebraska, New York, North Dakota, North Carolina, Oregon, South Dakota, Tennessee, Utah, Vermont and Wisconsin, that was manufactured and/or distributed by or for any Defendant or any predecessor, subsidiary, affiliate or division of any Defendant, at any time from December 9, 2002 through and including December 20, 2007. The Class is composed of indirect purchasers for resale as defined in Paragraph 41 of the Indirect Purchasers for Resale Second Amended Consolidated Class Complaint. Excluded from the Settlement Class are governmental entities, Defendants, or any present **[*39]** or former parent, subsidiary or affiliate thereof.[1]

No Settlement Class Members have elected to be excluded from the Settlement Class.

4. Pursuant to *Rule 23(a)(1)*, the Court determines that the Settlement Class is so numerous that joinder of all members is impracticable.

5. For purposes of this settlement only, the commonality requirement of *Rule 23(a)(2)* is satisfied because Plaintiffs have alleged one or more questions of fact and law common to the Settlement Class, including whether the Cadbury Defendants violated state antitrust and consumer protection laws by engaging in an unlawful conspiracy to fix, raise, maintain and/or stabilize prices of chocolate candy in the United States.

6. The Court hereby approves the following entities as Representative Plaintiffs of the Settlement Class pursuant to *Rule 23(a)(3)*, and finds that, for settlement purposes only, these Representative Plaintiffs' claims are typical of the claims of the Settlement Class: Treat America Limited, Corporate Services Group, Greater Tricities Services, LLC

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[1] Neither the Cadbury Settlement nor this Order is intended to or shall limit the rights of any state attorney general.

d/b/a GTS Refreshment Service, Food Express, **[*40]** Inc., All Star Services, Inc., The Konop Companies, North County Vending, Inc., NCV Arizona, Inc., SS Distributor, LLC d/b/a JR Foodmart, GNC Properties, Inc. d/b/a Olive View AMPM and Coborn's Inc. The claims of the Representative Plaintiffs and absent class members rely on the same legal theories and arise from the same alleged conspiratorial conduct by Defendants, namely, the agreement to fix, raise, maintain and/or stabilize prices of chocolate candy in various states.

7. The Court finds that, for purposes of this settlement with the Cadbury Defendants, the Representative Plaintiffs will fairly and adequately protect the interests of the Settlement Class in satisfaction of the requirements of *Rule 23(a)(4)* because: (1) the interests of the Representative Plaintiffs are consistent with those of the Settlement Class members; (2) there appear to be no conflicts between or among the Representative Plaintiffs and the other Settlement Class members; (3) the Representative Plaintiffs have been and appear to be capable of continuing to be active participants in both the prosecution and the settlement of this litigation; and (4) the Representative Plaintiffs and the Settlement Class members **[*41]** are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated class action cases, including those concerning violations of ***antitrust law***.

8. The Court finds that, for purposes of his settlement only, questions of law or fact common to members of the Settlement Class predominate over questions affecting only individual members of the Settlement Class under *Rule 23(b)(3)*. Further, a class action resolution in the manner proposed in the Settlement Agreement would be superior to other available methods for a fair and efficient adjudication of the litigation with respect to the Cadbury Defendants. In making these preliminary findings, the Court has considered, *inter alia*, (1) the interest of the Settlement Class members in individually controlling the prosecution or defense of separate actions; (2) the impracticality or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning these claims already commenced; and (4) the desirability of concentrating the litigation of the claims in a particular forum.

9. At this juncture, the Court makes no determination regarding the manageability **[*42]** of this litigation as a class action, if this litigation were to go to trial.

10. The Court hereby also approves the following law firms as Settlement Class Counsel pursuant to *Rule 23(g)*, and finds that, for settlement purposes only, these Settlement Class Counsel have and will fairly and adequately protect the interests of the Settlement Class: Robins, Kaplan, Miller & Ciresi L.L.P. and The Maher Law Firm.

11. The Indirect Purchaser for Resale Settlement Class has received notice in the manner approved by the Court in its Order of August 12, 2011 (Docket No. 1025). The Court finds that such notice: (i) constitutes reasonable and the best practicable notice; (ii) constitutes notice that is reasonably calculated, under the circumstances, to apprise potential Settlement Class members of the terms of the settlement, their right to object to the settlement, and their right to appear at the settlement Fairness Hearing; (iii) constitutes due, adequate and sufficient notice to all persons entitled to receive notice; and (iv) meets the requirements of due process and *Rule 23 of the Federal Rules of Civil Procedure*.

12. **[*43]** No individuals or entities have excluded themselves from the Settlement Class.

13. Pursuant to *Rule 23 of the Federal Rules of Civil Procedure*, the Court hereby finally approves in all respects the settlement set forth in the Settlement Agreement (the "Settlement") and finds that the Settlement and the Settlement Agreement are, in all respects, fair, reasonable and adequate, and in the best interest of the Settlement Class. The Court further approves the establishment of the Settlement Fund and Notice and Administration Fund under the terms and conditions set forth in the Settlement Agreement and the Escrow Agreements. The parties are hereby directed to implement and consummate the Settlement according to the terms and provisions of the Settlement Agreement.

14. Plaintiffs may use the Settlement Fund to pay from time to time such expenses as may reasonably be incurred in the prosecution of the Class Action, subject to an accounting to the Court at the time of the final resolution of the Class Action.

15. The above-captioned case is hereby dismissed with prejudice against the Cadbury Defendants only and without costs to any party.

16. (a) The Cadbury Defendants and their past and present **[*44]** officers, directors, employees, parents, subsidiaries, and affiliates; the past and present officers, directors, and employees of such parents, subsidiaries, and affiliates; and the predecessors, successors, heirs, executors, and assigns of each of the foregoing (the "Releasees")- shall be completely released, acquitted, and forever discharged from any and all manner of claims, demands, actions, suits, causes of action, whether class, individual, or otherwise in nature whether personal or subrogated, damages whenever incurred, damages of any kind including compensatory, punitive or other damages, including any compensation derived from *parens patriae* lawsuits, liabilities of any nature whatsoever, including interests, costs, expenses, class administration expenses, penalties, and lawyers' fees (including Settlement Class Counsel fees) that Class Representatives, the Settlement Class Members and their respective past and present parents, subsidiaries, affiliates, heirs and assigns. or each of them, ever had, now have, or hereafter can, shall, or may have against the Releasees, whether known or unknown, on account of, arising out of, relating to, or resulting from or in any way relating **[*45]** to conduct of the Releasees during the period February 1, 2001 to December 31, 2008 concerning any aspect of the pricing, selling, discounting, marketing, manufacturing, and distributing of chocolate candy purchased for resale in, or for delivery into, any state that has enacted a statute extending antitrust standing (or standing to assert claims which could be denominated to be antitrust claims in any state) to indirect purchasers for resale asserting claims under state or local antitrust, unfair competition, consumer protection, unfair practices, trade practice, or civil conspiracy law, or that permits indirect purchasers for resale to recover for such claims, including but not limited to the states of Alaska, Arkansas, Arizona, California, the District of Columbia, Florida, Guam, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, Nebraska, New York, North Dakota, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia and Wisconsin, or which are, have been or could have been asserted by Releasors, within the scope of the facts asserted in the Complaint, either of which arise under any **[*46]** state or local antitrust, unfair competition, consumer protection, unfair practices, trade practice, or civil conspiracy law. Nothing in this Order is intended to or shall release the rights of any state attorney general.

(b) Each Releasor waives *California Civil Code Section 1542* and similar provisions in other states. Class Plaintiffs have certified that they are aware of and have read and reviewed the following provision of *California Civil Code Section 1542* ("*Section 1542*"): "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." The provisions of the release set forth above shall apply, regardless of the provisions of *Section 1542* or any equivalent, similar, or comparable present or future law or principle of law of any jurisdiction. Each Releasor may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims that are the subject matter of this paragraph, but each Releasor hereby expressly and fully, finally and forever waives, **[*47]** relinquishes, and forever settles and releases any and all rights and benefits existing under (i) *Section 1542* or any equivalent, similar or comparable present or future law or principle of law of any jurisdiction and (ii) any law or principle of law of any jurisdiction that would limit or restrict the effect or scope of the provisions of the release set forth above. Each Releasor also expressly waives and fully, finally and forever settles any claims it may have against Releasees or any of them under *California Business and Professions Code § 17200 et seq.*, which claims are expressly incorporated into this paragraph.

(c) Nothing herein shall release any product defect, claims of supplier or distributor breach of contract, or similar claims between the parties relating to Chocolate Candy.

(d) Notwithstanding the foregoing, "Releasees" does not include any other Defendant currently named in the Action.

17. Upon final approval of the settlement (including, without limitation, the exhaustion of any judicial review, or requests for judicial review, from this Final Judgment and Order of Dismissal), the Cadbury Defendants fully and finally release and discharge each of the Representative Plaintiffs **[*48]** and their counsel and experts from any Claims relating to the institution or prosecution of the Action.

18. Nothing in this Final Judgment and Order of Dismissal, the settlement, or the Settlement Agreement, is or shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing.

19. Without affecting the finality of this Final Judgment and Order of Dismissal, the Court retains continuing and exclusive jurisdiction over any all matters relating to the administration, consummation, enforcement and interpretation of the Settlement Agreement and of this Final Judgment and Order of Dismissal, and for any other necessary purpose. The Cadbury Defendants, Plaintiffs and each member of the Settlement Class are hereby deemed to have irrevocably submitted to the exclusive jurisdiction of this Court for any suit, action, proceeding or dispute arising out of or relating to the Settlement Agreement or the applicability of the Settlement Agreement, including the Exhibits hereto. Without limiting the generality of the foregoing, and without affecting the finality of this Final Judgment and Order of Dismissal, the Court retains jurisdiction **[*49]** over any such suit, action or proceeding. Solely for purposes of such suit, action or proceeding, to the fullest extent they may effectively do so under applicable law, the parties hereto are deemed to have irrevocably waived and agreed not to assert by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of this Court, or that this Court is, in any way, an improper venue or an inconvenient forum.

20. In the event that the Settlement does not become effective according to the Settlement Agreement, this Final Judgment and Order of Dismissal shall be rendered null and void as provided by the Settlement Agreement, shall be vacated, and all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Settlement Agreement.

SO ORDERED this 12th day of December, 2011.

/s/ Christopher C. Conner

CHRISTOPHER C. CONNER

United States District Judge

End of Document

[Bridgeport Harbour Place I, LLC v. Ganim](#)

Supreme Court of Connecticut

March 15, 2011, Argued; December 13, 2011, Officially Released

SC 18290

Reporter

303 Conn. 205 *; 32 A.3d 296 **; 2011 Conn. LEXIS 492 ***; 2011-2 Trade Cas. (CCH) P77,717

BRIDGEPORT HARBOUR PLACE I, LLC v. JOSEPH P. GANIM ET AL.

Prior History: **[***1]** Action to recover damages for the defendants' alleged violation of state ***antitrust law***, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the case was transferred to the judicial district of Waterbury, Complex Litigation Docket; thereafter, the action was withdrawn as against the defendant Harbor Communications, Inc.; subsequently, the court, Alander, J., granted the motions to strike filed by the defendant Charles J. Willinger, Jr., et al.; thereafter, the court, Stevens, J., granted the motion for summary judgment filed by the defendant HNTB Corporation, the motions to strike the amended complaint filed by the defendant Charles J. Willinger, Jr., et al., and the motions for judgment filed by the defendant Alfred Lenoci, Jr., et al., and rendered judgment thereon in favor of the named defendant et al., from which the plaintiff appealed to the Appellate Court; subsequently, the court, Stevens, J., granted the remaining defendants' motions to strike and the motions for judgment filed by the defendant Eight Hundred Fifteen Lafayette Center, LLC, et al., and rendered judgment in favor of the remaining defendants, and the plaintiff filed an **[***2]** amended appeal; thereafter, the action was withdrawn as against the defendant HNTB Corporation; subsequently, the Appellate Court, McLachlan, Robinson and Hennessey, Js., affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court.

Bridgeport Harbour Place I, LLC v. Ganim, 111 Conn. App. 197, 958 A.2d 210, 2008 Conn. App. LEXIS 510 (2008)

Disposition: Affirmed.

Core Terms

amended complaint, Sherman Act, anticompetitive, allegations, antitrust, defendants', bribes, conspiracy, competitors, corruption, quotation, bribery, marks, government action, relevant market, adverse effect, general contractor, motion to strike, trial court, contracts, commercial bribery, restraint of trade, antitrust claim, anti trust law, conspired, immunity, courts

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN1[] Regulated Practices, Price Fixing & Restraints of Trade

See *Conn. Gen. Stat. § 35-26*.

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

HN2[] Private Actions, State Regulation

See *Conn. Gen. Stat. § 35-35*.

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

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

HN3[] Motions to Dismiss, Failure to State Claim

A motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by a trial court. As a result, review of the court's ruling is plenary. The reviewing court takes the facts to be those alleged in the complaint that has been stricken, and it construes the complaint in the manner most favorable to sustaining its legal sufficiency. Thus, if facts provable in the complaint would support a cause of action, the motion to strike must be denied. A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged.

Antitrust & Trade Law > Clayton Act > Claims

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

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

HN4[] Clayton Act, Claims

Conn. Gen. Stat. § 35-44b provides that, in construing Connecticut's antitrust act, *Conn. Gen. Stat. § 35-24 et seq.*, the courts of Connecticut shall be guided by interpretations given by the federal courts to federal antitrust statutes. With respect to the allegations necessary to state a cognizable antitrust claim, in pleading such a claim, a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] Sherman Act, Claims

Conn. Gen. Stat. § 35-26 is substantially identical to *15 U.S.C.S. § 1* and applies to contracts, combinations, or conspiracies in restraint of trade or commerce. It is well settled that Congress designed the Sherman Act, *15 U.S.C.S. § 1 et seq.*, as a consumer welfare prescription. Consumer welfare is maximized when economic resources are allocated to their best use and when consumers are assured competitive price and quality. Accordingly, an act is deemed anticompetitive under the Sherman Act, *15 U.S.C.S. § 1 et seq.*, only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality.

Antitrust & Trade Law > Sherman Act > Claims

HN6[] **Sherman Act, Claims**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN7[] **Sherman Act, Claims**

A violation of *15 U.S.C.S. § 1* generally requires a combination or other form of concerted action between two legally distinct entities resulting in an unreasonable restraint on trade. If a restraint alleged is among that small class of actions that courts have deemed to have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, it will be unreasonable per se. Most antitrust claims, however, are analyzed under a rule of reason analysis which seeks to determine if the alleged restraint is unreasonable because its anticompetitive effects outweigh its procompetitive effects.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

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

HN8[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In order to establish, under *15 U.S.C.S. § 1*, an anticompetitive effect sufficient to avoid dismissal of a complaint for failure to state a claim, it is not enough to allege an injury to a competitor. Rather, the inquiry under the rule of reason is directed at the challenged restraint's overall impact on competitive conditions, rather than whether a particular party has been restrained by the conduct at issue. Accordingly, under the rule of reason, a plaintiff bears an initial burden to demonstrate that a defendant's challenged behavior had an actual adverse effect on competition as a whole in the relevant market. Anticompetitive effects, more commonly referred to as "injury to competition" or "harm to the competitive process," are usually measured by a reduction in output and an increase in prices in the relevant market.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN9[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The payment of bribes by suppliers to a purchasing agent does not by itself establish an anticompetitive effect. Although the bribes may have been illegal and unfair methods of competition, their illegality and unfairness do not support an inference that the bribes restrained competition. On the contrary, bribery may be consistent with intense competition among suppliers—some of which resort to illegal measures to gain an advantage.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

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

HN10[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The Sherman Act's, *15 U.S.C.S. § 1 et seq.*, proscription of anti-competitive conduct does not apply to government action. The Sherman Act also does not proscribe private citizens' conduct undertaken to influence government action. That is so because the purpose of the Sherman Act is to regulate business, not political activity. This is true even if the conduct by which citizens attempt to influence governmental regulation is undertaken for the sole purpose of destroying competition, involves unethical business practices, or is specifically intended to hurt competitors.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

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

HN11[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

Insofar as the Sherman Act, *15 U.S.C.S. § 1 et seq.*, sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

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

HN12[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The proscriptions of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, tailored as they are for the business world, are not at all appropriate for application in the political arena.

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

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN13[] **Sherman Act, Scope**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, does not proscribe private citizens' conduct undertaken to influence government action, even if that conduct involves conspiracy or bribery.

Syllabus

The plaintiff developer, which had been awarded a contract with the defendant city of Bridgeport to develop certain real property, sought to recover damages from the defendants, claiming that the they had violated the Connecticut Antitrust Act (*§ 35-24 et seq.*) by engaging in an illegal conspiracy in restraint of trade. The plaintiff specifically alleged that the named defendant, the former mayor of Bridgeport, engaged in a contract steering scheme in which he received the proceeds of bribes and kickbacks from businesses seeking city contracts, that the plaintiff refused to participate in the scheme, and that certain defendants prevented the plaintiff from fulfilling its contractual obligations. The trial court granted the defendants' motions to strike the plaintiff's complaint, concluding that the complaint failed to allege facts sufficient to demonstrate an antitrust violation, and rendered judgment **[***3]** for the defendants, from which the plaintiff appealed to the Appellate Court. The Appellate Court affirmed the trial court's judgment, concluding that the plaintiff's complaint was devoid of factual allegations that would support the legal conclusion that the defendants' conduct had an adverse effect on competition as a whole in the relevant market of commercial development in Bridgeport. On the granting of certification, the plaintiff appealed to this court, claiming that the Appellate Court improperly concluded that the complaint failed to allege an antitrust violation. *Held* that the Appellate Court properly upheld the trial court's decision to grant the defendants' motions to strike, the plaintiff's complaint having failed to state a cognizable antitrust injury; the plaintiff's complaint demonstrated only that the plaintiff was injured by the defendants' conduct rather than that the defendants' conduct restrained competition among general contractors seeking contracts with the city, and commercial bribery does not constitute a restraint of trade for purposes of ***antitrust law***.

Counsel: William F. Gallagher, with whom were William J. Sweeney and, on the brief, Hugh D. Hughes and R. Bartley **[***4]** Halloran, for the appellant (plaintiff).

Jeffrey J. Mirman, with whom were John F. Droney, Jr., and, on the brief, Kurt F. Zimmerman and Leonard K. Atkinson, for the appellee (named defendant).

Jeffrey J. White, with whom were Craig A. Raabe and, on the brief, Edward J. Heath and Jamie M. Landry, for the appellee (defendant city of Bridgeport).

Ira B. Grudberg, with whom were Christian Young and, on the brief, Trisha M. Morris, for the appellees (defendant Crescent Avenue Development Company, LLC, et al.).

Hubert J. Santos, with whom were Jeffrey R. Hellman and, on the brief, Sandra Snaden Kuwaye, for the appellees (defendant Charles J. Willinger, Jr., et al.).

Judges: Palmer, Zarella, DiPentima, Lavine and Beach, Js. PALMER, J. In this opinion the other justices concurred.

Opinion by: PALMER

Opinion

[298] [*207]** PALMER, J. The plaintiff, Bridgeport Harbour Place I, LLC, brought this action against the defendants, Joseph P. Ganim, the city of Bridgeport (city), Alfred Lenoci, Sr., Alfred Lenoci, Jr., United Properties, Ltd., Eight Hundred Fifteen Lafayette Centre, LLC, United Investments, LLC, United Environmental Redevelopment, LLC, Crescent Avenue Development Company, LLC, Charles J. Willinger, Jr., Willinger, Willinger and Bucci,

[*5]** P.C., Joseph T. Kasper, Jr., Kasper Group, Inc., and Michael Schinella,[1] alleging that the defendants had violated *General Statutes § 35-26*[2] of the Connecticut Antitrust Act (antitrust act) by engaging in an illegal conspiracy in restraint of trade. The trial court granted the defendants' motions to strike the plaintiff's amended complaint on the ground that the complaint failed to allege an antitrust injury. The plaintiff appealed to the Appellate Court, which affirmed the trial court's judgment. *Bridgeport Harbour Place I, LLC v. Ganim, 111 Conn. App. 197, 210, 958 A.2d 210 (2008)*. We granted **[*208]** the plaintiff's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly affirm the trial court's granting of the defendants' motion[s] to strike?" *Bridgeport Harbour Place I, LLC v. Ganim, 290 Conn. 906, 962 A.2d 793 (2009)*. We answer that question in the affirmative and, accordingly, affirm the judgment of the Appellate Court.

The following relevant procedural and factual background is set forth in the opinion of the Appellate Court. "In May, 1997, the city . . . requested proposals for the site development of a section of waterfront **[**299]** property known as Steel Point. A development proposal submitted by Bridgeport Renaissance Center, later renamed Harbour Place Limited Partnership and subsequently acquired by the plaintiff, was chosen by the city for the project. On November 18, 1998, the city and the plaintiff signed a development agreement. The plaintiff could not fulfill its obligations under the contract, however, due to the successive withdrawals of several financing partners, and the city terminated the contract in March, 2001.

"According to the plaintiff, it was prevented from completing the development activities specified in the contract by the unlawful conduct of the defendants. Specifically, the plaintiff alleged that the city's mayor, Ganim, engaged in a contract steering scheme in which his coconspirators, Leonard Grimaldi and Paul Pinto, demanded **[***7]** bribes and kickbacks from businesses seeking city contracts and then divided the proceeds of those illegal payments with Ganim. After the contract had been awarded to the plaintiff, the plaintiff refused to participate in the scheme. Thereafter, Ganim and the other defendants allegedly conspired to deprive the plaintiff of its development rights, through corrupt and illegal means, for their own benefit. Because of the unreasonable delays, conditions and demands imposed on the plaintiff, its three financial partners withdrew **[*209]** from the project, and the plaintiff was unable to fulfill its contractual obligations. From the date it was chosen until it was discharged in March, 2001, the plaintiff had expended millions of dollars in its attempt to complete the project.

"The plaintiff filed a one count complaint on October 19, 2004, claiming that the defendants [had] violated the [antitrust act] by engaging in an illegal conspiracy in restraint of trade. [The plaintiff] sought treble damages pursuant to *General Statutes § 35-35*.[3] Several of the defendants filed motions to strike the complaint on the ground that it failed to state a legally sufficient antitrust claim. The [trial] court, *Alander,* ***[***8]*** *J.*, granted the motions, concluding that the plaintiff's original complaint failed to allege facts that would establish an actual adverse effect on competition as a whole in the relevant market and failed to allege facts that would constitute price discrimination in violation of *General Statutes § 35-45*.

"The plaintiff timely filed an amended complaint. See *Practice Book § 10-44*. The amended complaint added one paragraph, alleging, in part, that '[t]he defendants' conduct had an actual adverse effect on competition as a whole in the relevant market of undertaking and completing commercial development in the [c]ity . . . in a timely, cost

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[1] Harbor Communications, Inc., and HNTB Corporation also were named as defendants. The plaintiff subsequently withdrew its complaint against Harbor Communications, Inc., and the action subsequently was withdrawn as against **[***6]** HNTB Corporation.

[2] *General Statutes § 35-26* provides: ***HN1***[] "Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful."

[3] *General Statutes § 35-35* provides: ***HN2***[] "The state, or any person, including, but not limited to, a consumer, injured in its business or property by any violation of the provisions of this chapter shall recover treble damages, together with a reasonable attorney's fee and costs."

efficient manner.'[4] The other allegations **[*210]** in the amended complaint **[**300]** were the same as in the original complaint, and the plaintiff did not amend its allegations with respect to [its claim of] price discrimination.

"Six of the defendants filed motions to strike the plaintiff's amended complaint, claiming that the plaintiff [had] failed to allege any additional facts that could constitute a cognizable antitrust claim. The court, *Stevens, J*., heard argument and issued its decision on March 5, 2007, granting the motions of those defendants. In its decision, the court concluded that the allegations in the added paragraph contained only legal or conclusory claims and did not provide a **[***10]** factual basis for an antitrust violation. Further, the court stated that, even if it is assumed that the relevant market was as alleged in the added paragraph, the plaintiff nevertheless failed to allege any facts of a specific nature that demonstrated that the defendants' conduct had an adverse effect on competition in that market. The court noted: 'When taken as true, the facts set forth in the . . . amended complaint establish that the plaintiff lost its ability to develop a single property, Steel Point, due to the improper conduct of the various defendants. The plaintiff has not alleged any particular facts, however, that would indicate that this action prevented other competitors from developing Steel Point or other properties in [the city] under government contracts with the city . . . or otherwise hindered competitors in such pursuits.'

"Subsequently, the [remaining] defendants filed motions to strike the amended complaint on identical grounds. The court granted the motions and . . . rendered judgment in favor of all of the defendants." *Bridgeport Harbour Place I, LLC v. Ganim, supra, 111 Conn. App. 200-203*.

The plaintiff appealed to the Appellate Court from the judgment of the **[***11]** trial court, claiming, inter alia, that **[*211]** the trial court improperly had determined that the amended complaint failed to allege an antitrust injury. Specifically, the plaintiff contended that the allegations in the amended complaint "that the defendants conspired to exclude competition in connection with eight different city projects through commercial bribery and other unlawful acts were sufficient to support the legal conclusion that the defendants engaged in anticompetitive behavior in commercial development in [the city]." *Id., 207*. The Appellate Court disagreed, concluding that the amended complaint was "devoid of factual allegations that would support the legal conclusion that the defendants' conduct had an adverse effect on competition as a whole in the relevant market. The plaintiff [did] not allege how the challenged actions decreased competition among developers or how the alleged payback scheme actually affected the marketplace, which allegations are necessary to support a . . . violation [of *§ 35-26*] under a rule of reason analysis. The plaintiff appears to claim that the very fact that the defendants allegedly required anyone who wanted a city contract in [the city] to pay **[***12]** bribes, i.e., they had to 'pay to play,' automatically results in an anticompetitive effect on the market. The plaintiff can cite no case law in support of such a position." *Id., 208*. The Appellate Court also noted that "the case law suggest[ed] otherwise." Id. In reaching its conclusion, the court relied on three cases, namely, *Expert Masonry, Inc. v. Boone County, 440 F.3d 336, 348 (6th Cir. 2006)*, *Comet Mechanical Contractors, Inc. v. E. A. Cowen Construction, Inc., 609 F.2d 404, 406 (10th Cir. 1980)*, and *Federal Paper Board Co. v. Amata, 693 F. Sup. 1376, 1383 (D. Conn. 1988)*, that had held that commercial bribery, standing alone, does not constitute anticompetitive behavior under federal ***antitrust law***.

[301]** On appeal to this court, the plaintiff contends that the Appellate Court improperly concluded that the **[*212]** amended complaint fails to allege a cognizable antitrust injury. The plaintiff claims that the complaint, when construed in the light most favorable to sustaining its legal sufficiency, alleges such an injury because it asserts that the defendants "controlled the relevant market to such an extent that they excluded competitors at will through their bribery and kickback scheme." **[***13]** In particular, the plaintiff contends that "[t]he restraint alleged [in the complaint] is that of a general contractor, the Lenocis and their cronies, conspiring with the mayor [Ganim] who

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[4] "The added paragraph . . . [provides]: 'The defendants' conduct had **[***9]** an actual adverse effect on competition as a whole in the relevant market of undertaking and completing commercial development in the [c]ity . . . in a timely, cost efficient manner. The defendants' conduct as alleged added the extra cost of corrupt paying as demanded. The corruption and payback system of Ganim, Grimaldi and Pinto, which operated with the cooperation of . . . [city] officials under . . . Ganim, including . . . corporation counsel, leaders of the [c]ity [c]ouncil, its economic director, finance director, zoning officials, comptroller and others caused the market for the commercial development as a whole to be adversely affected.'" *Bridgeport Harbour Place I, LLC v. Ganim, supra, 111 Conn. App. 201 n.3*.

controlled the city . . . ." The plaintiff further contends that "the Lenocis' control over [Ganim] effectively precluded competition among general contractors." According to the plaintiff, "[b]ecause so many publicly bid projects were controlled by the Lenocis and involved kickbacks and bribes, this had the effect of stifling competition for these kinds of projects." Finally, the plaintiff contends that paragraph twenty-seven of the amended complaint,[5] which identifies eight city contracts that the Lenocis allegedly obtained as a result of corrupt payments, supports the claim that the defendants' conduct had an anticompetitive effect on the market as a whole. We are not persuaded by the plaintiff's claim.

The following legal principles guide our analysis. ***HN3***[] "A motion to strike challenges the legal sufficiency of a **[*213]** pleading . . . and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause **[***15]** of action, the motion to strike must be denied." (Citations omitted; internal quotation marks omitted.) *Vacco v. Microsoft Corp., 260 Conn. 59, 64-65, 793 A.2d 1048 (2002)*. "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 498, 815 A.2d 1188 (2003)*.

Furthermore, ***HN4***[] *General Statutes § 35-44b* provides that, in construing the antitrust act, "the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes."[6] With respect to the allegations **[**302]** necessary to state a cognizable antitrust claim, the United States Supreme Court has explained that, in pleading such a claim, "a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . ."[7] (Citations omitted.) *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; see also *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. **[*214]** 2001)* (in deciding motion to dismiss for failure to state **[***16]** claim, "[i]t is . . . improper [for the court] to assume that the [plaintiff] can prove facts that it has not alleged or that the [defendant has] violated the antitrust laws in ways that have not been alleged" [internal quotation marks omitted]); *Furlong v. Long Island College Hospital, 710 F.2d 922, 927 (2d Cir. 1983)* (conclusory allegations cannot "substitute for minimally sufficient factual allegations").

HN5[] "*Section 35-26* is substantially identical to **[***17]** *§ 1* of the Sherman Act; *15 U.S.C. § 1* [2006];[8] and applies to contracts, combinations, or conspiracies in restraint of trade or commerce." *Shea v. First Federal Savings*

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[5] Paragraph twenty-seven of the plaintiff's amended complaint provides in relevant part: "Ganim, acting through his office and through and in cooperation with various municipal officials and employees he influenced through corrupt payments of extraordinary benefits, appointments, awards of city contracts **[***14]** to relatives, was engaged in a massive, hidden conspiracy with the defendants and others, Willinger, Lenoci Sr., Lenoci Jr., Pinto, Grimaldi, Kasper and Schinella to illegally profit from the awarding and completion of contracts with the [c]ity . . . . The corrupt agreements included but were not limited to those involving the sewer treatment facility, the baseball park, the hockey stadium, the removal of asbestos, the public relations campaign for [the city], the clean and green program for the removal of distressed buildings, the redevelopment of Father Panik [V]illage, the redevelopment of Steel Point and the awarding of contracts for legal services, all in the restraint of trade . . . ."

[6] See *Westport Taxi Service, Inc. v. Westport Transit District, 235 Conn. 1, 15-16, 664 A.2d 719 (1995)* ("we follow federal precedent when we interpret the [antitrust] act unless the text of our antitrust statutes, or other pertinent state law, requires us to interpret it differently"); see also *Brown & Brown, Inc. v. Blumenthal, 297 Conn. 710, 727, 1 A.3d 21 (2010)* ("[t]he antitrust act intentionally was patterned after federal ***antitrust law***").

[7] We note, moreover, that, because Connecticut is a fact pleading state; see, e.g., *Sullins v. Rodriguez, 281 Conn. 128, 147, 913 A.2d 415 (2007)*; see also *Practice Book § 10-1*; this point has particular pertinence to cases, like the present one, involving claims under this state's antitrust laws.

[8] *Title 15 of the 2006 edition of the United States Code, § 1*, provides in relevant part: ***HN6***[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce **[***18]** among the several States, or with foreign nations, is declared to be illegal. . . ."

& Loan Assn. of New Haven, 184 Conn. 285, 305, 439 A.2d 997 (1981). It is well settled that "Congress designed the Sherman Act as a consumer welfare prescription." (Internal quotation marks omitted.) Reiter v. Sonotone Corp., 442 U.S. 330, 343, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). "Consumer welfare is maximized when economic resources are allocated to their best use . . . and when consumers are assured competitive price and quality." (Citation omitted.) Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir.), cert. denied, *516 U.S. 987, 116 S. Ct. 515, 133 L. Ed. 2d 424 (1995)*. "Accordingly, an act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality." (Emphasis in original.) Id.

HN7[] "A violation of [§] 1 [of the Sherman Act] generally requires a combination or other form of concerted action between two legally distinct entities resulting in an unreasonable restraint on trade. . . . If a restraint **[*215]** alleged is among that small class of actions that courts have deemed to have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, it will be unreasonable per se . . . . Most antitrust claims, however, [like those asserted in the present case] are analyzed under a rule of reason analysis which seeks to determine if the alleged restraint is unreasonable because its anticompetitive effects outweigh its procompetitive effects." (Citations omitted; internal quotation marks omitted.) E & L Consulting, Ltd. v. Doman Industries Ltd., 472 F.3d 23, 29 (2d Cir. 2006), cert. denied, *552 U.S. 816, 128 S. Ct. 97, 169 L. Ed. 2d 22 (2007)*.

HN8[] In order to establish an anticompetitive effect sufficient to avoid dismissal of a complaint for failure to state a claim, it is not enough to allege an injury to a competitor. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, **[**303]** 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) **[***19]** (antitrust laws were designed "for the protection of competition, not competitors" [internal quotation marks omitted]). Rather, "the inquiry under the rule of reason is directed at the challenged restraint's overall impact on competitive conditions, rather than whether a particular party has been restrained by the conduct at issue." Berman Enterprises, Inc. v. Local 333, United Marine Division, 644 F.2d 930, 937 (2d Cir.), cert. denied, *454 U.S. 965, 102 S. Ct. 506, 70 L. Ed. 2d 381 (1981)*. Accordingly, "[u]nder the rule of reason, the [plaintiff bears] an initial burden to demonstrate [that] the [defendant's] challenged behavior had an actual adverse effect on competition as a whole in the relevant market." (Internal quotation marks omitted.) Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 317 (2d Cir. 2008). "Anticompetitive effects, more commonly referred to as 'injury to competition' or 'harm to the competitive process,' are usually measured by a reduction in output and **[*216]** an increase in prices in the relevant market." Sullivan v. National Football League, 34 F.3d 1091, 1096-97 (1st Cir. 1994), cert. denied, *513 U.S. 1190, 115 S. Ct. 1252, 131 L. Ed. 2d 133 (1995)*; **[***20]** see also Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 264 (2d Cir. 2001) ("whether an actual adverse effect has occurred is determined by examining factors like reduced output, increased prices and decreased quality").

Upon review of the plaintiff's amended complaint, we conclude that the Appellate Court properly upheld the trial court's decision to grant the defendants' motions to strike because the complaint is devoid of facts demonstrating that the defendants' alleged bribery scheme actually had an adverse effect on competition. Almost every paragraph of the thirty-three page amended complaint focuses on the various ways in which the defendants' conduct injured the plaintiff *individually* by preventing it from completing the Steel Point project.[9] There is not a single

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[9] The following allegations of the amended complaint are representative of the entire complaint: "40. On or about January 27, 1999, as a result of the illegal conspiracy in restraint of trade **[***22]** by the defendants, the [plaintiff's] development partner . . . withdrew from the Steel Point project."

"46. In April of 1999, less than one month after the known extension of the development agreement with the plaintiff, Pinto and the defendants Lenoci Sr., Lenoci Jr., and Ganim agreed to select and cause other officials and employees to sabotage the [plaintiff's] plan to develop the Steel Point site, in direct derogation of the [plaintiff's] rights under the development agreement."

"51. The defendant . . . Willinger intentionally . . . and in bad faith inserted commercially unreasonable terms and conditions into the [Steel Point] agreement, intentionally delayed the completion of the agreements, participated in a scheme to steer [c]ity contracts on the project to entities who would pay fees to [the] conspirators, and who would act to further delay and interpose unfair development conditions [on] the Steel Point project."

allegation **[**304]** in the **[*217]** complaint explaining how the bribery scheme reduced output or raised prices, the sine qua non of an antitrust injury. Furthermore, although the plaintiff argues that the Lenocis' control over Ganim effectively precluded general contractors from competing for projects open to public bidding, the amended complaint itself contains no such allegation. As the defendants note, the amended **[***21]** complaint does not even identify a general contractor, other than the plaintiff, that was adversely affected by the defendants' scheme. Much less does the amended complaint allege facts demonstrating that general contractors as a group were precluded from competing for city contracts. The thrust of the amended complaint, rather, is that any general contractor that wanted to do business with the city could do so but had to pay to play.[10] As the District Court explained in *Federal Paper [*218] Board Co. v. Amata, supra, 693 F. Sup. 1376*, however, ***HN9***[] "[t]he payment of bribes by suppliers to a purchasing agent does not by itself establish an anticompetitive effect. Although the bribes may have been illegal and unfair methods of competition, their illegality and unfairness [do] not support an inference that the bribes restrained competition. On the contrary, bribery could have been consistent with intense competition among the suppliers—some of which resorted to illegal measures to gain an advantage." *Id., 1383*.

As the Appellate Court noted, moreover, even if the plaintiff adequately alleged in its amended complaint an anticompetitive impact on the market, federal courts have concluded that commercial bribery does not constitute a

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"53. From May of 1999 through January of 2000, while the plaintiff was attempting in good faith to complete the transaction, [certain of the defendants] were engaged in a conspiracy in restraint of trade or commerce to deprive the plaintiff of its rights."

"56. Unaware **[***23]** of the fact that the mayor [Ganim] . . . had entered into a corrupt agreement to block and [to] interfere with [the plaintiff's] contractual rights, the plaintiff continued to try to complete the Steel Point [p]roject, spending large sums of money on all of the various components of the project . . . ."

"65. The defendants . . . Lenoci Sr. . . . Lenoci [Jr.], Michael Schinella, and the related Lenoci [c]orporations . . . engaged in an illegal conspiracy in restraint of trade in one or more of the following ways:

* * *

"d) by engaging in a myriad of illegal schemes to enrich the mayor [Ganim] and other [city] officials . . . in order to obtain the cooperation of those officials in frustrating the development attempts of the [p]laintiff, [and]

"e) by providing the chief elected official of the [c]ity . . . with items of value in order to secure his cooperation in frustrating the development attempts of the plaintiff."

"67. The defendant[s] . . . Kasper and Kasper Group [Inc.] engaged in a conspiracy in restraint of trade in one or more of the following ways

"a) by attempting to insert the Lenoci defendants into the Steel Point project;

"b) by paying bribes to the mayor [Ganim] . . .

"c) by conspiring **[***24]** with the Lenocis and the Lenoci controlled entities to steal the [plaintiff's] development project

"d) by deceiving the plaintiff and hiding from the plaintiff the illegal conspiracy [and]

"e) by paying sums of money to other conspirators in support of the conspiracy . . . ."

[10] For example, paragraph twenty-eight of the amended complaint provides in relevant part: "At all times mentioned herein, and for a long time prior to the incidents described in this complaint, Pinto and Grimaldi received payments from businesses seeking to do business with the [c]ity . . . and then shared the proceeds of these payments with . . . Ganim."

Paragraph thirty-three of the amended complaint provides in relevant part: "Unlike other businesses in the [c]ity . . . the plaintiff refused to pay . . . or associate itself with the members of the conspiracy, in order to complete [the Steel Point] development project. As a result, the [d]efendant . . . Ganim, through the members of his administration, paid consultants . . . Willinger and the Willinger firm prevented [the] [p]laintiff from completing the [Steel Point] transaction."

Paragraph thirty-six provides in relevant part: "During the period of the plaintiff's **[***25]** development of Steel Point, the defendant Willinger represented the defendants Lenoci Sr., Lenoci Jr., and their related companies, and Pinto, Grimaldi, Kasper and related companies, and Ganim . . . received from the defendants [money] extorted from persons seeking to do business with the [c]ity . . . ."

restraint of trade within the meaning of the Sherman Act. See Bridgeport Harbour Place I, LLC v. Ganim, supra, 111 Conn. App. 208. We are aware of no case in which governmental corruption was found to fall within the purview of federal ***antitrust law***.

Recently, in Coll v. First American Title Ins. Co., 642 F.3d 876 (10th Cir. 2011), the Tenth Circuit Court of Appeals engaged in a comprehensive review of the governing case law in explaining **[**305]** why commercial bribery of government officials does not constitute a **[*219]** restraint of trade for purposes of the Sherman Act. The analysis of the court in *Coll*, with which we agree, bears repeating. "In Parker [v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)], **[***26]** the [United States] Supreme Court held that **HN10**[] the . . . Sherman Act's proscription of anti-competitive conduct did not apply to government action. See [id., 350-52]. Later in [Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) (*Noerr*)], the [c]ourt addressed the other side of the same coin, [Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 383, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)], concluding that the Sherman Act also did not proscribe private citizens' conduct undertaken to influence government action. See [Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., supra, 135-37]. That is so because the purpose of the Sherman Act is to regulate business, not political activity. See [id., 137]. This was true, according to *Noerr*, even if the conduct by which citizens attempted to influence governmental regulation was undertaken for the sole purpose of destroying competition, involved unethical business practices, or was specifically intended to hurt competitors. See [id., 138-45]. In fact, *Noerr* addressed claims of egregious private conduct, including assertions that a number of railroads conspired to engage **[***27]** in a publicity campaign against their competitors in the trucking industry designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers. [Id., 129-30]. . . .

"Notwithstanding this deceptive and unethical business conduct, the [c]ourt held that the Sherman Act did not apply to proscribe it. See [id., 140-41]. [The court in *Noerr* stated that] **HN11**[] [i]nsofar as [the Sherman] **[*220]** Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and . . . a publicity campaign to influence governmental action falls clearly into the category of political activity. **HN12**[] The proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. [Id.]

"In conclusion, [the court in] *Noerr* noted that the fight between the railroads and the truckers appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately **[***28]** deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. [Id., 144-45].

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"More recently, the [United States] Supreme Court, relying on its reasoning in *Noerr*, held that **HN13**[] the Sherman Act did not proscribe private citizens' conduct undertaken to influence government action, even if that conduct involved conspiracy or bribery. In [Columbia v. Omni Outdoor Advertising, Inc., supra, 499 U.S. 365], a jury found that a billboard company conspired with city officials to obtain legislation that protected the billboard company's monopolization of the billboard market within the city [of Columbia, South Carolina] and that restrained the business of a competitor billboard company. See [id., 368-69]. Nevertheless, the . . . [c]ourt held that the Sherman Act did not apply to such conduct, **[**306]** which was undertaken to influence governmental action. See [id., 384]. In reaching this conclusion, the [c]ourt first rejected a conspiracy exception to *Parker* state-action immunity. See [id., 374-75]. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private **[***29]** citizens urges upon them, such an **[*221]** exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a conspiracy charge. [Id., 375]. The [c]ourt applied this same reasoning to reject a conspiracy exception to *Noerr* immunity, too: The same factors [that] . . . make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became . . . co-conspirators in some sense with the private party urging such action. [Id., 383-84] . . . .

"[*Columbia*] went further, rejecting exceptions to *Parker* and *Noerr* immunity even for conspiracies involving corruption. See [id., 376-79]. A conspiracy exception narrowed along such vague lines is similarly impractical. Few governmental actions are immune from the charge that they are not in the public interest or **[***30]** in some sense corrupt. . . . The fact is that virtually all regulation benefits some segments of . . . society and harms others; and that it is not universally considered contrary to public good if the net economic loss to the losers exceeds the net economic gain to the winners. [Id., 377]. . . .

"[To] carve out a special exclusion to [the] *Noerr-Pennington*[11] [doctrine] when the corruption involves some ill-defined and open-ended concept of bribery or other acts that might violate state or federal law . . . would, of course, vitiate [the] *Noerr-Pennington* [doctrine] almost entirely because there is hardly any lobbying **[*222]** effort that is not open to at least a charge of some illegal dealings when important economic interests are at stake. . . . The Supreme Court in [*Columbia*] understood that risk and held that corruption—and even bribery explicitly—would not vitiate a claim of *Noerr-Pennington* immunity. The [c]ourt said: Such unlawful activity has no necessary relationship to whether the governmental action is in the public interest. A mayor is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid . . . . **[***31]** To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the [Sherman Act] . . . is not directed to that end. Congress has passed other laws aimed at combating corruption in state and local governments. Insofar as the Sherman Act sets up a code of ethics at all, it is a code that condemns trade restraints not political activity. [Id., 378-79]." (Citations omitted; internal quotation marks omitted.) *Coll v. First American Title Ins. Co., supra, 642 F.3d 896-98*; see also *Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hospital, 185 F.3d 154, 162* **[**307]** *(3d Cir. 1999)* ("Liability for [anticompetitive] injuries caused by . . . state action is precluded [under the Sherman Act] even [when] it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process. The remedy for such conduct rests with laws addressed to it and not with courts looking behind sovereign state action at the behest of antitrust plaintiffs. Federalism requires this result both with respect to state actors and with respect **[***32]** to private parties who have urged the state action."), cert. denied, *530 U.S. 1261, 120 S. Ct. 2716, 147 L. Ed. 2d 982 (2000)*; *Comet Mechanical Contractors, Inc. v. E. A. Cowen Construction, Inc., supra, 609 F.2d 406-407* (plaintiff's allegation that it was **[*223]** denied government contract because it refused to pay bribe to government official did not establish antitrust violation); *Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 687 (9th Cir.)* ("commercial bribery, standing alone, does not constitute a violation of the Sherman Act"), cert. denied, *429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976)*.

As the foregoing case law makes clear, the plaintiff's allegation that the defendants took bribes and kickbacks in exchange for steering public contracts does not state a cognizable antitrust claim.[12] Accordingly, we agree with the Appellate Court that the trial court properly granted the defendants' motions to strike the plaintiff's amended complaint.

The judgment of the Appellate Court is affirmed.

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[11] *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*.

[12] This does not mean that there can be no remedy for the plaintiff's injuries. Indeed, the plaintiff brought a separate action against several **[***33]** of the defendants for, among other wrongful acts, breach of contract, tortious interference with contractual relations, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), *General Statutes § 42-110a et seq.* See *Bridgeport Harbour Place I, LLC v. Ganim, 131 Conn. App. 99, 104, 30 A.3d 703 (2011)*. The jury rendered a verdict in favor of the plaintiff on several counts and awarded the plaintiff $366,524 in damages. *Id., 111-12*. Thereafter, the court awarded the plaintiff punitive damages, attorney's fees and costs in accordance with the jury's findings on the CUTPA claim. *Id., 113*. The Appellate Court recently affirmed the judgment in that case. *Id., 178*. Federal authorities also successfully prosecuted several of the defendants for bribery, mail fraud and violations of the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § 1961 et seq. (1994)*, in addition to other crimes.

In this opinion the other justices concurred.

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FTC v. Church & Dwight Co.

United States Court of Appeals for the District of Columbia Circuit

October 11, 2011, Argued; December 13, 2011, Decided

No. 10-5383 Consolidated with 11-5008

Reporter

665 F.3d 1312 *; 398 U.S. App. D.C. 449 **; 2011 U.S. App. LEXIS 24587 ***; 2011-2 Trade Cas. (CCH) P77,721

FEDERAL TRADE COMMISSION, APPELLEE v. CHURCH & DWIGHT CO., INC., APPELLANT

Prior History: **[***1]** Appeals from the United States District Court for the District of Columbia. (No. 1:10-mc-00149).

FTC v. Church & Dwight Co., 747 F. Supp. 2d 3, 2010 U.S. Dist. LEXIS 115205 (D.D.C., 2010)

Core Terms

condoms, products, district court, subpoena, bundling, practices, rebates, reasonably relevant, discounts, documents, retailers, brand, exclusionary, consumer, sales

LexisNexis® Headnotes

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

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

HN1[] **Methods of Investigation, Subpoenas**

Whether the district court applied the correct standard in deciding an investigative subpoena should be enforced is a question of law, which is decides de novo. The appellate court reviews the district court's determination of relevance, a question of fact, only for clear error.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN2[] **Methods of Investigation, Subpoenas**

A district court must enforce a federal agency's investigative subpoena if the information sought is "reasonably relevant" -- or, put differently, not plainly incompetent or irrelevant to any lawful purpose of the agency -- and not unduly burdensome to produce.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > Subpoenas

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

HN3[] Methods of Investigation, Subpoenas

A long-established point is that the validity of a Federal Trade Commission subpoenas is to be measured against the purposes stated in the resolution authorizing use of compulsory process.

Administrative Law > Judicial Review > Standards of Review > General Overview

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > Subpoenas

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

HN4[] Judicial Review, Standards of Review

Reviewing courts defer to the Federal Trade Commission's interpretation of its own resolution authorizing use of compulsory process. So long as the material the Commission seeks is relevant to the investigation -- the boundary of which may be defined quite generally, the district court must enforce the agency's demand.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN5[] Methods of Investigation, Subpoenas

A court will not interpret the scope of a resolution authorizing use of compulsory process so broadly as to enable the agency to investigate a matter beyond the reach of the laws it enforces.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6[] Price Fixing & Restraints of Trade, Tying Arrangements

In a tying case, the plaintiff must allege the defendant company used market power in the tying product to gain market power in the tied product.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > Subpoenas

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

HN7[] **Methods of Investigation, Subpoenas**

Courts do not require the Federal Trade Commission to seek in one document request all the information it might need in order successfully to establish a violation at trial.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN8[] **Methods of Investigation, Subpoenas**

A subpoena enforcement action is generally not the proper forum in which to litigate disagreements over an agency's authority to pursue an investigation. Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > Subpoenas

HN9[] **Methods of Investigation, Subpoenas**

The Federal Trade Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of violation. In light of the broad deference courts afford the investigating agency, it is essentially the respondent's burden to show that the information is irrelevant.

Counsel: Carl W. Hittinger argued the cause for appellant. With him on the briefs was Earl J. Silbert.

Mark S. Hegedus, Attorney, Federal Trade Commission, argued the cause for appellee. With him on the brief were Willard K. Tom, General Counsel, David C. Shonka, Principal Deputy General Counsel, John F. Daly, Deputy General Counsel, and Leslie Rice Melman, Assistant General Counsel.

R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

Judges: Before: SENTELLE, Chief Judge, GINSBURG,* Circuit Judge, and WILLIAMS, Senior Circuit Judge.

Opinion by: GINSBURG

Opinion

[*1313] **[**450]** GINSBURG, Circuit Judge: Church and Dwight Co., Inc., the leading manufacturer of condoms in the United States, appeals an order of the district court enforcing a subpoena and an accompanying civil investigative demand (CID) issued by the Federal Trade Commission insofar as the FTC would require it to produce

* As of the date the opinion was published, Judge Ginsburg had taken senior status.

information related to its sales of products other than condoms. Church & Dwight contends such information is not reasonably relevant to the Commission's investigation into **[***2]** its potentially monopolistic practices in the market for condoms. Because the Commission's inquiry lawfully extends to the possibility Church & Dwight is engaged in the exclusionary bundling of rebates to retailers that sell condoms and other Church & Dwight products, we hold the district court did not err in finding that the information on products other than condoms was reasonably relevant to the Commission's investigation. Accordingly, we affirm the order enforcing **[*1314]** **[**451]** the subpoena and the CID against Church & Dwight as issued.

I. Background

Church & Dwight sells condoms primarily under its Trojan brand name. According to the Commission, the Company accounts for "at least 70%" of the latex condoms sold in the United States.[*] In order to market its condoms, Church & Dwight offers retailers a discount based upon the amount of shelf space they devote to its condoms. Church & Dwight also sells a variety of other products, including such consumer products as cat litter and toothpaste.

In June 2009 the Commission issued a "Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation" in order to determine whether Church & Dwight

> has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in the United States, or in any part of that commerce, through potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of *Section 5* of the Federal Trade Commission Act ....

Pursuant to the Resolution, the Commission issued a subpoena duces tecum seeking, among other things, production of documents related to Church & Dwight's sales and distribution of condoms in the United States and Canada. At the same time the Commission issued a CID seeking information about cost, pricing, production, and sales of the Company's condoms in the United States and Canada.

Although the Commission did not explicitly request information on products other than condoms, Specification R of the subpoena provides: "All Documents **[***4]** responsive to this request ... shall be produced in complete form, unredacted unless privileged ...."

Church & Dwight turned over to the Commission documents and data sets relating to its condom business with the information on other products redacted. Church & Dwight petitioned the Commission either to limit or to quash the subpoena and the CID. The Commission denied that request and petitioned the district court to enforce the subpoena and the CID.

In the district court, Church & Dwight argued, "Properly read, the FTC's Resolution's language concerning 'Trojan brand condoms and other products distributed or sold by Church & Dwight' does not include irrelevant non-condom products such as toothpaste, cat litter, baking soda and detergents." The district court, finding the information on products other than condoms in documents with information pertaining to condoms was "reasonably relevant" to the Commission's investigation and the request was not "unduly burdensome," granted the petition for enforcement.

II. Analysis

Church & Dwight appeals the district court's order insofar as the subpoena and the CID relate to its products other than condoms. The Company first contends the district **[***5]** court departed from the legal standard prescribed in precedent because it (1) did not interpret the scope of the Resolution, (2) did not identify the materials **[*1315]** **[**452]** sought in the subpoena and the CID, and (3) required that the materials sought in the subpoena and the CID be only plausibly, rather than reasonably, relevant to the Commission's investigation. It also argues that, even if

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[*] Although its inquiry into the market for condoms is not limited to the latex variety of the product, the Commission has not provided an estimate of Church & Dwight's share of a market that includes both latex **[***3]** and non-latex condoms.

the district court applied the correct legal standard, the court clearly erred when it found the disputed materials were in fact reasonably relevant to the investigation.

A. Standards of Review

HN1[] Whether the district court applied the correct standard in deciding an investigative subpoena should be enforced is a question of law, which we decide de novo. *See* *U.S. Int'l Trade Comm'n v. ASAT, Inc., 411 F.3d 245, 253, 366 U.S. App. D.C. 269 (D.C. Cir. 2005)*; *FTC v. Texaco, 555 F.2d 862, 876 n.29, 180 U.S. App. D.C. 390 (D.C. Cir. 1977)* (en banc). We review the district court's determination of relevance, a question of fact, only for clear error. *See* *FTC v. Invention Submission Corp., 965 F.2d 1086, 1089, 296 U.S. App. D.C. 124 (D.C. Cir. 1992)*.

In the last-cited case we explained *HN2*[] "a district court must enforce a federal agency's investigative subpoena if the information sought is 'reasonably **[***6]** relevant'—or, put differently, 'not plainly incompetent or irrelevant to any lawful purpose of the [agency]'—and not 'unduly burdensome' to produce." *965 F.2d at 1089* (brackets in original) (internal citations omitted) (quoting *Texaco, 555 F.2d at 872, 873 n.23, 881)*. We also reiterated *HN3*[] a long-established point quite pertinent to the dispute here: "[T]he validity of Commission subpoenas is to be measured against the purposes stated in the resolution ...." *965 F.2d at 1092* (quoting *FTC v. Carter, 636 F.2d 781, 789, 205 U.S. App. D.C. 73 (D.C. Cir. 1980))*.

B. Scope of the Resolution

The main dispute in this case is whether the Commission's inquiry, as defined by the Resolution, extends to Church & Dwight's products other than condoms. The Resolution indicates the Commission is investigating various of Church & Dwight's practices, including its "conditioning [of] discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products ...." Despite the seemingly unqualified reach of the phrase "and other products," the Company argues we should interpret it narrowly to mean "and other [condom] products." For its part, the Commission maintains the Resolution **[***7]** comprehends an investigation into Church & Dwight's possible bundling of rebates based upon the retailer's sales of both its condoms and its other products. Under the Commission's interpretation, the information concerning products other than condoms is unquestionably relevant to its investigation, and the district court was correct to enforce the subpoena and the CID.

As an initial matter, Church & Dwight is incorrect in claiming the district court "failed to interpret" the Resolution; the district court simply interpreted the Resolution as being more broad than Church & Dwight had argued. The question properly before us is whether the district court correctly interpreted the Resolution to include an inquiry that implicated Church & Dwight products other than condoms.

Contrary to the Company's urging, *HN4*[] we defer to the Commission's interpretation of its own Resolution. *Cf.* *FTC v. Ken Roberts Co., 276 F.3d 583, 586, 349 U.S. App. D.C. 240 (D.C. Cir. 2001)* ("courts of appeals have consistently deferred to agency determinations of their own investigative authority"); *EEOC v. Lutheran Social Servs., 186 F.3d 959, 965, 337 U.S. App. D.C. 373 (D.C. Cir. 1999)* ("agency's interpretation of relevance of subpoena deserves deference because the **[***8]** scope of the investigation is very much dependent on the agency's interpretation and administration of its authorizing **[*1316]** **[**453]** substantive legislation" (internal quotation marks, alterations, and citation omitted)). So long as the material the Commission seeks is "relevant to the *investigation*?the boundary of which may be defined quite generally," *Invention Submission, 965 F.2d at 1090*, *see also* *Texaco, 555 F.2d at 874 n.26* ("resolutions of [a broad] sort are not uncommon in the investigative process"), the district court must enforce the agency's demand.

The Commission maintains its Resolution contemplates an investigation into the possibility Church & Dwight is engaged in exclusionary practices in which products other than condoms may play a role. Such practices include bundling discounts, as in *LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003)* (en banc), and tying sales, as in *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Church & Dwight replies that, because the initial clause of the Resolution authorizes an investigation into illegal monopolization "in the distribution or sale of condoms ... through potentially exclusionary practices including, but not limited **[***9]** to, [shelf-space discounts] on Trojan brand condoms and other products," the last two words must refer only to Church & Dwight's condom brands other than Trojan. There is, however, a reasonable interpretation of the Resolution that is less narrow than the one Church & Dwight favors. Although ***HN5***[] we will not interpret the scope of the Resolution so broadly as to enable the agency to investigate a matter beyond the reach of the laws it enforces, *see Invention Submission Corp., 965 F.2d at 1089*, we note that an inquiry into the bundling of rebates on condoms and other types of products with the purpose of sustaining market power in the market for condoms is arguably within the condemnation of the Sherman Act as the Third Circuit construed it in *LePage's, 324 F.3d at 154-57* (concluding 3M's practice of bundling rebates for multiple products in order to maintain its monopoly in one of them was an exclusionary practice in violation of *§ 2* of the Sherman Act).[*]*

Church & Dwight suggests we should reject this interpretation of the Resolution because the Commission's subpoena and CID are too narrowly focused to support a case premised upon a theory of bundling that includes products other than condoms. The Company reasons the Commission, had it wanted to pursue such a theory, would have requested information on products other than condoms even when that information appears in documents that contain no information on condoms. This argument fails because ***HN7***[] we do not require the Commission to seek in one document request all the information it might need in order successfully to establish a violation at trial.

LePage's is of course not the law of this circuit, and it has been roundly criticized, *see, e.g.*, Antitrust Modernization Comm'n, *Report and Recommendations* 94 **[***11]** (2007) ("The lack of clear standards regarding bundling, as reflected in *LePage's v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare"); Bruce H. Kobayashi, *The Law and Economics of* ***[*1317] [**454]*** *Predatory Pricing, in* ***ANTITRUST LAW*** AND ECONOMICS 116, 148 (Keith N. Hylton ed., 2009) ("The potential for liability will result in [firms with sufficient market power and multiple product lines] being deterred from using bundling that would have led to reduced prices for consumers and higher welfare"); Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, *72 U. Chi. L. Rev. 49, 71 (2005)* ("highly unlikely that 3M would tailor practices that cover six of its departments solely because of the effects that it would have on" the one product market in which it competed with LePage's); Daniel L. Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, *72 U. Chi. L. Rev. 243, 254-56, 262-64 (2005)* (by not following test for predatory conduct from *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*, or some similar standard for predatory conduct, *LePage's* condemns behavior that does **[***12]** not obviously reduce, and may even promote, consumer welfare). We need not, however, pass upon the merits of the rule in *LePage's* in order to resolve this case.

Because *LePage's* is the law in the Third Circuit, and because Church & Dwight sells both condoms and other consumer products within the Third Circuit, the Commission may lawfully investigate whether the Company's practices would constitute a violation of the law in that circuit. Although this court might someday reach a different resolution of the issue presented in *LePage's*, ***HN8***[] "a subpoena enforcement action is [generally] not the proper forum in which to litigate disagreements over an agency's authority to pursue an investigation. Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced." *Ken Roberts, 276 F.3d at 584*. We hold, therefore, the Resolution lawfully encompasses an investigation into whether Church & Dwight has bundled discounts for condoms and other products in order to acquire or maintain a monopoly in the market for condoms in the United States.

C. Church & Dwight's Remaining Contentions

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[*] The Commission's contention its Resolution also comprehends an investigation into potential tying is less than persuasive. ***HN6***[] In a tying case, the plaintiff must allege the defendant company used market power in the tying product to gain **[***10]** market power in the tied product. *See Eastman Kodak, 504 U.S. at 464* & n.9. Here, however, the Commission indicated in its Resolution it is investigating only the acquisition or maintenance of a monopoly in the condom market; that is the only product market in which the FTC has alleged Church & Dwight has market power, and the Commission has not identified any potentially tied product.

We can dispose of Church & Dwight's other contentions **[***13]** in short order. First, we reject the Company's contention the district court "never described" the materials sought in the subpoena and the CID; in fact, the district court described the disputed materials the Commission sought and the Company "seeks to redact" as "information from the documents [Church & Dwight] produce[d] regarding proprietary and confidential information on non-condom products ...." *FTC v. Church & Dwight Co., 747 F. Supp. 2d 3, 8 (D.D.C. 2010)* (internal quotation marks omitted). In any event, the Company does not actually dispute the identity of the materials at issue.

Second, Church & Dwight claims the district court's finding of relevance was based upon both a legal and a clear factual error. As for the legal error, the Company contends the district court was satisfied with mere "plausibility" instead of demanding the "reasonable relevance" required under *Texaco*. It bases this claim upon the following statement in the opinion of the district court: "[I]t is entirely plausible that information [concerning other products] appearing in the same document with relevant information concerning ... condoms would itself be relevant to the investigation." That statement **[***14]** is not inconsistent, however, with the correct legal standard, viz., that the "requested materials ... be reasonably relevant to the investigation," which appears in the next sentence **[*1318]** **[**455]** of the court's opinion, followed by a citation to *Invention Submission*.

As for the factual error, the Company erroneously argues *Texaco* requires the district court to "perform an independent review" of the information sought and "articulate the reasons underlying a finding of relevancy" to the investigation. Again the Company would demand of the district court a more searching probe of the relation between the Commission's inquiry and the information sought than our precedents require or even allow. As we said in *Invention Submission*,

> ***HN9***[] the Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of violation. *See* *Texaco, 555 F.2d at 877*. ... [I]n light of the broad deference we afford the investigating agency, it is essentially the respondent's burden to show that the information is irrelevant. *Cf.* *id. at 882* ....

965 F.2d at 1090.

The present Resolution, as we have explained, contemplates an investigation **[***15]** into Church & Dwight's sales not only of condoms but also of other products. The information the Commission is seeking concerning those other products is obviously relevant to that investigation;[*]* the district court had no obligation to belabor the obvious.

III. Conclusion

Church & Dwight's claims fail because they rest upon an unduly narrow interpretation of the Resolution, one that is inconsistent with the principles laid out in *Texaco* and more recently applied in *Invention Submission*. The Commission contemplates an investigation into the bundling of rebates to retailers on sales of condoms and of other products, which may **[***16]** violate the Sherman Act as interpreted by the Third Circuit in *LePage's*. Therefore the district court did not err in finding that the information concerning products other than condoms was reasonably relevant to the Commission's inquiry. Accordingly, the order of the district court granting enforcement of the Commission's subpoena and the associated CID is in all respects

Affirmed.

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[*] The Commission also suggested at oral argument that the Company is required to produce information on products other than condoms even if that information is not directly relevant to its investigation because the Commission requested unredacted versions of documents containing at least some relevant information. We need not, however, reach the question whether the Commission's anti-redaction policy is permissible because we conclude the subpoena and CID at issue here are directed entirely toward information reasonably relevant to the Commission's investigation.

MYD Marine Distrib. v. Int'l Paint Ltd.

Court of Appeal of Florida, Fourth District

December 14, 2011, Decided

No. 4D10-2833

Reporter

76 So. 3d 42 *; 2011 Fla. App. LEXIS 19927 **; 36 Fla. L. Weekly D 2724

MYD MARINE DISTRIBUTOR, INC., a Florida corporation, MYD MARINE DISTRIBUTOR, INC., a California corporation, and MYD MID-ATLANTIC, INC., a Maryland corporation, Appellants, v. INTERNATIONAL PAINT LTD., INTERNATIONAL PAINT LLC, DONOVAN MARINE, INC., and EAST COAST MARINE DISTRIBUTORS, INC., Appellees.

Subsequent History: Decision reached on appeal by *MYD Marine Distrib. v. Int'l Paint, Ltd., 151 So. 3d 1263, 2014 Fla. App. LEXIS 19054 (Fla. Dist. Ct. App. 4th Dist., Nov. 20, 2014)*

Costs and fees proceeding at, Decision reached on appeal by *MYD Marine Distrib. v. Int'l Paint, Ltd., 187 So. 3d 1285, 2016 Fla. App. LEXIS 5614 (Fla. Dist. Ct. App. 4th Dist., Apr. 13, 2016)*

Decision reached on appeal by *MYD Marine Distrib. v. Int'l Paint Ltd., 201 So. 3d 843, 2016 Fla. App. LEXIS 15618 (Fla. Dist. Ct. App. 4th Dist., Oct. 19, 2016)*

Prior History: [1]** Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert A. Rosenberg, Judge; L.T. Case No. 08-062407 CACE (07).

Myd Marine Distrib., Inc. v. Int'l Paint, Inc., 2009 U.S. Dist. LEXIS 141159 (S.D. Fla., Mar. 9, 2009)

Core Terms

Paint, distributor, prices, amended complaint, manufacturer, termination, conspiracy, antitrust, Marine, yacht, factual allegations, antitrust claim, horizontal, failure to state a cause of action, competitors, discounter, customers, products

LexisNexis® Headnotes

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

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

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

A dismissal for failure to state a cause of action is reviewed de novo.

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

HN2[] Motions to Dismiss, Failure to State Claim

A motion to dismiss for failure to state a cause of action admits all well pleaded facts as true, as well as reasonable inferences that may arise from those facts.

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

Governments > Legislation > Interpretation

HN3[] Private Actions, State Regulation

Pursuant to *§ 542.18, Fla. Stat.* (2009), every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful. The Florida Legislature has indicated that its intent is for courts that are construing the Florida Antitrust Act to give due consideration and great weight to the interpretations of the federal courts relating to comparable federal antitrust statutes. *§ 542.32, Fla. Stat.* (2005). Therefore, Florida courts look to federal cases to elucidate what is an agreement in restraint of trade and what proof constitutes a conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] Sherman Act, Claims

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN5[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

In a distributor-termination case, there must be concerted action (contract, combination, or conspiracy) between the manufacturer and other distributors to establish an antitrust violation. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. The manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination. Thus, a manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, standing alone, does not constitute a conspiracy. There must also be some other evidence of a tacit understanding or agreement.

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

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

HN6[] Private Actions, State Regulation

Although Monsanto Co. v. Spray-Rite Serv. Corp. and Parts Depot Co. v. Fla. Auto Supply, Inc., involved the legal standard for analyzing what constitutes a reasonable inference when considering a motion for a directed verdict, the same standard is applicable in evaluating the sufficiency of an antitrust claim where, as may often be the case in distributor-termination cases, the plaintiff's conclusion of concerted action is based on inferences from the alleged facts.

Antitrust & Trade Law > Sherman Act > Claims

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

Evidence > Inferences & Presumptions > Inferences

HN7[] **Sherman Act, Claims**

In identifying facts that are suggestive enough to render a *15 U.S.C.S. § 1* antitrust conspiracy plausible, Florida courts have the benefit of prior rulings. Accordingly, a pleading which merely asserts complaints to the manufacturer by competing dealers followed by termination of a discounter would be insufficient to create a reasonable inference of a conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

HN8[] **Sherman Act, Claims**

To state a claim for antitrust conspiracy, the factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). The complaint must contain enough factual matter (taken as true) to suggest that an agreement was made and allegations plausibly suggesting (not merely consistent with) agreement.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN9[] **Sherman Act, Claims**

To survive a motion to dismiss, a party claiming an antitrust conspiracy may not merely plead that an agreement was reached. The party must plead sufficient facts to establish each element and cannot use terms which are conclusory. The party must also allege that the agreement was an unreasonable restraint on competition. *15 U.S.C.S. § 1* outlaws only unreasonable restraints. The factual allegations required to plead that an agreement unreasonably restrains competition depends on whether the agreement is categorized as vertical or horizontal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN10[] Price Fixing & Restraints of Trade, Vertical Restraints

Vertical restraints upon competition are those imposed by persons or firms on a different level of the distribution system than the level of the persons or firms receiving the impact of the restraints, e.g., resale price fixing may involve a manufacturer dictating the price at which a dealer sells a product. On the other hand, horizontal restraints are those imposed within the same distribution level, e.g., by some dealers refusing to sell to other dealers. Horizontal restraints also encompass the situation where dealers conspire to induce the manufacturer to refuse to deal with a particular dealer.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN11[] Cartels & Horizontal Restraints, Price Fixing

A horizontal agreement exists where distributors conspire to induce a manufacturer to refuse to deal with a particular distributor. Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful. Elimination, by joint collaborative action, of discounters from access to the market is a per se violation of the Sherman Act.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN12[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason.

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

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

HN13[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason requires the plaintiff in an antitrust case to prove that a restrictive practice constitutes an unreasonable restraint on competition. Under Florida law, three elements must be alleged under the rule of reason test: 1) that there is a specifically defined market; 2) that the defendants possessed the ability to affect price or output; and 3) that plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in that market.

Counsel: Scott E. Perwin of Kenny Nachwalter et al., Miami, for appellants.

Cristina Alonso and Charles M. Rosenberg of Carlton Fields, P.A., Miami, and Daniel G. Swanson of Gibson Dunn & Crutcher, LLP, Los Angeles, CA, for appellees, International Paint, Ltd. and International Paint, LLC.

A. Rodger Traynor, Jr., Ronald B. Ravikoff and Francisco A. Rodriguez of Akerman Senterfitt, Miami, for appellee, Donovan Marine, Inc.

Charles A. Morehead, III of Moody, Jones, Ingino & Morehead, P.A., Plantation, for appellee, East Coast Marine Distributors, Inc.

Judges: CIKLIN, J. MAY, C.J., and STEVENSON, J., concur.

Opinion by: CIKLIN

Opinion

[*44] CIKLIN, J.

MYD Marine Distributor, Inc. and two affiliated companies[1](collectively referred to as "MYD") appeal the trial court's final order dismissing their antitrust claims with prejudice for failure to state a cause of action. Because we conclude that the amended complaint sufficiently alleges antitrust claims, we reverse.

MYD, as a distributor of marine paint and related products, purchases the paint and other goods it distributes from manufacturers and resells them to yacht builders, boatyards, and other customers who use marine paint in their businesses. Until it was terminated in November 2008, MYD was a distributor of Awlgrip topside yacht paint.[2] The appellees, International Paint Ltd. and International Paint LLC (collectively referred to as "International Paint"), manufacture Awlgrip paint.

In December 2008, MYD filed suit against International Paint and two competing Awlgrip distributors—Donovan Marine, Inc. ("Donovan") and East Coast Marine Distributors, Inc. d/b/a Gold Coast Marine Distributor ("Gold Coast"). In its complaint, MYD asserted claims under the state antitrust laws of Florida, California, and Maryland respectively. After its initial complaint was dismissed for failure to state a cause of action, MYD filed an amended complaint. The defendants again moved to dismiss.

In its amended complaint, **[**3]** MYD alleged that it was the largest distributor of Awlgrip paint in North America and that it consistently sold "its products at significantly lower prices than the prices charged by its competitors." MYD then claimed that several competing distributors of Awlgrip paint (including Donovan and Gold Coast) conspired with one another and with International Paint to "eliminate the **[*45]** competitive threat posed by MYD's discounting and to raise prices to the levels charged by the conspiring distributors."

MYD next described specific instances where the "unlawful conspiracy" had been "either acknowledged or carried out by members of the conspiracy in the presence of witnesses." The paragraph of the amended complaint which is relevant to the defendant distributors in this case read in pertinent part:

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[1] In the appellate briefs, the parties treat these three companies as a single entity; thus, for simplicity, the appellants are collectively **[**2]** referred to in this opinion as the singular "MYD."

[2] In its amended complaint, MYD defines topside yacht paint as "paint and other related coatings used to paint pleasure boats above the water line."

> Michael Sharrow of Donovan and Joel Mains of Gold Coast jointly met with Ken Hickling, then Global Manager of the Awlgrip division of International Paint, at the Fort Lauderdale Boat Show. . . . Mr. Sharrow is a manager of Donovan and Mr. Mains is a principal and owner of Gold Coast. Donovan and Gold Coast are competitors of one another and of MYD. During the meeting, Mr. Mains and Mr. Sharrow vociferously **[**4]** complained that MYD was "ruin[ing] the Awlgrip market" by undercutting their prices on Awlgrip products. . . . During this meeting, Mr. Sharrow and Mr. Mains jointly asked Mr. Hickling either (i) to coerce MYD into raising its Awlgrip prices or (ii) if MYD refused to raise its prices, to terminate MYD as an Awlgrip distributor. Mr. Hickling agreed to do so, thereby forming a three-way agreement among International Paint, Gold Coast and Donovan. When the three-way meeting ended, Mr. Del Monico [(MYD's owner)] approached Mr. Hickling and introduced himself. Mr. Hickling responded by saying: "So you're the fellow that Donovan and Gold Coast say ruined the Awlgrip market." . . . Mr. Hickling then asked Mr. Del Monico to raise MYD's profit margins to at least 25%. Mr. Del Monico stated that Mr. Hickling's request was against U.S. law, to which Mr. Hickling replied: "Well, I'm not an American, am I?"

MYD also alleged that representatives from International Paint had admitted on multiple occasions that it was "under intense pressure from MYD's competitors either to get MYD to raise its prices on Awlgrip products or to terminate MYD as an Awlgrip distributor." These factual allegations included **[**5]** the names of the people who made the comments, those who heard them, and in many instances the dates on which they occurred.

The amended complaint also described a series of actions allegedly taken by International Paint to coerce MYD into raising its prices including: 1) requesting on several occasions that MYD raise its prices to levels charged by other distributors; 2) threatening to delay shipments of orders to MYD; 3) spreading false rumors that MYD was in serious financial difficulty; and 4) shipping defective product to MYD and then falsely telling MYD's customers who bought the defective product that it had informed MYD of the problem, but MYD resold the paint regardless. Ultimately, according to the amended complaint, when these coercive efforts failed, International Paint terminated MYD as an Awlgrip distributor. MYD also alleged statements made by International Paint representatives admitting that MYD's discount pricing was the reason for its termination.

After hearing arguments on the motions, the trial court granted the motions to dismiss MYD's amended complaint. When MYD subsequently advised the trial court that it did not intend to further amend its antitrust claims, the **[**6]** trial court entered a final judgment in favor of International Paint, Donovan, and Gold Coast. This appeal followed.

HN1[] A dismissal for failure to state a cause of action is reviewed de novo. *Wells v. Wells, 24 So. 3d 579, 582 (Fla. 4th DCA* ***[*46]*** *2009)*. ***HN2***[] "A motion to dismiss for failure to state a cause of action admits all well pleaded facts as true, as well as *reasonable* inferences that may arise from those facts." *Id*. (emphasis added) (citation and quotation marks omitted).

MYD sued International Paint, Donovan, and Gold Coast for violations of the Florida Antitrust Act of 1980.[3] *See § 542.15, Fla. Stat.* (2005). ***HN3***[] Pursuant to *section 542.18, Florida Statutes*, "[e]very contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." The Florida Legislature has indicated that its intent is for courts that are construing the Florida Antitrust Act to give "due consideration and great weight . . . to the interpretations of the federal courts relating to comparable federal antitrust statutes." *See § 542.32, Fla. Stat.* (2005). Therefore, we "look to federal cases to elucidate what is an agreement in restraint of trade and what proof constitutes a conspiracy." *Parts Depot Co. v. Fla. Auto Supply, Inc., 669 So. 2d 321, 324 (Fla. 4th DCA 1996)*.

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[3] MYD **[**7]** also sued for violations of California and Maryland antitrust laws. Because those laws are, in relevant part, substantially similar to the Florida ***antitrust law*** and to the equivalent *§ 1* of the federal Sherman Act the analysis in terms of stating a cause of action in a Florida civil court, is the same under any of the three states' laws. *See 15 U.S.C. § 1* ***HN4***[] ("Every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."); *§ 542.18, Fla. Stat.* (2009) ("Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful."); *Cal. Bus. & Prof'l. Code §§ 16720*, *16726* (West 2009); *Md. Code Ann., Com. Law § 11-204(a)* (West 2009) ("A person may not . . . [b]y contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce . . . .").

HN5[] In a distributor-termination case, there must be concerted action ("contract, combination, or conspiracy") between the manufacturer and other distributors to establish an antitrust violation. *See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (discussing requirements for the comparable *§ 1* of the Sherman Act).

In **[**8]** *Monsanto*, the United States Supreme Court explained:

> Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*. Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

Id. (citation omitted). Thus, "[a] manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, standing alone, does not constitute a conspiracy." *Parts Depot, 669 So. 2d at 324*. There must also be "some other evidence of a tacit understanding or agreement." *Id. at 325*.

HN6[] Although *Monsanto* and *Parts Depot* involved the legal standard for analyzing what constitutes a reasonable inference when considering a motion for a directed verdict, the same standard is applicable in evaluating the sufficiency of an antitrust claim where, as may often be the case in distributor-termination cases, the plaintiff's conclusion of concerted action is based on inferences **[**9]** from the alleged facts. *See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* *HN7*[] ("In identifying facts that are suggestive enough to render a *§ 1* conspiracy **[*47]** plausible, we have the benefit of . . . prior rulings . . . .").[4] Accordingly, a pleading which *merely* asserts complaints to the manufacturer by competing dealers followed by termination of a discounter would be insufficient to create a "reasonable inference" of a conspiracy.

In this case, however, MYD has pled much more than just mere complaints followed by termination. MYD alleged an exact place where the conspiracy was formed and the actual representatives from each of the defendants who participated in the agreement. It pled **[**11]** that representatives from Donovan and Gold Coast arranged to meet jointly with a representative from International Paint at a Fort Lauderdale boat show. According to the amended complaint, the representatives "jointly asked" International Paint to force MYD to raise its prices and to terminate MYD as an Awlgrip distributor if MYD refused. MYD also alleged that International Paint agreed to do so, and that immediately after the meeting with the competing distributors, International Paint's representative asked MYD's principal to raise MYD's profit margins to at least 25%. The allegation that International Paint requested that MYD raise its prices immediately after the joint meeting with the competing distributors places International Paint's demand "in a context that raises a suggestion of a preceding agreement." *See Twombly, 550 U.S. at 557*.

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[4] In *Twombly*, the United States Supreme Court addressed the question of what "a plaintiff must plead in order to state a claim under *§ 1* of the Sherman Act." *550 U.S. at 554-55*. The Court concluded that *HN8*[] to state such a claim, the "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id. at 555* (citations and footnote omitted). The Court further explained that the complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made" and "allegations plausibly suggesting (not merely consistent with) agreement." *Id. at 556-57*. The Court then looked to case law and commentary involving other stages **[**10]** of antitrust trials (such as summary judgments and directed verdicts) to determine if the alleged conduct in that case (parallel conduct by competing companies) was sufficient.

While we are not bound by the United States Supreme Court's interpretation of the Federal Rules of Civil Procedure, we have been instructed by our legislature to give "due consideration and great weight . . . to the interpretations of the federal courts" in interpreting Florida's antitrust statutes. *See § 542.32, Fla. Stat.* Furthermore, we note that we have looked to federal cases in the past to guide us in analyzing the sufficiency of Florida antitrust complaints. *See, e.g.*, *Okeelanta Power Ltd. P'ship v. Fla. Power & Light Co., 766 So. 2d 264, 267 (Fla. 4th DCA 2000)*. As such, we believe that Florida courts should look to *Twombly* in determining whether an agreement in violation of the Florida ***Antitrust law*** can be *reasonably* inferred from the alleged facts.

Even if the above facts were insufficient, MYD also alleged an additional fact which when viewed in the light most favorable to it, further supports the allegation that an agreement was reached. MYD alleged that its owner responded to International Paint's request that MYD raise its prices by telling International Paint's representative that the **[**12]** request was against U.S. law. The representative's alleged response was, "Well, I'm not an American, am I?" A reasonable inference from International Paint's response is that International Paint admitted that its conduct was in violation of U.S. ***antitrust law***. Independent action by International Paint, however, would not be illegal. Thus, the response could be reasonably interpreted as an admission that International Paint's request that MYD raise its prices was made pursuant to the alleged agreement with Donovan and Gold Coast.

[*48] ***HN9***[] To survive a motion to dismiss, MYD could not merely plead that an agreement was reached. *See* *Okeelanta Power Ltd. P'ship v. Fla. Power & Light Co., 766 So. 2d 264, 267 (Fla. 4th DCA 2000)* ("[T]he party must plead sufficient facts to establish *each* element and cannot use terms which are conclusory." (emphasis added)). MYD also had to allege that the agreement was an unreasonable restraint on competition. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* ("[T]he Court has repeated time and again that *§ 1* outlaw[s] only unreasonable restraints." (citation and quotation marks omitted)); *Parts Depot, 669 So. 2d at 325*. The factual **[**13]** allegations required to plead that an agreement unreasonably restrains competition depends on whether the agreement is categorized as vertical or horizontal.[5]

HN11[] A horizontal agreement exists where distributors conspire to induce a manufacturer to refuse to deal with a particular distributor. *Parts Depot, 669 So. 2d at 324*. "Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements **[**14]** that are per se unlawful." *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; *see also* *United States v. General Motors Corp., 384 U.S. 127, 145, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)* ("Elimination, by joint collaborative action, of discounters from access to the market is a per se violation of the [Sherman] Act.").

Here, the factual allegations in MYD's amended complaint suggest that Donovan and Gold Coast conspired to induce International Paint to refuse to deal with MYD. MYD further alleged that this concerted action by Donovan and Gold Coast was done to protect themselves from price competition by MYD. Thus, the alleged conduct was a per se violation of the Florida Antitrust Act. *See* *Texaco Inc., 547 U.S. at 5*; *General Motors, 384 U.S. at 145*. As such, MYD was not required to plead any additional facts to show that the alleged agreement between Donovan and Gold Coast would have anticompetitive effects.

MYD also claims that its allegation that International Paint agreed to the demands of Donovan and Gold Coast made it a participant in the horizontal conspiracy, and as such International Paint's conduct was also per se unlawful. We disagree.

In *Leegin*, the United States Supreme Court explained:

> ***HN12***[] A horizontal cartel among competing **[**15]** manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. To the extent *a vertical agreement* setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason.

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[5] In *Parts Depot*, we explained the distinction between vertical and horizontal restraints:

> ***HN10***[] "Vertical" restraints upon competition are those imposed by persons or firms on a different level of the distribution system than the level of the persons or firms receiving the impact of the restraints, e.g., resale price fixing may involve a manufacturer dictating the price at which a dealer sells a product.
>
> On the other hand, "horizontal" restraints are those imposed within the same distribution level, e.g., by some dealers refusing to sell to other dealers. Horizontal restraints also encompass the situation where dealers conspire to induce the manufacturer to refuse to deal with a particular dealer.

669 So. 2d at 324 (citation omitted).

[*49] *551 U.S. at 893* (emphasis added) (internal citation omitted). MYD has alleged that International Paint agreed to set a minimum resale price (gross profit margins of at least 25% which is a 33% markup) in order to help the horizontal cartel to increase average retail prices of Awlgrip paint. Thus, according to *Leegin*, International Paint's participation created a vertical agreement between International Paint and the cartel and should be analyzed under the rule of reason.

HN13[] The rule of reason "requires the plaintiff to prove that a restrictive practice constitutes an unreasonable restraint on competition." *Parts Depot, 669 So. 2d at 325*. Under Florida law, "[t]hree elements must be alleged . . . under the rule of reason test: 1) that there is a specifically defined market; 2) that the defendants possessed the ability to affect price or output; and 3) that plaintiff's **[**16]** exclusion from the market did affect or was intended to affect the price or supply of goods in that market." *Id. at 326*.

MYD alleged the three required elements in its amended complaint. According to the amended complaint, the relevant product market was topside yacht paint, which was defined as "paint and other related coatings used to paint pleasure boats above the water line." MYD further alleged that "[t]opside yacht paint is not reasonably interchangeable with other types of marine paint, such as paint used on commercial vessels (e.g., tugboats and barges) or bottom paint (also known as anti-fouling paint) used on pleasure boats." The amended complaint also stated that the relevant geographic markets depended on the size of the customers. For large customers such as yacht manufacturers, the relevant geographic market was the entire United States. For smaller accounts, the relevant geographic market was regional with the relevant regional markets relevant to this case being South Florida, the mid-Atlantic, Southern California, Northern California, and the Pacific Northwest. Thus, MYD alleged "enough information in [its] complaint to [reasonably] suggest the contours of the relevant **[**17]** geographic and product markets." *See* *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1336 (11th Cir. 2010)*.

MYD also alleged that International Paint possessed the ability to affect price or output in this specifically defined market. According to the amended complaint, International Paint had "market power?the ability to raise prices above competitive levels without losing sufficient sales to make the price increase unprofitable—in each of the relevant markets." MYD supported its contention with the following factual allegations: (1) Awlgrip paint has a market share above 80% in the topside yacht paint market; and (2) International Paint "earns supracompetitive margins on Awlgrip paint."

To show that MYD's exclusion from the relevant market did affect or was intended to affect the price or supply of goods in that market, MYD alleged that it was the largest distributor of Awlgrip paint in North America and that it consistently sold its products "at significantly lower prices than the prices charged by [its] competitors." Thus, MYD's termination as an Awlgrip distributor resulted in the removal of a significant discounter from the market. MYD also alleged that Awlgrip had a sufficiently **[**18]** dominant position that customers continued to buy Awlgrip at higher prices after MYD was terminated rather than substituting other brands of topside yacht paint.

Thus, MYD's amended complaint contains sufficient factual allegations to properly plead that the vertical agreement between International Paint and the competing distributors was an unreasonable **[*50]** restraint on competition. Therefore, the trial court erred in granting International Paint's motion to dismiss MYD's antitrust claims for failure to state a cause of action.

The other two points on appeal raised by MYD have been carefully considered and found to be either without merit or not yet ripe for appellate review. Because MYD's amended complaint contains sufficient factual allegations to properly plead antitrust claims, we reverse the trial court's orders granting the motions to dismiss the amended complaint against International Paint, Donovan, and Gold Coast.

Reversed and remanded for further proceedings consistent with this opinion.

MAY, C.J., and STEVENSON, J., concur.

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Aguadilla Paint Center, Inc.; CB Gasoline Service Group; Micada de Puerto Rico, Inc., Recurridos v. Esso Standard Oil, Co. (Puerto Rico), Peticionario

Tribunal Supremo De Puerto Rico

15 de diciembre de 2011

CC-2010-1135

Reportero
183 D.P.R. 901 *; 2011 PR Sup. LEXIS 190 **; 2011 TSPR 194

Aguadilla Paint Center, Inc.; CB Gasoline Service Group; Micada de Puerto Rico, Inc., Recurridos v. Esso Standard Oil, Co. (Puerto Rico), Peticionario

Historia Previa: [1]** Certiorari. Tribunal de Apelaciones: Región Judicial de Bayamón, Panel VI. Materia: Ley de Monopolios ("Ley 77"); Ley de Gasolina ("Ley 3"); Daños y Perjuicios.

Tesis de LexisNexis ®

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN1[] **Gasoline Fuels, Gasoline Dealers & Distributors**

Véase *23 L.P.R.A. § 1102*.

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN2[] **Gasoline Fuels, Gasoline Dealers & Distributors**

Véase *23 L.P.R.A. § 1104*.

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN3[] **Gasoline Fuels, Gasoline Dealers & Distributors**

El Art. 5 de la Ley de Gasolina, *23 L.P.R.A. § 1105*, dispone para que todo productor o refinador de petróleo o distribuidor-mayorista de productos de petróleo que supla gasolina o combustibles especiales a detallistas, le aplique uniformemente a todos los vendedores al detal a quienes supla, de la renta de equipos y rótulos, cuando de una forma directa o indirecta éstos sean provistos a dichos detallistas por ese productor, refinador o distribuidor-mayorista.

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN4[] **Gasoline Fuels, Gasoline Dealers & Distributors**

El Art. 6 de la Ley de Gasolina, *23 L.P.R.A. § 1106*, ordena la distribución uniforme de combustible en periodos de escasez o disminución en el abasto o disponibilidad de gasolina o de combustibles especiales. El Art. 7 de la mencionada Ley prohíbe que un vendedor al detal de combustible, a sabiendas, solicite o induzca la concesión, o rebaja en precios o en la renta de equipos y rótulos, en violación a los Arts. 4 y 5 de la Ley de Gasolina, *23 L.P.R.A. § 1107*.

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN5[] **Gasoline Fuels, Gasoline Dealers & Distributors**

Véase *23 L.P.R.A. § 1104a*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN6[] **Regulated Practices, Trade Practices & Unfair Competition**

Véase *23 L.P.R.A. § 1108*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

Véase *23 L.P.R.A. § 1101(j)*.

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN8[] **Gasoline Fuels, Gasoline Dealers & Distributors**

La versión del Art. 8 de la Ley de Gasolina, *23 L.P.R.A. § 1108*, que surgió como resultado de la enmienda realizada por la Ley Núm. 157 de 21 de agosto de 1996 fue el producto de un error probablemente tipográfico, que no reflejaba la intención o voluntad del legislador. La intención de la Ley Núm. 157 era incluir los Arts. 4, 4A, 5 y 5A en la versión del Art. 8 de la Ley de Gasolina, y su exclusión responde a un mero error administrativo ("clerical error").

Governments > Legislation > Interpretation

HN9[] **Legislation, Interpretation**

Si una palabra, frase o disposición ha sido aprobada por inadvertencia o error, especialmente si es contraria al resto de la ley o limitaría la efectividad de ésta, se puede eliminar. Bajo las mismas circunstancias se puede añadir una frase o palabras, para que se pueda cumplir con la intención legislativa.

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN10[] **Gasoline Fuels, Gasoline Dealers & Distributors**

Véase *23 L.P.R.A. § 1107*.

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

HN11[] **Private Actions, State Regulation**

Véase *10 L.P.R.A. § 259(a)*.

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

HN12[] **Private Actions, State Regulation**

Véase *10 L.P.R.A. § 259(c)*.

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

HN13[] **Private Actions, State Regulation**

Es al Departamento de Justicia a través de la O.A.M. al que, conforme al mandato legislativo, corresponde fiscalizar directamente las infracciones a la Ley de Monopolios, específicamente en lo concerniente a as violaciones a las disposiciones de prácticas injustas de comercio, incluyendo toda práctica o acto injusto o engañoso. Además, en virtud del Art. 3 de la Ley de Monopolios, *10 L.P.R.A. § 259*, es al D.A.Co. al que corresponde la jurisdicción primaria exclusiva en toda causa de acción antimonopolística emprendida por la O.A.M., cuya causa de acción esté basada en alguna práctica o acto injusto o engañoso.

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

HN14[] **Private Actions, State Regulation**

Véase *10 L.P.R.A. § 268(a)*.

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

HN15[] **Private Actions, State Regulation**

El Art. 12(a) de la Ley de Monopolios, *10 L.P.R.A. § 268(a)*, establece el llamado remedio de triple daño para toda persona que sufra daños como consecuencia de actos antimonopolísticos. La acción judicial para recobrar tales daños deberá iniciarse dentro del término de cuatro años, contados a partir del nacimiento de la causa de acción. Ahora bien, es claro del texto de este inciso (a) del Art. 12 de la Ley de Monopolios que, sin distinción alguna, éste exceptúa de su ámbito jurisdiccional toda causa de acción que se pretenda o se tenga que iniciar al amparo de la *§ 259* de la propia Ley de Monopolios, *10 L.P.R.A. § 259*. O sea, toda causa de acción por prácticas o actos injustos o engañosos.

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

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN16[] **Private Actions, State Regulation**

El Art. 8 de la Ley de Gasolina, *23 L.P.R.A. § 1108*, establece como una "práctica o acto injusto o engañoso" cualquier violación al Art. 4A de la Ley de Gasolina y señala que tal violación "estará sujeta a las disposiciones de las *secs. 257 et seq.* del Título 10", o sea, a la sección 257 "y las siguientes" de la Ley de Monopolios, *10 L.P.R.A. § 257, et seq.*

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

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN17[] **Private Actions, State Regulation**

El Art. 3(a) de la Ley de Monopolios, *10 L.P.R.A. § 259(a)*, declara como ilegal "las prácticas o actos injustos o engañosos", que es precisamente la conducta descrita y remitida ante el ámbito de esa ley por el Art. 8 de la Ley de Gasolina, *23 L.P.R.A. § 1108*.

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

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN18[] **Private Actions, State Regulation**

La conducta prohibida por el Art. 4A de la Ley de Gasolina, *23 L.P.R.A. § 1104a*, se encuentra bajo el ámbito jurisdiccional del Art. 3 de la Ley de Monopolios, *10 L.P.R.A. § 259*, y el Art. 12(a) de la Ley de Monopolios, *10 L.P.R.A. § 268(a)* exceptúa expresamente de su ámbito jurisdiccional toda acción que se presente al amparo de la sección 259. Por lo tanto, cualquier persona privada que sufra daños por actuaciones prohibidas por la Ley de Monopolios cuenta con un remedio de triple daño al amparo del Art. 12(a) de la Ley de Monopolios, *10 L.P.R.A. § 268(a)*, excepto que su causa de acción se fundamente en el Art. 3 de la Ley de Monopolios. Siendo así, evidentemente toda causa de acción al amparo del Art. 4A de la Ley de Gasolina, *23 L.P.R.A. § 1104a*, se encuentra excluida de la posibilidad del remedio de triple daño que provee el Art. 12(a) de la Ley de Monopolios, *10 L.P.R.A. § 268(a)*.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

HN19[] **Justiciability, Case & Controversy Requirements**

Una parte demandante posee legitimación activa si cumple con los siguientes requisitos: (1) ha sufrido un daño claro y palpable; (2) el referido daño es real, inmediato y preciso, y no abstracto o hipotético; (3) existe conexión entre el daño sufrido y la causa de acción ejercitada; y (4) la causa de acción surge bajo el palio de la Constitución o de una ley.

Administrative Law > Separation of Powers > Jurisdiction

HN20[] **Separation of Powers, Jurisdiction**

Si un estatuto le confiere la jurisdicción al organismo administrativo se trata de una jurisdicción estatutaria exclusiva.

Administrative Law > Separation of Powers > Jurisdiction

HN21[] **Separation of Powers, Jurisdiction**

El concepto jurisdicción estatutaria o exclusiva guarda relación con la jurisdicción primaria concurrente pero es distinto en cuanto a su alcance y naturaleza. En la jurisdicción exclusiva se trata de situaciones en que no aplica la doctrina de jurisdicción primaria concurrente porque la propia ley aclara que esta última no existe. Es decir, el propio estatuto establece una jurisdicción exclusiva. Cuando un estatuto le confiere de manera expresa la jurisdicción a un órgano administrativo sobre determinado tipo de asuntos, los tribunales no tendrán autoridad para dilucidar el caso en primera instancia. Claro está, la jurisdicción primaria exclusiva no soslaya la revisión judicial posterior de la decisión del organismo.

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

HN22[] **Private Actions, State Regulation**

Con excepción de los remedios autorizados por *10 L.P.R.A. § 269* (injuctions), el Art. 3 de la Ley de Monopolios, *10 L.P.R.A. § 259*, le confiere jurisdicción primaria exclusiva al D.A.Co. en la dilucidación de cualquier violación al inciso (a) del propio artículo, esto es, la utilización de métodos injustos de competencia y prácticas o actos injustos o engañosos en los negocios o el comercio.

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN23[] **Gasoline Fuels, Gasoline Dealers & Distributors**

El Art. 7 de la Ley de Gasolina, *23 L.P.R.A. § 1107*, provee para una causa de acción en contra de los detallistas y no a favor de éstos.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN24[] **Effect & Operation, Retrospective Operation**

Véase *31 L.P.R.A. § 3*.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN25[] **Effect & Operation, Retrospective Operation**

Es un principio de derecho español, que los estatutos que regulan la jurisdicción y el procedimiento, son de interés público, y empiezan a regir retroactivamente, o más bien, que no son consideradas como retroactivas en tal sentido, que caigan bajo las restricciones del Art. 3 del Código Civil.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN26[] **Effect & Operation, Retrospective Operation**

La regla general de que los estatutos sólo se interpretarán prospectivamente (prospectively) y no retrospectiva o retroactivamente, de ordinario no es aplicable a estatutos que afectan el remedio o procedimiento, o, conforme se dice de otro modo, esa regla general está sujeta a una excepción cuando se trata de un estatuto relativo al remedio o procedimiento.

Abogados: Abogados de la Parte Peticionaria: Lcdo. Salvador Antonetti Stutts, Lcdo. Carlos Valldejully Sastre, Lcdo. Carlos J. Sagardía Abreu, Lcda. Carla Framil Ferrán, Lcdo. Pedro A. Delgado Hernández.

Abogado de la Parte Recurrida: Lcdo. Juan A. Ramos Díaz.

Oficina de la Procuradora General: Lcda. Amir Cristina Nieves Villegas, Procuradora General Auxiliar.

Jueces: Panel integrado por su presidenta, la Juez García García, la Jueza Varona Méndez y la Juez Gómez Córdova. Opinión del Tribunal emitida por el Juez Asociado señor Kolthoff Caraballo. Opinión Disidente emitida por el Juez Presidente señor Hernández Denton a la cual se une la Juez Asociada señora Rodríguez Rodríguez.

Opinion Por: Erick V. Kolthoff Caraballo

Opinion

[*908] Opinión del Tribunal emitida por el Juez Asociado señor Kolthoff Caraballo

San Juan, Puerto Rico, a 15 de diciembre de 2011.

En esta ocasión la controversia que nos ocupa es relativamente sencilla: ?tiene legitimación activa una persona privada, detallista de gasolina, para presentar una causa de acción ante el Tribunal de Primera Instancia contra **[**2]** un distribuidor-mayorista de ese producto por alegadas violaciones a las disposiciones relativas al deber de desvinculación operacional que establece el Art. 4A de la Ley de Control de Productores, Refinadores y Distribuidores-Mayoristas de Gasolina?[1] Al atender tal interrogante, interpretamos por primera vez de forma conjunta dos estatutos que regulan la competencia en el mercado de gasolina, a saber: la Ley de Control de Productores, Refinadores y Distribuidores-Mayoristas de Gasolina, Ley Núm. 3 de 21 de marzo de 1978, según enmendada, *23 L.P.R.A. sec. 1101 et seq*. (Ley de Gasolina), y la Ley de Monopolios **[*909]** y Restricción del Comercio, Ley Núm. 77 de 25 de junio de 1964, según enmendada, *10 L.P.R.A sec. 257 et seq*. (Ley de Monopolios).

I

[1] ***23 L.P.R.A. sec. 1104a***.

La peticionaria Esso Standard Oil Company (la peticionaria o Esso) es una corporación dedicada a la importación, distribución y venta de gasolina al por mayor, o sea, un distribuidor-mayorista.[2] Por su parte, las recurridas Aguadilla Paint Center, Inc., y CB Gasoline Service Group, Inc. (las recurridas) son detallistas,[3] o sea, vendedores al detal de gasolina, en este caso gasolina importada, distribuida y vendida por la peticionaria **[**3]** Esso (detallistas de marca).

Para agosto de 2004, las recurridas presentaron una demanda ante el tribunal de instancia en la que imputaron a la peticionaria Esso, *inter alia*, incurrir en la práctica de vinculación operacional, en contravención al Art. 4A de la Ley de Gasolina, *supra*, y al Art. 7 de la Ley de Monopolios.[4] Además, solicitaron resarcimiento en daños y perjuicios, según el Art. 1802 del Código Civil, *31 L.P.R.A. sec. 5141*.

Luego de múltiples incidentes procesales,[5] el 12 de marzo de 2010 Esso solicitó la desestimación de la demanda **[*910]** al amparo de la Regla 10.2 de Procedimiento Civil.[6] En su moción, Esso argumentó básicamente que la causa de acción de las recurridas, fundada en la obligación de "desvinculación operacional" que establece el Art. 4A de la Ley de Gasolina, *supra*, debía ser desestimada porque el Art. 8 de la Ley de Gasolina, *23 L.P.R.A. sec. 1108*, establece que una violación al Art. 4A "constituirá una práctica o acto injusto o engañoso y estará sujeto a las disposiciones de las *secs. 257 et seq.*" de la Ley de Monopolios, *supra*.

El tribunal de instancia declaró no ha lugar la solicitud de desestimación de Esso, al concluir "que un ente privado como la demandante puede presentar una acción al amparo del Artículo 7 de la [Ley de Gasolina, *23 L.P.R.A. Sec. 1107*] sobre competencia en el mercado de gasolina, ante el Tribunal de Primera Instancia".[7] Inconforme, Esso recurrió ante el Tribunal de Apelaciones mediante recurso de *certiorari*. Dicho foro concluyó que, luego de un análisis ponderado del **[**5]** recurso presentado y los documentos que obraban en el expediente, Esso no lo había colocado en condiciones de conceder el remedio solicitado y que el dictamen recurrido no ameritaba su intervención en esa etapa procesal.

Ante tal dictamen, Esso acudió ante esta Curia mediante recurso de *certiorari* esbozando los siguientes señalamientos de error:

> Erró el Tribunal de Apelaciones al no expedir el auto solicitado y reconocer que el Art. 12(a) de la Ley de Monopolios excluye demandas privadas por alegada vinculación operacional bajo el Art. 4A de la Ley de Gasolina.
>
> Erró el Tribunal de Apelaciones al no expedir el auto solicitado y no ordenar la desestimación de la reclamación bajo el Art. 4A de la Ley de Gasolina, ya que los demandantes no tienen legitimación activa para incoarla y, por lo tanto, el Tribunal de Primera Instancia carece de jurisdicción sobre la materia para atenderla.

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[2] Véase Art. 1(f) de la Ley de Gasolina, *supra*, ***23 L.P.R.A. sec. 1101(f)***.

[3] Véase Art. 1(g) de la Ley de Gasolina, *supra*, ***23 L.P.R.A. sec. 1101(g)***.

[4] ***10 L.P.R.A. sec. 263***.

[5] **El [**4] 1 de octubre de 2004, Esso solicitó por primera vez la desestimación de la demanda, basado en que el Art. 4 de la Ley de Gasolina desplazaba la aplicación del Art. 7 de la Ley de Monopolios (caso DAC2005-0343). Sin embargo, el Tribunal de Primera Instancia denegó la solicitud de desestimación, por lo que Esso recurrió ante el Tribunal de Apelaciones (caso KLCE2005-00564). El Tribunal de Apelaciones denegó la expedición del auto mediante "Resolución" de 26 de mayo de 2005. Entonces, Esso recurrió ante este Tribunal mediante *certiorari*, el cual denegamos el 10 de noviembre de 2005. Tal determinación advino final y firme, continuando así los procedimientos ante el Tribunal de Primera Instancia**.

[6] 32 L.P.R.A. Ap. III, R. 10.2.

[7] Véase Apéndice de la Petición de *certiorari*, pág. 179.

> **[*911]** Erró el Tribunal de Apelaciones al determinar que Esso no lo colocó en "condiciones de conceder el remedio solicitado", ya que se cumplen los criterios para la expedición del auto contenidos en la Regla 40 del Reglamento del Tribunal de Apelaciones.

Expedido **[**6]** el *certiorari*, paralizamos los procedimientos y ordenamos a las partes presentar sus correspondientes alegatos.[8] Con el beneficio de la posición de todas las partes, resolvemos.

II

A. *Ley de Control de Productores, Refinadores y Distribuidores-Mayoristas de Gasolina*

Según surge de su Exposición de Motivos, la aprobación de la Ley de Control de Productores, Refinadores y Distribuidores-Mayoristas de Gasolina, Ley Núm. 3 de 21 de marzo de 1978, según enmendada, *23 L.P.R.A. sec. 1101 et seq*., tuvo como propósito -entre otros- combatir el problema "que representa el que el control de los abastos de productos energéticos y, en especial, la gasolina y otros combustibles derivados del petróleo y del gas natural, continúe concentrándose en las manos de unos pocos que dominan todos los aspectos relacionados con la producción, refinación y mercadeo de estos productos".[9] De manera que el legislador buscó eliminar las ventajas competitivas existentes en el mercado de la gasolina o combustibles especiales de motor, **[**7]** así como disponer sobre la supervisión de ese proceso y establecer medidas para el cumplimiento de los propósitos perseguidos por dicho estatuto. A tenor **[*912]** con este fin, el legislador tipificó delitos y fijó penalidades a los infractores del estatuto.

De esta manera, la Asamblea Legislativa determinó que, ante la falta de uniformidad competitiva, era necesario instituir salvaguardas minuciosas que impidieran las actuaciones de las compañías petroleras y distribuidoras de productos energéticos dirigidas a monopolizar los puntos de distribución pública de gasolina.[10] Además, la Ley de Gasolina persigue proteger la industria de la venta de combustible al detal de toda práctica discriminatoria que pretenda eliminar al detallista individual de gasolina de la competencia del mercado, así como también de aquellas prácticas discriminatorias y de control sobre la estructura de precios dirigidas a favorecer a unos detallistas en perjuicio de otros y del consumidor.[11]

Por otro lado, apenas unos meses después de aprobada la Ley de Gasolina, la Legislatura aprobó -a manera de *addendum* **[**8]** a esta última- la Ley Núm. 73 de 23 de junio de 1978, según enmendada, *23 L.P.R.A. sec. 1131 et seq*. (Ley Núm. 73), dirigida a la "Reglamentación y Control de la Industria de la Gasolina". Con la aprobación de la Ley Núm. 73 se declaró "la industria de la gasolina en todas sus facetas como una revestida de interés público".[12] Al así hacerlo se reconoció que la industria de la gasolina constituye un elemento fundamental para la seguridad y el bienestar del pueblo de Puerto Rico. Esto debido a que de la disponibilidad de ese producto dependía en gran medida en aquel entonces -y evidentemente continúa siendo así en la actualidad- el normal funcionamiento de nuestra economía y el continuo desarrollo de las actividades cotidianas del País.[13]

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[8] También ordenamos a la Procuradora General de Puerto Rico que compareciera y expresara su posición sobre la controversia, en carácter de A*micus Curiae*; la Procuradora General así lo hizo.

[9] Véase Exposición de Motivos de la Ley de Gasolina, *supra*.

[10] Véase Exposición de Motivos de la Ley de Gasolina, *supra*.

[11] Íd.

[12] ***23 L.P.R.A. sec. 1131***.

[13] Véase la Exposición de Motivos de la Ley de Reglamentación y Control de la Industria de la Gasolina, Ley Núm. 73 de 23 de junio de 1978, según enmendada, ***23 L.P.R.A. sec. 1131 et seq***. (Ley Núm. 73).

[*913] Cónsono con la Ley de Gasolina, el propósito de la Ley Núm. 73 es regular de manera efectiva ciertos aspectos de la industria de la gasolina y así asegurar que los intereses del pueblo de Puerto Rico estén adecuadamente protegidos **[**9]** de actividades perjudiciales que tengan lugar en cualquiera de los distintos niveles operacionales de esa industria.[14] Al así actuar, el legislador señaló que es al Gobierno al que 1e compete asegurar que exista una situación estable dentro de toda actividad que afecte el bienestar general de la ciudadanía, así como asegurar el buen orden de la comunidad y la protección de los mejores intereses del sistema económico y gubernamental.[15]

Con el fin de cumplir con sus propósitos, la Ley Núm. 73 estableció ciertas obligaciones y prohibiciones que se detallan en su Art. 3.[16] Entre ellas y a manera de ejemplo, se prohíbe que en las relaciones entre distribuidores-mayoristas y detallistas existan simultáneamente contratos de arrendamiento y subarrendamiento (*lease and lease-back*), cuando dicha relación tenga el efecto o el propósito de cancelar la obligación del pago entre las partes o de restringir irrazonablemente el derecho a la libre contratación o a la disposición de la propiedad.[17] Además, la Ley Núm. 73 estableció la obligación a todo distribuidor-mayorista de presentar **[**10]** en la Oficina de Asuntos Monopolísticos (O.A.M.)[18] una copia legible de todo contrato en el que se establezca una relación comercial con un detallista, dentro de los diez días siguientes a su formalización, así como toda enmienda o modificación subsiguiente a éste.

[*914] Conjuntamente, y para asegurar el cumplimiento de sus objetivos y propósitos, la Ley Núm. 73 facultó a varias agencias gubernamentales y les impuso la responsabilidad de realizar diversas funciones. Entre esas agencias se encuentran el Departamento de Comercio,[19] la Comisión de Servicio Público, la Junta de Planificación, la Administración de Reglamentos y Permisos y el Departamento de Asuntos del Consumidor (D.A.Co.).[20]

Finalmente, es menester considerar lo que establece el Art. 5 de la Ley Núm. 73 con relación a la Ley de Monopolios, *supra*:

> ***§ 1134* [**11] Aplicación de la Ley de Monopolios**
> Nada de lo aquí dispuesto o promulgado por reglamento o de otra forma, conforme a las disposiciones de las *secs. 1131* a 1135 de este título, será interpretado como que exceptúa de o confiere inmunidad en cuanto a la aplicabilidad de las disposiciones de las *secs. 257* a 274 del Título 10.[21]

En resumen, es evidente que desde sus inicios tanto la Ley de Gasolina como su *addendum*, la Ley Núm. 73, dispusieron no sólo para la protección de la industria de venta de combustible al detal de toda práctica discriminatoria en perjuicio de los mejores intereses del pueblo de Puerto Rico, sino que reconocieron expresamente la injerencia de la Ley de Monopolios, *supra*, en tal proceso. Así, ambas leyes dispusieron para que la actuación del Departamento de Justicia de Puerto Rico, a través de su O.A.M., fuera una cardinal en el cumplimiento de sus disposiciones fiscalizadoras. Además, el legislador dispuso para que otras agencias gubernamentales, tales como el D.A.Co., tuvieran también participación.

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14 Véase la Exposición de Motivos de la Ley Núm. 73, *supra*.

15 Véase la Exposición de Motivos de la Ley Núm. 73, *supra*.

16 ***23 L.P.R.A. sec. 1131***.

17 ***23 L.P.R.A. sec. 1133(a)***.

18 Como detallaremos más adelante, la Oficina de Asuntos Monopolísticos (O.A.M.) es una entidad adscrita al Departamento de Justicia, con facultades para la administración de la legislación sobre prácticas monopolísticas, así como para la fiscalización de éstas.

19 Actualmente Departamento de Desarrollo Económico y Comercio.

20 ***23 L.P.R.A. secs. 1133(c)-1133(h)***.

21 ***23 L.P.R.A. sec. 1134***.

A tono con todo lo anterior, el Art. 2(a) de la Ley de Gasolina, *supra*, *23 L.P.R.A. sec. 1102*, establece que:

> **[*915]** ***HN1***[] ... ningún productor, refinador o distribuidor-mayorista **[**12]** adquirirá o establecerá, abrirá, operará o recobrará para operar estación alguna de servicio de venta al detal de gasolina para ser operada con personal de su propia compañía o empresa subsidiaria, agente, agente por comisión, o bajo contrato con alguna persona natural o jurídica, que opere o administre dicha estación de servicio de venta al detal mediante convenio o arreglo remunerado con dicho productor, refinador o distribuidor-mayorista. La estación de servicio de venta de gasolina sólo podrá ser operada por un detallista.

Asimismo, el Art. 4 de la Ley de Gasolina, *supra*, *23 L.P.R.A. sec. 1104*, establece que:

> ***HN2***[] [t]odo productor o refinador de petróleo o distribuidor-mayorista de productos de petróleo que supla gasolina y/o combustibles especiales a estaciones de servicio para la venta al detal de dichos productos estará obligado a proveer uniformemente a todos los detallistas de venta de gasolina y/o combustibles especiales a quienes supla, todo descuento, deducción, disminución o rebaja en precios que conceda de forma directa o indirecta.[22]

Ahora bien, relacionado directamente a la controversia que nos ocupa, analizamos el Art. 4A de la Ley de Gasolina, *supra*, el cual dispone lo siguiente:

> ***§ 1104a*** **Desvinculación operacional**
>
> ***HN5***[] Ningún refinador, productor de petróleo o distribuidor-mayorista podrá, mediante convenio, arreglo, contrato, esquema corporativo operacional, con cualquier detallista y/o persona natural o jurídica, **[**14]** o de cualquier otra forma operar directamente una estación de servicio de venta al detal de gasolina **[*916]** de forma que impida su completa desvinculación operacional. Ningún refinador, productor de petróleo o distribuidor-mayorista podrá, mediante convenio, arreglo, contrato, esquema corporativa [sic] operacional, con cualquier detallista y/o persona natural o jurídica, o de cualquier otra forma imponer, requerir, fijar o limitar directamente el margen de ganancia y/o el precio de venta al detal de la gasolina y/o combustibles especiales en la estación de servicio de venta al detal.

El Art. 4A de la Ley de Gasolina, *supra*, es el resultado de una enmienda que se hiciera a este estatuto mediante la Ley Núm. 157 de 21 de agosto de 1996 y otra enmienda al propio artículo -que añade la segunda oración- mediante la aprobación de la Ley Núm. 74-2005. El artículo establece la "desvinculación operacional" o, lo que es lo mismo, prohíbe la llamada "vinculación operacional" de los mayoristas de gasolina con las estaciones de venta a1 detal. La Ley Núm. 157 también enmendó la Ley de Gasolina para establecer que "desvinculación operacional" es el cese por parte de un refinador, productor de petróleo o **[**15]** distribuidor-mayorista "de participar en forma directa en la operación o actividades de intercambio comercial de la venta al detal de gasolina y combustibles especiales en 1as estaciones de servicio de venta al detal".[23]

De otra parte, y cardinal a la controversia que nos ocupa, debemos considerar también el Art. 8 de la Ley de Gasolina, el cual dispone lo siguiente:

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[22] Por su parte, ***HN3***[] el Art. 5 de la Ley de Gasolina, *supra*, ***23 L.P.R.A. sec. 1105***, dispone para que todo productor o refinador de petróleo o distribuidor-mayorista **[**13]** de productos de petróleo que supla gasolina o combustibles especiales a detallistas, le aplique uniformemente a todos los vendedores al detal a quienes supla, de la renta de equipos y rótulos, cuando de una forma directa o indirecta éstos sean provistos a dichos detallistas por ese productor, refinador o distribuidor-mayorista.

Mientras, ***HN4***[] el Art. 6 de la Ley de Gasolina, *supra*, ***23 L.P.R.A., sec. 1106***, ordena la distribución uniforme de combustible en periodos de escasez o disminución en el abasto o disponibilidad de gasolina o de combustibles especiales. El Art. 7 de la mencionada Ley prohíbe que un vendedor al detal de combustible, a sabiendas, solicite o induzca la concesión, o rebaja en precios o en la renta de equipos y rótulos, en violación a los Arts. 4 y 5 de la Ley de Gasolina, ***23 L.P.R.A. sec. 1107***.

[23] ***23 L.P.R.A. sec. 1101(j)***.

> ***§ 1108*** **Violación de competencia justa**
>
> *HN6*[] Cualquier violación a las *secs. 1102*, *1102a*, *1104*, ***1104a***, 1105 y 1105a de este título **constituirá una práctica o acto injusto [o] engañoso y estará sujeto a las disposiciones de las *secs. 257 et seq.* del Título 10**.[24] (Énfasis suplido.)

El Art. 8 de la Ley de Gasolina, *supra*, está dirigido a dos fines íntimamente ligados. En primer lugar, instaurar **[*917]** como "práctica o acto injusto o engañoso" toda violación a los Arts. 2, 2A, 4, **4A**, 5 y 5A de la Ley de Gasolina. En segundo lugar, **establecer que cualquier violación a los artículos mencionados estará sujeta a lo dispuesto en la Ley de Monopolios**, *supra*. Complementando esta disposición, el Art. 10 de la Ley de Gasolina dispone que "[e]l cumplimiento de los propósitos y las disposiciones de las **[**16]** *secs. 1101* a 1110 de [la Ley de Gasolina] será responsabilidad del Secretario de Justicia, por conducto de la Oficina de Asuntos Monopolísticos de dicho Departamento".[25]

En su versión original, el Art. 8 de la Ley de Gasolina, *supra*, leía de la siguiente manera:

> Cualquier violación a los Arts. 4, 5, 6 y 7 constituirá una práctica o acto injusto o engañoso y estará sujeto a las disposiciones del Artículo 3 de la Ley Núm. 77 de 25 de junio de 1964.[26]

Nótese que este artículo originalmente hacía referencia a violaciones al Art. 4 de la Ley de Gasolina, *supra*, el cual establece la obligación de todo productor o refinador de petróleo o distribuidor-mayorista de productos de petróleo de proveer uniformidad en todo descuento, deducción, disminución o rebaja en precios, a los detallistas; violaciones al Art. 5, el cual establece la obligación de todo productor o refinador de petróleo o distribuidor-mayorista de productos de petróleo de proveer uniformidad en la renta de equipos y rótulos a los detallistas; y violaciones al Art. 6, el cual establece la obligación de todo productor o refinador de petróleo o distribuidor-mayorista **[**17]** de productos de petróleo de instaurar un prorrateo indiscriminado y una distribución uniforme entre todos los detallistas a quienes supla gasolina para la venta, durante tiempos de escasez, o disminución en el abasto o disponibilidad de gasolina o de combustibles especiales. Por otro lado, el Art. 8 en su versión original también hacía referencia a violaciones al Art. 7, el **[*918]** cual establece una prohibición al detallista de solicitar o inducir la concesión o rebaja en precios en la renta de equipos y rótulos. Como puede percibirse, cada disposición a la cual el Art. 8 en su versión original hacía referencia -Arts. 4 al 7- contenía una prohibición cuya violación, constituía "una práctica o acto injusto o engañoso".

Ahora bien, desde su redacción original el Art. 8 de la Ley de Gasolina, *supra*, ha sufrido dos enmiendas. La primera de ellas mediante la aprobación de la Ley Núm. 157 de 21 de agosto de 1996 (Ley Núm. 157), la cual en su Exposición de Motivos señalaba lo siguiente (haciendo referencia a la Ley Núm. 3 de 1978, Ley de Gasolina):

> En el 1978, la Asamblea Legislativa aprobó legislación dirigida **a proteger a los detallistas de gasolina de posibles prácticas predadoras de parte de compañías [**18] mayoristas distribuidora de gasolina**. Una de esas leyes, la Ley Núm. 3... dispuso que **ninguna compañía mayorista podía operar directamente estaciones de gasolina**, sujeto a determinadas excepciones. **La responsabilidad para vigilar por el cumplimiento de esta ley fue asignada al Secretario de Justicia a través de su Oficina de Asuntos Monopolísticos**. (Énfasis suplido.)[27]

Como puede verse, en la Exposición de Motivos de la Ley Núm. 157, la Asamblea Legislativa mencionó la Ley de Gasolina entre aquellas cuya intención es "proteger a los detallistas de gasolina de posibles **prácticas predadoras de parte de compañías mayoristas distribuidoras de gasolina**". (Énfasis suplido.)[28] Además, señaló que la Ley

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[24] ***23 L.P.R.A. sec. 1108***.

[25] ***23 L.P.R.A. sec. 1110***.

[26] Art. 8 de la Ley Núm. 3 de 25 de marzo de 1978.

[27] Véase la Exposición de Motivos de la Ley Núm. 157 de 21 de agosto de 1996 (Ley Núm. 157).

[28] Exposición de Motivos de la Ley Núm. 157, *supra*.

de Gasolina "dispuso que ninguna compañía mayorista podía operar directamente estaciones de gasolina, sujeto a determinadas excepciones".[29] De manera que la Ley Núm. 157, en su Exposición de Motivos reconoció como una práctica depredadora, esto es, dañina a los detallistas y prohibida por la Ley de Gasolina, aquella en la cual el mayorista **[*919]** operaba directamente una estación de gasolina. Señalaba, además, **[**19]** que la fiscalización de esa prohibición era un asunto a ser trabajado por la **Oficina de Asuntos Monopolísticos**.

Por otro lado, en su último párrafo, la Exposición de Motivos de la Ley Núm. 157 también señala como su propósito el enmendar la Ley de Gasolina a los efectos de que se establezca la completa separación entre las operaciones de ventas al detal y las de mayoristas y refinadores de gasolina. El texto mencionado lee así:

> Con la presente medida se pretende cerrar las brechas de excepción que, por quedar abiertas en 1978, han limitado el logro de los objetivos públicos en esta industria. **En específico, se establece la completa separación entre las operaciones de ventas al detal y las de mayoristas y refinadores de gasolina, disponiéndose un plazo para que se lleven a efectos las desvinculaciones necesarias hasta lograrlos**. (Énfasis suplido.)[30]

Como parte de las enmiendas realizadas a la Ley de Gasolina dirigidas a establecer esa "completa separación entre las operaciones" de detallistas y mayoristas, la Ley Núm. 157 creó el mencionado Art. 4A, que prohíbe todo acto que impida **[**20]** la llamada "desvinculación operacional". La definición de "desvinculación operacional", que la propia Ley Núm. 157 también estableció como una de las enmiendas a la Ley de Gasolina, *supra*, señala que ésta ***HN7***[] "ocurre cuando un... distribuidor mayorista cesa de participar en forma directa en la operación y/o actividades de intercambio comercial de la venta al detal de gasolina... en las estaciones de venta al detal".[31]

Ahora bien, la enmienda al Art. 8 de la Ley de Gasolina, *supra*, producida por la Ley Núm. 157 cambió la mayoría de los artículos a los que hacía referencia la versión del artículo original. La versión del Art. 8 después de la enmienda de la Ley Núm. 157 pasó a ser la siguiente:

> **[*920]** Cualquier violación a los Artículos 1, 2, 3, 4 y 5 constituirá una práctica o acto injusto o engañoso y estará sujeto a las disposiciones del Artículo 3 de la Ley Núm. 77 de 25 de junio de 1964, según enmendada.

Al analizar el texto anterior tenemos que concluir que la referida enmienda al Art. 8 producida por la Ley Núm. 157 produjo cambios ilógicos en unos casos e inconsecuentes en otros. Nos explicamos. En primer lugar, no guarda relación alguna con la lógica el que una ley **[**21]** en cuya Exposición de Motivos se señala que su propósito es enmendar la Ley de Gasolina para establecer una completa separación entre las operaciones de ventas al detal y las de mayoristas, evitando así "posibles prácticas predadoras [monopolísticas] de parte de compañías mayoristas distribuidoras de gasolina"; que crea el Art. 4A de "desvinculación operacional" para esos fines, y que reconoce que la fiscalización de tal cumplimiento descansa en el *expertise* de la O.A.M., no incluya el Art. 4A como parte de la enmienda al mencionado Art. 8 de la Ley de Gasolina, *supra*.

Por otro lado, la enmienda al Art. 8 de la Ley de Gasolina, *supra*, que introdujo la Ley Núm. 157 también incluyó, como "práctica o acto injusto o engañoso", cualquier violación al Art. 1 de la Ley de Gasolina, *supra*, *23 L.P.R.A. sec. 1101*. Sin embargo, el Art. 1 de la Ley de Gasolina, *supra*, solo establecía en ese entonces -y establece actualmente- una serie de definiciones de términos, ninguno de los cuales constituye una prohibición *per se*. Por lo tanto, nadie podía cometer una violación al Art. 1 de la Ley de Gasolina, *supra*, pues tal artículo no prohibía ni prohíbe cosa alguna.

Por último, lo mismo ocurría con el Art. **[**22]** 3 de la Ley de Gasolina, *supra*, *23 L.P.R.A. sec. 1103*. Tal artículo establecía en aquel momento -y permanece igual al presente- la creación del "Comité Interagencial sobre la Industria de la Gasolina". Como ocurría con el Art. 1 ("Definiciones"), el Art. 3 no instituía prohibición alguna, por lo

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[29] Íd.

[30] Véase la Exposición de Motivos de la Ley Núm. 157.

[31] ***23 L.P.R.A. sec. 1101(j)***.

que la inclusión **[*921]** de ese artículo en la enumeración establecida por la enmienda de la Ley Núm. 157 al Art. 8 de la Ley de Gasolina, *supra*, resultaba totalmente inconsecuente.

Siendo así, la pregunta que procede es a qué obedeció la redacción y aprobación final del Art. 8 de la Ley de Gasolina, *supra*, después de la enmienda integrada por la Ley Núm. 157. Aunque el historial legislativo no nos arroja demasiada luz al respecto, sí encontramos que la primera versión de enmienda a este artículo (que se presentó en el Proyecto de Ley de la Cámara de Representantes) señalaba que constituiría una práctica o acto injusto o engañoso "[c]ualquier violación a los Artículos 2, 4, ***4A***, 5, *5A*, 6, *6A*, y 7". (Itálicas en el original y énfasis suplido.)[32]

Por otro lado, al codificarse la versión de la segunda y **[**23]** última enmienda que sufriera este artículo mediante la Ley Núm. 74 de 25 de agosto de 2005, se señala en su historial la siguiente nota de codificación:

> La ley enmendadora de 1996 parece haberse referido a los arts. 1, 2, 3, 4 y 5 de la propia ley en vez de los artículos enmendados o adicionados por la misma, a saber: arts. 1, 2, 4A, 5A y 8, o sea, *secs. 1101*, *1102*, *1104a*, *1105a* y 1108 de este título. **Sin embargo, por tener semejanza al contenido de las secciones referidas originalmente en la ley de 1978, pudiera ser que la ley de 1996 intentó referirse a los arts. 4, 4A, 5 y 5A de la ley, *secs. 1104*, *1104a*, *1105* y 1105a de este título**. (Énfasis suplido.)

Al considerar todo lo anterior, no nos cabe duda de que ***HN8***[] la versión del Art. 8 de la Ley de Gasolina, *supra*, que surgió como resultado de la enmienda realizada por la Ley Núm. 157 fue el producto de un error probablemente tipográfico, que no reflejaba la intención o voluntad del legislador. Como sugiere la nota de codificación del historial de este artículo, entendemos que la intención de la Ley Núm. 157 era incluir los Arts. 4, 4A, 5 y 5A en la versión **[*922]** del Art. 8 de la Ley de Gasolina, *supra*, y su exclusión responde a un mero error **[**24]** administrativo ("clerical error").

Determinamos lo anterior, considerando la norma de hermenéutica jurídica que reiteramos en *Passalacqua v. Mun. de San Juan, 16 P.R. Offic. Trans. 756, 116 D.P.R. 618, 623 (1985)*, en donde señalamos lo siguiente:

> En *Roig Commercial Bank v. Buscaglia, Tes., 74 P.R.R. 919, 74 D.P.R. 986, 998 (1953)*, este Tribunal determinó que ***HN9***[] si una palabra, frase o disposición ha sido aprobada por inadvertencia o error, **especialmente si es contraria al resto de la ley o limitaría la efectividad de ésta, se puede eliminar. Entendemos que bajo las mismas circunstancias se puede añadir una frase o palabras, para que se pueda cumplir con la intención legislativa**. (Énfasis suplido.)

De manera que, siendo consistentes con lo que ha sido nuestra pauta en materia de interpretación jurídica al confrontar situaciones en una ley como la del caso de autos, determinamos que el legislador tuvo la intención de que el Art. 4A formara parte de los enumerados en el Art. 8 de la Ley de Gasolina, *supra*, desde la aprobación de la Ley Núm. 157; así debe interpretarse.

Para finalizar el análisis de los artículos de la Ley de Gasolina que son necesarios considerar para la resolución del caso de autos, tenemos que referirnos al Art. 7, **[**25]** de la mencionada ley, *23 L.P.R.A. sec. 1107*. Dicho artículo dispone lo siguiente:

> ***§ 1107* Obligación del detallista**
>
> ***HN10***[] Ninguna persona natural o jurídica **que opere una estación de servicio de venta al detal** podrá, a sabiendas, solicitar o inducir la concesión, o rebaja en precios o en la renta de equipos y rótulos, en violación a las *secs. 1104* y 1105 de este título. (Énfasis suplido.)

Como surge claramente de su texto -incluso desde el título-, este artículo se dirige únicamente al vendedor al detal de combustible, prohibiéndole el que, a sabiendas, induzca o le solicite a un productor o distribuidor-mayorista **[*923]** (entre otros) la concesión o rebaja en precios o en la renta de equipos y rótulos, en violación a los Artículos

[32] Véase P. de la C. 2288 de 30 de enero de 1996, 7ma Sesión Ordinaria, 12 Asamblea Legislativa, pág. 7.

4 y 5 de la Ley de Gasolina. En otras palabras, el objeto de prohibición es aquel detallista que pretende solicitar o inducir a un productor o distribuidor-mayorista a que le provea precios distintos en la gasolina o los combustibles especiales, que los que provee a otros detallistas, esto, en violación al Art. 4 de la Ley de Gasolina, *supra*. De igual manera, el artículo está dirigido únicamente a aquel detallista que solicite o induzca al productor o distribuidor-mayorista **[**26]** (entre otros) a que le provea una renta distinta de equipos y rótulos que aquella que se le provee a otros detallistas, esto, en violación al Art. 5 de la Ley de Gasolina.

B. *Ley de Monopolios*

Las leyes monopolísticas, así como aquellas que pretenden establecer la justa competencia y que establecen restricciones al comercio, constituyen estatutos que precisan extremo cuidado tanto en su legislación como en su interpretación jurídica. El objetivo que inspira este tipo de estatuto está fundamentado en intereses apremiantes y, como tal, indispensables para la economía de la jurisdicción en la que se aplican.

Así, en Colón Cabrera v. Caribbean Petroleum,[33] expresamos con relación a nuestra Ley de Monopolios que, "considerando que se trata de un asunto que incide sobre los cimientos de nuestra sociedad democrática, entendemos que los propósitos que subyacen dicha legislación son de la más alta jerarquía y constituyen un interés apremiante del Estado".

El propósito principal de este tipo de estatuto yace en el principio económico fundamental que dispone la preservación de la libertad de competencia y el entorpecimiento de **[*924]** toda práctica que perjudique el desarrollo **[**27]** de los distintos mercados. Por lo tanto, tales estatutos tienen como objetivo la erradicación de los actos abusivos, desleales y monopolísticos que tiendan a limitar la actividad mercantil, favoreciendo así la libre y abierta competencia en los mercados.[34]

En Puerto Rico, la Ley de Monopolios, *supra*, fue redactada tomando como base dos estatutos federales: la Ley Sherman[35] y la Ley Clayton.[36] De hecho, este también es el patrón en la mayoría de los estados de la Unión que también cuentan con estatutos que regulan de alguna manera la competencia, los monopolios y las restricciones al comercio, y que contienen disposiciones comparables con las de las leyes federales antimonopolísticas.

Nuestra Ley de Monopolios fue promulgada "para asegurarle al Pueblo en general, y a los pequeños comerciantes en particular, los beneficios de la libre competencia".[37] Como señalamos en Colón Cabrera v. Caribbean Petroleum, *supra*, el propósito de la Ley de Monopolios es

> ... evitar la confabulación **[**28]** entre firmas para dominar el mercado, [el] acaparamiento de materias primas, [1os] aumentos indebidos en los precios resultantes de una posición monopolística, [1as] prácticas discriminatorias en las relaciones con clientes [y la] concentración extrema de la actividad económica y de la riqueza en algunos grandes consorcios de empresas.

Ahora bien, en cuanto a la controversia que nos ocupa, es necesario considerar en específico los Arts. 3(a) y 12(a) de la Ley de Monopolios.

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[33] *2007 TSPR 48, 170 D.P.R. 582, 595, 2007 Juris P.R. 53 (2007)*.

[34] J. von Kalinowski, Antitrust Laws and Trade Regulation, Sec. 1.02, Second ed. (2004).

[35] *15 U.S.C.A. sec. 1 et seq.*

[36] *15 U.S.C.A. sec. 12 et seq.*; *P.R. Fuels, Inc. v. Empire Gas Co., Inc., 99 TSPR 168, 1999 TSPR 168, 149 D.P.R. 691, 706-707, 1999 Juris P.R. 171 (1999)*.

[37] ***G.G. & Supp. Corp v. S.& F. Systs.,Inc., 2001 TSPR 54, 153 D.P.R. 861, 869, 2001 Juris P.R. 57 (2001)***.

[*925] C. ***El Art. 3(a) de la Ley de Monopolios***

En lo pertinente, el Art. 3(a) de la Ley de Monopolios[38] establece que serán ilegales ***HN11***[] "[l]os métodos injustos de competencia, así como las **prácticas o actos injustos o engañosos** en los negocios o el comercio". (Énfasis suplido.) Así también el inciso (c) de este artículo establece lo siguiente:

> ***HN12***[] (c) Sin menoscabo de la facultad de recurrir a los medios autorizados por la sec. 269 de este título [*injuctions]*, la Oficina de Asuntos Monopolísticos podrá radicar (sic) y tramitar querellas administrativas en el Departamento de Asuntos del Consumidor para prevenir, evitar y detener las violaciones al inciso (a) de **[**29]** esta sección o los reglamentos aprobados de conformidad al inciso (b) de la misma.[39]

Distinto a otras disposiciones de la Ley de Monopolios, el Art. 3 tuvo su base en la Sec. 5(a)(1) de la ley que creó la Comisión Federal de Comercio (*15 U.S.C. sec. 45*), la cual -al igual que el Art. 3(a)- declara ilegales los métodos injustos de competencia y los actos o prácticas injustas o engañosas que afectan el comercio.[40]

Por otra parte, el inciso (c) del Art. 3 de la Ley de Gasolina, 23 L.P.R.A. sec. 259(c), faculta expresamente a la Oficina de Asuntos Monopolísticos del Departamento de Justicia a actuar como ente fiscalizador ante el D.A.Co. en cuanto a toda violación por "métodos injustos de competencia, así como las prácticas o actos injustos o engañosos en los negocios o el comercio". La Oficina de Asuntos Monopolísticos fue creada por el Art. 16 del mencionado estatuto para implementar el propósito que lo inspira.[41] La O.A.M. es una entidad adscrita al Departamento **[*926]** de Justicia, con facultades para la administración de la legislación sobre prácticas monopolísticas, **[**30]** así como para la fiscalización de éstas. Además, posee la facultad de promulgar reglamentos y proscribir actuaciones que constituyan métodos injustos de competencia y prácticas o actos injustos o engañosos en los negocios o el comercio.[42] En fin, la O.A.M. es una entidad creada con una delegación de poderes amplios que le permite al Estado contar con los instrumentos investigativos precisos para cumplir con el propósito fiscalizador de la Ley de Monopolios.[43] No existe duda de que, conforme al Art. 3 de la Ley de Monopolios, *supra*, es la O.A.M. el organismo gubernamental con el deber ministerial de fiscalizar y velar por el cumplimiento de esa ley.

Ahora bien, nótese que el Art. 3 de la Ley de Monopolios, *supra*, **no** le confiere poderes adjudicativos a la O.A.M. Esto es, no es a la O.A.M. a la cual le corresponde adjudicar la controversia, sino investigar y presentar la causa de acción. El inciso (c) del Art. 3 de la Ley de Monopolios, *supra*, dispone no sólo que es ante el D.A.Co. que la O.A.M. podrá presentar y tramitar querellas buscando prevenir, **[**31]** evitar y detener las violaciones al inciso (a) del propio artículo, sino que en el resto del artículo se establece todo un esquema procesal y apelativo que deberá seguirse ante esa agencia y del cual mencionaremos algunos detalles.

Así, el inciso (c) del Art. 3 de la Ley de Monopolios, *supra*, establece que una vez la parte querellada haya sido notificada de la querella en su contra, el D.A.Co. deberá celebrar una vista y resolver la controversia entre las partes, otorgando el remedio más adecuado tan pronto le sea posible.[44] Mientras, el inciso (d) establece que la O.A.M. tendrá un término de treinta días para recurrir en revisión **[*927]** de la decisión del D.A.Co. al Tribunal de Primera Instancia, si esta le fuera adversa.[45] Por su parte, el inciso (e) establece la forma en que se formalizará tal

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[38] ***10 L.P.R.A. sec. 259(a)***.

[39] ***10 L.P.R.A. sec. 259(c)***.

[40] Diario de Sesiones del Senado de Puerto Rico de 22 de mayo de 1964, pág. 1706.

[41] Art. 16(a) de la Ley de Monopolios, ***23 L.P.R.A. sec. 272(a)***.

[42] ***10 L.P.R.A. sec. 259(b)***.

[43] Colón Cabrera v. Caribbean Petroleum, *supra*, pág. 594.

[44] 23 L.P.R.A. sec. 259(c).

[45] 23 L.P.R.A. sec. 259(d).

recurso de revisión ante el Tribunal de Primera Instancia, del cual se tendrá que notificar a la parte querellada y al D.A.Co., que contará con un término de quince días para solicitar intervención.[46]

El inciso (g) establece que el Tribunal de Primera Instancia revisará la decisión del D.A.Co. a base del récord administrativo **[**32]** que se sometió ante la agencia y sólo en cuanto a las conclusiones de derecho. **Además, las determinaciones de hecho del D.A.Co**. "**serán concluyentes para el tribunal si estuvieren sostenidas por evidencia sustancial"**.[47]

Es evidente que, por la referencia directa a esa agencia, por el procedimiento tan detallado establecido ante ésta y considerando la naturaleza de la causas de acción que intrincan las controversias monopolísticas -sobre todo ante alegaciones de prácticas o actos injustos o engañosos- el legislador decidió que fuera el D.A.Co. el que tuviera la jurisdicción primaria exclusiva para tramitar y adjudicar toda querella presentada por la O.A.M.

La jurisdicción primaria exclusiva de D.A.Co. en este asunto se confirma, además, mediante la propia Ley Orgánica del Departamento de Asuntos del Consumidor, Ley Núm. 5 de 23 de abril de 1973, según enmendada,[48] la cual en su Art. 6(x) incluye entre los poderes y facultades que ejercerá el Secretario de Asuntos del Consumidor el "[a]djudicar las querellas que la Oficina de Asuntos Monopolísticos del Departamento de Justicia, radique (sic) y procese en virtud de lo dispuesto en la sec. 259 [Art. 3] del **[*928]** Título **[**33]** 10".[49] Como vemos, en armonía con el Art. 3(c) de la Ley de Monopolios, el inciso (x) del Art. 6 de la Ley Orgánica de D.A.Co. le confiere jurisdicción a esa agencia para adjudicar las querellas que 1e presente la O.A.M. al amparo del Art. 3 de la Ley de Monopolios.

En conclusión, ***HN13***[] es al Departamento de Justicia a través de la O.A.M. al que, conforme al mandato legislativo, corresponde fiscalizar directamente las infracciones a la Ley de Monopolios, específicamente en lo concerniente a 1as violaciones a las disposiciones de prácticas injustas de comercio, incluyendo toda práctica o acto injusto o engañoso. Además, concluimos que, en virtud del Art. 3 de la Ley de Monopolios, *supra*, es al D.A.Co. al que corresponde la jurisdicción primaria exclusiva en toda causa de acción antimonopolística emprendida por la O.A.M., cuya causa de acción esté basada en alguna práctica o acto injusto o engañoso.

H. *El Art. 12(a) de la Ley de Monopolios*

Como ya hemos establecido, una infracción a la prohibición de vinculación operacional que estatuye el Art. 4A de la Ley de Gasolina, *supra*, constituye una "práctica o acto injusto o engañoso", acción que estaría sujeta a las disposiciones **[**34]** de nuestra Ley de Monopolios, conforme al Art. 8 de la Ley de Gasolina, *supra*. De manera que corresponde entonces, ante la alegación de una violación a la disposición que exige tal "desvinculación operacional", remitirse a aquellos artículos de la Ley de Monopolios que versan sobre 1as "prácticas o actos injustos o engañosos" al comercio, a los fines de resolver cualquier interrogante sobre esta materia. Ya hemos analizado el Art. 3 de la Ley de Monopolios, *supra*, por lo que nos resta discutir el Art. 12 del mencionado estatuto, específicamente el inciso (a), el cual dispone:

> **[*929]** ***§ 268*** **Demandas por personas perjudicadas**
>
> ***HN14***[] (a) Cualquier persona que sea perjudicada en sus negocios o propiedades por otra persona, por razón de actos, o intentos de actos, prohibidos o declarados ilegales por las disposiciones de este capítulo, **salvo las de las secs. 259** y 261 de este título, puede demandar a causa de dichos actos ante el Tribunal de Primera Instancia y tendrá derecho a recobrar tres (3) veces el importe de los daños y perjuicios que haya

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[46] 23 L.P.R.A. sec. 259(e).

[47] 23 L.P.R.A. sec. 259(g).

[48] ***3 L.P.R.A. sec. 341e(x)***.

[49] Íd.

sufrido, más las costas del procedimiento y una suma razonable para honorarios de abogado.[50] (Énfasis suplido.)

HN15[] El Art. 12(a) de la Ley de Monopolios, *supra*, **[**35]** establece el llamado remedio de triple daño para toda persona que sufra daños como consecuencia de actos antimonopolísticos. La acción judicial para recobrar tales daños deberá iniciarse dentro de1 término de cuatro años, contados a partir del nacimiento de la causa de acción.[51] Ahora bien, **es claro del texto de este inciso (a) del Art. 12 de la Ley de Monopolios, *supra*, que, sin distinción alguna, éste exceptúa de su ámbito jurisdiccional toda causa de acción que se pretenda o se tenga que iniciar al amparo de la sec. 259 de la propia Ley de Monopolios. O sea, toda causa de acción por prácticas o actos injustos o engañosos**.

III

En el presente caso no albergamos dudas con relación a que una persona privada, ya sea natural o jurídica, carece de legitimación activa para presentar una causa de acción contra un distribuidor-mayorista por alegada violación al Art. 4A de la Ley de Gasolina, *supra*. Así surge claramente de cada estatuto concernido. Veamos.

HN16[] El Art. 8 de la Ley de Gasolina, *supra*, establece como una "práctica o acto injusto [o] engañoso" cualquier violación al Art. 4A de la mencionada ley y señala que tal violación **[*930]** "estará sujet[a] a las disposiciones **[**36]** de las *secs. 257 et seq.* del Título 10", o sea, a la sección 257 "y las siguientes" de la Ley de Monopolios.

Por su parte, *HN17*[] el Art. 3(a) de la Ley de Monopolios (sec. 259(a)) declara como ilegal "las prácticas o actos injustos o engañosos", que es precisamente la conducta descrita y remitida ante el ámbito de esa ley por el Art. 8 de la Ley de Gasolina, *supra*. Nótese, entonces, que existe una clara identificación o concordancia en el lenguaje utilizado en ambas disposiciones. De manera que, por el lenguaje claro de ambos estatutos -Ley de Gasolina y Ley de Monopolios- es evidente que el legislador dispuso, a través del Art. 8 de la Ley de Gasolina, *supra*, el que toda violación al Art. 4A de esa ley fuera comprendida, cubierta o estuviera bajo el ámbito jurisdiccional del Art. 3 de la Ley de Monopolios, *supra*.

Una vez determinamos que *HN18*[] la conducta prohibida por el Art. 4A de la Ley de Gasolina, *supra*, se encuentra bajo el ámbito jurisdiccional del Art. 3 de la Ley de Monopolios (sec. 259), nos enfrentamos al Art. 12(a) de la Ley de Monopolios, *supra*, que, a su vez, exceptúa expresamente de su ámbito jurisdiccional toda acción que se presente al amparo de la sección 259. Por lo tanto, cualquier **[**37]** persona privada que sufra daños por actuaciones prohibidas por la Ley de Monopolios cuenta con un remedio de triple daño al amparo del Art. 12(a) de la Ley de Monopolios, *supra*, **excepto que su causa de acción se fundamente en el Art. 3 de la Ley de Monopolios (sec. 259)**.[52] Siendo así, evidentemente **toda causa de acción al amparo del Art. 4A de la Ley de Gasolina, *supra*, se encuentra excluida de la posibilidad del remedio [*931] de triple daño que provee el Art. 12(a) de la Ley de Monopolios, *supra***.

En este contexto, Esso argumenta que erró el foro de instancia al no desestimar, al amparo de la Regla 10.2 de Procedimiento Civil, la reclamación de las recurridas fundamentada en el Art. 4A de la Ley de Gasolina.[53] Le asiste la razón. La Regla 10.2 de Procedimiento Civil de 1979, 32 L.P.R.A. Ap. V, R. 10.2, establece unas defensas privilegiadas que, como tal, pueden presentarse en cualquier momento del proceso.[54] Es decir, tales defensas no

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[50] ***10 L.P.R.A. sec. 268(a)***.

[51] ***10 L.P.R.A. sec. 268(c)***.

[52] El Art. 12(a) también incluye dentro de dicha excepción la sec. 261.

[53] Véase Alegato **[**38]** de la parte peticionaria, pág. 15.

se pierden si no se levantan en la contestación de la demanda o antes. Entre esas defensas privilegiadas, la Regla 10.2 incluye la falta de jurisdicción sobre la materia.[55]

Recientemente, en *González v. Mayagüez Resort & Casino, 2009 TSPR 140, 176 D.P.R. 848, 855, 2009 Juris P.R. 143 (2009)*, reiteramos nuestra pauta en el sentido de que la ausencia de jurisdicción sobre la materia

> (1) no es susceptible de ser subsanada; (2) las partes no pueden voluntariamente conferírsela a un tribunal como tampoco puede éste abrogársela [sic]; (3) conlleva la nulidad de los dictámenes emitidos; (4) impone a los tribunales el ineludible deber de auscultar su propia jurisdicción; (5) impone a los tribunales apelativos el deber de examinar la jurisdicción del foro de donde procede el recurso; y (6) puede presentarse en cualquier etapa del procedimiento, a instancia de las partes o por el tribunal *motu proprio*.

Por otro lado, ***HN19***[] una parte demandante posee legitimación activa si cumple con los siguientes **[**39]** requisitos: "(1) ha sufrido un daño claro y palpable; (2) el referido daño es real, inmediato y preciso, y no abstracto o hipotético; (3) **[*932]** existe conexión entre el daño sufrido y la causa de acción ejercitada; y (4) **la causa de acción surge bajo el palio de la Constitución o de una ley**".[56] (Énfasis suplido.) Considerando entonces que, como hemos establecido, una persona privada no puede presentar una causa de acción por alegada violación al Art. 4A de la Ley de Gasolina, *supra*, las recurridas carecen de una causa de acción que surja bajo el palio de una ley. Siendo así, el foro de instancia ciertamente carecía de jurisdicción sobre la materia para atender tal causa de acción y debió desestimarla, conforme a la Regla 10.2 de Procedimiento Civil de 1979, *supra*.

De otra parte, recientemente establecimos en *SLG Semidey Vázquez v. ASIFAL, 177 D.P.R. 657, 676 (2009)*, que ***HN20***[] "[s]i [un] estatuto le confiere la jurisdicción al organismo administrativo se trata de una jurisdicción estatutaria (exclusiva)".[57] Allí también pautamos lo siguiente:

> ***HN21***[] El concepto jurisdicción **[**40]** estatutaria o exclusiva guarda relación con la jurisdicción primaria concurrente pero es distinto en cuanto a su alcance y naturaleza. En la jurisdicción exclusiva se trata de situaciones en que no aplica la doctrina de jurisdicción primaria concurrente porque la propia ley aclara que esta última no existe. Es decir, el propio estatuto establece una jurisdicción exclusiva. En tales casos estamos frente a un mandato legislativo. De ahí, que cuando un estatuto le confiere de manera expresa la jurisdicción a un órgano administrativo sobre determinado tipo de asuntos, los tribunales no tendrán autoridad para dilucidar el caso en primera instancia. Claro está, la jurisdicción primaria exclusiva no soslaya la revisión judicial posterior de la decisión del organismo. (Citas y énfasis omitidos.)[58]

Al observar la manera expresa, amplia y detallada con la que el legislador se manifestó, determinamos **[*933]** que, ***HN22***[] con excepción de los remedios autorizados por la sec. 269 (injuctions), el **[**41]** Art. 3 de la Ley de Monopolios, *supra*, le confiere jurisdicción primaria exclusiva al D.A.Co. en la dilucidación de cualquier violación al inciso (a) del propio artículo, esto es, la utilización de métodos injustos de competencia y prácticas o actos injustos o engañosos en los negocios o el comercio.

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[54] R. Hernández Colón, Práctica Jurídica de Puerto Rico: Derecho Procesal Civil, 4ta ed., San Juan, Ed. Lexisnexis, 2007, sec. 2601, pág. 234.

[55] La nueva Regla 10.8(c) de Procedimiento Civil, 32 L.P.R.A. Ap. V, R. 11.3, señala que "[s]iempre que surja, por indicación de las partes o de algún otro modo, que el tribunal carece de jurisdicción sobre la materia, éste desestimará el pleito".

[56] *Col. Peritos Elec. v. A. E. E., 150 D.P.R. 327, 331 (2000)*. Véase, además, *Hernández Torres v. Gobernador, 129 D.P.R. 824, 835 (1992)*.

[57] Véase, además, D. Fernández, Derecho Administrativo y Ley de Procedimiento Administrativo Uniforme, 2da ed., Colombia, Forum, 2001, sec. 8.3, pág. 437 esc. 1.

[58] *SLG Semidey Vázquez v. ASIFAL, 177 D.P.R. 657, 677 (2009)*.

En cuanto a la determinación del tribunal de instancia en el sentido de que "un ente privado como la demandante puede presentar una causa de acción al amparo del Artículo 7 de la Ley de Control de Gasolina", por lo que ya explicamos determinamos que la misma es claramente errónea. *HN23*[] El Art. 7 de la Ley de Gasolina, *supra*, provee para una causa de acción en contra de los detallistas y no a favor de éstos. De otra parte, además de que la interpretación de tal estatuto por parte del foro primario no fue la correcta, lo cierto es que las recurridas nunca reclamaron una causa de acción al amparo del Art. 7 de la Ley de Gasolina, sino del Art. 7 de la Ley de Monopolios, *supra*.[59]

Ahora bien, con relación a que la causa de acción de las recurridas pueda ser resarcida como un remedio sencillo u ordinario **[**42]** de daños y perjuicios al amparo del Art. 1802 del Código Civil, *31 L.P.R.A. sec. 5141*, nada encontramos en la ley que lo impida; al contrario. Como bien señala la Procuradora General en su comparecencia especial, surge de la discusión reseñada en el historial legislativo con relación a los informes camerales que originaron la Ley de Monopolios, lo siguiente:

> En cuanto a las acciones de los particulares, por triple daño, estas no se autorizan con respecto a los actos prohibidos por el Artículo 3, **sin que por ello se intente afectar el derecho a entablar una acción ordinaria de daños y perjuicios, si ésta procediere [*934] conforme al Código Civil u otros principios de ley**. (Énfasis suplido.)[60]

Como vemos, las expresiones del legislador fueron claras. La Asamblea Legislativa no tuvo la intención de que una causa de acción como la del caso de autos no pudiera ser resarcida como un remedio sencillo u ordinario de daños y perjuicios al amparo del Art. 1802 del Código Civil, *supra*. Todo lo contrario.

Por último, al final de su alegato las recurridas argumentan que la causa de acción en este litigio comprende hechos **[**43]** ocurridos durante los años 2000 al 2005, periodo de tiempo en el que el Art. 8 de la Ley de Gasolina, *supra*, no había sido enmendado para incluir el Art. 4A. Por esto, las recurridas concluyen que en vista de que tal enmienda ocurrió con posterioridad a la presentación de su causa de acción, ésta -la enmienda de 2005- tendría un efecto retroactivo en violación al Art. 3 de nuestro Código Civil.[61] No les asiste la razón.

En primer lugar, ya hemos determinado basado en el análisis del artículo enmendando y del historial legislativo de la Ley Núm. 157, *supra*, que la intención de la Asamblea Legislativa fue que el Art. 4A de la Ley de Gasolina, *supra*, estuviera incluido bajo el ámbito jurisdiccional del Art. 8 de la propia Ley, desde la enmienda de 1996. Así lo interpretamos.

Pero, además, si aceptáramos la proposición de las recurridas en el sentido de que el Art. 8 de la Ley de Gasolina, *supra*, no incluía bajo su ámbito **[**44]** jurisdiccional el Art. 4A para el año en que estos instaron su causa de acción, tendríamos que resolver de todos modos que la enmienda de 2005 no constituiría una enmienda con efecto retroactivo. Nos explicamos.

[*935] La inclusión del Art. 4A de la Ley de Gasolina, *supra*, al ámbito jurisdiccional del Art. 8 de la Ley de Gasolina, *supra*, mediante la enmienda de 2005, constituyó un cambio en el aspecto jurisdiccional de este artículo. Esto es, desde la enmienda de 2005 toda causa de acción al amparo del Art. 4A de Ley de Gasolina, *supra*, se encuentra comprendida bajo el ámbito jurisdiccional del Art. 3 de la Ley de Monopolios, *supra* (sec. 259). Siendo así, la enmienda de 2005 en efecto produjo que ya no se pueden ejercer causas de acción privadas al amparo de este artículo y que es D.A.Co. el que adviene a tener jurisdicción primaria exclusiva.

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[59] Véase la demanda instada por los recurridos. Apéndice de la Petición de *certiorari*, págs. 79-84.

[60] Diario de Sesiones de la Cámara de Representantes, 22 de mayo de 1964, pág. 1708.

[61] El Art. 3 del Código Civil establece lo siguiente:

> *HN24*[] Las leyes no tendrán efecto retroactivo, si no dispusieran lo contrario. En ningún caso podrá el efecto retroactivo de una ley perjudicar los derechos adquiridos al amparo de una legislación anterior. *31 L.P.R.A. sec. 3*.

Desde el 1905, esta Curia resolvió, interpretando el Art. 3 del Código Civil, *supra*, que:

> ***HN25***[] ... es un principio de derecho español, que **los estatutos que regulan la jurisdicción y el procedimiento, son de interés público, y empiezan a regir retroactivamente**, o más bien, que no son consideradas como retroactivas en tal sentido, que caigan bajo las restricciones **[**45]** de este artículo. (Énfasis suplido.)[62]

Así también, en Texas Co. v. Sancho Bonet, Tes*., 52 P.R.R. 637, 52 D.P.R. 658, 667(1938)*, señalamos que:

> ... como se dice en 59 Corpus Juris 1173, resumiendo la jurisprudencia, ***HN26***[] "... La regla general de que los estatutos sólo se interpretarán prospectivamente (prospectively) y no retrospectiva o retroactivamente, **de ordinario no es aplicable a estatutos que afectan el remedio o procedimiento, o, conforme se dice de otro modo, esa regla general está sujeta a una excepción cuando se trata de un estatuto relativo al remedio o procedimiento".** (Énfasis suplido.)

De manera que, considerando que la enmienda producida por la Ley Núm. 74 de 25 de agosto de 2005 al Art. 8 de la Ley de Gasolina, *supra*, tuvo claramente un efecto sobre los procesos y la jurisdicción del tribunal de instancia en causas de acción al amparo del Art. 4A de la Ley de Gasolina, *supra*, tal **[*936]** enmienda no constituye una retroactiva en el marco que el Art. 3 del Código Civil, *supra*, lo prohíbe.[63]

IV

Por todo lo anterior, se revoca la Resolución emitida por el Tribunal de Apelaciones y, en consecuencia, se desestima la causa de acción fundamentada en el Art. 4A de la Ley de Gasolina, *supra*, ante el Tribunal de Primera Instancia, por falta de jurisdicción.

Se dictará sentencia de conformidad.

Erick V. Kolthoff Caraballo

Juez Asociado

SENTENCIA

San Juan, Puerto Rico, a 15 de diciembre de 2011.

Por los fundamentos expuestos en la Opinión que antecede, la cual se hace formar parte íntegra de la presente, se revoca la Resolución emitida por el Tribunal de Apelaciones y, en consecuencia, se desestima la causa de acción fundamentada en el Art. 4A de la Ley de Gasolina, Ley Núm. 3 de 21 de marzo de 1978, según enmendada, ante el Tribunal de Primera Instancia, por falta de jurisdicción.

Así lo pronunció, manda el Tribunal y certifica la Secretaria del Tribunal Supremo, Interina. El Juez Presidente señor Hernández Denton emitió Opinión Disidente a la cual se une la Juez Asociada señora Rodríguez Rodríguez.

Larissa Ortiz Modestti

Secretaria del Tribunal Supremo, Interina

Disension Por: Federico **[**47]** Hernández Denton

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[62] ***American Railroad Co. of P.R. v. Hernández, 8 D.P.R. 516, 520 (1905)***.

[63] *J.R.T. v. A.E.E. 133 D.P.R. 1, 13, 1993 Juris P.R. 49, (1993)*. Véase, además, ***Texas Co. v. Sancho Bonet, Tes., 52 P.R.R. 637, 52 D.P.R. 658, 667 (1938)***; R.E. Bernier y J.A. **[**46]** Cuevas Segarra, Aprobación e intepretación de las leyes en Puerto Rico, 2da ed., San Juan, Pubs. J.T.S., 1987, Vol. I, Cap. 63.

Disension

Opinión Disidente emitida por el Juez Presidente señor Hernández Denton a la cual se une la Juez Asociada señora Rodríguez Rodríguez.

San Juan, Puerto Rico, a 15 de diciembre de 2011.

Por entender que ni la Ley de Control de Productores, Refinadores y Distribuidores Mayoristas de Gasolina, Ley Núm. 3 de 21 de marzo de 1978, según enmendada, *23 L.P.R.A. secs. 1101, et seq*. (Ley de Gasolina), ni la Ley de Monopolios y Restricción del Comercio, Ley Núm. 77 de 25 de junio de 1964, según enmendada, *10 L.P.R.A. secs. 257, et seq*. (Ley de Monopolios), impiden que un participante del mercado presente una acción en daños por violaciones a las prohibiciones de las referidas leyes, disentimos del curso seguido por una mayoría de este Tribunal. En esencia, no **[*937]** podemos estar de acuerdo porque el resultado de la Opinión del Tribunal es contrario a los propósitos de los estatutos antimonopolísticos en controversia.

I.

Los demandantes, Aguadilla Paint Center, Inc., CB Gasoline Service Group y Micada de Puerto Rico, Inc., son detallistas o vendedores al detal de gasolina importada, distribuida y vendida por Esso Standard Oil (Esso). Es decir, detallistas de marca. En 2004, los detallistas **[**48]** presentaron una demanda contra Esso en la cual le imputaban incurrir en la práctica ilícita de vinculación operacional y discrimen de precios y descuentos, en contravención al Art. 4A de la Ley de Gasolina, *23 L.P.R.A. sec. 1104a* y el Art. 7 de la Ley de Monopolios, *10 L.P.R.A. sec. 263*. Asimismo, solicitaron indemnización bajo el Art. 1802 del Código Civil de Puerto Rico, *31 L.P.R.A. sec. 5141*. En específico, los demandantes alegan que Esso controla la operación de las estaciones de gasolina en violación al Art. 4A, porque establece el costo de la gasolina, la cantidad de gasolina que vende, la frecuencia con la que se compra la gasolina, la entrega de la misma, el método de pago, el precio sugerido de venta y la renta de las estaciones de servicio. De otro lado, la causa de acción por violación al Art. 7 de la Ley de Monopolios se basa en que, alegadamente, Esso mantiene un discrimen de precios frente a compradores igualmente situados.

Por su parte, Esso solicitó la desestimación alegando, en esencia, que esas dos causas de acción solo pueden ser presentadas por el Departamento de Justicia. Por lo tanto, los demandantes carecían de legitimación activa.

El Tribunal de Primera Instancia **[**49]** proveyó no ha lugar a la moción de desestimación y el foro apelativo intermedio mantuvo ese dictamen al no expedir el auto solicitado, por no estar en posición de intervenir en esa etapa procesal. **[*938]** Inconforme, Esso acude ante nos. Por su parte, los demandantes, cuyos planteamientos quedaron excluidos de la Opinión del Tribunal, argumentan que son conscientes de que existen una serie de remedios en los estatutos antes mencionados que le han sido encomendados al Departamento de Justicia. En específico, aducen que los *injunctions* preliminares y permanentes reconocidos en dichas leyes para paralizar actuaciones prohibidas son competencia exclusiva del Secretario de Justicia y es este quien tiene legitimación activa para procurarlos. Sin embargo, los demandantes no buscan interferir con esos remedios. Su única súplica es que se les permita demostrar que Esso les causó daños al violar los preceptos de ambas leyes por incurrir en prácticas de vinculación operacional y discrimen de precios. Inclusive, aunque lo solicitaron originalmente en su demanda, los demandantes sostienen ante nos que no reclaman el beneficio de triple daño, reconocido en los estatutos antimonopolísticos de Estados Unidos **[**50]** y Puerto Rico. De nuevo, solo quieren que se les permita demostrar cómo, al incurrir en las prácticas prohibidas por los referidos estatutos, se les causó daños que, en algunos casos, resultaron en la quiebra de negocios familiares.

II.

A. Estatutos antimonopolísticos

La Ley de Gasolina, *supra*, tiene como propósito combatir el control de los abastos de productos energéticos y eliminar las ventajas competitivas existentes en el mercado de gasolina. Por ello, nuestra Asamblea Legislativa procuró la uniformidad competitiva e implantó prohibiciones a prácticas discriminatorias y de control de precios. Unos meses más tarde, se aprobó la Ley Núm. 73 del 23 de junio de 1978, *23 L.P.R.A. secs. 1131, et seq*., (Ley 73), con el propósito de declarar la industria de la gasolina -en todas sus facetas- como una revestida de **interés público**.

[*939] A su vez, la Ley 73, *supra*, implantó una serie de prohibiciones sobre acuerdos de arrendamiento y subarrendamiento y otro tipo de vinculación entre mayoristas y detallistas. Además, estableció que los mayoristas están obligados a presentar ante la Oficina de Asuntos Monopolísticos (O.A.M.) del Departamento de Justicia copia de todos sus contratos con los detallistas. **[**51]** Asimismo, la Ley 73, *supra*, dispuso que reconocía la existencia de la Ley de Monopolios, *supra*, y que nada de lo dispuesto en la primera contravendría la segunda. Esto es, que la Asamblea Legislativa era consciente de la Ley de Monopolios, *supra*, y de su operación.

A tono con lo anterior, el Art. 4A de la Ley de Gasolina, *23 L.P.R.A. sec. 1104a*, dispone que:

> Ningún... distribuidor-mayorista podrá, mediante convenio... operar directamente una estación de servicio de venta al detal de gasolina de forma que impida su completa desvinculación operacional. Ningún... distribuidor-mayorista podrá, mediante convenio... imponer, requerir, fijar o limitar directamente el margen de ganancia y/o el precio de venta al detal de la gasolina... en la estación de servicio de venta al detal.

Asimismo, el Art. 8 de la Ley de Gasolina, *23 L.P.R.A. sec. 1108*, dispone que: "Cualquier violación a las *secs. 1102*, *1102a*, *1104*, ***1104a***, 1105 y 1105a, de este título constituirá una práctica o acto injusto o engañoso y estará sujeto a las disposiciones de las *secs. 257, et seq*., del Título 10." (Énfasis suplido). Esto último sobre las *secs. 257, et seq*., del Título 10 se refiere a la Ley de Monopolios.

De otra parte, **[**52]** la Oficina de Asuntos Monopolísticos del Departamento de Justicia tiene a su haber una serie de remedios y facultades para fiscalizar el cumplimiento con Ley de Monopolios, *supra*. Cabe resaltar que todas las secciones de esa ley a las que la Opinión de este Tribunal hace referencia, disponen que la O.A.M. "podrá" realizar determinados actos.

[*940] Por su parte, el Art. 7 de la Ley de Monopolios dispone, en lo pertinente, que:

> Será ilegal el que cualquier persona, directa o indirectamente, discrimine en precio entre distintos compradores de cosas objeto de comercio del mismo grado y calidad, cuando dichas cosas sean vendidas para uso, consumo o reventa en Puerto Rico, y cuando el efecto de tal discrimen pueda ser el de reducir sustancialmente la competencia o tender a crear un monopolio en cualquier línea de comercio en Puerto Rico o afectar, destruir o evitar la competencia con cualquier persona que hubiese concedido o a sabiendas hubiese recibido el beneficio de tal discriminación, o con cualquier cliente de uno de éstos. *10 L.P.R.A. sec. 263*.

Por último, el Art. 12 de la Ley de Monopolios, preceptúa que:

> Cualquier persona que sea perjudicada en sus negocios o propiedades por otra persona, **[**53]** por razón de actos o intentos de actos, prohibidos o declarados ilegales por las disposiciones de este capítulo, salvo las de las ***Secs. 259*** y 261 de este título pueden demandar a causa de dichos actos ante el Tribunal de Primera Instancia y tendrá derecho a recobrar tres (3) veces el importe de los daños y perjuicios que haya sufrido, más las costas del procedimiento y una suma razonable para honorarios de abogado. *10 L.P.R.A. sec. 268*. (Énfasis suplido).

Como este último artículo excluye las acciones bajo la *Sec. 259*, este Foro hoy concluye que no será cualquier persona la que pueda presentar esa acción, sino que será la O.A.M. la única legitimada bajo esa sección de la Ley de Monopolios, *supra*. Por ello, ordena la desestimación de las causas de acción bajo la Ley de Gasolina, *supra*, y la Ley de Monopolios, *supra*, aunque permite que el caso continúe sobre las alegaciones de daños bajo el Art. 1802 del Código Civil, *supra*.

Como veremos más adelante, ese análisis es contrario a lo expresado en *Pressure Vessels P.R. v. Empire Gas P.R., 137 D.P.R. 497, 1994 Juris P.R. 144 (1994)*. Allí, establecimos el origen y los propósitos abarcadores del Art.

2 de la Ley de Monopolios, **[*941]** *10 L.P.R.A. sec. 258*. Este busca evitar **[**54]** cualquier acto, contrato, o conspiración para restringir irrazonablemente los negocios o el comercio en Puerto Rico. Para ello, nuestra Asamblea Legislativa adoptó el mismo texto de la Sec. 1 del Sherman Act, *15 U.S.C. 1*. *Véase: Pressure Vessels, supra*; *Northern Pac. R. Co. v. United States, 356 U.S. 1, 4, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*.

Además, establecimos que tanto el texto de nuestro artículo como la doctrina federal coinciden en que hay tres requisitos que se tienen que establecer para demostrar una infracción a esta disposición: (1) deberá existir algún contrato, combinación o conspiración entre dos o más entidades, (2) el cual restringe irrazonablemente los negocios o el comercio (3) en Puerto Rico. *Pressure Vessels, supra, p*ág. 509. Finalmente, en el referido caso, resolvimos que un demandante puede traer prueba para demostrar la irrazonabilidad de unos contratos a la luz de su efecto sustancialmente adverso sobre la libre competencia, ello como vehículo para probar que, "como consecuencia de la infracción de la ley, el demandante haya sufrido un daño". Íd. pág. 520.

B. Concesión de poder de reglamentación

El 23 de junio de 1978, la Asamblea Legislativa aprobó dos leyes que nos atañen frente a la actual **[**55]** controversia. La primera es la Ley Núm. 72, que tuvo el propósito de adicionar, al Art. 3 de la Ley de Monopolios, *supra*, una disposición "a fin de autorizar a la Oficina de Asuntos Monopolísticos a radicar y tramitar querellas por violaciones a este artículo en el Departamento de Asuntos del Consumidor", "autorizar a dicho Departamento a resolver dichas querellas e imponer las sanciones aquí dispuestas" y "establecer el trámite procesal para la revisión judicial de dichas querellas". *Véase*: Ley Núm. 72 de 23 de junio de 1978, 1978 Leyes de Puerto Rico, págs. 256-257. La exposición de motivos de esa Ley establece claramente que lo que se quiso fue "proveer un **foro adicional a [*942] los existentes** donde puedan ventilarse los actos o métodos injustos en los negocios y el comercio". Íd., pág. 257. (Énfasis suplido.)

Por su parte, la segunda ley aprobada, la Ley Núm. 73 de 23 de junio de 1978, *supra*, se estableció con el propósito de "autorizar al Departamento de Justicia, de Comercio y de Asuntos del Consumidor, a la Junta de Planificación, la Administración de Reglamentos y Permisos y, a la Comisión de Servicio Público a adoptar e implantar la reglamentación necesaria para poner en efectos **[**56]** los propósitos y objetivos de esta ley". Ley Núm. 73 de 23 de junio de 1978, 1978 Leyes de Puerto Rico, pág. 259. La exposición de motivos de esta ley dispone que es "necesaria la intervención gubernamental en su ejercicio del Poder de Razón de Estado para evitar la dislocación en la integridad, funcionalidad y competencia que debe prevalecer en el mercado de la gasolina en Puerto Rico, industria vital a los mejores intereses de la ciudadanía y a la dinámica económica del país". Íd. pág. 260. Más adelante, esa misma ley proscribe en su Art. 5 que "nada de lo aquí dispuesto o promulgado por reglamento o de otra forma, conforme a las disposiciones de esta ley, será interpretado como que exceptúa de o confiere inmunidad en cuanto al aplicación de las disposiciones de la Ley Núm. 77 de 25 de junio de 1964, según enmendada". Íd. Pág. 264.

Así las cosas, la Asamblea Legislativa quiso adicionar un remedio administrativo con el propósito de allegar herramientas a la lucha antimonopolística. No obstante, nada de lo aquí dispuesto sobre las facultades y el trámite administrativo tuvo el propósito de eliminar los remedios reconocidos por la Ley de Monopolios, *supra*, como bien dispuso el Art. 5 **[**57]** de la Ley Núm. 73, *supra*.

Esa acción legislativa es totalmente consistente con la enmienda de 1970 a la Ley de Monopolios, *supra*. Mediante la Ley Núm. 67 de 30 de mayo de 1970, se realizó una enmienda al Art. 3 de la Ley de Monopolios, *supra*, que dispone que "sin menoscabo de la facultad de recurrir a los remedios autorizados **[*943]** en el Artículo 13 [que versa sobre los remedios de *injunction*], la Oficina de Asuntos Monopolísticos, mediante reglas y reglamentos promulgados. podrá proscribir actos o prácticas específicas.". Ley Núm. 67 de 30 de mayo de 1970, 1970 Leyes de Puerto Rico, pág. 185.

Por ello, el Art. 3 de la Ley de Monopolios, *supra*, según enmendado, simplemente reconoce la facultad administrativa de reglamentar prácticas ilícitas y provee un foro ante el Departamento de Asuntos del Consumidor para examinar violaciones a los estatutos aquí discutidos.

III.

Por los fundamentos que anteceden, disentimos del resultado de la Opinión Mayoritaria. Somos del criterio que nada en los estatutos que hemos discutido impide la legitimación activa de los demandantes y que, a pesar de que bajo el Art. 12 de la Ley de Monopolios, *supra*, se excluye el Art. 3, la acción de los demandantes en nada **[**58]** contraviene la delegación legislativa de poder para reglamentar, que se concede en ese Art. 3. En síntesis, se les debe permitir a los demandantes probar un caso de daños por violaciones a las disposiciones específicas de los estatutos aquí discutidos. Veamos.

La Ley de Gasolina, *supra*, fue adoptada con posterioridad a la aprobación de la Ley de Monopolios, *supra*. Asimismo, la primera expresa que la Asamblea Legislativa fue consciente de las disposiciones de la segunda, al momento de aprobarla. La Ley de Gasolina expresa en su Art. 8 que cualquier violación a varios de sus artículos, incluyendo el Art. 4A, "constituirá una práctica o acto injusto a (sic) engañoso y estará sujeto a las disposiciones de las *secs. 257, et seq*. del Título 10". *23 L.P.R.A. sec. 1108*.

Cuando acudimos a las *secs. 257* y siguientes del Título 10, es decir, la Ley de Monopolios, encontramos que el **[*944]** Art. 12 reconoce una causa de acción a: "cualquier persona que sea perjudicada en sus negocios o propiedades por otra persona, por razón de actos, o intentos de actos, prohibidos o declarados ilegales por las disposiciones de este capítulo, salvo las de las *secs. 259* y 261." *10 L.P.R.A. sec. 268*.

Cónsono con los propósitos **[**59]** legislativos de nuestros estatutos y de los estatutos federales en que se basa la legislación local, **esa causa de acción, es totalmente independiente del poder legislativo de reglamentar que se le confirió a las agencias administrativas mediante el Art. 3 de la Ley de Monopolios, *10 L.P.R.A. sec. 259***.

Esto es importante porque, según la Opinión del Tribunal, las prácticas violatorias del Art. 8 de la Ley de Gasolina, *supra*, sólo estarían sujetas a la acción bajo el Art. 3 de la Ley de Monopolios, que dispone que "los métodos injustos de competencia, así como las prácticas o actos injustos o engañosos en los negocios o el comercio, por la presente se declaran ilegales". *10 L.P.R.A. sec. 259*. Es decir, que porque el Art. 8 de la Ley de Gasolina declara "actos injustos y engañosos" lo prohibido en dicha ley y que, como el Art. 3 de la Ley de Monopolios es el que prohíbe los "actos injustos y engañosos" y, éste, a su vez, está excluido del Art. 12 de la Ley de Monopolios que reconoce la acción de triple daño, entonces los demandantes no tienen disponible esa causa de acción por violaciones a la Ley de Gasolina, *supra*.

Esa interpretación textualista -que propone el peticionario y que adopta **[**60]** completamente este Tribunal- es totalmente contraria a los propósitos de ambas leyes. Además, los artículos bajo los cuales reclaman los demandantes no deben interpretarse como los únicos artículos de esas leyes que permiten una acción en daños. Si bien esa interpretación que hace la Opinión de este Tribunal permite que los demandantes continúen con su causa de acción en daños bajo el Art. 1802 del Código Civil de Puerto Rico, *supra*, cabe preguntarnos: ?qué alegaciones **[*945]** podrán presentar los demandantes para demostrar que fue la realización de prácticas prohibidas por parte del demandado la que le causaron los daños que buscan indemnizar, si se le han desestimado las causas de acción bajo la Ley de Monopolios y la Ley de Gasolina?

Somos del criterio que se pudo llegar a una interpretación distinta. Máxime ante el hecho de que la propia Opinión del Tribunal reconoce el origen directo de nuestros estatutos antimonopolísticos de sus análogos federales.

En los Estados Unidos, los "private actions" juegan un rol crítico en el régimen antimonopolístico. J. Von Kalinowski, ***Antitrust Law*** and Trade Regulation, Sec. 160.01, 2d. ed., Vol. 8 pág. 160-2 (supl. 2011). **"In enacting the antitrust laws, [**61] the U.S. Congress was convinced that private antitrust litigation is one of the surest weapons for effective antitrust enforcement and that private suits are an important element of the Nation's antitrust enforcement scheme. The Supreme Court has labeled the private action as a vital means of enforcing the antitrust policy of the United States and as an important weapon of antitrust enforcement."** Íd. (Citas omitidas). (Énfasis suplido).

Por ello, nuestra interpretación es que la alegada acción ilícita de los demandados podría estar prohibida por la Ley de Monopolios, *supra*, y los demandantes así podrían demostrarlo conforme a nuestra *Opinión en Pressure*

Vessels, supra, que, en esencia, le permite a un participante del mercado reclamar daños por una actuación prohibida bajo el estatuto antimonopolístico.

De hecho, en la legislación federal, el remedio de triple daño está disponible bajo la *Sec. 4* del Clayton Act. El texto de esa sección es sumamente sencillo y simplemente reconoce una causa de acción a cualquier persona afectada por razón de cualquier acto prohibido bajo una ley antimonopolística. *15 USC sec. 15*. Para obtener ese remedio, el demandante sólo tiene que probar que el daño **[**62]** fue causado por razón de una actuación **[*946]** antimonopolística. J. Von Kalinowski, op. cit. sec. 161.02, pág. 161-9. ("Thus, in antitrust cases, it is not sufficient simply to demonstrate an injury, even injury directly caused by the defendant. The injury will not be considered antitrust injury unless it was caused by reason of a violation of the antitrust laws.")(Citas omitidas.) Esto demuestra que el Congreso quiso permitirles a los participantes del mercado presentar una acción de daños por el mero hecho de otro haber realizado una práctica antimonopolística.

Por lo tanto, habríamos concluido que la demanda presentada por los recurridos podía continuar. Con su decisión, este Tribunal deja en suspenso un importante elemento de la lucha antimonopolística, en particular sobre el negocio de distribución de combustibles en Puerto Rico. Basta mirar a décadas pasadas para recordar las prácticas indeseables que sufrimos en el País durante la crisis petrolera de los años 1970's. Hoy, de espaldas a la política pública de los Estados Unidos, a base de la cual formulamos nuestros estatutos sobre esta materia, este Tribunal ata las manos y cierra las puertas de la justicia a quienes alegan haber sufrido **[**63]** un daño que ahora será más difícil de demostrar.

De la normativa federal antes descrita es evidente que, desde principios del siglo pasado, el ordenamiento dispuso que los competidores jugarían un rol central en la lucha contra el control ilícito de los mercados, mediante la presentación de acciones para recuperar el daño causado por acciones monopolísticas. No vemos por qué los participantes del mercado de gasolina puertorriqueño no puedan hacer lo mismo, cuando nuestra legislación también tiene el propósito de apoderar a los afectados con legitimación para reclamar remedios por prácticas injustas.

IV.

A modo de epílogo, la decisión de este Tribunal se emite **[*947]** en los momentos en que está entredicho la capacidad de la Oficina de Asuntos Monopolísticos para adelantar los propósitos legislativos. De la propia información publicada por el Departamento de Justicia sobre su presupuesto para el año fiscal en curso surge que, desde el año 2009, dicha Oficina ha perdido casi de un cuarenta por ciento de su personal, apenas cuenta con cuatro abogados en la actualidad, y, durante el mismo periodo, se le ha recortado sobre un quince por ciento de su presupuesto. *Véase*: Departamento de Justica, Presupuesto **[**64]** Aprobado para el año 2012, disponible en: *http://www.pr.gov/presupuesto/aprobado_201* 2/ju sticia.htm.

En suma, habríamos permitido que el litigio continuara en sus méritos en vez de resolverlo sumariamente, sin permitirle al demandante establecer su caso. La desestimación de acciones privadas contra el control ilícito de los mercados en nuestra jurisdicción es contraria tanto a la intención como al espíritu de la Ley de Monopolios y la Ley de Gasolina y priva a los detallistas de gasolina un instrumento muy importante para vindicar sus derechos ante prácticas injustas de los mayoristas.

Federico Hernández Denton

Juez Presidente

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In re Int'l Air Transp. Surcharge Antitrust Litig.

United States District Court for the Northern District of California

December 19, 2011, Decided; December 19, 2011, Filed

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Reporter

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IN RE INTERNATIONAL AIR TRANSPORTATION SURCHARGE ANTITRUST LITIGATION. This document relates to: ALL ACTIONS.

Subsequent History: Affirmed by *Collins v. United Airlines, Inc. (In re Int'l Air Transp. Surcharge Antitrust Litig.), 2014 U.S. App. LEXIS 10497 (9th Cir. Cal., June 5, 2014)*

Prior History: *In re Int'l Air Transp. Surcharge Antitrust Litig., 2008 U.S. Dist. LEXIS 111007 (N.D. Cal., Oct. 31, 2008)*

Core Terms

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Judges: CHARLES R. BREYER, UNITED STATES DISTRICT JUDGE.

Opinion by: CHARLES R. BREYER

Opinion

ORDER DENYING MOTION TO ENFORCE

British Airways ("BA") and Virgin Atlantic Airways, Ltd. ("VAA") (collectively, "the airlines") reached settlements three years ago in this antitrust MDL. See Mot. (dkt. 365) at 1. Carnival PLC, a cruise company, now asks the Court to declare that it is a member of those settlement classes and thus entitled to compensation from the settlement funds. Id. As discussed below, the Court concludes that the Settlement Administrator properly determined that Carnival is not a class member.

I. BACKGROUND

BA and VAA entered into settlements with the plaintiffs in this case on February 15, 2008, and the Court approved the settlements on October 3, 2008, retaining jurisdiction over their enforcement. **[*16]** See dkt. 293, 294. The settlement agreements both defined the settlement class as:

> [A]ll Persons to whom, in the period beginning on August 11, 2004 and ending on March 23, 2006, [BA or VAA] sold, in the United Kingdom, at least one coupon for passenger air travel on a flight operated by [BA or VAA] and as to which the long-haul fuel surcharge was paid and not refunded in whole or in part as of the date of the Settlement Agreement.

Mot. at 5.

Carnival asserts that, during the relevant time period, it purchased about 130,180 tickets from BA and VAA combined, the great majority of which were used by Carnival's passengers, and a minority of which were used by

Carnival's crew members. Id. at 1. [1] Carnival explains that it does not include a line-item charge to its passengers for air travel; rather, the air travel is bundled together with a variety of services, such as dining, entertainment, and travel to ports of call "to create a single, unique product — a Carnival cruise vacation — for which there is but one total price." Id. at 3. Carnival had purchase agreements with BA and VAA which provided that Carnival would reserve airline tickets up to nine months prior to departure, and had to **[*17]** pay for those tickets about six weeks before departure. Id. Carnival represents that, because it had to pay for the tickets at the time it committed to purchase them, which was often before it had identified a customer to use the tickets, it was responsible for any failure to fill the seat. Id. The airlines' only recourse for failure to pay for tickets was with Carnival, the airlines provided rate quotes directly to Carnival, and notices of fuel surcharge increases also went directly to Carnival. Id. at 3-4. Carnival thus considers itself a direct purchaser of the airline tickets. See generally Mot.

In April 2010, the Settlement Administrator, Kenneth R. Feinberg, **[*18]** denied Carnival's request for compensation under the settlement funds. See Libow Decl. Ex. E (dkt. 375-5). The Settlement Administrator explained:

> It is my conclusion that the parties' contracts and course of dealing indicate that Carnival issued tickets as an agent for the airlines and the passengers paid these fares and surcharges. Accordingly, under the Settlement Agreement the appropriate Settlement Class Members are the airlines' passengers, rather than Carnival, and the passengers, rather than Carnival, are entitled to the refund for the fuel surcharge on the tickets.

Id. at 1. He stated that his conclusion was based on four considerations: (1) that the passengers who purchased cruises had the option of buying the airline tickets either from Carnival or separately, but that in both cases the passenger had to pay the surcharge; (2) that "[i]n calculating what to charge the passenger for the air ticket . . . Carnival had to take into account the fuel surcharge in its pricing and the passenger had to pay the fuel surcharge;" (3) that under the contracts with BA and VAA, Carnival "purchased as an agent;" and (4) that Carnival's contention that it was a "principal," not an agent, was **[*19]** based on regulations unrelated to the settlement agreement. Id. at 1-2.

Carnival sought reconsideration of the Settlement Administrator's decision, which he denied. See Mot. at 6. The Settlement Administrator found that Carnival's submission did not warrant reversal of his initial decision "that the individual Carnival customers, who purchased tickets for air travel and paid the fuel surcharge, are the direct purchasers who are entitled to claim a refund under the Settlement." See Libow Decl. Ex. I (dkt. 375-9).

Carnival now moves the Court to enforce the settlement agreements by: (1) declaring that Carnival is a member of the settlement classes, (2) declaring that Carnival is entitled to compensation from the settlement funds, and (3) ordering that Carnival be paid compensation from the settlement funds. See Mot. at 15.

II. LEGAL STANDARD

"A settlement agreement is treated as any other contract for purposes of interpretation." *United Commercial Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992)*. Federal courts are to apply state contract law principles to the enforcement of settlement agreements. See *O'Neil v. Bunge Corp., 365 F.3d 820, 822 (9th Cir. 2004)*. [2]

The Settlement Administrator, who was involved in the mediation and negotiation of the settlement agreements, and has been administering the funds for three years, has direct and extensive knowledge of this case. See Opp'n at 10. Thus, the Court must give some deference to his recommendation as to factual matters. See *Goodrich Corp.*

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[1] According to Carnival, the Settlement Administrator "recently determined that Carnival is entitled to compensation from the settlement funds for about 2,823 tickets purchased on BA for business travel by Carnival crew members and about 276 tickets on VAA for business travel by Carnival crew members," and asserts that it is "not seeking compensation on those approximately 3,099 tickets." Id. n.1. The parties confirmed at the motion hearing that the tickets Carnival purchased for its crew members are not at issue in this Motion.

[2] The settlement **[*20]** agreements selected New York law to govern the interpretation of their terms. See Opp'n at 2.

v. Town of Middlesbury, 311 F.3d 154, 171 (2d Cir. 2002) ("a district court must give some deference to a [special] master's recommendation where the [special] master has direct and extensive knowledge about the particular circumstances of a given case") (internal quotation marks omitted). However, the Settlement Administrator's legal conclusion as to the proper construction of the settlement agreements is owed no deference. See Gulf Ins. Co. v. Transatlantic Reinsurance Co., 13 A.D.3d 278, 788 N.Y.S.2d 44, 45 (App. Div. 2004) (applying *de novo* standard of review to construction of contract).

III. DISCUSSION

The only question before the Court is whether Carnival is a class member.

Carnival's argument that it is a class member relies heavily on ***antitrust law***, characterizing itself **[*21]** as a direct purchaser of the airline tickets, and its passengers as indirect purchasers who cannot recover under *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. See generally Mot. That argument is fairly persuasive upon initial reading, because the antitrust principles it contains are sound: only direct purchasers may recover for antitrust injury, [3] and a "pass-on" defense is impermissible. [4] But the question before the Court is one of contracts, not ***antitrust law***. See *United Commercial Ins. Svc., Inc., 962 F.2d at 856*. The Court must determine whether Carnival fits within the definition of a class member as defined by the settlement agreement and irrespective of antitrust principles. It was therefore appropriate for the Settlement Administrator to focus on the "parties' contracts and course of dealing" in making the determination of whether Carnival is a class member. See Libow Decl. Ex. E (April 2010 letter from Settlement Administrator denying Carnival's claim).

A. Carnival was not the Purchaser

To be a class member under the settlement agreement, one has to be a person to whom BA or VAA sold a coupon for passenger air travel and to which the fuel surcharge was paid and not refunded. See Mot. at 5 (class definition). The Settlement Administrator found that, based upon the purchase contracts between Carnival and BA/VAA, and Carnival's process in attaining the airline tickets from the airlines and providing them to its passengers, Carnival does not fit within that definition. See generally Libow Decl. Ex. E. Importantly, there is no dispute that Carnival remitted money to the airlines and received airline tickets in exchange: the question is whether it actually purchased the tickets, or acted as a conduit for its passengers. Several considerations suggest that Carnival was acting as a conduit.

1. Relationship Between Carnival and VAA

Carnival's contract with VAA refers to Carnival as an "agent," **[*23]** but Carnival asserts that "that nomenclature was only a naming convention." Mot. at 4. Nonetheless, the contract describes an arrangement that sounds very much like Carnival is acting as a travel agent. [5]

The contract provides, for example, that "Agents must use the full passport name of each passenger when making CRS bookings," Brooker Decl. Ex. A (dkt. 376-1) § 6.1(p), that "Agents shall not make fraudulent, fictitious or speculative bookings in the CRS, or hold reservations or block space to accommodate expected demand," id. §

[3] See *Illinois Brick, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707* (indirect purchaser was not a proper plaintiff to bring antitrust claim even if indirect purchaser could show that the direct purchaser passed on the alleged overcharge).

[4] See *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)* **[*22]** ("As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever the price the buyer sells, the price he pays the seller remains illegally high, and his profits would b greater were his costs lower.").

[5] At the motion hearing, Carnival agreed that a traditional travel agent would not be a class member.

6.1(c), and that "A ticket shall not be issued to a customer unless the booking has been confirmed in that class in airline's internal reservation system," id. § 6.1(f).

The airlines also submitted a declaration from the head of National Sales at VAA, which explains that when a Carnival passenger requests that Carnival handle the booking of air travel, Carnival does the booking using the CRS/GDS system, which contains information about VAA's schedules, availability and fares. Brooker Decl. ¶ 9. "The CRS/GDS system is not unique to Carnival — it is used by most **[*24]** travel agents and tour operators that book travel for their customers." Id. No payment is due to VAA until a ticket issues. Id. ¶ 11. Twenty-one days before a flight, Carnival is required to ticket any bookings it is holding for passengers on a VAA flight; when that ticket is issued, it is issued in the name of the specific passenger, not in Carnival's name. Id. ¶¶ 13-14. At that point, Carnival was obligated to remit the agreed fare to VAA. Id. ¶¶ 14, 17. Once paid, Carnival was not permitted to switch the passenger on the ticket, because, VAA explains, "it is not Carnival's ticket." Id. ¶ 19. Additionally, when the ticket issued, "the customer enters into two contracts, one with Carnival and one with VAA in accordance with the Conditions of Carriage." Opp'n at 5.

This evidence supports the conclusion that Carnival facilitated ticket sales much as any travel agent would, but did not buy tickets on its own behalf.

2. Relationship Between Carnival and BA

Carnival's relationship with BA appears to be quite similar. The relationship is governed by two contracts: the IATA and the IT contract. See Opp'n at 5. Under the IATA contract, as with VAA, Carnival uses the CRS/GDS system, through which **[*25]** BA gives agents access to its inventory, including flights, fares and availability. Rodgers Decl. (dkt. 377) ¶ 7. Carnival must provide a passenger's name at booking, and is not required to remit payment until a ticket is issued. Id. ¶ 8. Under the IT contract, Carnival has the right to sell seats to its customers on identified flights as part of a cruise package, and in return, Carnival agreed to pay the Nett Inclusive Tour Fare and assume responsibility for collecting and remitting payment for taxes, fees, and charges. Id. ¶ 9; see also Rodgers Decl. Ex. 2 (IT agreement) ¶ 4.2 ("The Airlines will provide seats at Nett Inclusive Tour Fares on certain routes, for certain prices, in certain classes and subject to specific rules and restrictions, all of which will be detailed in the Rate Sheets."). Under the IT contract, Carnival can only book tickets to named passengers. Id. ¶ 13 (citing Rodgers Decl. Ex. 2 (IT agreement)) § 6.1(g)). And Carnival was again obligated to "incorporate the Conditions of Carriage and all other relevant ticketing and contractual obligations . . . at the request of and for the benefit of the relevant Airline." Id. ¶ 6.1(i).

The language in the BA contracts **[*26]** characterizing Carnival as a "principal," see, e.g., Monts Decl. Ex. A (dkt. 367-1) § 2.3 ("If the Organiser is arranging a Package for the Group which includes travel with the benefit of the Group Nett Rates then the Organiser acts as principal."); Rogers Decl. Ex. 2 § 2.1 (". . . acting as principal, not as the Airline's agent."), does not change the Court's conclusion. Even if the contracts use the word "principal" more broadly than only in the context of the ATOL Regulations, compare Rodgers Decl. ¶ 15 ("The term 'principal' appears for the purposes of the Air Travel Organisers' Licensing Regulations.") [6]; with Rodgers Decl. Ex. 2 (IT agreement) § 6.2 ("Tour Operator shall not hold itself out as BA's . . . agent for the purposes of the ATOL Regulations or otherwise"), such language is not determinative of the issue here: not whether Carnival was technically BA's agent, but whether Carnival purchased the airfares on its own behalf, as a class member. [7] The evidence previously discussed leads the Court to conclude that Carnival did not purchase the airfares on its own behalf, but performed a consolidating function analogous to that of a travel agent.

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[6] The declaration was made by BA's **[*27]** Key Account Manager, who manages BA's account with Carnival. Id. ¶ 2. Nonetheless it is not clear that this individual was involved in the drafting of the agreement or that he has personal knowledge of the purpose of that term.

[7] See also Mot. at 11 (arguing as to agency descriptor that "the Supreme Court recently noted" that "it is not the description of a transaction or a party to it that determines its antitrust significance but the economic substance of the arrangement").

3. Additional Arguments about Agency

Carnival makes two additional arguments for why it is not an agent.

First, Carnival cites to *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 852 (3d Cir. 1996)*, in which the plaintiffs sought to circumvent the bar of Havover Shoe and Illinois Brick by arguing that their lawyers had acted as their agents for the purposes of purchasing photocopies. See Mot. at 12-13. The court in *McCarthy, 80 F.3d at 852*, held that "none of the plaintiffs retained their lawyers to act as mere purchasing agents whose sole objective and function was to buy photocopies for the clients." Id. Carnival argues that the "sole objective and function" of its purchase of tickets was not to arrange air travel **[*28]** on behalf of BA and VAA. Mot. at 13. But even if McCarthy, a Third Circuit case, had precedential value, it is distinguishable here for at least three reasons. First, this case sounds in contract, not ***antitrust, law***. Second, the airlines' argument here is that Carnival was acting like an agent of the defendants — not of the plaintiffs. And third, arguably Carnival's sole function was to sell airline tickets as far as the airlines were concerned. Nonetheless, as previously discussed, Carnival need not have technically been an "agent" to be acting along the lines of a travel agent by purchasing tickets for its clients.

Next, Carnival argues without reference to any authority that "[w]hen travel agents sell tickets on behalf of an airline, they charge the fare established by the carrier; they do not price the ticket themselves or exercise any pricing discretion." Mot. at 10. Carnival reasons that "any pricing of air travel is necessarily made by Carnival when it sells single-price, all-inclusive cruise packages," id., and so Carnival cannot be an agent. That argument fails, because Carnival does not contest that it secures the ticket prices that the airlines require. Bundling services **[*29]** together and charging clients for them all at once does not mean that Carnival sets the price for the airline tickets, just that Carnival has flexibility in pricing the entire bundle of services.

B. Carnival Never Paid Fuel Surcharges

Most important, under Carnival's arrangements with the airlines, it was never responsible for paying fuel surcharges. See Opp'n at 12-13. "Fuel surcharges were only levied on tickets that were issued to individual passengers for seats actually flown by the ticketed passengers, and therefore were only paid for by the individual passengers, not by Carnival." Id. at 12; Brooker Decl. ¶ 14 (VAA fuel surcharge at time ticket issued); Rodgers Decl. ¶ 24 ("British Airways only assessed a fuel surcharge if a ticket was issued to a passenger and actually utilized by the passenger"). If a ticket was not issued to an individual passenger, at most Carnival had to pay a fixed fee to the airlines. See Rodgers Decl. ¶ 24. Fuel surcharges were not assessed if no ticket was issued to an individual passenger. Id.; Opp'n at 12. Thus, as the airlines argue, "[w]hatever risk Carnival assumed with respect to the seats that it requested BA reserve for Carnival customers, Carnival **[*30]** was never at risk of paying a fuel surcharge." Opp'n at 12.

This is the most significant fact weighing against Carnival's inclusion in the class. Carnival agreed with the Court at the motion hearing that this case was about the fuel surcharges. That Carnival was never on the hook for the fuel surcharge is consistent with it only purchasing airline tickets on behalf of its passengers, and inconsistent with its being a purchaser entitled to recovery.

Importantly, BA conceded at the motion hearing that if Carnival paid a fuel surcharge and there was no customer to pass that charge onto, Carnival would be a class member. To the extent that ever occurred, Carnival should prevail as to those charges. No evidence has been presented to the Court that it ever occurred.

Accordingly, the Court agrees with the Settlement Administrator that Carnival did not purchase tickets for itself but as a conduit.

C. Carnival's Delay Was Not Improper

Finally, the airlines complain that Carnival's delay in seeking review of the Settlement Administrator's decision threatens to harm other claimants. See Opp'n at 13-14. The Settlement Administrator's initial ruling denying Carnival's claim was 18 months ago, and it **[*31]** has been nearly a year since his denial of their request for reconsideration. Id. at 13. In the meantime, apparently 2,500 Carnival passengers have submitted claims and been issued refunds. Id. The airlines note that under the settlement agreement, each coupon for passenger travel is eligible for only one refund. Id. Therefore, they suggest, Carnival's claim threatens to take money out of its own passengers' pockets.

Be that as it may, Carnival was within its rights to wait as long as it did. Claimants have until December 2012 to submit claims, see id., and so Carnival might have waited another year to even step forward. That so many Carnival passengers submitted claims, presumably believing that they were class members, just underscores that it would be a windfall for Carnival to recover for a surcharge it never paid.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Carnival is not a class member and DENIES the Motion, except as to any instances in which Carnival can demonstrate to the Settlement Administrator that Carnival, and not its passenger, paid the fuel surcharge.

IT IS SO ORDERED.

Dated: December 19, 2011

/s/ Charles R. Breyer

CHARLES R. BREYER

UNITED STATES DISTRICT **[*32]** JUDGE

End of Document

[In re Processed Egg Prods. Antitrust Litig.](#)

United States District Court for the Eastern District of Pennsylvania

December 19, 2011, Decided; December 20, 2011, Filed

No. 11-cv-3520; MDL No. 2002; 08-md-02002

Reporter

836 F. Supp. 2d 290 *; 2011 U.S. Dist. LEXIS 146258 **; 2011-2 Trade Cas. (CCH) P77,738; 2011 WL 6396446

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION. THIS DOCUMENT APPLIES TO: ASSOCIATED WHOLESALE GROCERS, INC. v. UNITED EGG PRODUCERS, No. 11-cv-3520

Subsequent History: Motion granted by, in part, Motion denied by, in part *In re Processed Egg Prods. Antitrust Litig., 2012 U.S. Dist. LEXIS 37265 (E.D. Pa., Mar. 19, 2012)*

Prior History: *In re Processed Egg Prods. Antitrust Litig., 2011 U.S. Dist. LEXIS 139995 (E.D. Pa., Nov. 30, 2011)*

Core Terms

removal, preemption, federal law, federal question, cause of action, state law, cooperatives, egg, agricultural, pre-empted, federal statute, Sherman Act, costs, Capper-Volstead Act, defenses, civil action, antitrust, subject matter jurisdiction, federal court, state claims, cases, multidistrict litigation, federal jurisdiction, factual allegations, intent of congress, legal authority, district court, federal issue, circumstances, well-pleaded

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For IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION (2:08-md-02002), IN RE: IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION.

For SANDRA A. JESKIE (2:08-md-02002), Special Master: SANDRA A. JESKIE, LEAD ATTORNEY, DUANE, MORRIS LLP, PHILADELPHIA, PA.

Judges: GENE E.K. PRATTER, United States District **[**3]** Judge.

Opinion by: GENE E.K. PRATTER

Opinion

[*293] **MEMORANDUM**

GENE E.K. PRATTER, J.

Plaintiffs have moved for the remand of this action for lack of subject matter jurisdiction pursuant to *28 U.S.C. § 1447(c)*. For the reasons that follow, the Court grants the motion.

I. Background

Plaintiffs are six direct purchasers of eggs and egg products who originally filed their Complaint in the Twenty-Ninth Judicial District, the District Court of Wyandotte County, Kansas. As the basis for their single claim, Plaintiffs exclusively rely on Kansas state law in asserting that various egg and egg product producers and trade groups conspired to fix prices and restrict the supply of shell egg and egg products in violation of the Kansas Restraint of Trade Act, *Kan. Stat. Ann. §§ 50-101* and *50-112*.

After Plaintiffs initiated suit, this "Kansas action" has navigated several procedural stopovers before ultimately coming to roost before this Court. Defendants filed a notice of removal of the action before the U.S. District Court of Kansas, following which Plaintiffs filed the motion *sub judice.* While the motion was pending before the Kansas federal court, the Judicial Panel on Multidistrict Litigation conditionally transferred this action **[**4]** to the Processed Egg Products Antitrust Litigation (MDL No. 2002), then pending in this Court. *See* J.P.M.L. Transfer Order (Doc. No. 515). The cases coordinated or consolidated in the multidistrict litigation concern allegations of a conspiracy in violation of the Sherman Act among egg producers and trade groups to manipulate the supply of eggs and egg products and thereby affect the domestic prices of those goods. *See In re Processed Egg Prods. Antitrust Litig., 588 F. Supp. 2d 1366, 1367 (J.P.M.L. 2008)*. Some of those cases also include various state law claims against the Defendants. Because this Kansas action has been conditionally transferred to the multidistrict litigation, the pending motion for remand is before this Court. [1]

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[1] Defendants filed their Notice of Removal on the docket of the U.S. District Court of Kansas, Civil Action No. 11-2063 at Docket No. 1. On that docket, Plaintiffs filed their Motion to Remand at Docket No. 21, and Defendants responded in opposition. Defendants jointly filed a response at Docket No. 68 (hereinafter, "Defs.' Resp."), and Defendant Sparboe Farms, Inc. responded separately at Docket No. 66 (hereinafter, "Sparboe Resp."). Plaintiffs filed their **[**5]** reply at Docket No. 75 (hereinafter, "Pls.' Reply").

[*294] **II. Subject Matter Jurisdiction**

A defendant may properly remove to federal district court a civil action originally brought in state court, so long as the federal district court would have original jurisdiction over the matter. *See* 28 U.S.C. § 1441(a); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 7-8, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983). In doing so, the removing defendant bears the burden of establishing that jurisdiction exists. Dukes v. U. S. Healthcare, Inc., 57 F.3d 350, 359 (3d Cir. 1995).

Here, as the parties agree, because the named parties are not diverse, the Court's jurisdiction cannot be based upon diversity jurisdiction **[**6]** under 28 U.S.C. § 1332(a). "Where the parties are not diverse, removal is appropriate only if the case falls within the district court's original 'federal question' jurisdiction . . . ." U.S. Express Lines Ltd. v. Higgins, 281 F.3d 383, 389 (3d Cir. 2002). In their removal papers Defendants invoked both 28 U.S.C. §§ 1331 and 1337 as bases for federal question jurisdiction. *See* Defs.' Notice of Removal at ¶ 4. These provisions respectively provide for the district court's original jurisdiction in "all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, and "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies," 28 U.S.C. § 1337. The term "arising under" is construed consistently across these provisions. Franchise Tax Bd., 463 U.S. at 8 n.7 ("[W]e have not distinguished between the 'arising under' standards of § 1337 and § 1331.").

Defendants argue that the Kansas action raises federal question jurisdiction sufficient for removal: "(1) because Plaintiffs allege claims that arise in interstate commerce that arise solely under federal law; **[**7]** (2) because at least two Plaintiffs allege claims that have no connection at all to Kansas and, therefore, at least those claims cannot arise under Kansas law and must arise under federal law; (3) because the federal law of agricultural cooperatives completely preempts state law; and (4) because Plaintiffs' claims (even if properly pled under the Kansas Act) on their face raise substantial federal questions." Defs.' Resp. at 1. However, the Court determines that the federal issues identified by Defendants, to the extent that the Complaint's lone state claim implicates any, are insufficient to establish federal question jurisdiction.

A. Well-Pleaded Complaint Rule and Artful Pleading Doctrine

"Ordinarily, determining whether a particular case arises under federal law turns on the 'well-pleaded complaint' rule." Aetna Health Inc. v. Davila, 542 U.S. 200, 207, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004) (internal quotations omitted) (citing Franchise Tax Bd., 463 U.S. at 9-10). Under the rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) (citing Gully v. First Nat'l Bank, 299 U.S. 109, 112-13, 57 S. Ct. 96, 81 L. Ed. 70 (1936)); **[**8]** *see also* Gully, 299 U.S. at 115 ("Not every question of federal law emerging **[*295]** in a suit is proof that a federal law is the basis of the suit.").

Accordingly, a petition for removal and an answer to a complaint are irrelevant in determining the presence *vel non* of a federal question, and "[i]t is not enough that a federal question is or may be raised as a defense." U.S. Express, 281 F.3d at 389 (citation omitted). Likewise, counterclaims are inadequate to confer federal jurisdiction. Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002). In essence, the "rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar, 482 U.S. at 392.

Upon the transfer of the case to this district, this Court granted leave for the parties to file supplemental briefing as to Third Circuit law; those supplemental briefs are filed on this Court's docket, Action No. 08-md-2002 at Docket Nos. 529 and 530 (hereinafter, respectively, "Pls.' Suppl." and "Defs.' Suppl."). All Defendants joined the Defendants' supplemental memorandum. *See* Defs.' Suppl. at 9 n.5. Plaintiffs also filed a Notice of Supplemental Authority with this Court at Docket No. 540.

"[T]he vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." *Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986)*. However, a "state suit need not invoke a federal law in order to 'arise under' it for removal purposes." *U.S. Express, 281 F.3d at 389*. Consequently, for purposes of federal question jurisdiction, either a "federal law creates **[**9]** the cause of action or ... the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Empire Healthchoice Assurance Inc. v. McVeigh, 547 U.S. 677, 690, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)* (citing *Franchise Tax Bd., 463 U.S. at 27-28*). [2]

A **[**10]** familiar, if cynical, corollary to the well-pleaded complaint rule is the "artful pleading" doctrine. *See Rivet v. Regions Bank of La., 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)*; *Franchise Tax Bd., 463 U.S. at 22 (1983)*. "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Rivet, 522 U.S. at 475*. As such, this doctrine "requires a court to peer through what are ostensibly wholly state claims to discern the federal question lurking in the verbiage." *U.S. Express, 281 F.3d at 389*.

In doing so, it is important to recognize that the term "federal issue" is not merely "a password opening federal courts to any state action embracing a point of federal law," and that a cause of action simply "appear[ing] in state raiment" is not necessarily cause for exclusion from federal courts. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)*. [3] Accordingly, the Court must **[*296]** ask "does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved **[**11]** balance of federal and state judicial responsibilities"? *Id. at 314*.

In their Complaint, Plaintiffs present a cause of action under state law, the Kansas Restraint of Trade Act ("KRTA"), for violations of *Kan. Stat. Ann. §§ 50-101* and *50-112*. *See* Compl. ¶¶ 227, 234-35, 37 (articulating that Defendants' alleged conduct was "in violation of the Kansas Restraint of Trade Act, *K.S.A. 50-101* and *50-112*" and seeking relief pursuant to *Kan. Stat. Ann. §§ 50-115*, *50-108*, and *50-161*). This "Kansas law is similar in some respects to the Sherman Act, but it is not identical." *Bergstrom v. Noah, 266 Kan. 829, 974 P.2d 520, 531 (Kan. 1999)*. The Act "denies any person the right to form a trust or to be 'in any manner interested' in a trust, 'either directly or directly,' as defined in the [Act,] *K.S.A. 50-102*. In addition, all arrangements, contracts, **[**12]** agreements or trusts 'which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state' are 'against public policy, unlawful and void.'" *Van Hoecke Contracting, Inc. v. Lennox Indus., Inc., No. 05-02343, 2005 U.S. Dist. LEXIS 23439, 2005 WL 2575271, at *3 (D. Kan. Oct. 12, 2005)* (quoting *Kan. Stat. Ann. § 50-112*). The Supreme Court of Kansas has summarized the KRTA as "very sweeping in its provisions. It defines and denounces five kinds of combinations, which it denominates trusts. The definitions are couched in general terms, but cover almost every conceivable device by which freedom of commerce might be hampered, competition restricted, or the price of commodities controlled." *Bergstrom, 974 P.2d at 530* (quoting

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[2] Additionally, a "state claim may be removed to federal court... when Congress expressly so provides, such as in the Price-Anderson Act...." *Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 8, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)*. That Act "contains an unusual pre-emption provision, *42 U.S.C. § 2014(hh)*, that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims." *Id. at 6* (citation omitted).

Another such example is the Securities Litigation Uniform Standards Act of 1998, the removal provision for which, *15 U.S.C. § 78bb(f)(2)*, is "jurisdictional" and "creates an express exception to the well-pleaded complaint rule, conferring federal removal jurisdiction over a unique class of state law claims." *Rowinski v. Salomon Smith Barney Inc., 398 F.3d 294, 297-298 (3d Cir. 2005)* (footnote and citation omitted).

[3] As the Third Circuit Court of Appeals has recognized, generally, "there is a very limited area in which a federal court in a case removed from a state court is authorized to recharacterize what purports to be a state law claim as a claim arising under a federal statute." *R.R. Labor Execs. Ass'n v. Pittsburgh & Lake Erie R.R. Co., 858 F.2d 936, 942 (3d Cir. 1988)*.

Kansas v. Wilson, 73 Kan. 334, 80 P. 639, 640 (1906) in reference to Kan. Stat. Ann. §§ 50-101 to 50-110); *see also* Van Hoecke, 2005 U.S. Dist. LEXIS 23439, 2005 WL 2575271, at *4 (quoting same). [4]

None of the Defendants' arguments against remand are premised upon the contention that the Complaint is deficient in alleging a prima facie claim under the KRTA. *Cf.* United Jersey Banks v. Parell, 783 F.2d 360, 368 (3d Cir. 1986) (commenting that "federal jurisdiction will not be found when the complaint states a prima facie claim under state law"); *see also* Jackson v. Prime Motors, Inc., No. 11-2360, 2010 U.S. Dist. LEXIS 143015, 2011 WL 1883806, at *3 (E.D. Pa. May 17, 2011). Instead, Defendants attempt to recast the Plaintiff's claim as one arising under the Sherman Act because "[e]ither in whole or in part, Plaintiffs allege interstate conspiracy claims that can only arise under the Sherman Act." Defs.' Resp. at 6.

Defendants argue that Plaintiffs assert factual allegations that involve "the same nationwide conspiracy, in interstate commerce, to fix prices of eggs and egg products," and which are "virtually **[**14]** identical" **[*297]** to those allegations giving rise to the federal claims existing in the multidistrict litigation. *Id.* [5] However, even if the same factual allegations and same theory of conspiracy could give rise to both federal and state claims, the fact that Plaintiffs could have also brought a Sherman Act claim is not a factor in applying the well-pleaded complaint rule. *See* Delta Dental of R.I. v. Blue Cross & Blue Shield of R.I., 942 F. Supp. 740, 747 (D.R.I. 1996) ("... [T]he present dispute could have been brought as a federal antitrust claim under the Sherman Act. [Plaintiff] has chosen to forego its rights under federal law, however, instead relying exclusively on state law in asserting its claims against [Defendant].... [Plaintiff], as the master of the claim, has chosen to rely exclusively on state law and to litigate in state court—a choice that [Defendant] cannot defeat, notwithstanding that the case could have been brought under the Sherman Act or that federal defenses might be available.").

Defendants also contend **[**15]** that Plaintiffs are impermissibly seeking to recover for claims based upon sales of goods outside of Kansas, and that Plaintiffs "can only seek recovery [for those claims] pursuant to federal law." Defs.' Resp. at 8. Namely, according to Defendants, Kansas courts generally do not recognize the enforcement of state law on extraterritorial acts and that the KRTA cannot apply to out-of-state transactions because to do so would conflict with the federal dormant commerce clause. *Id.* Additionally, Defendants claim that some of these six Plaintiffs may not be able to recover at all under the KRTA because those Plaintiffs' claims do not involve sales made in or into Kansas. *Id.* at 7-8. Even assuming, *arguendo*, the validity of these arguments, Defendants are merely highlighting that Plaintiffs may not be able to recover under the KRTA for the full scope of the activities and damages alleged in the Complaint for various reasons, including because of at least one reason premised upon a federal legal issue. [6] Nonetheless, these arguments are not occasion for a Chicken Little panic. Instead, they simply

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[4] One federal district court also observed recently that:

> In discussing the Kansas restraint of trade act, Kansas Supreme Court noted that no hard and fast rule could be laid down, but that the question is never whether there is a restraint of trade, but whether the restraint is reasonable **[**13]** and whether or not the restraint contravenes the public welfare. Because the restraint of trade act concerns itself with the public welfare, it was designed to protect the competitive process, not competitors.

Ablulimir v. U-Haul Co. of Kansas, Inc., No. 11-4014-EFM, 2011 U.S. Dist. LEXIS 75191, 2011 WL 2731774, at *6 (D. Kan. June 13, 2011).

[5] Plaintiffs do not appear to dispute that their Complaint is premised upon factual allegations that form the cause of actions at issue in the multidistrict litigation.

[6] There is some authority that may further diminish the Defendants' interstate commerce argument in one respect. *See* In re Wyoming Tight Sands Antitrust Cases, No. 85-2349, 1990 U.S. Dist. LEXIS 12165, 1990 WL 136788, at *4 (D. Kan. Aug. 2, 1990) (rejecting an argument that "Kansas antitrust laws regulate activities solely in intrastate and opposed to interstate commerce" because "K.S.A. 50-112 clearly makes unlawful 'all arrangements ... which tend to prevent full and free competition in the importation, transportation or sale of articles imported *into this state*" and by "its clear language, the statute clearly contemplates enforcement in the interstate context," and because the cases raised by the movant "demonstrate that when a challenged course of conduct has implicated both inter-and intrastate commerce, the courts have applied Kansas antitrust statutes").

constitute defenses to the state claim, and defenses do not provide appropriate grounds for **[**16]** removal on the basis of federal question jurisdiction. [7]

Defendants are equally unpersuasive in their argument that "the Plaintiffs' Complaint raises the substantial federal question of the agricultural cooperative's immunity on its face." Defs.' Resp. at 20. All **[*298]** parties appear to agree that the Capper-Volstead Act and the other statutes, "allow[] certain agricultural producers to form cooperatives without incurring antitrust liability." *In re Mushroom Direct Purchaser Antitrust Litig., 655 F.3d 158, 158 (3d Cir. 2011)*. However, according to Defendants, the Plaintiffs' allegations "are designed to establish that Defendants have not complied with the terms of the federal cooperative acts [such as the Capper-Volstead Act, the Agricultural Cooperative Marketing Act, and *Section 6* of the Clayton Act]. Otherwise, Defendants' alleged actions would be legally justified and Plaintiffs could not prove that Defendants engaged in anticompetitive conduct." Defs.' Suppl. at 7.

However, there are no allegations in the Complaint that refer to any federal statute, let alone any allegations that **[**18]** Defendants do not qualify for immunity under the Capper-Volstead Act or a similar federal statute. Furthermore, Defendant Sparboe Farms, Inc. [8] acknowledges that "compliance or non-compliance" with those statutes "is not an element of Plaintiffs' claims," and thus "Plaintiffs are not required to make any affirmative pleading with respect to federal statutes." Sparboe Resp. at 13.

As previously discussed, although the Complaint contains *factual* allegations that *could* give rise to a federal antitrust claim, or factual allegations that ostensibly appear to anticipate a federal defense, the existence of these possibilities do not provide **[*299]** grounds for federal question jurisdiction when Plaintiffs do not actually assert a federal antitrust claim. [9] Likewise, no grounds **[**19]** for federal question jurisdiction exist because Plaintiffs do not have to prove (or disprove) a substantial question of federal law to make out all necessary elements of their KRTA

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[7] In exercising their "plaintiff's choice" by only pursuing a KRTA claim in their Complaint, Plaintiffs may have accounted for the advantages and disadvantages of pursuing remedies under the KRTA in lieu of the Sherman Act. *See, e.g.*, Kenton C. Granger, *A Glimpse at a Plaintiff's Remedies Under Kansas'* ***[**17]*** *Antitrust Laws*, 8 Washburn L.J. 1, 10-13 (describing some of the possible advantages of bringing a KRTA suit as compared to a federal antitrust suit, and vice versa).

[8] In the pending multidistrict litigation, Direct Purchaser Plaintiffs entered into a settlement agreement with Sparboe, as well as a settlement agreement with another group of Defendants. Plaintiffs have represented to the Court that "Plaintiffs opted-out of th[ose] direct purchaser settlements on or before November 16, 2010, and filed their lawsuit in Kansas state court." Pls.' Mot. at 4, ¶ 12, *see also id.* at 3-4, ¶¶ 9-11.

[9] The Court does not address in this decision whether the Capper-Volstead Act or the other statutes create a recognized defense to the KRTA. However, the Court observes that Defendants, in recounting the development of the Capper-Volstead Act in light of the history of "prosecutions of [agricultural] cooperatives under state antitrust laws," quote the Supreme Court for the contention that "[s]ome state courts had sustained antitrust charges against agricultural cooperatives, and as a result eventually *all the States passed Acts* ***[**20]*** *authorizing their existence.*" Defs.' Resp. at 14-15 (emphasis added) (quoting *Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 464, 80 S. Ct. 847, 4 L. Ed. 2d 880 (1960))*. Seemingly, the Cooperative Marketing Act, *Kan. Stat. Ann. §§ 17-1601 to 17-1636*, which provides, "[n]o association, contract, method or act which [under Kansas law qualifies as, or is conduct attributed to, an agricultural cooperative association] shall be deemed a conspiracy or combination in restraint of trade or as creating an illegal monopoly," *id.* *§ 17-1634*, may qualify as one such state statute. *See Kan. Wheat Growers' Ass'n v. Charlet, 118 Kan. 765, 236 P. 657, 658 (Kan. 1925)* (commenting that the Kansas Supreme Court had "held the statute [the Cooperative Marketing Act] to be valid, and held the [defendant] association is not an unreasonable combination in restraint of trade, or an organization for fostering unlawful monopoly"). It follows that the Cooperative Marketing Act might provide an alternative explanation for why Plaintiffs alleged facts that could be construed as anticipating an "agricultural cooperative"-type defense. *See, e.g.*, Compl. ¶ 106 ("These activities fall outside the legitimate objectives of any agricultural cooperative."); **[**21]** *id.* ¶ 108 ("UEP members are large corporate competitors rather than small farmers banding together to cut out the corporate middlemen who would otherwise market their eggs. UEP members do not associate to collectively process, handle and market their products, and UEP does not provide those services. UEP does not wash, candle, grade, break, pasteurize, package, store, transport, or distribute its members' eggs. UEP does not negotiate contracts for sale for its members.").

claim. *See* Grable, 545 U.S. at 314-15 (recognizing that federal question jurisdiction exists when the meaning of a federal statute both is disputed and is an essential element of the plaintiff's state law cause of action). [10] As such, the Defendants' arguments on this score do not implicate any of the previously discussed principles concerning federal question jurisdiction, the well-pleaded complaint rule, and the artful pleading doctrine that would warrant denying the remand request.

B. Complete Preemption

Another way in which the artful pleading doctrine permits removal is "where federal law completely preempts a plaintiff's state-law claim." Rivet, 522 U.S. at 475. That is, when the pre-emptive force of a statute is so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Caterpillar, 482 U.S. at 393 (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)); *see also* 13D Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3566 ("It is based on the theory that some federal statutes have such an overwhelming preemptive effect that they do more than merely provide a defense to a state-law claim."). [11] This occurs "when a federal statute wholly displaces the state-law cause of action." Anderson, 539 U.S. at 6, 8; *see also* In re Cmty. Bank of N. Va., 418 F.3d 277, 294 (3d Cir. 2005). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore **[**23]** arises under federal law." Caterpillar, 482 U.S. at 393. [12]

The Court of Appeals for the Third Circuit has determined that complete preemption exists only when (1) the federal statute that ostensibly serves as **[*300]** the basis for removal "contains civil enforcement provisions **[**24]** within the scope of which the plaintiff's claim falls," and (2) there is "a clear indication of a Congressional intention to permit removal." *Goepel v. Nat'l Postal Mail Handlers Union, 36 F.3d 306, 311 (3d Cir. 1994)* (quoting R.R. Labor, 858 F.2d at 942); Allstate Ins. Co. v. 65 Sec. Plan, 879 F.2d 90, 93 (3d Cir. 1989).

Although our Court of Appeals has not revisited the test in recent years, the second-part of this inquiry may have been modified by a subsequent Supreme Court decision to "focus[] on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable." Anderson, 539 U.S. at 9 n.5. Under either formulation of the test, "Congressional intent remains the touchstone, however." 14B Wright & Miller, *supra* § 3722.2.

In one case illustrative of complete preemption, the Supreme Court "found complete pre-emption" when "the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and

[10] Contrary to the Defendants' contention otherwise, they have not demonstrated that the Plaintiffs' KRTA claim is like the state law quiet title claim in Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 125 S. Ct. 2363, 162 L. Ed. 2d 257. In *Grable*, the Supreme Court upheld the removal of a state quiet title claim because it was premised on the grounds that a sale of real property was invalid because the service of an IRS seizure notice was inadequate under a federal statute. Id. at 310-11. The issue involving notice under the federal statute was thus "an essential element of [the] quiet title claim." Id. at 315. Here, the purported federal issue of an agricultural cooperative's immunity *might* arise as an affirmative **[**22]** defense to the Plaintiff's KRTA claim, but not as an element of the cause of action.

[11] "Very few statutes have a complete preemption effect." Wright & Miller, *supra* § 3566. Examples of statutes that have been found to completely preempt state law include the Labor Management Relations Act, 1947, and the Employee Retirement Income Security Act of 1974. *See* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 484 n.6, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999).

[12] In this way, complete preemption could be understood to serve as the recalibration of a non-existent state claim into the federal claim that it actually is: "An effort to invoke nonexistent state law is no different from a spelling error. A complaint reciting that a firm with a large share of the market for some product is violating 'the anti-rust laws' could not be dismissed on the observation that there is no federal prohibition of iron oxide. A court would treat the document as one under anti-trust law from the outset." Bartholet v. Reishauer A.G., 953 F.2d 1073, 1075 (7th Cir. 1992).

remedies governing that cause of action." Anderson, 539 U.S. at 8. However, the Supreme Court has recognized that "the absence of a federal private right of **[**25]** action as evidence [is] relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that [28 U.S.C.] § 1331 requires." Grable, 545 U.S. at 318. Indeed, "the combination of no federal cause of action and no preemption of state remedies ... [is] an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331. [Thus, a] missing cause of action [is] not... a missing federal door key, always required, but [is] a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state ... action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues." *Id.*

Courts often emphasize that complete preemption, which addresses federal subject matter jurisdiction, is "a distinct concept from ordinary preemption." R.R. Labor, 858 F.2d at 941 (citing Caterpillar, 482 U.S. at 398). In contrast, "[o]rdinary preemption governs what substantive law—federal or state—ought to control a claim styled under state law." Krashna v. Oliver Realty, Inc., 895 F.2d 111, 114 n.3 (3d Cir. 1990); *see also* Guckin v. Nagle, 259 F. Supp. 2d 406 (E.D. Pa. 2003) **[**26]** ("In other words, complete preemption addresses the forum, i.e., federal or state, where the claim must be heard; 'ordinary preemption' addresses the substantive rule of decision, i.e., federal or state, which the court must apply."); Vorhees v. Naper Aero Club, Inc., 272 F.3d 398, 403 (7th Cir. 2001) ("Only 'complete' preemption affects federal subject matter jurisdiction. 'Conflict' preemption relates to the merits of a claim. It comes into play any time a state law allegedly conflicts with federal law."); Wright & Miller, *supra* § 3556 ("The name [of 'complete preemption'] is misleading and this doctrine should be contrasted with 'ordinary' or 'conflict' preemption, under which federal law provides a defense to a state-law claim. 'Complete preemption,' in contrast, is actually a doctrine of subject matter jurisdiction." (footnote omitted)). Ordinary defensive preemption is embodied in the three categories of express preemption, conflict preemption, and field preemption. *See* Farina v. Nokia Inc., 625 F.3d 97, 115 (3d Cir. 2010) (citing Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)).

[*301] However, "[t]he fact that a defendant might ultimately prove that a plaintiff's **[**27]** claims are pre-empted ... does not establish that they are removable to federal court." R.R. Labor, 858 F.2d at 941 (quoting Caterpillar, 482 U.S. at 398). As such, "it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." Caterpillar, 482 U.S. at 393 (citing Franchise Tax Bd., 463 U.S. at 12).

Defendants contend that the principles of complete preemption apply to the KRTA claim by arguing that federal law regulating the economic activities of agricultural cooperatives completely preempts state law. According to Defendants, the "Plaintiffs' claims against [a trade group] and the individual Defendants arise in an area that is completely preempted by federal law" because the Capper-Volstead Act, the Agricultural Cooperative Marketing Act, and Section 6 of the Clayton Act "comprehensively regulate[] the joint economic activities of agricultural cooperatives." Defs.' Resp. at 12.

As Plaintiffs correctly contend in rejoinder, however, Defendants **[**28]** have not sustained their burden in demonstrating that removal is appropriate on the basis that the Plaintiffs' claim is completely preempted by the Capper-Volstead Act and the like. For example, Defendants have not pointed to any authority that suggests that any of the federal statutes that purportedly regulate the economic activities or competition of agricultural cooperatives create an exclusive cause of action or set forth procedures and remedies governing such actions. Moreover, the Defendants do not take the position that the Capper-Volstead Act, or the other statutes in combination or separately, create any sort of cause of action—and certainly not an exclusive cause of action—but rather provide for a kind of "immunity" to antitrust claims. Indeed, Defendants argue that those statutes "permit joint actions that might otherwise be illegal" and that "should cooperatives engage in anticompetitive behavior beyond that allowed by these statutes, then federal law provides a remedy through the Sherman Act." Defs.' Suppl. at 5-6; *see also* Defs.' Resp. at 12-13. In other words, Defendants appear to recognize that any federal cause of action in antitrust cases involving agricultural producers **[**29]** arises under the Sherman Act, not the Capper-Volstead Act or similar federal law. [13]

Defendants also have failed to demonstrate that those statutes manifest the Congressional intent that Defendants attempt to assign them. Defendants claim that the statutes "reflect a sustained congressional intent that agricultural cooperatives affirmatively be permitted to act jointly with and on behalf of their members," Defs.' Resp. at 12-13, and as such the statutes "evince an intent to occupy the field and preempt state law." Defs.' Suppl. at 5. Defendants cite excerpts of the plain language of the Capper-Volstead Act, the Agricultural Cooperative Marketing Act, and *Section 6* of the Clayton Act, as well as quotations from case law and commentators that discuss those statutes in a summary manner. *See* Defs.' Resp. at **[*302]** 13-17. [14] However, a close review of those authorities reveals that while there may be considerable Congressional interest in the economic activities **[**30]** of agricultural cooperatives, those authorities do not go so far as to serve as evidence that Congress intended to create a cause of action that is exclusively federal and could serve as the basis for removal, or that Congress intended these statutes to completely preempt state remedies.

Furthermore, the quintessence of the Defendants' **[**31]** argument as to complete preemption reveals that Defendants are scrambling the principles of complete preemption with the defense of federal preemption. [15] Indeed, this is evident in the Defendant's invocation of "field preemption" and "conflict preemption," which, as previously discussed, are defenses to the merits of a state claim. Given that in the removal context the Court's federal question jurisdiction cannot rest on federal defenses of preemption, the Defendants' reliance on ordinary preemption concepts cannot win the day. In sum, Defendants have not met their burden of demonstrating that removal on the grounds of complete preemption is appropriate. [16]

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[13] Although the Defendants occasionally invoke the Sherman Act in their arguments as to complete preemption, they are explicit in stating that they "do not contend that federal ***antitrust law*** preempts all state ***antitrust law***." Defs.' Resp. at 19.

[14] Some examples of the Defendants' legal authority from case law and commentators includes: Christine Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity, The Antitrust Source*, at 1 (Dec. 2010) (quoted by Defendants for the contention that the "Capper-Volstead Act represented the culmination of a long struggle by farmers to guarantee their right to organize cooperatives" and that the "passage of the Sherman Act and many state antitrust laws" led to "widespread concern ... that these laws would be used against agricultural cooperatives"), and *Bell v. Fur Breeders Agricultural Cooperative, 348 F. 3d 1224, 1232-33 (10th Cir. 2003)* (cited by Defendants for the proposition that federal courts "have determined that agricultural cooperatives, like corporations, do not have the plurality of actors necessary for a Section 1 conspiracy").

[15] This conflation is not unique to Defendants. *See, e.g., Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 273 n.7 (2d Cir. 2005)* ("Some commentators seem to equate the defense of field preemption, which defeats a plaintiff's state-law claim because federal law 'occupies the field' within which the state-law claim falls, with the doctrine of complete preemption, which creates federal subject-matter jurisdiction over preempted state-law claims .... But no Supreme Court case has ever held the two forms of preemption to be equivalent. **[**32]** It is true that the defense of field preemption and the doctrine of complete preemption both rest on the breadth, in some crude sense, of a federal statute's preemptive force. The two types of preemption are, however, better considered distinct." (citations omitted)).

[16] Although remand is appropriate at this time, the Court recognizes that this case might join the pending multidistrict litigation at another time. Such an occasion might develop, for instance, pursuant to the Class Action Fairness Act ("CAFA"). By way of example, this Court's jurisdiction might arise under CAFA given the potential interplay between the possible (albeit, rather novel) formation of a class of defendants, *see, e.g.*, *Kan. Stat. Ann. § 60-223*; *S. Ute Indian Tribe v. Amoco Prod. Co., 2 F.3d 1023, 1030 (10th Cir. 1993)* (describing a district court's certification of a defendant class upon a defendant's motion); CAFA's broad jurisdictional grant for state class actions, including those with a proposed class, *28 U.S.C. § 1332(d)*; and the federal removal statute, *28 U.S.C. § 1446(b)* ("If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by **[**33]** the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by *section 1332* of this title more than 1 year after commencement of the action.").

III. Request for Fees and Costs

Plaintiffs have requested pursuant to *28 U.S.C. § 1447(c)* the recovery of costs and **[*303]** expenses they have incurred due to the Defendants' removal of the Kansas action. However, the Court concludes that denial of this request is appropriate.

28 U.S.C. § 1447(c) provides that an "order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." There is no requirement "that fees under *§ 1447(c)* should either usually be granted or usually be denied." *Martin v. Franklin Capital Corp., 546 U.S. 132, 139, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)*.

Instead, the Court is guided by the standard that, "absent unusual circumstances, attorney's fees should not be awarded when the removing party has an objectively reasonable basis for removal." *Id. at 136*. Additionally, **[**34]** the Court has "discretion to consider whether unusual circumstances warrant a departure from the rule in a given case. For instance, a plaintiff's delay in seeking remand or failure to disclose facts necessary to determine jurisdiction may affect the decision to award attorney's fees." *Id. at 141*. This standard serves to "recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied," and likewise, not "discouraging [the] exercise [of removal] in all but obvious cases." *Id. at 140*. In exercising this discretion, the Court must ensure its rationale is "'faithful to the purposes' of awarding fees under *§ 1447(c)*." *Id. at 141*.

Plaintiffs claim that fees and costs are warranted because Defendants did not have an objectively reasonable basis for removal. In support, they cite a case from another district in this Circuit that found that "no reasonable basis for removal" was presented when the Defendants' arguments for removal were previously rejected by the Supreme Court and other **[**35]** courts. *See* *Gilbert v. Synagro, LLC, No. 1:CV-08-1460, 2008 U.S. Dist. LEXIS 98949, 2008 WL 5146506, at *1 (M.D. Pa. Dec. 8, 2008)*. Plaintiffs also argue that "Defendants failed to cite to any case from anywhere in the country that supported this argument." Pls.' Suppl. at 10.

However, this line of argument verges on the pot calling the kettle black. Plaintiffs likewise did not raise any legal authority that directly considered (and rejected) the Defendants' arguments. It may be that no court has had occasion to consider arguments like those raised by Defendants, or that the parties' research simply did not uncover such authority. Regardless, no single, dispositive conclusion can be drawn from the parties' mutual failure to raise legal authority that directly addressed Defendants' arguments—albeit, given the high quality of advocacy that the parties' counsel respectively exhibited, this result suggests by implication that there was no obvious authority contravening removal. Furthermore, based upon the circumstances of removal and the parties' briefing, it could be fairly said that Defendants were attempting to extend this area of law based upon certain legal authority, and that although the Court ultimately disagreed **[**36]** with their interpretation of that authority, the legal authority cited provided an objectively comprehensible and nonfrivolous basis for removal. *Cf.* *Vandeventer v. Guimond, 494 F. Supp. 2d 1255, 1269 (D. Kan. 2007)*.

Additionally, Plaintiffs imply that the Defendants' removal efforts are an intentional attempt to delay the litigation and impose unnecessary costs on Plaintiffs because the Defendants also sought to "stay **[*304]** the District of Kansas from timely ruling on Plaintiffs' Motion to Remand and by transferring this lawsuit across the country." Pls.' Suppl. at 10. However, this other alleged conduct, even if true, does not demonstrate intent to extensively prolong the litigation and impose costs upon Plaintiffs, particularly when considering this removal in the framework of the pending multidistrict litigation, which involves many of the same defendants and shares common factual allegations with the Plaintiffs' Complaint. Furthermore, the Court does not find other evidence of intentional delay here.

In sum, Plaintiffs do not cite to any legal authority or underlying facts in this case, nor does the Court find any such circumstances, that would justify an award for fees and costs under **[**37]** *§ 1447(c)*. Furthermore, the Court determines that none of the purposes underlying *§ 1447(c)* compel the award of fees and costs in the present circumstances. Accordingly, the Court denies the Plaintiffs' request for attorney's fees and costs.

IV. Conclusion

Although Defendants have mustered a series of arguments to support their removal of the Kansas action, these arguments must be considered unavailing. The Defendants' arguments essentially invoke defenses to the Complaint as the basis for the Court's federal question jurisdiction. However, defenses, even those that conjure federal issues and preemption defenses, simply are insufficient to support removal on the basis that the Plaintiffs' claim arises under federal law. Furthermore, Defendants have failed to satisfy their burden of demonstrating that the Plaintiff's KRTA claim establishes federal question jurisdiction. Accordingly, the Court grants the Plaintiffs' Motion for Remand, and the action will be remanded for lack of subject matter jurisdiction pursuant to *28 U.S.C. § 1447(c)*.

An Order consistent with this Memorandum follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

ORDER

AND NOW, this 19th **[**38]** day of December, 2011, upon consideration of the Plaintiffs' Motion to Remand (D. Kan., Civil Action No. 11-2063, Doc. No. 21), the Defendants' response and the Defendant Sparboe Farms, Inc.'s response (D. Kan., Civil Action No. 11-2063, Doc. Nos. 68 and 66), the Plaintiffs' reply (D. Kan., Civil Action No. 11-2063, Doc. No. 75), and the parties' supplemental filings thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that the Motion to Remand is GRANTED.

It is FURTHER ORDERED that this case is REMANDED to the Twenty-Ninth Judicial District, the District Court of Wyandotte County, Kansas, pursuant to *28 U.S.C. § 1447(c)*.

IT IS FURTHER ORDERED that the Clerk of Court shall CLOSE *Associated Wholesale Grocers, Inc. v. United Egg Producers*, Civil Action No. 11-3520 (E.D. Pa.), for all purposes, including statistics.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

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Sullivan v. DB Invs., Inc.

United States Court of Appeals for the Third Circuit

January 28, 2010, No. 08-2785 Argued, Nos. 08-2784/2798/2799/2818/2819/2831/2881 Submitted Under Third Circuit L.A.R. 34.1(a); February 23, 2011, Reargued En Banc; December 20, 2011, Opinion Filed

Nos. 08-2784/2785/2798/2799/2818/2819/2831/2881

Reporter
667 F.3d 273 *; 2011 U.S. App. LEXIS 25185 **; 2011-2 Trade Cas. (CCH) P77,736; 81 Fed. R. Serv. 3d (Callaghan) 580

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY; JAMES WALNUM, on behalf of themselves and all others similarly situated, v. DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL SELLING ORGANIZATION; DE BEERS CENTENARY A.G., DAVID T. MURRAY, Appellant in 08-2784 (Pursuant to Fed. R. App. P. 12(a)), SUSAN M. QUINN, Appellant in 08-2785 (Pursuant to Fed. R. App. P. 12(a)), MARVIN L. UNION; TIM HENNING; NEIL FREEDMAN; KYLIE LUKE; WILLIAM BENJAMIN COFFEY, Jr., Appellants in 08-2798 (Pursuant to Fed. R. App. P. 12(a)), AARON PETRUS, Appellant in 08-2799 (Pursuant to Fed. R. App. P. 12(a)), JANET GIDDINGS, Appellant in 08-2818 (Pursuant to Fed.R.App.P. 12(a)), FRANK ASCIONE; ROSAURA BAGOLIE; MATTHEW DELONG; SANDEEP GOPALAN; MANOJ KOLEL-VEETIL; MATTHEW METZ; ANITA PAL; DEB K PAL; JAY PAL; PETER PERERA; RANGESH K. SHAH; ED MCKENNA; THOMAS VAUGHAN, Appellants in 08-2819 (Pursuant to Fed.R.App.P. 12(a)), KRISTEN DISHMAN; MARGARET MARASCO, Appellants in 08-2831 (Pursuant to Fed.R.App.P. 12(a)), JAMES B. HICKS, Appellant in 08-2881 (Pursuant to Fed. R. App. P. 12(a))

Subsequent History: US Supreme Court certiorari denied by *Murray v. Sullivan, 2012 U.S. LEXIS 2656 (U.S., Apr. 2, 2012)*

Prior History: **[**1]** Appeals from the United States District Court for the District of New Jersey. (D.C. Civil No. 2-04-cv-02819). District Judge: Honorable Stanley R. Chesler.

Sullivan v. DB Invs., Inc., 2008 U.S. Dist. LEXIS 81146 (D.N.J., May 22, 2008)

Disposition: The orders certifying the classes and approving the settlement were affirmed.

Core Terms

settlement, Purchaser, district court, indirect, class member, predominance, certification, objectors, class action, diamonds, antitrust, class certification, state law, commonality, damages, quotations, cases, courts, injunctive relief, subclasses, settlement fund, certifying, factors, parties, consumer protection, questions, merits, anti trust law, variations, consumers

LexisNexis® Headnotes

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

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

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

HN1[] **Standards of Review, Abuse of Discretion**

The role of an appellate court is to ascertain whether or not a district court clearly abused its discretion in approving or rejecting a settlement agreement in a class action. A district court abuses its discretion if its decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. If the district court's analysis on these points is correct, however, then it is fair to say that the appellate court will ordinarily defer to its exercise of discretion embodied in the findings on predominance and superiority. Whether an incorrect legal standard has been used is an issue of law to be reviewed de novo. The district court's determination that the settlement is fair, reasonable, and adequate is likewise reviewed for abuse of discretion.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] **Class Actions, Compromise & Settlement**

Before approving a class settlement agreement, a district court first must determine that the requirements for class certification under *Fed. R. Civ. P. 23(a)*, *(b)* are met. *Rule 23(a)* contains four threshold requirements, which every putative class must satisfy: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Rule 23(a)*. Upon finding each of these prerequisites satisfied, the district court must then determine that the proposed class fits within one of the categories of class actions enumerated in *Rule 23(b)*.

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN3[] **Remedies, Injunctions**

Fed. R. Civ. P. 23(b)(2) authorizes class actions seeking injunctive relief in instances where a defendant has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is appropriate respecting the class as a whole. *Rule 23(b)(2)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN4[] **Prerequisites for Class Action, Predominance**

Certification of a class pursuant to *Fed. R. Civ. P. 23(b)(3)* seeking monetary compensation is permitted where (1) questions of law or fact common to class members predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Rule 23(b)(3). These twin requirements are commonly referred to as predominance and superiority.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN5[] **Prerequisites for Class Action, Commonality**

The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, and assesses whether a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated. Parallel with Fed. R. Civ. P. 23(a)(2)'s commonality element, which provides that a proposed class must share a common question of law or fact, Rule 23(b)(3)'s predominance requirement imposes a more rigorous obligation upon a reviewing court to ensure that issues common to the class predominate over those affecting only individual class members. Hence, the court considers the Rule 23(a) commonality requirement to be incorporated into the more stringent Rule 23(b)(3) predominance requirement, and therefore deem it appropriate to analyze the two factors together, with particular focus on the predominance requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN6[] **Prerequisites for Class Action, Commonality**

Three guideposts direct the predominance inquiry in a class action: first, that commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members; second, that variations in state law do not necessarily defeat predominance; and third, that concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN7[] **Prerequisites for Class Action, Predominance**

The focus of the predominance inquiry is on whether a defendant's conduct was common as to all class members, and whether all of the class members were harmed by the defendant's conduct.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN8[] **Prerequisites for Class Action, Commonality**

In the class action context, commonality and predominance are defeated when it cannot be said that there was a common course of conduct in which the defendant engaged with respect to each individual. But commonality is satisfied where common questions generate common answers apt to drive the resolution of the litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN9[] **Prerequisites for Class Action, Commonality**

Variations in the rights and remedies available to injured class members under the various laws of the fifty states do not defeat commonality and predominance for class action purposes. This is so because a finding of commonality does not require that all class members share identical claims, and predominance is not considered deficient merely because claims were subject to the varying laws of fifty states. Predominance under *Fed. R. Civ. P. 23(b)(3)* cannot be reduced to a mechanical, single-issue test; rather, as long as a sufficient constellation of common issues binds class members together, variations in the sources and application of applicable laws will not foreclose class certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN10[] **Prerequisites for Class Action, Commonality**

Courts are willing to certify nationwide classes where differences in state law fall into a limited number of predictable patterns, and any deviations can be overcome at trial by grouping similar state laws together and applying them as a unit.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN11[] **Prerequisites for Class Action, Commonality**

For purposes of litigation classes, if applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subgroups embracing each of the dominant legal standards can be appropriate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN12[] **Prerequisites for Class Action, Commonality**

Nothing in case law or the language of *Fed. R. Civ. P. 23* commands that everyone in a class must allege precisely identical or uniform causes of action, and statutory variations do not defeat predominance in the presence of other exceedingly common issues. Instead, where a defendant's singular conduct gives rise to one cause of action in one state, while providing for a different cause of action in another jurisdiction, the courts may group both claims in a single class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN13[] **Prerequisites for Class Action, Commonality**

In the class action context, the question is not what valid claims can plaintiffs assert; rather, it is simply whether common issues of fact or law predominate. *Fed. R. Civ. P. 23(b)(3)*. There is no "claims" or "merits" litmus test incorporated into the predominance inquiry beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN14[] **Class Actions, Certification of Classes**

Although an evaluation of the probable outcome on the merits is not properly part of a class certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the merits, limited to those aspects relevant to making the certification decision on an informed basis.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN15[] **Class Actions, Certification of Classes**

A court considering certification of a class may inquire whether the elements of asserted claims are capable of proof through common evidence, but lacks authority to adjudge the legal validity or soundness of the substantive elements of asserted claims. Put another way, a district court may inquire into the merits of the claims presented in order to determine whether the requirements of *Fed. R. Civ. P. 23* are met, but not in order to determine whether the individual elements of each claim are satisfied.

Civil Procedure > General Overview

Governments > Courts > Rule Application & Interpretation

HN16[] **Civil Procedure**

The Rules Enabling Act provides that the rules of procedure shall not abridge, enlarge, or modify any substantive right. *28 U.S.C.S. § 2072(b)*.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Governments > Courts > Rule Application & Interpretation

HN17[] **Class Actions, Compromise & Settlement**

Settlement agreements in class actions are creatures of private contract law. A district court is not a party to the settlement, nor may it modify the terms of a voluntary settlement agreement between parties. Thus, a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action. In the absence of a finding that plaintiffs are actually entitled to relief under substantive state law, the court does not abridge, enlarge, or modify any substantive right by approving a voluntarily-entered class settlement agreement. 28 U.S.C.S. § 2072(b).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN18[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(c) provides that a class certification order must include: (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified; and (2) a readily discernible, clear, and complete list of the claims, issues, or defenses to be treated on a class basis.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN19[] Class Actions, Certification of Classes

No particular format of a class certification order is necessary in order to meet the substantive requirement of Fed. R. Civ. P. 23(c), and an appellate court will not set aside substantively conforming certification orders purely over matters of form.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN20[] Remedies, Injunctions

See 15 U.S.C.S. § 26.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN21[] Remedies, Injunctions

In contrast to the damages provision of § 4 of the Clayton Act, § 16 of the Clayton Act, 15 U.S.C.S. § 26, is applied more expansively, both because its language is less restrictive than that of § 4 and because the injunctive remedy is a more flexible and adaptable tool for enforcing the antitrust laws than the damage remedy. Because actions seeking injunctive relief under § 16 do not present the countervailing considerations--such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses, plaintiffs need not satisfy the direct purchaser requirement as a condition of seeking injunctive relief.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN22[] Remedies, Injunctions

See 15 U.S.C.S. § 26.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN23[] Class Actions, Compromise & Settlement

Parties to a class action suit have the right to agree to anything they please in reference to the subject matter of their litigation, and a court, when applied to, will ordinarily give effect to their agreement if it comes within the general scope of the case made by the pleadings. In turn, the district court may provide broader relief in an action that is resolved before trial than the court could have awarded after a trial. Accordingly, district courts are afforded wide discretion to give effect to joint compromises that timely advance the interests of the parties without wasteful litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN24[] Prerequisites for Class Action, Typicality

Fed. R. Civ. P. 23(b)(2) authorizes class certification only when the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. *Rule 23(b)(2)*. Important to the analysis is that the relief sought should benefit the entire class, and the putative class must demonstrate that the interests of the class members are so like those of the individual representatives that injustice will not result from their being bound by such judgment in the subsequent application of principles of res judicata. Injunctive actions, seeking to define the relationship between the defendant and the world at large, will usually satisfy the requirement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN25[] Class Actions, Compromise & Settlement

Before approving a class settlement agreement, a district court must find that the requirements for class certification under *Fed. R. Civ. P. 23(a)*, *(b)* are met, and must separately determine that the settlement is fair to the class under *Rule 23(e)*. *Rule 23(e)* provides that a proposed settlement may only be approved after a hearing and on finding that it is fair, reasonable, and adequate. *Rule 23(e)(2)*. In this process, trial judges bear the important responsibility of protecting absent class members, and must be assured that the settlement represents adequate compensation for the release of the class claims. Where settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously, district courts should be even more scrupulous than usual when examining the fairness of the proposed settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN26[] Class Actions, Compromise & Settlement

In assessing the fairness of a proposed settlement of a class action, there are nine well-established primary factors for a district court to consider in conducting its inquiry: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN27[] Class Actions, Compromise & Settlement

A district court may consider factors illustrative of additional inquiries that in many instances will be useful for a thoroughgoing analysis of a class action settlement's terms: the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved--or likely to be achieved--for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable. The settling parties bear the burden of proving that the factors weigh in favor of approval of the settlement throughout this analysis. Because of the district court's proximity to the parties and to the nuances of the litigation, an appellate court accords great weight to the district court's factual findings in conducting the fairness inquiry.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN28[] **Class Actions, Compromise & Settlement**

A factor in assessing the fairness of a class action settlement captures the probable costs, in both time and money, of continued litigation.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN29[] **Class Actions, Compromise & Settlement**

A factor in assessing the fairness of a class action settlement attempts to gauge whether members of the class support the settlement by considering the number of objectors and opt-outs and the substance of any objections.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN30[] **Class Actions, Compromise & Settlement**

A factor in assessing the fairness of a class action settlement captures the degree of case development that class counsel had accomplished prior to settlement, and allows a court to determine whether counsel had an adequate appreciation of the merits of the case before negotiating.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN31[] **Class Actions, Compromise & Settlement**

A factor in assessing the fairness of a class action settlement examines what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN32[] **Class Actions, Compromise & Settlement**

A factor in assessing the fairness of a class action settlement attempts to measure the expected value of litigating the action rather than settling it at the current time.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN33[] **Class Actions, Compromise & Settlement**

A factor in assessing the fairness of a class action settlement measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial in light of the fact that the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the class action. Class certification is tenuous, as a district court retains the authority to decertify or modify a class at any time during the litigation if it proves to be unmanageable.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN34[] **Class Actions, Compromise & Settlement**

A factor in assessing the fairness of a class action settlement considers whether the defendants could withstand a judgment for an amount significantly greater than the settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN35[] **Class Actions, Compromise & Settlement**

In comparing the value of a class action settlement versus trial, a court must be careful to judge the fairness factors against the realistic, rather than theoretical, potential for recovery after trial.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN36[] **Class Actions, Compromise & Settlement**

In any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of remaining factors, this fact alone does not undermine the reasonableness of a settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN37[] **Class Actions, Compromise & Settlement**

Factors in assessing the fairness of a class action settlement consider whether the settlement represents a good value for a weak case or a poor value for a strong case. The reasonableness of the proposed settlement is assessed by comparing the present value of the damages plaintiffs would likely recover if successful at trial, appropriately discounted for the risk of not prevailing with the amount of the proposed settlement. Notably, in conducting the analysis, the court must guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN38[] **Class Actions, Compromise & Settlement**

Courts generally determine fairness of an antitrust class action settlement based on how it compensates the class for past injuries, without giving much, if any, consideration to treble damages.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN39[] **Class Actions, Compromise & Settlement**

In reaching a private consensual settlement of a class action, the parties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value. The court's principal role in this engagement is to protect the unnamed members of the class. As such, the court must remain cognizant that its intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN40[] **Class Actions, Compromise & Settlement**

A district court's principal obligation in approving a plan of allocation under a class action settlement is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund. Where a class is found to include subclasses divergent in interest, the use of subclasses may be appropriate and is designed to prevent conflicts of interest in class representation. Courts also not the potential drawbacks of subclassing, including the potential "Balkanization" of the class action, and creation of a huge obstacle to settlement if each subclass has an incentive to hold out for more money. An appellate court accords substantial deference to district courts with respect to their resolution of this issue" because such decisions require a balancing of costs and benefits that can best be performed by a district judge. Where the district court has declined to certify a subclass and treats all class members as falling within a single class for purposes of a fund allocation, the appellate court will ordinarily defer to its decision unless it constitutes an abuse of discretion.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN41[] **Class Actions, Compromise & Settlement**

Courts generally consider plans of allocation under a class action settlement that reimburse class members based on the type and extent of their injuries to be reasonable, and district courts have broad supervisory powers over the administration of class action settlements to allocate the proceeds among the claiming class members equitably.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN42[] **Class Attorneys, Fees**

A robust and thorough judicial review of fee applications is required in all class action settlements, but that the amount of a fee award is within the district court's discretion so long as it employs correct standards and procedures and makes findings of fact not clearly erroneous.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN43[] Class Attorneys, Fees

Attorneys' fees requests in a class action are generally assessed under one of two methods: the percentage-of-recovery (POR) approach or the lodestar scheme. The former applies a certain percentage to the settlement fund, while the latter multiplies the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services. The POR method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure. The lodestar method, which is more commonly utilized in statutory fee-shifting cases and where the expected relief has a small enough monetary value that a POR method would provide inadequate compensation is then used to crosscheck the reasonableness of a POR fee award.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN44[] Class Attorneys, Fees

The lodestar crosscheck of a percentage-of-recovery fee award in a class action is performed by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier. The multiplier endeavors to account for the contingent nature or risk involved in a particular case, and may be adjusted to account for particular circumstances, such as the quality of representation, the benefit obtained for the class, and the complexity and novelty of the issues presented.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN45[] Class Attorneys, Fees

The factors for determining a percentage-of-recovery fee award in a class action are as follows: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; (7) the awards in similar cases; (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained; and (10) any innovative terms of settlement.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN46[] Class Attorneys, Fees

A district court may not rely on a formulaic application of the appropriate range in awarding fees in a class action but must consider the relevant circumstances of the particular case.

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN47[] **Class Members, Named Members**

Incentive awards are not uncommon in class action litigation and particularly where a common fund has been created for the benefit of the entire class. The purpose of these payments is to compensate the named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws.

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Judges: Before: RENDELL and JORDAN, Circuit Judges, and AMBROSE*, District Judge. Before: SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and VANASKIE, Circuit Judges. SCIRICA, Circuit **[**4]** Judge, concurring. JORDAN, Circuit Judge, joined by SMITH, Circuit Judge, dissenting.

Opinion by: RENDELL

Opinion

[*285] OPINION OF THE COURT

RENDELL, *Circuit Judge*, with whom *Circuit Judges* SCIRICA, AMBRO, FUENTES, FISHER, CHAGARES and VANASKIE, join.

At issue on appeal in this class action litigation is the propriety of the District Court's certification of two nationwide settlement classes comprising purchasers of diamonds from De Beers SA. and related entities ("De Beers").[1] The settlement provided for a fund of $295 million to be distributed to both the direct and indirect purchasers: the direct purchasers were to receive $22.5 million of the fund, while the indirect purchasers would receive $272.5 million. A panel of our Court held that the District Court's ruling was inconsistent with the predominance inquiry mandated by *Federal Rule of Civil Procedure 23(b)(3)*, and remanded the matter for further proceedings. *See Sullivan v. DB Investments, Inc., 613 F.3d 134 (3d Cir. 2010)*, *reh'g en banc granted and vacated by Sullivan v. DB Investments, Inc., 619 F.3d 287 (3d Cir. 2010)*. We **[**5]** then granted the plaintiffs' petition for rehearing en banc and vacated the prior order. Accordingly, we address anew the propriety of the District Court's certification of the direct and indirect purchaser classes pursuant to *Federal Rule of Civil Procedure 23(b)(2)* and *23(b)(3)*, and also consider for the first time the objections raised to the fairness of the class settlement.[2]

We believe that the predominance inquiry should be easily resolved here based on De Beers's conduct and the injury it caused to each and every class member, and that the straightforward application of *Rule 23* and our precedent should result in affirming the District Court's order certifying the class. But the objectors to the class certification and our dissenting colleagues insist that, when deciding whether to certify a class, a district court must ensure that each class member possesses a viable claim or "some colorable legal claim," (Dissenting Op. at 10). We disagree, and accordingly, we will reason **[*286]** through our analysis in a more deliberate manner in order to explain why the addition of this new requirement into the *Rule 23* certification process **[**7]** is unwarranted.

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* Honorable Donetta W. Ambrose, United States District Court Judge for the Western District of Pennsylvania, sitting by designation.

1 The Settlement involved five individual class actions pending in federal court and two other class suits pending in state court. The individual federal suits presently before us are: *Sullivan v. DB Investments, Inc*., Index No. 04-cv-02819 (D.N.J.); *Null v. DB Investments, Inc*., Madison Co. No. 05-L-209 (Madison County, Ill. Cir. Ct., removed to S.D. Ill.); *Leider v. Ralfe*, No. 01-CV-3137 (S.D.N.Y.); *Anco Industrial Diamond Corp. v. DB Investments, Inc*., No. 01-cv-04463 (D.N.J.); and *British Diamond Import Co. v. Central Holdings Ltd*., No. 04-cv-04098 (D.N.J.). The two other class actions pending in state court pertinent to the Settlement and this set of appeals are: *Hopkins v. De Beers Centenary A.G*., San Francisco County No. CGC-04-432954 (Cal. Super. Ct.), and *Cornwell v. DB Investments, Inc*., Maricopa Co. **[**6]** No. CV2005-2968 (Ariz. Super. Ct.).

2 Because the Panel found the certification of the class to be flawed, it did not reach the *Rule 23* fairness objections to the settlement, distribution plan, and fee award, or the District Court's resolution of these objections. *See Sullivan, 613 F.3d at 142 n.6*. Because we now conclude that the District Court's certification of the proposed settlement was appropriate, we will also address these issues.

I. Factual & Procedural Background

A. Present Litigation & Settlement Proceedings

The allegations in the present case arose from De Beers's undisputed position as the dominant participant in the wholesale market for gem-quality diamonds throughout much of the twentieth century.[3] It is alleged that, beginning in 1890 and continuing through the filing of the Complaints at issue in this appeal, De Beers coordinated the worldwide sales of diamonds by, *inter alia*, executing output-purchase agreements with competitors, synchronizing and setting production limits, restricting the resale of diamonds within certain geographic regions, and directing marketing and advertising. Through its coordinated network of diamond producers, De Beers was able to value diamonds according to certain physical characteristics and to then control the quantity and prices of diamonds in the marketplace by strictly regimenting sales to preferred wholesalers, known as "sightholders."[4] Sightholders resold these diamonds to jewelry manufacturers and retailers — either as rough diamonds or as cut, polished, and finished stones — **[**8]** and constituted De Beers's primary channel for distribution of its diamonds.[5]

Between 2001 and 2002, plaintiffs brought suit complaining that De Beers's aforementioned business practices contravened state and federal antitrust, consumer protection, and unjust enrichment laws, and constituted unfair business practices and false advertising under common law and relevant state statutes. Specifically, the plaintiffs alleged that De Beers exploited its market dominance to artificially inflate the prices of rough diamonds; this, in turn, caused reseller and consumer purchasers of diamonds and diamond-infused products to pay an unwarranted premium for such products. The initial two price-fixing lawsuits were filed in the United States District Courts for the District of New Jersey and the Southern District of New York in 2001, and five subsequent lawsuits were initiated in federal and state courts in other parts of the country.[6] **[*287]** Three of the lawsuits **[**10]** were filed in state court

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[3] The vacated Panel Opinion describes the history, progression to power, and eventual market dominance of De Beers and its related entities in greater detail. *See* *Sullivan, 613 F.3d at 138-39*. For the sake of brevity, we provide a summary.

[4] Sightholders are selected by De Beers's subsidiary Diamond Trading Company ("DTC") based upon specific criteria, "including their financial standing and reliability, their market position, their distribution ability, their marketing ability, and their compliance with Diamond Trading Company Diamond Best Practice Principles." (App'x 1438.) In 2006, DTC had ninety-three sightholders, nine of which had head offices in the United States and seventy-six of which had sales offices in the country. (*Id*.) Sightholders sell both rough and polished diamonds, as well as diamond jewelry. (*Id*.) By way of example, the retailer Tiffany & Co. is a majority-owner of the South African sightholder Rand Precision Cut Diamonds, which sells polished diamonds and manufactures jewelry for sale in Tiffany stores. (*Id*. 1438-39.)

[5] The process by which De Beers sold its rough diamonds entailed a "diamond **[**9]** pipeline," which began with the sale of rough diamonds and ended with the purchase of retail diamond jewelry by consumers. The participants in the diamond pipeline included rough stone wholesalers, cutters and polishers of rough diamonds, finished stone wholesalers, diamond jewelry manufacturers and wholesalers, and retailers.

[6] The theories of recovery in the individual cases are as follows: *Anco Industrial* was filed on behalf of all direct purchasers of rough diamonds pursuant to Clayton Act §§ 4 and 16, *15 U.S.C. §§ 15* and *26*, to prevent and restrain violations of *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1-2*. *British Diamond* was filed on behalf of direct purchasers of polished diamonds pursuant to Clayton Act §§ 4 and 16, *15 U.S.C. §§ 15* and *26*, to prevent and restrain violations of *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1-2*. *Cornwell* was filed on behalf of all purchasers of diamonds in Arizona pursuant to *Ariz. Rev. Stat. Ann. § 44-1402* for monopolization of the market for diamonds, and under *§ 44-1403* for establishment, maintenance or use of monopoly. *Hopkins* was filed on behalf of California residents who purchased diamonds in California **[**11]** pursuant to *Cal. Bus. & Prof. Code § 16720, et seq*., alleging engagement in a continuing unlawful restraint of trade; pursuant to *§ 17200, et seq*., for violation of the unfair competition law; and under California common law for monopolization and attempted monopolization. *Leider* was filed on behalf of consumers who purchased diamonds or diamond jewelry pursuant to the Wilson Tariff Act, *15 U.S.C. §§ 8-11*; under § 16 of the Clayton Act, *15 U.S.C. § 26*, for injunctive relief in connection with *§§ 1* and *2* of the Sherman Act, and for damages for violations of *§ 2* of the Sherman Act; pursuant to federal and New York state common law for damages and injunctive relief;

in Arizona, California, and Illinois, respectively; the last was then removed to the United States District Court for the Southern District of Illinois. The five suits in federal court were subsequently all transferred to and consolidated in the United States District Court for the District of New Jersey, and are presently before us.

The plaintiffs in the seven cases are best characterized as falling within one of two types of purchaser classes. The first category includes direct purchasers of gem diamonds, who purchased directly from De Beers or one of its competitors ("Direct Purchaser Class" or "Direct Purchasers"). These plaintiffs advanced claims of price-fixing and monopolization pursuant to *§§ 1* and *2* of the Sherman Act, and sought monetary and injunctive relief under §§4 and 16 of the Clayton Act. The second category of plaintiffs consists of indirect purchasers of rough or cut-and-polished diamonds; this category of consumers, jewelry retailers and other middlemen acquired diamonds from sightholders or other direct purchasers, rather than directly from De Beers or its competitors ("Indirect Purchaser Class" or "Indirect Purchasers"). While both categories of purchasers alleged the same antitrust injury and sought injunctive relief pursuant to **[**13]** § 16 of the Clayton Act, the Indirect Purchasers sought damages pursuant only to state antitrust, consumer protection, and unjust enrichment statutes and common law.

As it had for well over a half-century, De Beers initially rejected the plaintiffs' assertion that courts in the United States possessed personal jurisdiction over it and its associated entities, arguing that it never transacted business directly in the United States. De Beers refused to appear in the lawsuits, resulting in defaults or default judgments being entered against it in each of the filed cases with the exception of *Cornwell*. While continuing to insist that these default judgments were unenforceable, counsel for De Beers approached **[*288]** plaintiffs' counsel in May 2005 to discuss settlement of the Indirect Purchasers' claims. These discussions yielded an agreement to settle *Sullivan, Hopkins, Null*, and *Cornwell* (the "Indirect Purchaser Settlement"), with De Beers agreeing to establish a settlement fund of $250 million to be distributed to class members, and further agreeing not to contest certification of a settlement class of indirect purchasers.[7] The settlement also provided for a stipulated injunction, enjoining **[**14]** De Beers from engaging in certain conduct violative of United States antitrust laws. Pursuant to the settlement, De Beers would consent to the District Court's jurisdiction for the limited purpose of fulfilling the terms of the settlement and enforcement of the injunction.

The District Court entered an order on November 30, 2005, preliminarily approving the Indirect Purchaser Settlement and conditionally certifying a settlement class of Indirect Purchasers pursuant to *Federal Rule of Civil Procedure 23(b)(2)* — for purposes of entering the stipulated injunction — and *23(b)(3)* — in order to distribute the settlement fund to class members.

De Beers then entered into settlement discussions with plaintiffs' counsel for the Direct Purchasers in *Anco* and *British Diamond*, ultimately reaching an agreement in March 2006. The latter agreement paralleled the Indirect Purchaser Settlement in that De Beers agreed to not contest certification of a Direct Purchaser settlement class, to abide by substantively identical injunctive **[**15]** relief as imposed under the Indirect Purchaser Settlement, and to establish a $22.5 million fund to satisfy the Direct Purchasers' claims. As part of this settlement, De Beers also agreed to increase the Indirect Purchaser Settlement fund by $22.5 million to accommodate those putative class members characterized as Indirect Purchasers in the lawsuits filed by the Direct Purchasers who had not participated in the Indirect Purchaser Settlement.

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under *N.Y. Gen. Bus. §§ 349-350*; and under New York's Donnelly Act and the antitrust laws of fifteen other states and the District of Columbia. *Null* was filed on behalf of all purchasers of De Beers diamonds pursuant to *815 Ill. Comp. Stat. § 505/1, et seq*., and *§ 510/2*, alleging unfair methods of competition and unfair or deceptive acts or practices, and, in the alternative, pursuant to the consumer fraud and deceptive practice laws of the various states where purchases of diamonds were made. *Sullivan* was filed on behalf **[**12]** of a class of all persons and businesses in the United States who purchased polished diamonds indirectly from De Beers pursuant to *§§ 1* and *2* of the Sherman Act for injunctive relief, and pursuant to state antitrust and deceptive practices acts for monetary relief.

[7] The *Leider* plaintiffs subsequently reached agreement with the parties to the Indirect Purchaser Settlement to resolve that matter in accordance with the terms of the Settlement.

On March 31, 2006, the District Court modified its November 30, 2005 Order to conditionally certify both the Direct and Indirect Purchaser settlement classes under *Rules 23(b)(2)* and *23(b)(3)*, and to preliminarily approve a combined settlement fund for both classes totaling $295 million, of which $22.5 million was allotted to Direct Purchasers and $272.5 million was allocated to the Indirect Purchaser claims. The combined settlement also provided for entry of a stipulated injunction, which required De Beers to, *inter alia*, comply with and abide by federal and state antitrust laws, to limit its purchases of diamonds from third-party producers, to abstain from setting or fixing the prices of diamonds sold by third-party producers, to desist from **[**16]** restricting the geographic regions within which sightholders could resell De Beers diamonds, and barred De Beers from purchasing diamonds in the United States for the principal purpose of restraining supply. Notably, De Beers agreed to subject itself to personal jurisdiction in the United States for purposes of enforcing the combined settlement agreement.

B. Special Master & Objections

After granting preliminary approval to the combined settlement agreement, the District Court referred the case to a Special Master pursuant to *Rules 23*, *53*, and *54 of the Federal Rules of Civil Procedure* to consider and recommend a plan for dissemination of the Notice of Settlement, a distribution plan for members of the **[*289]** Indirect and Direct Purchaser settlement classes, division of the fund between the Indirect Purchaser reseller and consumer subclasses, the amount of incentive awards for named plaintiffs, and the fee requests filed by plaintiffs' counsel. After two years of proceedings, the Special Master authored several lengthy Report and Recommendations finding the settlement fair, reasonable, and adequate based upon the parties' agreement to seek the certification of the following two nationwide Settlement **[**17]** Classes:

> (i) The "Direct Purchaser Class." All natural persons and legal entities located in the United States who purchased any Gem Diamond directly from a Defendant or Defendants' Competitors (including any entity controlled by or affiliated with any such party) from September 20, 1997 to the date of settlement class certification. The class shall exclude Defendants, the officers, directors or employees of any Defendant, any entity in which any Defendant has a controlling interest, any affiliate of any Defendant, Defendants' Competitors, any person or entity which is or was a Sightholder for the time period(s) during which such person or entity had Sightholder status, any federal, state or local governmental entity, and any judicial officer presiding over this Settlement, and any member of the judicial officer's family and court staff; and
>
> (ii) The "Indirect Purchaser Class." All natural persons and legal entities located in the United States who purchased any Diamond Product from January 1, 1994 to the date of settlement class certification, provided that any purchases of any Gem Diamond made directly from a Defendant (including any entity in which any Defendant has a controlling **[**18]** interest and any affiliate of any Defendant) or Defendants' competitors (including any entity controlled by or affiliated with any such party) shall be excluded. The class shall also exclude Defendants, the officers, directors or employees of any Defendant, any entity in which any Defendant has a controlling interest, any affiliate of any Defendant, any federal, state or local governmental entity, and any judicial officer presiding over this Settlement, and any member of the judicial officer's family and court staff.

(App'x 270 (quoting September 4, 2007 Report and Recommendation of Special Master Alfred M. Wolin ("R&R") at 21, App'x 1433-34).) The Indirect Purchaser Class was further subdivided into two subclasses for purposes of effectuating the Settlement Agreement:

> (1) The "Indirect Purchaser Reseller Subclass," consisting of all members of the Indirect Purchaser Class who purchased any diamond product for resale; and
> (2) The "Indirect Purchaser Consumer Subclass," consisting of all members of the Indirect Purchaser Class who purchased any diamond product for use and not for resale.

(*Id*. 270-71.)[8]

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[8] The Indirect Purchaser Consumer Subclass is estimated to contain between 67 and 117 million **[**19]** members, while the Indirect Purchaser Reseller Subclass contains an estimated 38,152 members. The Direct Purchaser Class is estimated to contain approximately 130 members. (App'x 275 n.1.)

After reviewing the record, the competing econometric reports furnished by several experts, and other reliable data, the Special Master recommended that, apart from the $22.5 million allocated to the Direct Purchaser Class,[9] the Indirect Purchaser **[*290]** Settlement Fund of $272.5 million should be allocated 50.3%, approximately $137.1 million, to the Resellers Subclass, and 49.7%, approximately $135.4 million, to the Consumers Subclass.[10] (App'x 1508.) Unlike Direct Purchasers, who purchased diamonds only, Indirect Purchasers generally purchased jewelry and other products containing diamonds; given this, the Special Master attempted to ascertain the cost of the diamonds in the final purchased product separate and apart from the cost of other components. The Special Master further recommended that claims that would result in *de minimis* recoveries from the settlement fund — equating to less than ten dollars[11] — not be paid in light of high administrative costs.[12]

With respect to plaintiffs' counsel's request for attorneys' fees and reimbursement of litigation expenses, the **[**22]** Special Master recommended a percentage of recovery approach with a lodestar cross-check, and concluded that the request for 25% of the settlement fund in fees, and for under 1% of the fund in expenses, was fair, reasonable, and adequate.[13] The Special Master further decided that the $220,000 in incentive awards sought on behalf of class representatives was appropriate in light of the benefits conferred upon the class and the risks incurred in engaging in litigation.

In response to the preliminary certification of the Settlement Agreement and the Special Master's recommendations, the District Court received twenty separate objections on behalf of thirty-seven objectors. All of the objectors were members of the Indirect Purchaser Class; none of the Direct Purchasers objected to the Settlement.[14] **[*291]** Fifteen of the twenty objections opposed class certification of the settlement, four objected to the stipulated provision for injunctive relief, six opposed the allocation and distribution of the Settlement Funds, and nine objected **[**23]** to the provisions for attorneys' fees. As required by the Federal Rules, the District Court conducted a Fairness Hearing in the matter on April 14, 2008. *Fed. R. Civ. P. 23(e)(2)*.

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[9] The Special Master advised that distribution **[**20]** of the Direct Purchaser Settlement Fund be conducted on a pro rata basis and that each Direct Class member receive the Net Settlement amount multiplied by the quotient of the Adjusted Purchases of the claimant divided by the aggregate Adjusted Purchases of all approved direct purchaser claims. The Adjusted Purchases of a claimant would be calculated by multiplying the amount paid for Rough Diamonds by 1.22 (the average Rough to Polished Matrix factor), and adding the total amount paid for Polished Diamonds. (App'x 1533-34.)

[10] The Special Master recommended that the Indirect Purchaser Consumer Subclass receive a pro rata share of the Indirect Purchaser Settlement Fund, calculated by multiplying the Net Consumer settlement fund amount by the quotient of a consumer's total recognized diamond claim divided by the total recognized diamond claims of all consumers. (App'x 1547.) In contrast, a Reseller Subclass member's claim would be calculated in a three step process: (1) all of the claimant's diamond purchases are converted to the common metric of polished wholesale value and adjusted to reflect the number of years each Reseller operated during the class period; (2) claims are weighted **[**21]** by applying the absorption weighting factor derived from a fixed effects regression analysis for each type of diamond purchase; and (3) the claimant's pro rata share of the Reseller Subclass settlement fund is the ratio of the claimant's "absorption adjusted purchases" to the sum of all claimants' "absorption adjusted purchases." (*Id*. 1575.)

[11] The Special Master's report noted that Indirect Purchaser Consumer claims aggregating less than $165 for mixed stone jewelry or products, and less than $95 for diamond only jewelry or products, would be considered *de minimis*. (App'x 1547-48.)

[12] Additionally, the Special Master recommended a four-part notification program — entailing direct notice, publication notice, "earned media outreach" in the form of press releases and news reporting, and electronic notice — finding that it provided notice "in a reasonable manner to all class members who would be bound by the proposed settlement." (App'x 1518-27 (quoting *Fed. R. Civ. P. 23(e)*).) The District Court adopted this recommendation and method of notification in its October 1, 2007 Order.

[13] The District Court rejected the Special Master's recommendation of adding a percentage of the interest earned on the total settlement fund to the total attorneys' fees.

[14] Four objectors were members of the Indirect Purchaser Reseller Subclass and thirty-three objectors belonged to the Indirect Purchaser Consumer Subclass. (App'x 272.)

The objectors challenging the propriety of certifying the two settlement classes raised two primary arguments. First, the objectors contended that a nationwide class of Indirect Purchasers should not be certified under *Rule 23(b)(3)* for purposes of administering a monetary settlement of state law claims because significant differences existed among the various antitrust, consumer protection, and unjust enrichment laws of the relevant state jurisdictions. Specifically, the objectors argued that the substantive law of many states prohibits indirect purchasers from recovering damages for antitrust injuries, exposing the class to particularized legal variations and precluding a finding that common questions of law or fact predominated over individual issues.[15] Second, the objectors challenged the certification of both Direct and Indirect Purchaser **[**24]** classes for purposes of implementing injunctive relief pursuant to *Rule 23(b)(2)*. The objectors asserted that the market for rough gem diamonds had become competitive during the course of the instant litigation, rendering an injunction to enforce compliance with antitrust laws superfluous, and divesting the Indirect Purchasers of antitrust standing to seek relief.

Other objections challenged the fairness and adequacy of the Settlement and the plan of allocation for the Indirect Purchaser Settlement Fund as between the Reseller and Consumer Subclasses, averring that each class member would collect only $1-2 in exchange for their full release of claims against De Beers if every single putative class member requested compensation; also, they might receive nothing under the *de minimis* provision **[**25]** in the Settlement. Objectors also urged that the award of attorneys' fees to plaintiffs' counsel was excessive and unreasonable in a default judgment case with minimal litigation.

C. Acceptance and Certification of Class Settlement

In its May 22, 2008 Opinion, the District Court considered and rejected each of the objections. Responding to the *Rule 23(b)(3)* objections, the Court concluded that differences in state antitrust and consumer protection statutes did not override class commonalities. Observing that "'predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws,'" (App'x 276 (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*), the District Court noted that "at the class certification stage, the Court need not concern itself with whether Plaintiffs can prove their allegations" so long as they "'make a threshold showing that the elements of impact will predominantly involve **[*292]** generalized issues of proof, rather than questions which are particular to each member of the plaintiff class,'" (*id*. 277 (quoting *In re Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002))*).) In this regard, the District **[**26]** Court presented the following operative factual and legal inquiries that, in its view, constituted common questions that predominated over individual issues in the litigation:

> (a) Whether Defendants combined or conspired with others to fix, raise, stabilize and maintain the prices of polished diamonds;
> (b) Whether Defendants monopolized or combined or conspired with others to monopolize the supply of polished diamonds;
> (c) Whether Defendants' conduct caused the prices of polished diamonds to be maintained at higher levels than would exist in a competitive market;
> (d) Whether Plaintiffs and the Classes are entitled to injunctive relief; and
> (e) Whether Defendants' conduct caused injury to the business or property of Plaintiffs and the other Class and Subclass Members and, if so, the appropriate class-wide measure of damages.

(App'x 276 (alterations omitted).) The District Court also stressed that all class members shared a common jurisdictional question pertaining to De Beers's refusal to submit to the jurisdiction of United States courts and the potential burden of confirming domestic contacts for purposes of establishing personal jurisdiction. (*Id*. 279.)

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[15] A related objection was filed on grounds that the equal allocation of the Indirect Purchaser Settlement Fund without consideration of a claimant's state of controlling law was improper since some states purportedly prohibited recovery by indirect purchasers. These objectors asserted that class members from states permitting indirect purchaser recovery should be entitled to greater monetary compensation.

Considering the nature of De Beers's **[**27]** central role in the alleged diamond conspiracy, the Court determined that each class member shared "a similar legal question arising from whether De Beers engaged in a broad conspiracy" aimed at affecting diamond prices in the United States; concurrently, all class members shared common factual issues pertaining to the form, duration, and extent of the conspiracy. (App'x 278-79.) The Court concluded that the totality of common issues predominated over individual questions, and, as a result, the objectors' assertion that disparities in state law precluded a nationwide class settlement was unavailing. In its analysis, the Court emphasized the expense, complexity, and imprecision of weighing the relative strengths of different state law claims, the policy interest in securing an expedient resolution to the disparate claims of the Direct and Indirect Purchasers, and De Beers's insistence upon a release of all potential damage claims in all fifty states.

With respect to the *Rule 23(b)(2)* analysis for injunctive relief, the District Court rejected the objectors' assertion that both of the purchaser classes faced no risk of future harm. The Court observed that De Beers had stipulated to the **[**28]** injunction and "waived the right to demand proof of substantive elements of the claims" advanced by plaintiffs, namely, that De Beers's ongoing conduct would continue to anti-competitively increase the price of all diamonds on the market. (App'x 285.) Accordingly, the Court determined that injunctive relief was appropriate and would benefit all classes and subclasses.

Having ruled that the *Rule 23(b)* elements were satisfied, the District Court then responded to the other objections relating to the fairness and adequacy of the Settlement and the plan of allocation and distribution, as well as to objections pertaining to attorneys' fees. The District Court conducted a fairness evaluation of the final settlement by applying and weighing the fairness factors set forth in *Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)*, "being mindful of the heightened standard of review in place for a settlement-only **[*293]** class that has not yet been entirely certified." (App'x 288-89.) The Court concluded that the final settlement agreement and the plan of allocation were fair, reasonable, and adequate. The District Court also reviewed the attorneys' fees application pursuant to *Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000)*, **[**29]** similarly finding the Special Master's recommendation for 25% of the settlement fund in fees to be fair, reasonable, and adequate.

Accordingly, the District Court entered a final order on May 22, 2008, certifying the Direct and Indirect Purchaser Classes under *Rules 23(b)(2)* and *23(b)(3)*. The Direct Purchaser Class consists of all sightholders who purchased rough gem diamonds directly from De Beers between September 20, 1997 and March 31, 2006. The Indirect Purchaser Class includes all Indirect Purchasers who acquired gem diamonds between January 1, 1994 and March 31, 2006, regardless of whether De Beers or one of its competitors supplied the diamonds.[16] The Court's order further included the previously agreed-upon injunction, which is to remain in effect for five years from the date of its issuance. The objectors then filed the appeals presently before us.

D. Proceedings On Appeal

On **[**30]** appeal, a divided panel of this Court initially determined that the District Court abused its discretion in certifying the nationwide class of litigants. We vacated this Opinion and granted rehearing en banc. While we do not usually discuss the analysis contained in a vacated opinion, we do so here because the Panel's decision reflected, accepted, and elaborated upon one or more of the views advanced by the objectors, with which we take issue. Our dissenting colleagues also embrace certain of these views.

Addressing the objectors' challenge to the District Court's finding of predominance under *Rule 23(b)(3)*, the Panel undertook a wide-ranging fact-finding review of state antitrust statutes, noting that the variance among states "is mainly a function of whether a state has chosen to follow the Sherman Act principles regarding standing laid down by the Supreme Court in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*." *Sullivan, 613 F.3d at 146*. There, the Supreme Court decided that only direct purchasers possessed standing under

[16] As the Panel Opinion noted, the parties did not explain, nor did the record reveal, any reason for the disparity in the time periods covered by the Settlement between the Indirect and Direct Purchaser classes. *See* *Sullivan, 613 F.3d at 143 n.8*. We do not consider this difference pertinent to the appeals.

the federal Sherman Act to sue for monetary damages incurred from an antitrust injury. The Panel observed that some states follow this framework and prohibit **[**31]** monetary recovery for indirect purchasers, while other states have enacted statutes known as "*Illinois Brick* repealers," which extend antitrust standing to indirect purchasers and consumers.[17] *Id*. As a result, the Panel found that "only some of th[e] jurisdictions recognize the claims for which recovery is sought," and that such distinctions reflected "fundamental policy differences among the several states." *Id. at 147, 149*. Based on its belief that many members of the Indirect Purchaser Class lacked a substantive right to recover damages, the Panel decided that "no question of law or fact regarding their legal rights is uniform **[*294]** throughout the class," thereby defeating a finding of predominance. *Id. at 149*.

The Panel then considered the various state consumer protection and unjust enrichment claims implicated by the District Court's certification, again noting several variations among jurisdictions: differences in whether indirect purchasers may invoke consumer protection **[**32]** and unjust enrichment statutes to gain antitrust relief; variations in the extent of elements of proof necessary to establish unjust enrichment or consumer fraud; and dissimilarities in whether a plaintiff must lack an adequate remedy at law to bring an equitable claim. *Id. at 150-51*. Based upon these discrepancies, the Panel decided that "evidence of price-fixing and monopolization does not give rise in every state to an unjust enrichment or consumer protection claim for indirect purchasers," defeating predominance and rendering the District Court's certification of a nationwide class an abuse of discretion. *Id. at 151*.

The Panel further observed that the District Court's certification order contravened the Rules Enabling Act, *28 U.S.C. § 2072(b)*, by extending antitrust remedies not rooted in state substantive law to putative class members. *Id*. The Panel expressly rejected the plaintiffs' argument that De Beers's willingness to stipulate to liability in all fifty states should suffice for the District Court's predominance inquiry, holding instead that such an approach would invite collusive settlements. *Id*. In the same vein, the Panel expressed concern that the District Court sacrificed **[**33]** principles of federalism in favor of obtaining an expedient settlement by certifying the nationwide class "despite the fact that only some of those jurisdictions recognize the claims for which recovery is sought." *Id. at 152*. Finding that certain states categorically deny to indirect purchasers a right to antitrust recovery as a matter of substantive law, the Panel concluded that the instant certification "wrongly allowed the sovereignty of the states to be subordinated to De Beers's desire to resolve all indirect purchaser claims simultaneously." *Id*.

Finally, the Panel rejected the District Court's certification of the Indirect Purchaser Class under *Rule 23(b)(2)* for the purpose of awarding injunctive relief under § 16 of the Clayton Act, *15 U.S.C. § 26*. Relying upon expert reports written to identify a methodology for calculating damages, the Panel concluded that De Beers's market share fell from approximately 65% in 2000 to 45% in 2006, and determined that, as a result, plaintiffs face "no significant threat of future antitrust harm in the absence of the injunction because . . . the market has become increasingly competitive from 2006 onward." *Id. at 157-58*. Accordingly, the Panel **[**34]** found that plaintiffs lacked antitrust standing under § 16 of the Clayton Act and vacated the District Court's order certifying the injunctive class.

The Panel Opinion remanded the matter to the District Court to consider whether "a more limited class of indirect purchasers is appropriate under *Rule 23*," and instructed the District Court to more precisely identify "a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Id. at 154* (quoting *Fed. R. Civ. P 23(c)(2)*). The Panel noted that the Court failed to clearly delineate the precise state law claims subject to class treatment and did not explicitly state whether the claims advanced apply to the Indirect Purchasers' antitrust, consumer protection, or unjust enrichment claims, or to some combination of the three. Accordingly, the Panel directed the District Court to "identify with particularity both the prerequisites for membership in the class and the issues or **[*295]** claims that will be resolved on a class-wide basis." *Id. at 155*.

In response, Appellees Shawn Sullivan, Arrigotti Fine Jewelry, and James Walnum petitioned for rehearing, urging that the Panel Opinion was inconsistent **[**35]** with our precedent governing class action settlements. In support, they raised several arguments. First, they contended that the Panel's demand that all class members assert at least one "uniform" claim in order for disparate state claims to be settled at once contravened our clear holdings in

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[17] Based on its assessment, the Panel found that at least twenty-five states and the District of Columbia possess *Illinois Brick* repealer statutes or have judicially extended antitrust standing to indirect purchasers.

Warfarin and *Prudential*. (*See* Pet. of Appellees for Reh'g or Reh'g En Banc 2.) Next, they urged that the Panel's extensive inquiry into the legal viability of plaintiff's claims at the class certification stage improperly adjudicated the merits of the asserted claims and undermined the "strong judicial policy in favor of class action settlement." (*Id*. (citation omitted).) Finally, the Appellees observed that the Panel's methodology supplanted the District Court as primary fact-finder and unilaterally reached factual conclusions based upon evidence unrelated to the subject at issue. (*Id*. 3-4.)

We granted the petition for the entire Court to address these issues.

II. Jurisdiction And Standard of Review

The District Court exercised federal question jurisdiction over the Direct Purchasers' Sherman Act antitrust claim for damages pursuant to § 4 of the Clayton Act, *15 U.S.C. § 15*, and over both the Direct **[**36]** and Indirect Purchasers' claims for injunctive relief under § 16 of the same Act, *15 U.S.C § 26*. Original jurisdiction over the federal claims also arose under *28 U.S.C. §§ 1331* and *1337(a)*. The District Court possessed supplemental jurisdiction over the Indirect Purchasers' state-law antitrust, consumer protection, and unjust enrichment claims pursuant to *28 U.S.C. § 1367*. We review final orders of the District Court pursuant to *28 U.S.C. § 1291*.

HN1[] "Our role as an appellate court is to ascertain whether or not the trial judge clearly abused his or her discretion in approving or rejecting a settlement agreement." *Ehrheart v. Verizon Wireless, 609 F.3d 590, 593 (3d Cir. 2010)*. A district court abuses its discretion if its '"decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.'" *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 312 (3d Cir. 2008)* (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 783 (3d Cir. 1995)* ("*GM Truck*")). "If the court's analysis on these points is correct, [however,] then 'it is fair to say that we will ordinarily defer to its exercise of discretion' **[**37]** embodied in the findings on predominance and superiority.'" *Linerboard, 305 F.3d at 149-50* (quoting *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 448 (3d Cir. 1977))*; *see also* *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co., 593 F.3d 802, 807 (9th Cir. 2010)* ("We review . . . the underlying determination whether the predominance requirement of *Rule 23(b)(3)* has been satisfied for abuse of discretion.") (citation omitted). "Whether an incorrect legal standard has been used is an issue of law to be reviewed *de novo*." *Id*. (citation omitted).

The District Court's "determination that the settlement was fair, reasonable, and adequate" is likewise reviewed for abuse of discretion. *In re Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001)*.

III. Discussion

At issue on appeal is the District Court's approval of the class settlement agreement **[*296]** and certification of the Indirect Purchaser Class pursuant to *Rule 23(b)(3)* and both the Direct and Indirect Purchaser Classes under *Rule 23(b)(2)*. We begin by discussing the standards for certifying a settlement class and will address the pertinent objections in light of the District Court's **[**38]** — and the vacated Panel's — Opinions. We will then consider the objections pertaining to the fairness of the settlement, the plan of allocation, and the attorneys' fees award, which we have not previously addressed.[18]

A. Certification Pursuant to Rule 23

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[18] As mentioned above, because the Panel concluded that certification was inappropriate, it did not reach the Special Master's recommendations or the objections to the distribution plan and fee award. *Sullivan, 613 F.3d at 142 n.6*. In light of our finding that class certification is appropriate, we assess these objections for the first time.

As we have consistently observed, "Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiffs' and counsel's ability to fairly and adequately protect class interests." In re Comm. Bank of N. Va., 622 F.3d 275, 291 (3d Cir. 2010) ("*Comm. Bank II*") (quoting GM Truck, 55 F.3d at 799) (alterations omitted). In turn, **HN2**[] before approving a class settlement agreement, "a district court first must determine that the requirements for class certification under Rule 23(a) and (b) are met." In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 341 (3d Cir. 2010). **[**39]** Rule 23(a) contains four threshold requirements, which every putative class must satisfy:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *see also* Amchem, 521 U.S. at 613. Upon finding each of these prerequisites satisfied, a district court must then determine that the proposed class fits within one of the categories of class actions enumerated in Rule 23(b).

As mentioned, **HN3**[] Rule 23(b)(2) authorizes class actions seeking injunctive relief in instances where the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see* In re Cmty. Bank of N. Va.. (Comm. Bank I), 418 F.3d 277, 302 n.14 (2005). Separately, **HN4**[] certification pursuant to Rule 23(b)(3) seeking monetary compensation is permitted where (1) "questions of law or fact common to class **[**40]** members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *see* Collins v. E.I. DuPont de Nemours & Co., 34 F.3d 172, 180 (3d Cir. 1994). These twin requirements are commonly referred to as predominance and superiority. We address the certification of the damages class first before turning to the certification for injunctive relief.

1. Predominance of Common Legal or Factual Issues Under Rule 23(b)(3)

The objectors challenge the District Court's Rule 23(b)(3) analysis with regard to the state law claims asserted by the Indirect Purchasers against De Beers. The District Court concluded that differences in state law did not override predominantly common factual and legal issues **[*297]** presented by De Beers's integral role in perpetuating the alleged conspiracy. Rejecting this view, the objectors argue that the existence of substantive variations in the state antitrust laws underlying the Indirect Purchaser damages claims should preclude a court from finding that common issues affecting the class as a whole predominate. They also urge **[**41]** that differences among state consumer protection and unjust enrichment laws would likewise preclude a finding of predominance. Our dissenting colleagues focus on this issue as well, and adopt a specific requirement that every class member has "some colorable legal claim" in order for a district court to certify a class. (Dissenting Op. at 10.) In our view, this requirement would result in a radical departure from what Rule 23 envisions and what our precedent demands, and it founders for many reasons.[19]

a. Legal Framework

HN5[] The predominance inquiry "'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,'" In re Ins. Broker. Antitrust Litig., 579 F.3d 241, 266 (3d Cir. 2009) (quoting Amchem, 521 U.S. at 624), and assesses whether a class action "would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated," Fed. R. Civ. P. 23(b)(3) advisory

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[19] The objectors also challenge the District Court's purported failure to identify the state law claims that should receive class treatment under the existing certification order, as we discuss below.

committee's note to 1966 amendment. *See also* 2 **[**42]** William Rubenstein, Alba Conte & Herbert Newberg, Newberg on Class Actions, § 4:25 (4th ed. 2010) ("[T]he predominance test asks whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all the issues in the suit."). Parallel with *Rule 23(a)(2)*'s commonality element, which provides that a proposed class must share a common question of law or fact, *Rule 23(b)(3)*'s predominance requirement imposes a more rigorous obligation upon a reviewing court to ensure that issues common to the class predominate over those affecting only individual class members. *Ins. Broker., 579 F.3d at 266*. "Hence, we consider the *Rule 23(a)* commonality requirement to be incorporated into the more stringent *Rule 23(b)(3)* predominance requirement, and therefore deem it appropriate to 'analyze the two factors together, with particular focus on the predominance requirement.'" *Id*. (quoting *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d Cir. 2004))*; *see also* *Danvers Motor Co., Inc. v. Ford Motor Co., 543 F.3d 141, 148 (3d Cir. 2008)* ("[T]he commonality requirement is subsumed by the predominance requirement.").

From our case law, we can distill at **[**43]** least ***HN6***[] three guideposts that direct the predominance inquiry: first, that commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members; second, that variations in state law do not necessarily defeat predominance; and third, that concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class. We address each of these guideposts in turn. Then, we turn to case law demonstrating that *Rule 23(b)(3)* does not, as urged by the objectors and the dissent, require individual class members to individually state a valid claim for relief. Next, we address the flaws inherent in the framework proposed by the dissent. Finally, we discuss why an important by-product of the class action device — settlement **[*298]** of all potential claims — supports the decision we reach here.

i) Precedent Regarding Predominance: Defendant's Conduct and Class Members' Injuries

Our precedent provides that ***HN7***[] the focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct. **[**44]** Our reasoning in *Warfarin* is instructive on this point. The claims asserted there were remarkably similar to the specific claims at issue here. There, we considered the propriety of the certification of a settlement class arising out of DuPont Pharmaceuticals' alleged dissemination of misleading information about a competitor's product. *391 F.3d at 522*. The plaintiffs averred that DuPont engaged in anticompetitive conduct that allowed it to maintain a 67% market share and to charge supracompetitive prices, in violation of federal ***antitrust law***, the antitrust statutes of *Illinois Brick* repealer states,[20] the consumer protection and deceptive practices statutes of all fifty states and the District of Columbia, and the common law prohibitions on unjust enrichment and tortious interference of every jurisdiction. *Id. at 523-25*. After reaching a class settlement with the defendant and receiving the district court's preliminary approval, objections were lodged contesting the certification of a single nationwide class of plaintiffs. The objectors argued that such certification was inappropriate due to inconsistencies in state antitrust and consumer fraud statutes' provision of statutory standing **[**45]** to assert antitrust claims and eligibility for treble or punitive damages recovery, and the relative weakness of certain consumer claims. *Id. at 529-31*.

Guided by the Supreme Court's observation that "[p]redominance is a test readily met in certain cases alleging consumer[ ] fraud or violations of the antitrust laws," we stated:

> This case falls squarely into that category: plaintiffs have alleged that DuPont engaged in a broad-based campaign, in violation of federal and state consumer fraud and antitrust laws, to deceive consumers, TPPs, health care professionals, and regulatory bodies into believing that generic warfarin sodium was not an equivalent alternative to Coumadin. These allegations naturally raise several questions of law and fact common to the entire class and which predominate over any issues related to individual class members, including the unlawfulness of DuPont's conduct under federal antitrust laws as well as state law, the causal linkage between

[20] As mentioned, certain states have enacted statutes known as "*Illinois Brick* repealers," which extend antitrust standing to indirect purchasers and consumers. *See supra* n. 17.

DuPont's conduct and the injury suffered by the **[**46]** class members, and the nature of the relief to which class members are entitled.

Id. at 528. In light of DuPont's allegedly deceptive "broad-based, national campaign conducted by and directed from corporate headquarters," we emphasized that proof of liability of DuPont's conduct "depends on evidence which is common to the class members" because "liability depends on the conduct of DuPont, and whether it conducted a nationwide campaign of misrepresentation and deception, [and] does not depend on the conduct of individual class members." *Id*. As a result, we affirmed the District Court's ruling that class members shared predominantly common issues as to the conduct of the defendants **[*299]** despite possessing claims arising under differing state laws. *Id. at 530*.[21]

We applied a similar approach in *Insurance Brokerage*, where, in evaluating a challenge to certification of a settlement class on the basis of predominance, we determined that the elements of a Sherman Act violation for concerted anticompetitive activity focused upon "the conduct of the defendants." *579 F.3d at 268*. Noting the presence of several shared questions of law and fact — including, among others, whether the defendants conspired to allocate a particular market, whether the conduct actually reduced competition in the market by consolidating the industry, and whether the conspiratorial conduct raised premiums for all members of the class — we concluded that "common questions abound with respect to whether the defendants engaged in illegal, concerted action." *579 F.3d at 268*. As a result, we held that "individual issues d[id] not overwhelm the common ones."[22] *Id; see also Linerboard, 305 F.3d at 162* **[**48]** ("[C]ommon issues [ ] predominate here because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did.") (citation & quotations omitted); *cf. In re LifeUSA Holding Inc., 242 F.3d 136, 145-46 (3d Cir. 2001)* (reversing certification of litigation class where plaintiffs' claims arose "not out of one single event or misrepresentation," but out of "non-standardized and individualized sales 'pitches'").

In this **[**49]** regard, we note the dissent's misreading of the Supreme Court's recent opinion in *Wal-mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)* as supporting its thesis that an inquiry into the existence or validity of each class member's claim is required at the class certification stage. To the contrary, *Dukes* actually bolsters our position, making clear that the focus is on whether the defendant's conduct was **[*300]** common as to all of the class members, not on whether each plaintiff has a "colorable" claim. In *Dukes,* the Court held that ***HN8***[] commonality and predominance are defeated when it cannot be said that there was a common course of conduct in which the defendant engaged with respect to each individual. But commonality is satisfied where common questions generate common answers "apt to drive the resolution of the litigation." *131 S. Ct. at 2551*. That is exactly what is presented here, for the answers to questions about De Beers's alleged misconduct and the harm it caused would be common as to all of the class members, and would thus inform the resolution of the litigation if it were not being settled.

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[21] Contrary to the objectors' and the Panel's view that *Warfarin*'s analysis is inapplicable because the plaintiffs in that case purportedly shared a common claim under the Delaware Consumer Fraud Act, our holding in *Warfarin* did not address the Delaware statute in analyzing predominance. *391 F.3d at 528-29*. Indeed, *Warfarin* did not consider whether every class member even possessed a claim under Delaware law, nor did it undertake a choice-of-law **[**47]** analysis to determine whether all members in the nationwide class could assert a claim under the Delaware statute. Rather, we simply concluded that any claims arising under the varying state laws and the Delaware statute could be proved with common evidence, thereby supporting a finding of predominance. *Id.*

[22] A comparable approach is evidenced in our decision in *Prudential*, where we affirmed the district court's finding of predominance based upon the central issue in the case — a common nationwide scheme of deceptive conduct by the defendant to defraud millions of customers. *148 F.3d at 315*. Similarly, in *Linerboard*, we noted that the "critical inquiry will be whether defendants successfully concealed the existence of the alleged conspiracy," and "the fact of *concealment* [ ] is the polestar in an analysis of fraudulent concealment." *305 F.3d at 163* (emphasis in original). Because it was the defendant's conduct that demanded attention, we found that "allegations of proof are all common to the defendants, not the plaintiffs." *Id.*

Specifically, here, plaintiffs allege that De Beers engaged in anticompetitive activity by exploiting **[**50]** its 65% share of the diamond market and control of the world's supply of rough diamonds to impose rigid constraints on the sale and resale of those diamonds. This conduct resulted in a common injury as to all class members — inflated diamond prices — in violation of federal ***antitrust law***, and the antitrust, consumer protection, or unjust enrichment laws of every state and the District of Columbia.[23] In this respect, as in *Warfarin* and *Insurance Brokerage,* De Beers's asserted price-fixing and monopolization conduct lies at the core of plaintiffs' claims, as do the common injuries which all class members suffered as a result. Based upon our case law, we can distill that "each class member shares a similar *legal* question arising from whether De Beers engaged in a broad conspiracy that was aimed to and did affect diamond prices in the United States." (App'x 278-79 (emphasis added).) Evidence for this legal question would entail generalized common proof as to "the implementation of De Beers'[s] conspiracy, the form of the conspiracy, and the duration and extent of the conspiracy." (*Id*. 278.)

The plaintiffs likewise share common *factual* questions as to whether De Beers "acted in concert to artificially fix, maintain, and stabilize prices and to monopolize trade and commerce in the market for polished diamonds," and whether said activity resulted "in an inflation in the prices of diamonds sold to consumers." (*Id*. 278-79.) These allegations are unaffected by the particularized conduct of individual class members, as proof of liability and liability itself would depend entirely upon De Beers's allegedly anticompetitive activities. Indeed, the presence of these questions stemming solely from De Beers's asserted behavior and the fact that all class members purchased diamonds is an apt illustration of why the predominance test is "readily met in certain cases alleging consumer [ ] fraud or violations of the antitrust laws.'"[24] *Ins. Broker., 579 F.3d at 266* (quoting *Amchem, 521 U.S. at 624*); *see* ***[**52]*** *generally* *Fed. R. Civ. P. 23(b)(3)* advisory committee's notes to 1966 amendment (providing that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action"). Considering this presentation of common issues, a finding that common inquiries predominated over individual questions particular to any putative class member appears reasonably within the discretion of the District Court.

The dissent urges that according to our view, the class is "practically limitless." (Dissenting Op. at 9.) This is plainly incorrect: the limits are found in the conduct of the defendant and the injuries sustained by class members as a result of the conduct. These provide sufficient class **[*301]** contours. The instant class is not made up of "everyone on earth," **[**53]** "regardless of diamond purchases." (Dissenting Op. at 8 n.5.) Instead, each member is a Direct or Indirect Purchaser, harmed by what De Beers did. These class members, moreover, possess a legally cognizable injury acknowledged in hornbook law, as their injuries are real, and stem not from simply feeling "wronged," as the dissent suggests (Dissenting Op. at 8), but from De Beers's alleged anti-competitive conduct, conduct which antitrust laws forbid.

ii) Precedent Regarding Variations in State Law

Furthermore, our precedent provides that ***HN9***[] "variations in the rights and remedies available to injured class members under the various laws of the fifty states [do] not defeat commonality and predominance." *Warfarin, 391 F.3d at 529* (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 315 (3d Cir. 1998))*. This is so because "'a finding of commonality does not require that all class members share identical claims,'" and predominance is not considered deficient merely "because claims were subject to the [varying] laws of

[23] No one seriously disputes that De Beers's alleged conduct, if true, was anticompetitive and violated **[**51]** state antitrust laws. Our disagreement with the dissent arises solely out of the question whether certain class members' potential inability to satisfy some states' statutory standing requirements should have precluded the District Court from certifying the settlement class in this case.

[24] As we noted in *Insurance Brokerage*, we do not presume here "that common issues necessarily predominate in every antitrust case." *579 F.3d at 267 n.26* (citing *Hydrogen Peroxide, 552 F.3d at 321-22*). Here, we merely conclude that the District Court was free to determine that common issues of law or fact stemming from De Beers's conduct in this instance satisfied the predominance requirement.

fifty states." *Id.* "'Predominance under *Rule 23(b)(3)* cannot be reduced to a mechanical, single-issue test'"; rather, "'[a]s long as a sufficient **[**54]** constellation of common issues binds class members together, variations in the sources and application'" of applicable laws will not foreclose class certification. *Linerboard, 305 F.3d at 162-63* (quoting with approval *Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000)* (rejecting argument that variations in twenty states' laws concerning reliance, waiver, and statutes of limitations defeated predominance)); *see also* *Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 39 (1st Cir. 2003)* ("*Rule 23(b)(3)* requires merely that common issues predominate, not that *all* issues be common to the class.") (emphasis added). Thus, it is not surprising that we can find no support in our Court's jurisprudence for the proposition that commonality and predominance are defeated merely because available rights and remedies differ under the several laws that form the basis for the class claims.[25]

We have never required the presentation of identical or uniform issues or claims as a prerequisite to certification of a class. Rather, our jurisprudence evinces a pragmatic response to certifications of common claims arising under varying state laws. In *Prudential*, we addressed the certification of a settlement class arising under federal securities law and varying state law formulations of common law fraud, breach of contract, bad faith, negligent misrepresentation, negligence, unjust enrichment, and breach of state consumer fraud statutes. *148 F.3d at 315*. ***HN10***[] We emphasized our willingness to certify nationwide classes where differences in state law fell "into a limited number of predictable patterns," and any deviations "could be overcome at trial by grouping similar state laws together and applying them as a unit." **[**56]** *Id.* As such, we affirmed the district court's decision to subsume the relatively **[*302]** minor differences in state law within a single class. *Id; see also* *Ins. Broker., 579 F.3d at 271* (noting that "subclasses are appropriate 'where a class is found to include subclasses divergent in interest'") (citation & alteration omitted).

Similarly, in *GM Truck*, we approved the certification of nationwide (b)(3) litigation classes where "the laws of the 50 states could be reduced to [several] general patterns, providing the framework for sub-classes if the nationwide action had proven unmanageable." *55 F.3d at 817-18* (discussing *In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986))*. Observing that "we [could not] conceive that each of the forty-nine states [ ] represented here has a truly unique statutory scheme," we determined that a nationwide class "could have been properly certified." *Id.* This alternative to outright rejection of certification of a nationwide class was deemed to be especially fitting because it could "surmount[ ] some of the individual issues while retaining some of the substantive advantages of the class action." *Id. at 818*.

Echoing this approach, our fellow Courts of **[**57]** Appeals have agreed that, ***HN11***[] for purposes of litigation classes, "if the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards," then certification of subgroups "embracing each of the dominant legal standards can be appropriate." *Klay v. Humana, Inc., 382 F.3d 1241, 1262 (11th Cir. 2004)*; *see also* *Walsh v. Ford Motor Co., 807 F.2d 1000, 1017, 257 U.S. App. D.C. 85 (D.C. Cir. 1986)* (R.B. Ginsburg, J.) (holding that class certification is appropriate where state law variations can be grouped by similar legal doctrines).

Where "a sufficient constellation of common issues binds class members together," *Linerboard, 305 F.3d at 162-63*, differences in state law treatment of indirect purchaser claims likely fall into a handful of clearly discernible statutory schemes. ***HN12***[] Nothing in our case law or the language of *Rule 23* commands that everyone in a class must allege precisely identical or "uniform" causes of action, *see* *Sullivan, 613 F.3d at 149*, and statutory variations do not defeat predominance in the presence of other exceedingly common issues.[26] Instead, as *Prudential* and *GM*

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[25] Other courts have similarly declined to examine the controlling substantive law pertinent to asserted claims at the class certification stage. *See, e.g.,* *Schumacher v. Tyson Fresh Meats, Inc., 2004 DSD 5, 221 F.R.D. 605, 612 (D.S.D. 2004)* ("Where federal claims and common law claims are predicated on **[**55]** the same factual allegations and proof will be essentially the same, 'even if the law of different states might ultimately govern the common law claims — an issue that need not and is not decided at this juncture — certification of the class for the whole action is appropriate.'") (quoting *Walsh v. Chittenden Corp., 798 F. Supp. 1043, 1055 (D. Vt. 1992))* (alteration omitted).

Truck explain, where a defendant's singular conduct gives rise to one cause **[**58]** of action in one state, while providing for a different cause of action in another jurisdiction, the courts may group both claims in a single class action. This tactic in litigation advances the laudatory purposes of the class action device, "preserv[ing] the resources of both the courts and the parties by permitting issues affecting all class members to be litigated in an efficient, expedited, and manageable fashion." *Allison v. Citgo Petrol. Corp., 151 F.3d 402, 410 (5th Cir. 1998)*.

iii) Certification of Settlement Classes: Diminished Concern Regarding Variations in State Law

But we need not rely merely on certifications involving actual litigation of the class issues for the proposition that differing state laws do not defeat commonality or predominance. The correct outcome is even clearer for certification of a settlement class because the concern for manageability **[**59]** that is a central tenet in the certification of a litigation class is removed from the equation. Indeed, the class settlement **[*303]** posture of this case largely marginalizes the objectors' concern that state law variations undermine a finding of predominance.

In *Warfarin*, we rejected an objection essentially indistinguishable from the one advanced here, namely, that "variations in and inconsistencies between the state consumer fraud and antitrust laws of the fifty states defeat the commonality and predominance requirements of *Rule 23*." *391 F.3d at 529*. In light of the Supreme Court's guidance that a district court "[c]onfronted with a request for settlement-only class certification" need not inquire whether the case "would present intractable management problems," *Amchem, 521 U.S. at 620*, in *Warfarin*, we delineated a "key" distinction between certification of a class for settlement versus certification for purposes of litigation, *391 F.3d at 529*. Specifically, we observed that, in the settlement context, variations in state antitrust, consumer protection and unjust enrichment laws did not present "the types of insuperable obstacles" that could render class litigation unmanageable.[27] *Id.* (citing **[**60]** *Prudential, 148 F.3d at 315*). We emphasized, as a result, that "variations [in state laws] are irrelevant to certification of a settlement class" since a settlement would eliminate the principal burden of establishing the elements of liability under disparate laws. *Id.; see, e.g., Davis v. J.P Morgan Chase & Co., 775 F. Supp. 2d 601, 609 (W.D.N.Y. 2011)* ("[S]tate-law distinctions impact trial manageability, which is relevant principally with respect to litigation at trial.") (citing *Warfarin, 391 F.3d at 529-30*); *In re Lupron Mktg & Sales Practices Litig., 228 F.R.D. 75, 92 (D. Mass. 2005)* (finding that "differences in the state consumer protection laws" implicate manageability concerns and do not pose an obstacle to certification of a settlement class).

Hence, our consideration of varying laws in the context of predominance has primarily focused on **[**61]** manageability of a litigation class. This is a particularly important point, as the objectors seem to conflate the predicate predominance analysis for certification of a settlement class with that required for certification of a litigation class, relying exclusively upon cases implicating the manageability obstacles inherent in class litigation. *See, e.g., Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc., 601 F.3d 1159, 1180 (11th Cir. 2010)*; *Cole v. Gen. Motors Corp., 484 F.3d 717, 724 (5th Cir. 2007)*. The Panel likewise referenced authority that focused on the manageability issues pertinent to certification of litigation classes in rejecting the settlement class certification. *See Sullivan, 613 F.3d at 151* (quoting *Clay v. Am. Tobacco Co., 188 F.R.D. 483, 501 (S.D. Ill. 1999)* (discussing "unmanageable" nature of varying state unjust enrichment laws)).

Because we are presented with a settlement class certification, "we are not as concerned with formulating some prediction as to how [variances in state law] would play out at trial, for the proposal is that there be no trial." *Ins. Broker., 579 F.3d at 269* (internal citations & quotations omitted). As such, we simply **[**62]** need not inquire whether the varying state treatments **[*304]** of indirect purchaser damage claims at issue would present the type

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[26] We do not reach this conclusion so as to allow district courts to "shirk" the requirements of *Rule 23* when certifying the class, as the dissent suggests. (Dissenting Op. at 21 n.13.) We do not ignore the differences in state law, but rather find, based on our precedent, that those differences do not defeat predominance.

[27] In conducting the analysis in *Warfarin*, we expressly distinguished the Seventh Circuit's decision in *In re Bridgestone/Firestone Inc., 288 F.3d 1012 (7th Cir. 2002)*, in which certification of a nationwide class arising under the tort laws of all fifty states was sought for purposes of litigation, rather than settlement. *391 F.3d at 529*.

of "insuperable obstacles" or "intractable management problems" pertinent to certification of a litigation class.[28] *Comm. Bank I, 418 F.3d at 299*; *Warfarin, 391 F.3d at 529*. The proposed settlement here obviates the difficulties inherent in proving the elements of varied claims at trial or in instructing a jury on varied state laws, and "the difference is key."[29] *Warfarin, 391 F.3d at 529*. Accordingly, while we are cognizant of our responsibility to "protect absentees by blocking unwarranted or overbroad class definitions," *Comm. Bank II, 622 F.3d at 291*, state law variations are largely "irrelevant to certification of a settlement class," *Warfarin, 391 F.3d at 529*.[30]

iv) Rule 23(b) (3) and our Precedent ***[**65]*** *do not Require that Individual Class Members State a Valid Claim*

At bottom, we can find no persuasive authority for deeming the certification of a class for settlement purposes improper based on differences in state law. The objectors and our dissenting colleagues nevertheless insist that, despite the prevalence of the shared issues of fact and law stemming from the defendant's conduct common as to all class members and each class member's resulting injury, states' inconsistent treatment of indirect purchaser damages claims overwhelms the commonalities. They advocate this because approximately twenty-five states have not extended antitrust standing to indirect purchasers through *Illinois Brick* repealer **[*305]** statutes or judicial edict; likewise, some uncertain number of states do not permit an end-run around antitrust standing through claims based on consumer protection and/or unjust enrichment statutes. (*See* Quinn Supp. Br. on Reh'g En Banc 21-22.) It follows then, they argue, that a large proportion of the Indirect Purchaser Class lacks any valid claims under applicable state substantive law, and, therefore, cannot "predominantly" share common issues of law or fact with those Indirect Purchasers **[**66]** actually possessing valid claims.[31] In turn, they insist that a district court must undertake a thorough review of applicable substantive law to assure itself that each class member has "at least

[28] We are aware that there may still be circumstances, as we and other Courts of Appeals have noted, where "'[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance.'" *Klay v. Humana, Inc., 382 F.3d 1241, 1261 (11th Cir. 2004)* (quoting *Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996))*. But these decisions are inapplicable here, as the certification **[**63]** orders at issue pertained to litigation classes and were preoccupied with the attendant manageability aspects of certification. More explicitly, the courts expressed unease that if "more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law," and noted "the difficulties in trying the [ ] claims on a class basis." *Id.* (citation & quotations omitted). Unlike those situations "where the certification inquiry [is] set against the backdrop of an impending trial," *Ins. Broker., 579 F.3d at 269*, the settlement context here does not present equivalent concerns.

[29] Unsurprisingly, we are not alone in recognizing the "key" distinction between certification for settlement purposes versus litigation, and "courts are more inclined to find the predominance test met [in the settlement context], even when there are differences in applicable state laws." *Ersler v. Toshiba Am., Inc., No. CV-07-2304, 2009 U.S. Dist. LEXIS 14374, 2009 WL 454354, at *4 (E.D.N.Y. Feb. 24, 2009)* (citing *In re Grand Theft Auto Video Game Consumer Litig., 251 F.R.D. 139, 158 (S.D.N.Y. 2008))*; *see, e.g., In re Mexico Money Transfer Litig., 267 F.3d 743, 746-47 (7th Cir. 2001)* **[**64]** (noting that while certification of litigation classes arising under varying consumer fraud statutes is often inappropriate, the same is not true for settlement classes where "no one need draw fine lines among state-law theories of relief"); *In re Inter-Op Hip Prosthesis Liability Litig., 204 F.R.D 330, 347 (N.D. Ohio 2001)* ("[W]hen taking the proposed settlement [ ] into consideration for purposes of determining class certification, individual issues which are normally present in . . . litigation become irrelevant, allowing the common issues to predominate.") (citation & quotations omitted).

[30] Although we will not here speculate as to the type of "situations where variations in state laws are so significant so as to defeat commonality and predominance even in a settlement class certification," *Warfarin, 391 F.3d at 530*, we are confident that the several common questions of law or fact arising from a "single central issue" — namely, De Beers's alleged anticompetitive conduct and the resulting injury caused to each class member — predominate over any issues concerning individual class members, *Prudential, 148 F.3d at 314* (citation & quotations omitted).

[31] As noted, the Panel conducted an extensive review of relevant state statutes and reached the conclusion that "indirect purchasers do not have a right to recover in all states, and, therefore, no question of law or fact regarding their legal rights is uniform throughout the class." *Sullivan, 613 F.3d at 149*.

some colorable legal claim" (Dissenting Op. at 10) or "has a valid claim" (Quinn Supp. Br. at 16) before certifying a settlement.

But this focus is misdirected. ***HN13***[] The question is not what valid claims can plaintiffs assert; rather, it is simply whether common issues of fact or law predominate. *See Fed. R. Civ. P. 23(b)(3)*. Contrary to what the dissent and objectors principally contend, there is no "claims" or "merits" litmus test incorporated into the predominance inquiry beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof. Such a view misreads *Rule 23* and our jurisprudence as to the inquiry a district court must conduct **[**67]** at the class certification stage. An analysis into the legal viability of asserted claims is properly considered through a motion to dismiss under *Rule 12(b)* or summary judgment pursuant to *Rule 56*, not as part of a *Rule 23* certification process. *See Comm. Bank II, 622 F.3d at 303* ("[T]he *Rule 23* requirements 'differ in kind from legal rulings under *Rule 12(b)(6)*.'") (quoting *Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001))*.

To adopt the position of the dissent and the objectors is to introduce a *Rule 12(b)(6)* inquiry as to every claim in the class before a class may be certified. But *Rule 23* makes clear that a district court has limited authority to examine the merits when conducting the certification inquiry:

> ***HN14***[] Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," *limited to those aspects relevant to making the certification decision on an informed basis*.

2003 Amendments **[**68]** to *Rule 23* (emphasis added); *see also Hassine v. Jeffes, 846 F.2d 169, 178 (3d Cir. 1988)* ("The ability of a named plaintiff to succeed on his or her individual claims has never been a prerequisite to certification of the class."). ***HN15***[] A court may inquire whether the elements of asserted claims are capable of proof through common evidence, but lacks authority to adjudge the legal validity or soundness of the substantive elements of asserted claims. Put another way, a district court may inquire into the merits of the claims presented in order to determine whether the requirements of *Rule 23* are met, but not in order to determine whether the individual elements of each claim are satisfied.

Citing our holdings in *Hydrogen Peroxide* and *Newton v. Merrill Lynch, **[*306]** Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001)*, the objectors argue that the District Court abused its discretion by failing to establish as part of the certification process that each class member possessed a valid claim under the applicable substantive laws.[32] (*See* Quinn Br. at 17.) But these cases do not stand for this proposition. We explained in *Hydrogen Peroxide* that an examination of the elements of plaintiffs' claim **[**69]** is sometimes necessary, not in order to determine whether each class member states a valid claim, but instead to determine whether the requirements of *Rule 23* — namely, that the elements of the claim can be proved "through evidence common to the class rather than individual to its members" — are met. *552 F.3d at 311-12*. In *Newton*, we similarly stated that a court may "delve beyond the pleadings to determine whether the requirements for class certification are satisfied," and held that a court's rigorous certification analysis may include a "preliminary inquiry into the merits." *259 F.3d at 167* (citations & quotations omitted). But we did not state that an inquiry into the merits was necessary in order to prove that each class member has state a valid claim as a prerequisite to class certification. Rather, the Rules and our case law have consistently made clear that plaintiffs need not actually establish the validity of claims at the certification stage.[33]

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[32] The Panel echoed the objectors' position, concluding after examining the laws of fifty states that many jurisdictions "categorically foreclosed" a legal right to recover on the merits to indirect purchasers. *Sullivan, 613 F.3d at 151 n.14*.

[33] The **[**70]** marginal role played by the question of "validity" of claims in class settlement certification situations is further evidenced by considering our subsequent *Prudential* decision. *See In re Prudential Ins. Co. of Am. Sales Practice Litig., 261 F.3d 355, 366 (3d Cir. 2001)* ("*Prudential II*"). There, we released all state-law claims — including unnamed claims — "arising from the same nucleus of operative facts as the claims" actually considered by the Court without adjudicating the validity of

Moreover, the merits inquiry is particularly unwarranted in the settlement context since a district court need not "envision the form that a trial" would take, *Newton, 259 F.3d at 167*, nor consider "the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove" the disputed element at trial, *Hydrogen Peroxide, 552 F.3d at 312*. In fact, the absence of evidentiary and trial manageability concerns that initially motivated our instruction to conduct a preliminary merits inquiry in the predominance context reinforces the "key" distinction between certification of a litigation and settlement class. *Warfarin, 391 F.3d at 529*. As such, the objectors' focus on the legal strengths and weaknesses of class members' claims misconstrues the requirements of *Rule 23*.[34] *See* *Newton, 259 F.3d at 167-69*.

[*307] Even still, the objectors and the dissent urge that the absence of one particular element for some class members — statutory standing — means that these members cannot state a valid claim, and therefore, the class cannot be certified. While it may be correct that states abiding by *Illinois Brick* require a plaintiff to be a direct purchaser as one element of an antitrust or consumer protection claim, the possibility that some of the Indirect Purchasers in the instant class might be unable to establish this element at trial is beside the point. This element, often confusingly denoted as a statutory standing requirement, is not jurisdictional.[35] Statutory standing is distinct from jurisdictional standing in that "Article III standing is required to establish a justiciable case or controversy within the jurisdiction of the federal courts," whereas "lack of antitrust standing affects a plaintiff's ability to recover, **[**73]** but does not implicate the subject matter jurisdiction of the court." *Gerlinger v. Amazon.com Inc., 526 F.3d 1253, 1256 (9th Cir. 2008)* (citation omitted); *see e.g.,* *Lerner v. Fleet Bank, N.A., 318 F.3d 113, 128 (2d Cir. 2003)* (noting that "statutory standing under the antitrust laws is not a prerequisite to federal subject matter jurisdiction"); *Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 778 (7th Cir. 1994)* ("[D]espite the suggestive terminology, 'antitrust standing' is not a jurisdictional requirement and is therefore waivable."). Accordingly, statutory standing is simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place.

Here, the supposed lack of one element necessary to prove a violation on the merits — statutory standing — does not establish a concomitant absence of other predominantly common issues. *See* *Prudential, 148 F.3d at 315* (affirming a district court's certification of a settlement class despite the fact that some objectors challenged the settlement on the grounds that some plaintiffs could not establish reliance — a necessary element of their state-law fraud claims). This is especially true in the settlement context where no proof on the merits need be adduced. *See* *Linerboard, 305 F.3d at 162-63* ("'[T]he mere fact that such concerns [of individualized factual and legal determinations] may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones.'") (quoting *Mowbray, 208 F.3d at 296*). Common questions as to the nature of De Beers's "conduct under federal antitrust laws as well as state law" and "the causal linkage between [De Beers's] conduct and the injury suffered by the class members" may still be found to predominate. *See*

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those other allegations. *Id*. We observed that "a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action" even where the "precluded claim was not presented, and could not have been presented, in the class action itself." *Id*. (citations omitted). We reasoned that while our "power to release those claims as part of a judgment" may "seem anomalous," "we have endorsed the rule because it 'serves the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements that 'prevent relitigation of settled questions at the core of a class action.'" *Id*. (quoting *TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982))*. **[**71]** As such, the unidentified prospective claims could be included in the settlement without adjudication of their validity since they arose from the identical fraudulent scheme perpetrated by the defendant.

[34] The objectors' associated argument that the predominance inquiry presupposes that every putative class members possesses at least a single valid cause of action **[**72]** likewise misses the point. While *Rule 23* may presuppose that every class member does actually allege a predominantly common claim against a defendant, *Rule 23* does not mandate that each of these claims must be shown capable of prevailing on the merits at the certification stage.

[35] To further clarify, we use the term "statutory standing" to refer to the possession of a viable claim or right to relief, not to a jurisdictional requirement. *See generally* *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction," and "jurisdiction is not defeated by the possibility that the averments might fail to state a cause **[**74]** of action") (citations and alterations omitted).

Warfarin, 391 F.3d at 528; *see also* Pet Food, 629 F.3d at 342 **[**75]** ("[T]he predominance requirement was satisfied because the same set of core operative facts and theory of proximate cause apply to each member of the class.") (internal quotations omitted).[36]

[*308] *v) The Dissent's Proposed Framework*

The dissent's proposed framework mistakenly places the cart before the horse by requiring the District Court to establish the validity of the disputed elements of the asserted claims — namely, the viability of indirect purchaser actions under state substantive laws — prior to certifying the class. Under this approach, the dissent seems to require **[**76]** that class members show that they can state a valid claim for relief. But the Rule 23 inquiry does not, and should not, involve a Rule 12(b)(6) inquiry.[37]

Were we to require district courts to ensure that "each member of a settlement class has a valid claim" in order to establish predominance, (Quinn Supp. Br. at 16), or that each class member has a "colorable legal claim," district courts would be obligated at the class certification stage to, *sua sponte*, conduct a thorough **[**77]** Rule 12(b)(6) analysis of every statutory and common-law claim to ensure that each plaintiff — including absent class members — possesses a valid cause of action or a "colorable claim" under the applicable federal or state substantive law. Such an inquiry into the merits goes beyond the requirements of Rule 23, for Rule 23 does not require a district court to determine whether class members individually have a colorable claim — one that "appear[s] to be true, valid, or right. (Dissenting Op. at 10 n.8.) In addition to exceeding the plain requirements of Rule 23, in nationwide class settlements, such as the one here, and even if limited to a statutory standing inquiry, this analysis would necessitate an intensive, fifty-state cataloguing of differences in state law at an early stage of the proceedings, and without the benefit of a developed record.[38] Despite the dissent's view, Rule 23 does not require such an intensive cataloguing of each class member's claim in order to establish predominance. Even more troublesome, this merits **[*309]** analysis might not actually answer the salient question of whether common issues of fact or law actually predominate over individual ones.

Moreover, district courts undertaking the scrupulous review of state laws could not ensure the validity of each individual claim without first settling upon the precise state law governing each of the putative class members' claims. This choice-of-law analysis would be particularly difficult in a nationwide class action where an array of factors beyond the residence of the class members must be **[**79]** considered, including, *inter alia*, the location of

[36] The Panel analyzed the antitrust claims separately from the consumer protection and unjust enrichment claims, seemingly concluding that plaintiffs could only prevail if each putative class member alleged either a "uniform" antitrust cause of action, a "uniform" consumer protection cause of action, or a "uniform" unjust enrichment claim. Sullivan, 613 F.3d 146, 150. We will not read into Rule 23 this heightened threshold requirement that plaintiffs must allege an identical cause of action, when all that is required is that common issues of law or fact predominate over questions particular to individual class members.

[37] The dissent describes this requirement in varied ways: under their view, class members who, "according to the plain terms of controlling law have no claim at all" (Dissenting Op. at 16 n. 11), have "no legal claim" (*Id*. at 1), have "no cause of action," (*Id*. at 4), have a claim "clearly lacking a colorable basis" (*Id*. at 15), or have a claim "nonexistent as a matter of substantive law" (*Id*. at 13), are barred from partaking in this class action settlement. The problem with this requirement, however, is that in order to separate class members possessing an "existent" legal claim from those possessing a "nonexistent" one, district courts would have to perform a Rule 12(b)(6) inquiry into each class member's claim.

[38] At the same time, **[**78]** it is by no means clear that the dissent's proposed analysis could be cabined to only consider the differing statutory standing requirements in the process of evaluating the validity of claims. As discussed *supra*, statutory standing for indirect purchasers is treated as but one element of a cause of action, rather than a jurisdictional requirement, as the dissent mistakenly suggests. If a district court were required to evaluate the statutory standing element to assess a claim's viability, logic and consistency suggest that the court should also consider other aspects of a claim for Rule 12(b)(6) and other deficiencies. This approach would delay proceedings in the trial court, as it would require the parties to engage in ill-timed, protracted merits litigation at the class certification stage.

the parties and the purchased items, and the place of contracting and performance. *See generally* Berg Chilling Sys., Inc. v. Hull Corp., 435 F.3d 455, 467 (3d Cir. 2006). The Seventh Circuit rightly noted that "choice-of-law issues in nationwide class actions are rarely so uncomplicated that one can delineate clear winning and losing arguments at an early stage in the litigation"; "the legal uncertainty resulting from the complicated choice-of-law issues" would unduly complicate the process for establishing predominance under Rule 23. Mirfasihi v. Fleet Mortg. Corp., 450 F.3d 745, 750 (7th Cir. 2006). As a result, many courts find it "inappropriate to decide choice of law issues incident to a motion for class certification." *See, e.g.,* In re Kirschner Med. Corp. Sec. Litig., 139 F.R.D. 74, 84 (D. Md. 1991); *Singer v. AT&T Corp., 185 F.R.D. 681, 691 (S.D. Fla. 1998)* ("It is well-established that consideration of choice of law issues at the class certification stage is generally premature.").

Even were a district court to properly ascertain the applicable law after conducting the choice-of-law inquiry, it would likely encounter unsettled **[**80]** legal questions, further undermining its ability to assess the viability of some class members' claims and increasing the costs of administration. By way of example, in *Warfarin*, we remarked on the "unsettled question of law as to whether Tennessee's antitrust statutes . . . cover only violations occurring in intrastate commerce or extend to cover violations occurring in interstate commerce as well." 391 F.3d at 530 n.12. Relegating the issue to a footnote, we did not think it necessary to pry into the legal merits of the Tennessee claims in approving the class settlement. In another instance, the Fifth Circuit confronted the unresolved question of whether Louisiana ***antitrust law*** granted standing to indirect purchasers of consumer products as part of the class certification process, and asked the Louisiana Supreme Court to accept certification of the question. *See* Free v. Abbott Labs., 176 F.3d 298, 298-99 (5th Cir. 1999). When the state court declined, the Fifth Circuit was "le[ft] to fathom Louisiana's unsettled ***antitrust law***." *Id*. By requiring district courts to assess the validity of unsettled state law claims at the certification stage, we would needlessly introduce additional **[**81]** legal uncertainty into a certification process that does not demand it.[39]

[*310] We raise the following questions to further demonstrate the error of the proposed framework adopted by our dissenting colleagues. If the dissent's "colorable legal claim" test is a threshold inquiry for commonality, why should the court not consider every potential disqualifier from one's having a "colorable legal claim?" For example, in any class certification case, should the court consider whether all potential class members complied with applicable pre-notice requirements under the relevant substantive law? Should the court consider whether every potential class

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[39] Application of the proposed inquiry to the instant matter demonstrates the likely obstacles the District Court would encounter under this approach. The objectors present Ohio's statutory regime as emblematic of the impropriety of the type of class settlement certification at issue here. Citing the Ohio Supreme Court's decision in Johnson v. Microsoft Corp., 106 Ohio St. 3d 278, 2005 Ohio 4985, 834 N.E.2d 791 (Ohio 2005), they urge that Ohio law prohibits all indirect purchaser claims asserting violations of Ohio ***antitrust law***, common law claims for unjust enrichment where a purchaser cannot establish that he conferred a benefit upon a defendant, and claims alleging violations of the Ohio Consumer Sales Practices Act predicated upon monopolistic pricing practices. (Quinn Br. at 60-61.) As a result, they insist that, "[d]irectly contrary to the district court's [certification], an Ohio class member does not have a valid claim under Ohio law." (*Id*. at 61.) The objectors contend that a similar problem exists for other *Illinois Brick* states.

This inference is flawed for several reasons. First, the objectors fail to engage in the type of choice-of-law **[**82]** exercise necessitated by their proposed approach — the evaluation of whether an Ohio class member is asserting a claim pursuant to Ohio law or pursuant to the law of a repealer state or a state affording an alternative basis for recovery. Undoubtedly, this analysis would present significant hurdles and potentially alter the presumed outcome. Second, although Johnson provides that an indirect purchaser lacking an antitrust claim under *Illinois Brick* cannot circumvent this limitation by relying upon the Ohio consumer protection statute, the Ohio Supreme Court did not, nor could it, preclude consumer protection claims predicated on fraud or deception. As the plaintiffs point out, the claims settled here include allegations of fraud and deception separate from the antitrust allegations, suggesting that some avenue of recovery arising from the same defendant conduct remains available to indirect purchasers even in Ohio. (*See* Pls.' Br. in Response to Quinn's Response to Class Counsel's Mot. for Leave to File Record Excerpts 13-14.) Finally, if the court is to evaluate the viability of plaintiffs' statutory standing element under Ohio law at the class certification stage, the objectors presented **[**83]** no sensible reason why the court should not likewise inspect the viability of every other aspect of an antitrust, consumer protection, or unjust enrichment claim, such as statutes of limitation, conditions precedent to suit, and the like. We do not doubt that such an exhaustive analysis would produce absurd results and cause undue delay in our trial courts.

member exhausted her administrative remedies under the relevant substantive law? Should the court evaluate whether each class member's claim complies with the applicable statute of limitations? The answers to these questions most certainly implicate whether a litigant, **[**84]** in a class action or otherwise, has a "colorable legal claim." These questions, moreover, show how flawed, from an administrative, logical, and practical standpoint, the dissent's and objectors' approach really is. No class would ever be certified because it would be impossible to demonstrate that every class member has a "colorable legal claim." (Dissenting Op. at 10.) More than this, it would gut commonality, for, most certainly, individual issues would then predominate. There would simply be no class that could meet this commonality and predominance test.

vi) Settlements

Finally, were we to mandate that a class include only those alleging "colorable" claims, we would effectively rule out the ability of a defendant to achieve "global peace" by obtaining releases from all those who might wish to assert claims, meritorious or not. We need not take judicial notice of the fact that plaintiffs with non-viable claims do nonetheless commence legal action. Here, in an effort to avoid protracted litigation and future relitigation of settled questions in federal and state courts across numerous jurisdictions, De Beers pursued a global settlement and demanded a release of potential damage claims **[**85]** in all fifty states. *See* *Prudential, 148 F.3d at 326 n.82* (noting that release of all claims "serves the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements **[*311]** that prevent relitigation of settled questions at the core of a class action") (citation & quotations omitted). Specifically, De Beers sought "global peace" in a settlement covering plaintiffs in every federal and state case, as well as potential plaintiffs who had not yet filed cases in either federal or state court. *See generally* *Klein v. O'Neal, Inc., 2009 U.S. Dist. LEXIS 36395, 2009 WL 1174638, at *3 (N.D. Tex. Apr. 29, 2009)* ("In a class action settlement setting, defendants seek and pay for global peace-i.e., the resolution of as many claims as possible."); *In re Vioxx Prods. Liability Litig., 574 F. Supp. 2d 606, 613 (E.D. La. 2008)* (quoting *In re Guidant Corp. Implantable Defibrillators Prods. Liability Litig., MDL No. 05-1708, 2008 U.S. Dist. LEXIS 17535, 2008 WL 682174, at *3 (D. Minn. 2008)* (noting that the parties "contemplated a global settlement covering Plaintiffs from both the MDL and state cases, and included Plaintiffs whose cases had been filed or transferred to the MDL, Plaintiffs whose cases were filed outside **[**86]** the MDL in state court proceedings, and potential Plaintiffs who had not yet filed their cases")). The parties entered a mutual agreement and sought certification of a settlement class with the aim of avoiding countless individual suits in diverse jurisdictions.

Our dissenting colleagues disparage the concept of "global peace" as if it were an impermissible objective in using the class action device. From a practical standpoint, however, achieving global peace is a valid, and valuable, incentive to class action settlements. Settlements avoid future litigation with all potential plaintiffs — meritorious or not. If the dissent's position were adopted, there would be no settlements, collusive or otherwise. First of all, litigating whether a claim is "colorable" and defending who is in and who is not in the class would be an endless process, preventing the parties from seriously getting to, and engaging in, settlement negotiations. And, as discussed above, the "individualized" nature of the task would doom the class certification process from the outset. Second, since releases would necessarily be limited to the qualifying class members, those ultimately excluded would no doubt go right **[**87]** back into court to continue to assert their claims. No defendants would consider settling under this framework, for they could never be assured that they have extinguished every claim from every potential plaintiff.[40]

As applied here, the objectors' approach would subject De Beers to numerous individual suits brought by claimants excluded from the class, undermining "the strong presumption in favor of voluntary settlement agreements, which we have explicitly recognized with approval." *Ehrheart, 609 F.3d at 594* (citing *Pennwalt Corp. v. Plough, 676 F.2d*

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[40] Of course, some global settlements may nevertheless be rejected for failing to meet the requirements of *Rule 23*. In *Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*, the Supreme Court rejected a global settlement in a mandatory class action based on a limited fund theory under *Rule 23(b)(1)(B)*. There, the plaintiffs seeking class certification failed to demonstrate that the fund available to pay claims was limited beyond the fund amount agreed to by the parties. There, the requirements of *Rule 23(b)(1)(B)* were not met; here, the requirements of *Rule 23(b)(3)* are met.

77, 79-80 (3d Cir. 1982)). "This presumption is especially strong in **[**88]** class actions and other complex cases . . . because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Id.* (citations omitted). By contrast, requiring a class to assert uniform or identical questions of law or fact and to preemptively demonstrate their legal viability "would seriously undermine the possibility for settling any large, multi district class action." *Prudential **[*312]** II, 261 F.3d at 367*. Apart from imposing immense administrative costs, the extraordinary requirement that class members individually possess a "colorable legal claim" would make it increasingly difficult to approve nationwide class settlements entailing predominantly common issues but arising under varying state laws. The resulting framework would likely siphon the various state law claims from federal class actions, and defendants seeking to settle "in such suits would always be concerned that a settlement of the federal class action would leave them exposed to countless suits in state court despite settlement of the federal claims." *Id; see also Pet Food, 629 F.3d at 342* ("[A]bsent class certification, the Court may be faced with litigating **[**89]** over 100 individual lawsuits all of which would arise out of the same set of operative facts.").

Rather than "concentrating the litigation of the claims" in a superior single action, *Fed. R. Civ. P. 23(b)(3)(C)*, this would serve to frustrate "[t]he core purpose of *Rule 23(b)(3)*," which "is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation," *Amchem, 521 U.S. at 617*.

b. Rules Enabling Act & Federalism Concerns

The objectors further contend that the District Court's certification of the settlement class was flawed because it "recognized as valid, for purposes of *Rule 23*, claims that are not recognized as valid under applicable state law." (Quinn Supp. Br. at 28.) Accordingly, they argue, the order ran afoul of ***HN16***[] the Rules Enabling Act, which provides that the rules of procedure "shall not abridge, enlarge or modify any substantive right." *28 U.S.C. § 2072(b)*.[41] We cannot agree.

In *Prudential*, we approved a district court's certification of a proposed settlement despite objections that the certification modified or abridged state law rights. *148 F.3d at 324* (discussing *962 F. Supp. 450, 461-62 (D.N.J. 1997))*. We agreed with the district court that "approval of a settlement under *Rule 23* merely recognizes the parties' voluntary compromise of their rights and does not itself affect their substantive state law rights." *Id*. (citation & alterations omitted). As a result, we also agreed with the district court's assessment that the proposed settlement could not violate the Rules Enabling Act since a "court's approval of a voluntary settlement, by nature a compromise of rights, does not affect substantive state rights." *Prudential, 962 F. Supp. at 462*.

It is well established that ***HN17***[] "settlement agreements are **[**91]** creatures of private contract law." *See, e.g., Bauer v. Trans. Sch. Dist. of City of St. Louis, 255 F.3d 478, 482 (8th Cir. 2001)*. "A district court is not a party to the settlement, nor may it modify the terms of a *voluntary* settlement agreement between parties." *Ehrheart, 609 F.3d at 593* (emphasis added). Thus, a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action. **[*313]** In the absence of a finding that plaintiffs are actually entitled to relief under substantive state law, we reiterate that a court does not "abridge, enlarge, or modify any substantive right" by approving a voluntarily-entered class settlement agreement. *§ 2072(b)*.

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[41] The Panel agreed with this characterization, holding that "the order contravenes the Rules Enabling Act" because it "extends antitrust remedies that, in many instances, have no root in state substantive law." *Sullivan, 613 F.3d at 149*. The **[**90]** Panel rejected the argument that De Beers's willingness to stipulate to liability obviated this concern, noting that a court was obligated even in the settlement context to ensure that all of *Rule 23*'s requirements were met and could not "effectively grant[ ] relief to individuals to whom De Beers had no antitrust liability." *Id*. The dissent repeats this argument.

In the same vein, we disagree with the contention that the District Court violated principles of federalism by extending to the plaintiffs a substantive right that they could not have asserted in state court.[42] As an initial matter, the District Court's approval of the parties' settlement should not be considered a recognition or expansion of substantive rights unavailable **[**92]** in a particular state.[43] *See supra*. In this regard, the disputed certification order did not subordinate the states' interests, as it did not in fact validate any asserted claims purportedly rejected by the states.[44]

Moreover, consideration of the policy imperatives underlying *Illinois Brick* confirms that the District Court's certification of a settlement class here did not infringe upon federalism principles. *Illinois Brick's* restriction on indirect purchaser recovery was motivated by prudential concerns for manageability; it does not reflect a categorical policy judgment that indirect purchasers do not merit antitrust protection. As we previously highlighted, the *Illinois Brick* Court offered "three policy reasons for its holding":

> (1) a risk of duplicative liability for defendants and potentially inconsistent adjudications could arise if courts permitted both direct and **[*314]** indirect purchasers to sue defendants for the same overcharge; (2) the evidentiary complexities and uncertainties involved in ascertaining the portion of the overcharge that the direct purchasers had passed on to the various levels of indirect purchasers would place too great a burden on the courts; and (3) permitting direct and indirect purchasers to sue only for the amount of the overcharge they themselves absorbed and did not pass on would cause inefficient **[**95]** enforcement of the antitrust laws by diluting the ultimate recovery and thus decreasing the direct purchasers' incentive to sue.

Howard Hess Dental Labs Inc. v. Dentsply Intern., Inc., 424 F.3d 363, 369-70 (3d Cir. 2005) (citing *Illinois Brick, 431 U.S. at 730-35, 740-43)*.[45] Nevertheless, the Supreme Court acknowledged that its aversion to administering

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[42] The Panel agreed with this argument, noting that certain states' "categorical refus[al] to allow indirect purchasers to bring a price-fixing claim" was "not trivial" and represented "fundamental policy differences among the several states." *Sullivan, 613 F.3d at 152, 148*. The Panel concluded that these state interests were in effect "subordinated to De Beers's desire to resolve all indirect purchaser claims simultaneously" and "in a quest to clear the queue in court." *Id. at 152* (citation & quotations omitted).

[43] The dissent concludes that approving class certification here endorses the enlargement of substantive rights because had some class members brought these claims individually in state court, they would "be immediately shown the exit." (Dissenting Op. at 30.) This is incorrect, for the state court would not automatically dismiss them without a motion from De Beers. More significantly, nothing would prevent De Beers from settling those claims in lieu of moving to **[**93]** dismiss them, and doing so in that scenario would not be an enlargement of substantive rights.

In responding to this point, the dissent equates an objection to class certification with a motion to dismiss, but such treatment demonstrates the very flaw in its position. Class certification and motions to dismiss involve two distinct (and different) standards, and the former does not permit as extensive an inquiry into the merits as the latter does. (*See* Dissenting Op. at 30 n.21.)

[44] The dissent decries this position, contending that including Indirect Purchasers in the class who could not, on an individual basis, state a claim for recovery impermissibly modifies the rights of those Indirect Purchasers who could recover individually. In so asserting, the dissent assumes that the size of the settlement fund would be the same if the Indirect Purchasers who cannot recover individually were excluded from the class. Surely this cannot be the case, for the settlement amount to which De Beers has agreed must be based in large part on the number of potential class members and on securing global peace. Had those Indirect Purchasers who could not recover individually been excluded, we seriously doubt **[**94]** that the Indirect Purchaser settlement fund would still be $272.5 million.

[45] Other Courts of Appeals have recognized a similar functional focus in the Supreme Court's decision. *See, e.g., Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 991 (7th Cir. 2006)* ("An example of the prudential limitations on standing is the judge-made 'indirect purchaser' doctrine of ***antitrust law***," which is premised on minimizing complicated litigation), *rev'd on other grounds, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007)*; ***County of Oakland v. City of Detroit, 866 F.2d 839, 852 (6th Cir. 1989)*** ("The question of whether a plaintiff has standing to sue under the antitrust laws depends largely on prudential considerations.").

indirect purchaser recoveries undoubtedly "denie[d] recovery to those indirect purchasers who may have been actually injured by antitrust violations." *Illinois Brick, 431 U.S. at 746*.[46]

Here, contrary to the dissent's and the objectors' argument, the District Court's certification order did not undermine these prudential considerations. De Beers's agreement to a specified recovery payment — and the interrelated removal of a need to ascertain and prove the amount of passed-on overcharges — marginalizes the first two *Illinois Brick* concerns for duplicative liability and complexity in ascertaining the passed-on overcharges. The third prudential concern is similarly inapposite since the Direct Purchaser Class pursued and approved a separate **[**97]** settlement agreement and there is no indication that the Indirect Purchaser Settlement undermined "the direct purchasers' incentive to sue." *Dentsply, 424 F.3d at 370*. Indeed, the immediate relief offered by the instant settlement appears to offer the most "[ ]efficient enforcement of the antitrust laws," *id*, when compared to the highly uncertain result the plaintiffs would encounter by engaging in protracted litigation against a party with a long track record of avoiding the jurisdiction of courts in the United States. *See generally* Comment, The Diamond Cartel, 56 Yale L.J. 1404, 1411 (1947) (discussing De Beers's avoidance of effective antitrust prosecution in light of "the twin difficulties of obtaining jurisdiction over the foreign corporations and of retaining within the court's reach tangible assets sufficient to enforce a decree").

Accordingly, we reject the assertion that the District Court inappropriately subordinated state sovereignty in certifying the class.

c. Identification of Class Claims Pursuant to Rule 23(c)(1)(B)

Apart from our disagreement with the objectors' arguments regarding commonality and predominance, we similarly reject the view that the District Court's Order **[**98]** in this case failed to satisfy all of **[*315]** *Rule 23(c)(1)(B)*'s substantive requirements.

As we have explicated, ***HN18***[] *Rule 23(c)* provides that a certification order "must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Hydrogen Peroxide, 552 F.3d at 320-21* (citation & quotations omitted); *see also* *Fed. R. Civ. P. 23(c)(1)(B)* ("An order that certifies a class action must define the class and the class claims, issues, or defenses. . . ."). The District Court's Order "easily meets the requirements of *Rule 23(c)(1)(B)* with respect to the definition of the class itself." *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am., 453 F.3d 179, 188 (3d Cir. 2006)*. The Court properly delineated the parameters of the Indirect Purchaser Class, defining class members as any purchasers of any diamond product in the United States except for those who purchased directly from De Beers or its competitors. (App'x 270.)

As to the second prong of the above test, the contention is raised that the Court's Order did not **[**99]** "explicitly define which claims, issues, or defenses are to be treated on a class basis." *Wachtel, 453 F.3d at 189*. We disagree with this characterization, as the settlement posture of this class action makes our decision on this front particularly simple. As we noted in *Wachtel*, a "critical" purpose of *Rule 23(c)(1)*'s requirement of a "full and clear articulation of the litigation's contours at the time of class certification" was the "need [ ] to determine how the case will be tried" through presentation of "a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible to class-wide proof." *453 F.3d at 186* (quoting *Fed. R. Civ. P. 23(c)(1)(A)* advisory committee's note) (quotations omitted). In the settlement context, however, this concern evaporates, "for the proposal is that there be

[46] States **[**96]** on both sides of the indirect purchaser restriction have likewise appreciated the pragmatic origins of and purposes served by *Illinois Brick*. *See, e.g.,* *Lorix v. Crompton Corp., 736 N.W.2d 619, 624 (Minn. 2007)* (noting that antitrust standing "has prudential limits based on remoteness of injury and complexity of proof); *Comes v. Microsoft Corp., 646 N.W.2d 440, 449 (Iowa 2002)* ("[T]he *Illinois Brick* court was wholly concerned with the complexity of litigation and the possibility of multiple liability."); *Abbott Labs, Inc. v. Segura, 907 S.W.2d 503, 506-07 (Tex. 1995)* (discussing the prudential policy concerns underlying *Illinois Brick*).

no trial." Comm. Bank II, 622 F.3d at 291 (citing Amchem, 521 U.S. at 620). As such, we agree with the Seventh Circuit's sentiment that "[g]iven the settlement, no one need draw fine lines among [the various] theories of relief." Mexico Money, 267 F.3d at 747.

The District Court's Order identified six common legal or factual issues it reasonably found **[**100]** to "predominate" over individual questions and susceptible to class treatment, (*see* App'x 276); the Court also expressly included in its Opinion a background section titled "Underlying Claims, Cases & Parties," which laid out in depth all the claims asserted in each individual suit to be resolved by the class settlement, (App'x 263-65). *See also supra* note 6. It is undisputed that the Settlement Agreement resolves and releases each and every one of these asserted claims and issues, obviating any need to "cobble together" some uncertain category of issues to be tried as a class. Wachtel, 453 F.3d at 189. **HN19**[] "[N]o particular format is necessary in order to meet the substantive requirement of [Rule 23(c)], and we will not set aside substantively conforming certification orders purely over matters of form." Id. at 188 n.10. The District Court's Opinion "facilitate[d] meaningful appellate review of [this] complex certification decision[ ]" by providing us with ample guidance as to the "contours" of the settlement." Id. at 186.[47]

[*316] Accordingly, we conclude that the District Court did not run afoul of the requirements of Rule 23(c)(1)(B) and properly certified the two classes of claims.

2. Injunctive Relief Pursuant to Rule 23(b)(2)

In addition to certifying the Direct and Indirect Purchaser Classes under Rule 23(b)(3), the District Court further certified the purchaser classes pursuant to Rule 23(b)(2) for the purpose of awarding injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26.[48] (App'x 285.) Plaintiffs alleged that, in the absence of injunctive relief, De Beers's anticompetitive conduct would continue to cause the entire membership of all classes to pay artificially inflated prices. The objectors counter that class members lack antitrust standing to seek injunctive relief because they cannot demonstrate a significant threat of injury from an impending violation of the antitrust laws. In support, they point to expert reports submitted in 2008 for the targeted purpose of identifying a common methodology benchmark for calculating damages; these reports suggested that the market for rough diamonds became more competitive in the interim between mid-2006 and 2008, in concert **[**103]** with De Beers's weakening position in the market.[49] In

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[47] We find additional support for our conclusion from the First Circuit's recent ruling in In re Pharmaceutical Industry Average Wholesale Price Litigation, 588 F.3d 24 (1st Cir. 2009). **[**101]** There, the Court remarked that "Rule 23(c)(1)(B) was added . . . to help appellate courts reviewing an order better understand the district court's decision," and to allow "appellate courts, attorneys, and parties [to] proceed with more information and mutual understanding." Id. at 40 (citing Wachtel, 453 F.3d at 186-87). As a result, the Court upheld a district court's certification order that "plainly defined the class and the class claims, issues, and defenses in sufficient detail," "devoted many pages to the class's factual allegations against the defendant," "carefully analyzed the proposed class's suitability for certification, again explaining the issues common to the class," and also "discussed the state consumer protection statutes underlying the class's claims, noting differences among them." Id. Likewise here, the District Court clearly defined the class, listed six common claims and issues, devoted significant discussion to the factual allegations, analyzed the class's suitability for certification by explaining the predominantly common issues, and noted the differences among the various statutes implicated in the claims. As succinctly stated by our fellow Court of Appeals, **[**102]** "[t]hat is enough." Id. at 41.

[48] 15 U.S.C. § 26 reads in pertinent part:

> **HN20**[] Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the ***antitrust law*** . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.

[49] After evaluating the mentioned expert reports, the Panel agreed with the objectors that plaintiffs no longer faced "a significant threat of future antitrust harm in the absence of the injunction," and, therefore, lacked antitrust standing under § 16 of the Clayton Act. Sullivan, 613 F.3d at 157-58.

making this argument, the objectors reject the District Court's conclusion that De Beers's willful entry into the settlement removed the plaintiffs' burden to establish the likelihood of future injury. (*See* App'x 285.)

HN21[] In contrast to the damages provision of § 4 of the Clayton Act, "'Section 16 has been applied more expansively, both because its language is less restrictive than that of § 4 **[**104]** . . . and because the injunctive remedy is a more flexible and adaptable tool for enforcing the antitrust laws than the damage remedy. . . .'"[50] **[*317]** *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 856 (3d Cir. 1996)* (quoting *Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980))*. Because actions seeking injunctive relief under § 16 do "not present the countervailing considerations — such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses," plaintiffs need not "satisfy the direct purchaser requirement as a condition of seeking injunctive relief." *In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 400 (3d Cir. 2000)* (*Warfarin I*) (quoting *Mid-West Paper Prods Co. v. Continental Group, Inc., 596 F.2d 573, 594 (3d Cir. 1979))* (quotations omitted). Instead, to establish the need for injunctive relief, plaintiffs must generally demonstrate three uncomplicated prerequisites: "a threat of loss"; that the injury in question "is of the type the antitrust laws were intended to prevent"; and "a significant threat of injury from a violation of the antitrust laws." *Id. at 399* (citations & quotations **[**105]** omitted; alterations added).

Despite this burden, it is well established that ***HN23***[] "parties to a suit have the right to agree to anything they please in reference to the subject matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings." *Sansom Comm. by Cook v. Lynn, 735 F.2d 1535, 1548 (3d Cir. 1984)* (quoting *Pac. R.R. v. Ketchum, 101 U.S. 289, 297, 25 L. Ed. 932 (1879)* (quotations & alterations omitted)). In turn, "[a]s the Supreme Court has recognized, a district court may 'provide broader relief in an action that is resolved before trial than the court could have awarded after a trial.'" *In re "Agent Orange" Prod. Liability Litig., 818 F.2d 179, 185 (2d Cir. 1987)* **[**106]** (quoting *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 525, 106 S. Ct. 3063, 92 L. Ed. 2d 405 (1986)* (alterations omitted). Accordingly, district courts are afforded wide discretion to give effect to joint compromises that timely advance the interests of the parties without wasteful litigation.[51] In exercising this discretion, the District Court here could reasonably approve a mutually agreed-upon stipulation enjoining conduct within the Court's jurisdiction regardless of whether the plaintiffs could have received identical relief in a contested suit by satisfying each of the aforementioned requirements at trial.

Yet because of the class nature of the instant **[**107]** suit, the District Court's approval of the stipulated injunction borne out of a class settlement did need to satisfy an additional test. Specifically, ***HN24***[] *Rule 23(b)(2)* authorizes class certification only when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Fed. R. Civ. P. 23(b)(2)*.[52] Important to the analysis "is **[*318]** that the relief

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[50] Section 16 provides in pertinent part:

> ***HN22***[] Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.

15 U.S.C. § 26.

[51] Unsurprisingly, a paucity of case law addresses the issue of whether parties to a lawsuit may consent to the issuance of an injunction that is agreeable to all parties without a court's asking whether the prerequisites of *Rule 23(b)(2)* have been satisfied. This dearth of precedent is to be expected since it would be highly illogical for a defendant to dispute an injunction to which it in fact agreed, and for a plaintiff beneficiary to object to an injunction entered for its benefit. Curiously, the latter situation is presented here.

[52] "This rule applies when the putative class seeks injunctive or declaratory relief, and 'does not extend to cases in which **[**108]** the appropriate final relief relates exclusively or predominantly to money damages,'" as with a certification pursuant to

sought . . . should benefit the entire class," and "the putative class [must] 'demonstrate that the interests of the class members are so like those of the individual representatives that injustice will not result from their being bound by such judgment in the subsequent application of principles of res judicata.'" Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 59 (3d Cir. 1994) (quoting Hassine, 846 F.2d at 179). "[I]njunctive actions, seeking to define the relationship between the defendant and the 'world at large,' will usually satisfy the requirement." Id.

Here, we have no difficulty concluding that Rule 23(b)(2)'s requirement that De Beers's alleged conduct be "generally applicable to the class" was satisfied. Indeed, much of our discussion of "predominance" in the previous section of this Opinion specifically emphasized the common elements of the complained of conduct that are equally applicable to "the class as a whole." *See supra*. As the District Court discussed, the plaintiffs alleged that De Beers's anticompetitive behavior "caused the entire membership of all classes to pay artificially inflated prices," and that, in the absence of injunctive relief, all classes would continue to pay artificial premiums. (App'x 285.) These claims demonstrate shared interests between the members of the putative class, and, these allegations, if proven, would support injunctive relief respecting the class as a whole. Likewise, the parties' mutual decision to settle claims "on grounds generally applicable **[**109]** to the class" complies with the text of Rule 23(b)(2) and should be respected.

In reaching this decision, we also reject the objectors' request that we engage in fact-finding as to whether all class members could show an imminent threat of prospective antitrust injury. Due to the settlement posture of this case, which controls, we need not concern ourselves with this issue. Moreover, the District Court never addressed the question of whether changes in the market negatively affected De Beers's ability to extract higher rents from diamond sightholders and subsequent purchasers.[53] Without the benefit of the **[*319]** District Court's factual findings on the matter in any event, "[w]e deem it inappropriate to treat this question without any evidence having been presented on [it] and without the benefit of the findings and opinion of the district judge. Merola v. Atl. Richfield Co., 515 F.2d 165, 173 (3d Cir. 1975).

At bottom, we hold that the District Court acted within its discretion in accepting De Beers's stipulation to the injunctive relief.

B. Fairness of the Class Action Settlement & the Plan of Allocation

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Rule 23(b)(3). Beck v. Maximus, Inc., 457 F.3d 291, 301 (3d Cir. 2006) (quoting Fed. R. Civ. P. 23(b)(2) advisory committee's note).

[53] The objectors urge, based on the damages methodology expert reports, that De Beers's market share fell to approximately 46% in 2006, and, therefore, posed little continuing threat of future antitrust harm. (Quinn Br. 19.) Although the experts mentioned that De Beers lost its dominant **[**110]** share of an increasingly competitive market, the experts never opined — as the objectors contend — that plaintiffs face no significant threat of future antitrust harm. Were we to conduct our own independent analysis, we might draw a very different conclusion as to De Beers's asserted ability to inflict future harm: we might decide that De Beers's ongoing leadership position — considering its purported 46% market share in the diamond market — afforded it ample opportunity to influence diamond prices, posing an ongoing and significant threat of antitrust injury. *See generally* United States v. Continental Can Co., 378 U.S. 441, 459, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964) (discussing defendant's "dominant position" based upon a 43%-46% market share in a highly concentrated industry). The objectors place far too much stock in De Beers's purported market share, ignoring one of the basic tenets in assessing market power: "Obviously no magic inheres in numbers; the relative effect of percentage command of a market varies with the setting in which that factor is placed." Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 612, 73 S. Ct. 872, 97 L. Ed. 1277 (1953).

Curiously, the objectors and the Panel also rejected the plaintiffs' contention that the **[**111]** injunction entered by the District Court in 2006 — an injunction directly tailored to fostering competition — played any role in the increasingly competitive market. Sullivan, 613 F.3d at 157. The Panel opined that although the mid-2006 competitive increases "roughly coincided with the District Court's issuance of the injunction," this coincidence did not support the reasonable deduction that the injunction "played a meaningful role in producing those competitive gains." Id. at 157-58. An equally logical inference would be that increased competition approximating the issuance of the injunction evidenced the efficacy of the relief. That said, we will abstain from extrapolating broad legal conclusions of market competitiveness from data narrowly focused on damages methodology.

Apart from contesting the certification of the settlement class, the objectors raise two other arguments as to the fairness and adequacy of the proposed settlement. First, they quarrel with the District Court's approval **[**112]** of the settlement as a whole under *Federal Rule of Civil Procedure 23(e)*'s requirement that the settlement be "fair, reasonable, and adequate." (*See* Bagolie Br. at 18-28.) Second, the objectors dispute the fairness and adequacy of the settlement's plan of allocation for a portion of the settlement. Specifically, they urge that the proposed Indirect Purchaser Settlement distribution is "patently unfair" and presents "an intra-class conflict of interest that renders Class Counsel, as well as the class representative, inadequate." (*See* Murray Consol. Br. at 13; Quinn Br. at 63-64; Petrus Br. at 12-13.) We address each objection in order.

1. Approval of the Settlement

HN25[] Before approving a class settlement agreement, a district court must find that the requirements for class certification under *Rule 23(a)* and *(b)* are met, and must separately "determine that the settlement is fair to the class under [*Rule] 23(e)*." *Ins. Broker., 579 F.3d at 257*. *Rule 23(e)* provides that a proposed settlement may only be approved "after a hearing and on finding that it is fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(2)*. In this process, "trial judges bear the important responsibility of protecting absent **[**113]** class members," and must be "assur[ed] that the settlement represents adequate compensation for the release of the class claims." *Pet Food, 629 F.3d at 349* (citation & quotations omitted); *see also* *Ehrheart, 609 F.3d at 593* (stressing that "[t]he purpose of *Rule 23(e)* is to protect the unnamed members of the class," and that a "district court acts as a fiduciary" for absent class members) (citing *Warfarin, 391 F.3d at 534*). "[W]here settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously, district courts should be even 'more scrupulous than usual' when examining the fairness of the proposed settlement." *Warfarin, 391 F.3d at 534* (quoting *GM Truck, 55 F.3d at 805*).

HN26[] In assessing the fairness of a proposed settlement, we have articulated nine well-established primary factors for a district court to consider in conducting its inquiry:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the **[*320]** risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining **[**114]** the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Pet Food, 629 F.3d at 350 (quoting *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975))*. (internal quotation marks and alterations omitted).

Furthermore, ***HN27***[] a district court may consider several other factors "illustrative of additional inquiries that in many instances will be useful for a thoroughgoing analysis of a settlement's terms," *id*.:

> [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or **[**115]** likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Id. (quoting *Prudential, 148 F.3d at 323*). The "settling parties bear the burden of proving that the *Girsh* factors weigh in favor of approval of the settlement" throughout this analysis.[54] *Id.* (citation omitted). "Because of the district court's proximity to the parties and to the nuances of the litigation, we accord great weight to the court's factual findings" in conducting the fairness inquiry. *Prudential, 148 F.3d at 317*.

The District Court in this instance engaged in a thorough review of the *Girsh* factors, holding that the relevant considerations on balance weighed in favor of a finding of fairness under *Rule 23(e)*. We conclude that the Court did not abuse its discretion in finding the settlement to be fair, reasonable, and adequate.

a. Complexity, Expense, and Likely Duration of the Litigation

HN28[] The first *Girsh* factor "captures the probable costs, in both time and money, of continued litigation." *Warfarin, 391 F.3d at 536* (citation omitted). The District Court found that this litigation "would have been difficult, as multiple parties, multiple claims, extensive jurisdictional problems, and complicated discovery would be involved." (App'x 289.) The Court further discussed the likelihood of extensive motion practice as to jurisdiction, the lifting of default judgments, statute of limitations issues, and the concern for protecting **[*321]** foreign litigants in United States courts. (*Id*. 289-90.)

We agree with the District Court's conclusion that **[**117]** litigation of the numerous legal and factual issues discussed would have inevitably contributed to the expense and duration of the proceedings. Faced with the uncertainty arising from the existing defaults and De Beers's ongoing denial of personal jurisdiction, the settlement provided substantial and immediate relief to the class without further expense. Moreover, extended motion practice "would not only further prolong the litigation but also reduce the value of any recovery to the class." *Warfarin, 391 F.3d at 536*. Accordingly, this first factor favors the settlement.

b. The Reaction of the Class to the Settlement

HN29[] The second *Girsh* factor "attempts to gauge whether members of the class support the settlement," by considering the number of objectors and opt-outs and the substance of any objections. *Prudential, 148 F.3d at 318*. The District Court determined that the reaction of the class was overwhelmingly positive,[55] and noted that all twenty of the objections pertained to the Indirect Purchaser Class, with all but four objections relating to the consumer subclass, which consists of between 67 and 117 million members. (App'x 290-91.) We agree with the District Court's observation that **[**118]** the minimal number of objections and requests for exclusion are consistent with class settlements we have previously approved, and we are satisfied that the District Court acted within its discretion in finding this factor to favor settlement.

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[54] We have separately observed that "an initial presumption of fairness" may apply when reviewing a proposed settlement where: "(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *Warfarin, 391 F.3d at 535* (quoting *In re Cendant Corp. Litig., 264 F.3d 201, 232 (3d Cir. 2001)* ("*Cendant*"). The District Court **[**116]** did not consider or rely upon this presumption in assessing fairness. Because we find no error in the Court's thorough analysis, we will likewise disregard this presumption.

[55] The Court noted that, as of March 31, 2008, it had received 433,891 claims forms from all classes — nine from members of the Direct Purchaser Class and 433,882 from the Indirect Purchaser Class, with 431,380 from the Consumer Subclass and 2,502 from the Reseller Subclass. (App'x 291.) The Court also stated that five requests for exclusion had been received from the Direct Purchaser Class and 139 from the Indirect Purchaser Class (66 from the Reseller Subclass and 69 from the Consumer Subclass). (*Id*.) The Court received no objections from any direct purchasers and also noted that notice was provided to the United States Attorney General and the Attorney Generals of all fifty states, with none seeking to participate in the proceedings. (*Id*. 290-291, 1449-1450.)

c. The Stage of the Proceedings and the Amount of Discovery Completed

HN30[] The third *Girsh* factor "captures the degree of case development that class counsel had accomplished prior to settlement," **[**119]** and allows the court to "determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Warfarin, 391 F.3d at 537* (citation, quotations & alterations omitted). The District Court thoroughly discussed the development of this case prior to settlement, highlighting the extensive factual discovery of industry participants, consumers, and experts in the field; the retention of economic experts; the review of publicly available information; the experiences of counsel who had previously sued De Beers for price-fixing; and the analysis of proceedings relating to De Beers's other contractual entanglements in the field. (App'x 292.) The Court further observed that several of the individual suits had been in litigation for years before negotiation of the settlement, and emphasized that classes had been certified in several individual suits after significant factual investigation and legal development. (*Id*.) The Court committed no error in concluding that counsel adequately appreciated the merits of the case prior to reaching a settlement, and we agree that this factor favors approval of the settlement.

[*322] *d. The Risks of Establishing Liability*

HN31[] The fourth *Girsh* **[**120]** factor "examine[s] what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *Cendant, 264 F.3d at 237*. As already highlighted, the District Court discussed at length the various difficulties plaintiffs would likely encounter in attempting to collect on default judgments in foreign jurisdictions, observing that the Court's monetary judgments would likely be perceived as "beyond its authority" and "effectively void." (App'x 294-95.) The objectors' misguided contention that no risk of establishing liability exists entirely disregards the potential drawbacks of litigating and attempting to collect in foreign jurisdictions, including the extensive motion practice and expense such an uncertain tactic would entail. We are also influenced by De Beers's track record of rejecting United States jurisdiction over its legal affairs and the fact that De Beers has continued to deny any wrongdoing even in reaching a settlement agreement in this matter. Accordingly, we discern no error in the District Court's conclusion that this factor favors settlement.

e. The Risks of Establishing Damages

HN32[] As with the fourth *Girsh* **[**121]** factor, "this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time." *Cendant, 264 F.3d at 238-39* (citation & quotations omitted). The District Court found that entry of a default judgment against De Beers would prompt the court to "conduct such hearings or order such references as it deems necessary and proper" to ascertain the amount of damages since the damages had not presently been established with certainty. (App'x 296 (quoting *Fed. R. Civ. P. 55(b)*).) The expert reports submitted by the various parties indicated that these proceedings would likely entail a "battle of the experts," with each side presenting its figures and defenses to the other side's proposals. (*Id*. 297.) Because of the "uncertainty attendant to such a battle," the District Court determined this factor to weigh in support of settlement, (*id*.), and the objectors do not contest this finding on appeal. Accordingly, we find no flaw in the District Court's decision that the additional "risk in establishing damages" counsels in favor of approval of the settlement. *Cendant, 264 F.3d at 239*.

f. The Risks of Maintaining the Class Action Through Trial

HN33[] The sixth **[**122]** *Girsh* factor "measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial" in light of the fact that "the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the class action." *Warfarin, 391 F.3d at 537* (internal quotations & citation omitted). Class certification is tenuous, as a "district court retains the authority to decertify or modify a class at any time during the litigation if it proves to be unmanageable." Id. (citation omitted). As we have discussed *supra*, although the size and variety of issues implicated in this nationwide class action do not present an obstacle to certification of a settlement class, "there is a significant risk that such a class would create intractable management problems if it were to become a litigation class, and therefore be decertified." Id. Accordingly, we agree with the District Court that the considerable risk of maintaining the class action through trial weighed in favor of settlement.[56]

[*323] *g. Ability of Defendants to Withstand a Greater Judgment*

HN34[] The seventh Girsh factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the settlement." Warfarin, 391 F.3d at 537-58 (citation, quotations, & alteration omitted). The District Court observed that "little fact-finding has been done on this issue," and noted that the parties did not dispute De Beers's ability to withstand a greater judgment. (App'x 298-99.) Even so, the Court found this factor to neither favor nor disfavor the proposed settlement because "it **[**124]** would be extremely difficult, if not impossible, to collect a judgment from De Beers." (*Id.*) The objectors contend that the District Court made insufficient findings as to De Beers's market capitalization, which suggested an ability to withstand a much higher judgment, and, therefore, should have weighed this factor against the settlement. (Bagolie Br. at 26-27).

HN35[] In comparing the value of settlement versus trial, we must be careful to judge the fairness factors "against the realistic, rather than theoretical, potential for recovery after trial." In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 461 (S.D.N.Y. 2004). In this regard, a finding that an immediate settlement is preferable to the high unlikelihood of collecting a theoretical judgment against De Beers appears entirely reasonable. Moreover, a defendant's ability to withstand a much higher judgment does not necessarily "mean that it is obligated to pay any more than what the [class members] are entitled to under the theories of liability that existed at the time the settlement was reached." Warfarin, 391 F.3d at 538. That said, "[t]he proponents of a settlement bear the burden of proving that the *Girsh* factors weigh **[**125]** in favor of approval," and we have previously found that defendants' speculative ability to pay "substantially more than they did under the Settlement" cut against approval, "albeit only moderately." Cendant, 264 F.3d at 241.

At bottom, we agree that, HN36[] "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement." Weber v. Gov't Empl. Ins. Co., 262 F.R.D. 431, 447 (D.N.J. 2009). As such, we find no error in the District Court's conclusion that De Beers's ability to withstand a greater judgment does not necessarily undermine the fairness of the settlement.

h. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and All Attendant Risks of Litigation

HN37[] The final two Girsh factors consider "whether the settlement represents a good value for a weak case or a poor value for a strong case." Warfarin, 391 F.3d at 538. The reasonableness of a proposed settlement is assessed by comparing "the present value of the damages plaintiffs would likely recover if successful **[*324]** **[**126]** [at trial], appropriately discounted for the risk of not prevailing . . . with the amount of the proposed settlement." Prudential, 148 F.3d at 322. Notably, in conducting the analysis, the court must "guard against demanding too large a

[56] The objectors aver that drawing a distinction between settlement and litigation classes "would create two standards for class certification" although **[**123]** "the federal rules do not provide for such a difference." (Bagolie Br. at 25.) This argument patently disregards our clear and consistent precedent on the subject. While the standards for class certification are the same for both settlement and litigation classes, certification in the former context need not consider "whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." Comm. Bank II, 622 F.3d at 291 (citing Amchem, 521 U.S. at 620). This added risk is of utmost significance in determining whether a settlement would best serve the interests of the class.

settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *GM Truck, 55 F.3d at 806* (citations omitted).

Applying this framework, the District Court described the methodology utilized by the Indirect Purchaser Consumer Subclass's expert, who theorized that the average overcharge for diamond sales was 4.85% and the total worldwide overcharge equalled $4.99 billion; the United States consumes approximately 50% of the diamonds and diamond jewelry worldwide, rendering the overcharge to the U.S. market equal to $2.49 billion. (App'x 300.) Accordingly, the proposed $272.5 million Indirect Purchaser Settlement Fund represented 10.93% of this overcharge. (*Id*.) The expert further posited that although the Direct Purchaser Class recovery could not be precisely quantified in the absence of data as to the exact amount of non-De Beers sales to Direct **[**127]** Purchasers, the value could reasonably be estimated. Placing the total value of United States imports of rough diamonds during the Direct Purchaser Class Period at $4.3 billion, the expert estimated that at least 46% — or approximately $2 billion — of the rough diamond sales were excluded sales; applying the 4.85 weighted overcharge percentage to that $2 billion, the expert theorized that the overcharge percentage was near $100 million. (*Id*.) As such, the proposed $22.5 million recovery represented more than 20% of the single damages. (*Id*.) The District Court found this estimate reasonable and the objectors do not protest this methodology.

Instead, the objectors contend that the District Court abused its discretion in overvaluing the settlement by considering only estimated *single* damages in its "best possible recovery" inquiry, rather than comparing the settlement amount to the *treble* damages that are an automatic component of antitrust damages recovery in many jurisdictions. (Bagolie Br. 28, 32-43.) Although the objectors correctly note that the District Court compared the settlement recovery to single damages in evaluating the propriety of the settlement's monetary component, (App'x **[**128]** 301), we do not agree with the objectors that this methodology constituted legal error.

Some disagreement exists in the case law as to whether the reasonableness of a settlement amount should be evaluated by comparison to the potential single damages of a class or the trebled damages authorized in certain jurisdictions. *Compare* *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1324 (2d Cir. 1990)* ("[T]he district judge correctly recognized that it is inappropriate to measure the adequacy of a settlement amount by comparing to a trebled base recovery figure."), *Carnegie v. Household Intern., Inc., 445 F. Supp. 2d 1032, 1035 (N.D. Ill. 2006)* ("[N]umerous courts have held that in determining a settlement value, the potential for treble damages should not be taken into account."), and *Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 376 (D.D.C. 2002)* ("[T]he standard for evaluating settlement involves a comparison of the settlement amount with the estimated single damages."), *with* *In re Auction Houses Antitrust Litig., 2001 U.S. Dist. LEXIS 1713, 2001 WL 170792, at *7 (S.D.N.Y. Feb. 22, 2001)* ("[T]here are few perceptible justifications of the single damages standard for the determination of the **[**129]** fairness of antitrust class actions," which "places the settlement court, [acting] as a fiduciary for the absent class members, in **[*325]** a position in which it may be forced to approve a settlement that no non-representative plaintiffs would accept"), and *In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D 197, 210 n.30 (D. Me. 2003)* ("[I]f a settlement reflects a potential damage recovery, it should logically reflect the other parts of that recovery (trebling and attorneys' fees) that the statute awards automatically.").

That said, "we know of no authority that *requires* a district court to assess the fairness of a settlement in light of the potential for trebled damages."[57] *Comm. Bank II, 622 F.3d at 312* (emphasis in original); *see also* *Rodriguez v. West Publishing Corp., 563 F.3d 948, 964-65 (9th Cir. 2009)* ("We have never precluded courts from comparing the settlement amount to both single and treble damages. By the same token, we do not require them to do so in all cases."). Rather, ***HN38***[] "courts generally determine fairness of an antitrust class action settlement based on how it compensates the class for past injuries, without giving much, if any, consideration to treble **[**130]** damages."[58] *Rodriguez, 563 F.3d at 964*; *see also* *City of Detroit v. Grinnell Corp., 495 F.2d 448, 458-59*

57 Peculiarly, the objectors at once argue "that treble damages *could* be considered in assessing" fairness while also presuming without cause that a fairness inquiry "*necessarily* involves consideration of treble damages." (Bagolie Br. 38-39 (emphasis added).)

(2d Cir. 1974) ("[T]he vast majority of courts which have approved settlements . . . have given their approval . . . based on an estimate of single damages only."), *overruled on other grounds as recognized by* U.S. Football League v. Nat'l Football League, 887 F.2d 408, 415-16 (2d Cir. 1989). Without delving into the debate over whether single or treble damages are the proper variable of comparison, we cannot label the District Court's adherence to the commonly accepted procedure for assessing the fairness, adequacy, and reasonableness of a settlement an abuse of discretion.[59] Moreover, many of the state law claims asserted would not provide for treble damages recovery.

Finding no abuse in the District Court's conclusion that the proposed settlement offered a reasonable recovery, particularly **[*326]** "when accounting for the additional relief provided by the injunction," (App'x 301), we are also not persuaded that the Court erred in assessing the reasonableness of the settlement in light of all of the attendant risks of litigation. Girsh, 521 F.2d at 157. The District Court found the "magnitude of the potential risks in litigation, including likely profound difficulties enforcing United States default judgments in the relevant foreign countries, establishing personal jurisdiction, and establishing liability," to **[**133]** compare unfavorably to the recovery offered by the proposed settlement. (App'x 301-02.) Based on this assessment, we find the District Court's conclusion that these final factors weigh in favor of the settlement compelling.

On balance, we conclude that the District Court did not abuse its discretion in finding the Settlement as a whole fair, adequate, and reasonable.

2. Plan of Allocation

The objectors next aver that the previously discussed differences in state law mandate a differential allocation in the percentage of recovery within the Indirect Purchaser Consumer Settlement Fund, which should "account for the[ ] varying strengths and weaknesses" of consumer claims as informed by the applicable state law treatments of indirect purchaser causes of action. (Murray Br. at 15-18.) Accordingly, they contend that the District Court should utilize subclasses in accounting for the varied rights to recovery caused by *Illinois Brick* disparities in state laws. (Quinn Answer to Pet. for Reh'g En Banc at 11.)

HN40[] A district court's "principal obligation" in approving a plan of allocation "is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund." Walsh v. Great Atl. & Pac. Tea Co., Inc., 726 F.2d 956, 964 (3d Cir. 1983). **[**134]** In prior instances where objectors challenged the fairness of intra-class allocation of settlement funds, we have explained that "where a class is found to include subclasses divergent in interest," the use of subclasses may be appropriate and "is designed to prevent conflicts of interest in class representation." Ins. Broker., 579 F.3d at 271. We have likewise noted the potential drawbacks of subclassing, including the potential "'Balkanization' of the class action," and creation of "a huge obstacle to settlement if each

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[58] We agree with our fellow Court of Appeals that, **HN39**[] in reaching a private consensual settlement, the "parties, counsel, mediators, and district judges naturally arrive **[**131]** at a reasonable range for settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value." Rodriguez, 563 F.3d at 965. Our principal role in this engagement "is to protect the unnamed members of the class." Ehrheart, 609 F.3d at 593. As such, we must remain cognizant that our "'intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.'" Rodriguez, 563 F.3d at 965 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998)); *see also* GM Truck, 55 F.3d at 805 (same). No assertion of collusion, fraud, or overreaching is advanced or evidenced in the settlement at issue here.

[59] The objectors also allege legal error in the District Court's estimate of the "best possible recovery" for the Indirect Purchaser Class by reference to the class as a whole, rather than by making separate findings as to estimated damages for the Consumer and Reseller subclasses. **[**132]** (Bagolie Br. at 27.) This argument falls short. The Special Master — whose findings were accepted by the District Court — thoroughly considered several expert reports and econometric models submitted by various counsel discussing the proper share of damages within the Indirect Purchaser class. The Special Master established an appropriate distribution of the Indirect Purchaser fund based upon estimated damages to both the Consumer and Reseller subclasses, and the objectors have not demonstrated the inaccuracy of this analysis. (*See* App'x 1473-1508.)

subclass has an incentive to hold out for more money." *Id*. (quoting *In re Cendant Corp. Sec. Litig., 404 F.3d 173, 202 (3d Cir. 2005)* ("*Cendant Sec*.")). We accord "substantial deference to district courts with respect to their resolution of this issue" because such decisions "require[] a balancing of costs and benefits that can best be performed by a district judge." *Ins. Broker., 579 F.3d at 271*. "Where the district court has declined to certify a subclass" and treats all class members as falling within a single class for purposes of a fund allocation, "we will ordinarily defer to its decision unless it constituted an abuse of discretion." *Id*. (quoting *Cendant Sec., 404 F.3d at 202*) **[**135]** (quotations & alterations omitted).

In *Insurance Brokerage*, the objectors asserted that the district court abused its discretion in failing to require the establishment of subclasses where "the increased recovery of one sub-class was achieved at the expense of another subclass's diminished recovery." *Id. at 270*. There, the plan of allocation tied reimbursement "to the extent of damages incurred on certain policies of insurance," and was "allocated in such a way that policyholders who likely incurred the most damage are entitled to a larger proportion of the recovery than those whose injuries were less severe." *Id. at 272-73*. Although we observed that the proposed sub **[*327]** classes "ha[d] some appeal" in remedying an unequal division of the settlement fund, we deferred to the district court's thorough explanation that the objectors had failed to evidence "divergent or antagonistic interests between the three groups," and had not established that "these groups have claims of varying merit." *Id. at 272* (citation & quotations omitted). Indeed, despite the factual disparities in the type of insurance at issue, the district court had highlighted that "all of the class members shared a unified interest **[**136]** in establishing [] liability for engaging in anticompetitive conduct which increased the cost of premium for all policyholders," undermining the showing of divergent interests. *Id. at 273*. We further noted that the plan of allocation "was carefully devised to ensure a fair distribution of the settlement fund," and "merely created a structure for ensuring that reimbursement [was] tied to the extent of damages incurred." *Id. at 272*. Accordingly, we found the settlement allocation fair and within the district court's discretion. *Id*.

We reached a different conclusion in *Pet Food. 629 F.3d at 353*. There, the district court carefully examined the fairness of the total settlement fund, but did not discuss whether an allocation of the fund to a sub-segment of claims — namely, to consumers who had received refunds outside of the settlement — was inadequate and rendered the settlement unfair and unreasonable to those who had received nothing on account of their claims. *629 F.3d at 353* (noting that although "we do not doubt the able District Court properly determined that the fund was a fair and adequate settlement of all the claims advanced by plaintiffs in this case[,] . . . [w]e are unable **[**137]** to determine whether the $250,000 allocation was a fair and adequate settlement of the Purchase Claims"). There, we decided that the district court lacked sufficient information to decide whether the allocation to certain claimants was fair, and, thus, we remanded for further proceedings. *Id. at 356*.

Like the progressive settlement contemplated in *Insurance Brokerage,* the settlement at issue here provides for a pro rata distribution to all class members, and does not distinguish based upon any variables, such as the applicable state law of claimants' states of residence or location of purchase. While the District Court here did not specifically evaluate the pro rata allocation through the fairness lens, it did consider the differential allocation question in conducting the predominance analysis, noting the imprecision inherent in weighing class member claims "based on the relative strength of different state law claims." (App'x 279.) The District Court further noted in its *Rule 23(a)* analysis that the various "individual classes were represented by separate counsel during settlement negotiations, allowing for 'adequate structural protections to assure that differently situated plaintiffs **[**138]** negotiate for their own unique interests.'" (App'x 220 (quoting *Warfarin, 391 F.3d at 533*).) Moreover, the Court observed that there were no intra-class conflicts since all putative members experienced injury caused by De Beers, all sought recovery for overpayment caused by allegedly anticompetitive behavior, and all shared common interests in establishing damages and injunctive relief. (*Id*. at 220-21.)

It may be entirely reasonable to apply the same damages calculation to claimants from all states because, as the district court in *Warfarin* observed, "[i]t is purely speculative that claimants from indirect purchaser states could anticipate a greater recovery than claimants from other states." *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 260 (D. Del. 2002)*; *see also* *Cendant, 264 F.3d at 250* (given **[*328]** the "speculative" nature of such an inquiry, differences in the liability standards between *§ 11* and *§ 10(b)* securities claims did *not* warrant differential plan of allocation). And only by engaging in the type of fact-intensive merits and choice-of-law analyses that we have rejected could a district court attempt to assay the "varying strengths and weaknesses" of asserted state claims. **[**139]** (*See* Murray Br. at 15-18.) We can find no support in our case law for differentiating within a class based on the strength or weakness of the theories of recovery. Accordingly, we decline to require such an analysis.

Moreover, it is noteworthy that each putative class member suffered the same alleged injury as a result of De Beers's anticompetitive conduct, irrespective of the vagaries of applicable state laws. Recognizing this, the plan of allocation here "adjust[s] diamond purchases to a common measure," allowing an "apples to apples" comparison "of the relative amount of damages suffered by various claimants within the classes and subclasses and permits distribution pro rata based on the relative amounts of damages suffered." (App'x 1530.) ***HN41***[] Courts "generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable," *In re Corel Corp. Inc. Sec. Litig., 293 F. Supp. 2d 484, 493 (E.D. Pa. 2003)*, and we are mindful that "district courts have broad supervisory powers over the administration of class action settlements to allocate the proceeds among the claiming class members equitably," *McCoy v. Health Net, Inc., 569 F. Supp. 2d 448, 469 (D.N.J. 2008)*. **[**140]** The record here confirms that the District Court carefully considered expert advice in accepting the plan of allocation, and "[t]his kind of decision is intensely fact-based, falling within the purview of the District Court's decision." *Cendant, 264 F.3d at 254*. In light of the foregoing analysis, we cannot conclude that the District Court abused its discretion in accepting the carefully negotiated plan of allocation.

Lastly, the objectors contend that the settlement's minimum claim payment requirement of $10 provides inadequate settlement relief, as it will eliminate the rights of many class members without providing any compensation. (Petrus/Giddings Br. at 12.) They urge that a minimum payment provision contradicts the purpose of the class action mechanism to provide recovery even where the amount is "paltry." (*Id*. at 16 (quoting *Yang v. Odom, 392 F.3d 97, 106 (3d Cir. 2004))*.) We disagree and find no abuse in the District Court's decision to approve the minimum claim payment threshold.

As other courts have observed, "*de minimis* thresholds for payable claims are beneficial to the class as a whole since they save the settlement fund from being depleted by the administrative costs associated **[**141]** with claims unlikely to exceed those costs and courts have frequently approved such thresholds, often at $10." *In re Gilat Satellite Networks, Ltd., No. CV-02-1510, 2007 U.S. Dist. LEXIS 29062, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007)*; *see, e.g., In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 463 (S.D.N.Y. 2004)* (noting that the minimum recovery requirement is a common procedure that addresses "the undeniable fact that claims-processing costs money, which comes out of the settlement fund"); *Mehling v. New York Life Ins. Co., 248 F.R.D. 455, 463 (E.D. Pa. 2008)* (approving settlement plan with $50 minimum payment). The District Court adopted the Special Master's considered decision that "administrative costs to make *de minimis* payments are too large to justify the small payments," and the objectors have offered only conclusory counter-allegations. (App'x 1531). Indicative of the disingenuous **[*329]** nature of their responses is the objectors' assertion that "[i]n exchange for their release, millions of class members [will] receive no money." (Quinn Br. at 63-64.) This argument fails to acknowledge the injunctive relief offered by the settlement, however, which is intended to benefit all class members **[**142]** regardless of individual monetary recovery.[60]

Furthermore, the objectors appear to ignore a key rationale underlying the class action mechanism. In addition to providing individual class members with payments, "'[t]he policy at the very core of the class action mechanism'" is to provide sufficient incentive to prosecute an action "'by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor,'" **[**143]** *Yang, 392 F.3d at 106* (quoting *Amchem, 521 U.S. at 617*). In this instance, the representative parties and their counsel were properly incentivized to bring and prosecute this action through settlement, resulting in a net benefit to the class. As a result, based upon the

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[60] The objectors' related argument that the *de minimis* provision will deprive 57 million consumers of monetary recovery even if they file a claim is equally weak. (Giddings/Petrus Br. 9.) This contention unfairly presumes that every single putative class member will timely submit claims forms, rendering every member's *pro rata* recovery below $10. By contrast, the evidence accepted by the Special Master demonstrated that "consumer claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns." (App'x 1550 (citation & quotations omitted).) In the absence of any credible evidence subjecting the objectors' position, we cannot conclude that the District Court abused its discretion in adopting the distribution plan.

evidence offered before the Special Master and the arguments alleged herein, we cannot conclude that the District Court abused its discretion in approving this element of the plan of allocation.

C. Objections to the Fee Award

The objectors likewise aver that the District Court abused its discretion in awarding attorneys' fees that they urge are excessive. (Quinn Br. at 65; Hicks Prelim. Op. Br. at 7; Petrus/Giddings Br. at 12.) They contend that class counsel will receive in excess of $73 million — equal to approximately 25% of the $293 million principal settlement fund — despite this being a default judgment case, which entailed minimal motions practice and discovery. Additionally, considering the large number of putative class members and the alleged lack of risk undertaken by class counsel in prosecuting this case to settlement, the objectors urge that the award is unjustified under our jurisprudence. We disagree.

Our **[**144]** case law makes clear that ***HN42***[] a "robust" and "thorough judicial review of fee applications is required in all class action settlements," *In re Diet Drugs, 582 F.3d 524, 537-38 (3d Cir. 2009)* (citation & quotations omitted), but that "the amount of a fee award . . . is within the district court's discretion so long as it employs correct standards and procedures and makes findings of fact not clearly erroneous," *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 299 (3d Cir. 2005)* (citation & quotations omitted). *See also* *Ursic v. Bethlehem Mines, 719 F.2d 670, 675 (3d Cir. 1983)* ("[T]he district court has discretion in determining the amount of a fee award . . . in view of [its] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.") (quoting *Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983))*.

[*330] ***HN43***[] Attorneys' fees requests are generally assessed under one of two methods: the percentage-of-recovery ("POR") approach or the lodestar scheme. "The former applies a certain percentage to the settlement fund," while "[t]he latter multiplies the number of hours class counsel worked on a case by a reasonable hourly billing **[**145]** rate for such services." *Diet Drugs, 582 F.3d at 540* (citation, quotations, & alterations omitted). The POR method "is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *Rite Aid, 396 F.3d at 300* (citation & quotations omitted). The lodestar method, which is more commonly utilized in statutory fee-shifting cases and "where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation," *Diet Drugs, 582 F.3d at 540-41*, is then used "to cross-check the reasonableness of a percentage-of-recovery fee award," *AT&T Corp., 455 F.3d at 164*.[61] Because the case at issue entailed a common fund, the District Court applied the POR method and utilized a lodestar crosscheck. (App'x 310.). The objectors do not dispute the propriety of this approach, and we find no fault with this decision.

In determining the appropriate percentage fee award, the District Court then devoted detailed consideration to each of the ten factors that we identified in *Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000)*,[62] and *Prudential, 148 F.3d 283*,[63] finding, *inter alia*, that the complexity and duration of the litigation, the time and skill

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[61] ***HN44***[] The lodestar crosscheck "is performed by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier." *AT&T Corp., 455 F.3d at 164*. The multiplier endeavors "to account for the contingent nature **[**146]** or risk involved in a particular case," and may be adjusted "to account for particular circumstances, such as the quality of representation, the benefit obtained for the class, [and] the complexity and novelty of the issues presented." *Id. at 164 n.4* (citations & quotations omitted).

[62] ***HN45***[] The *Gunter* factors are as follows:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

223 F.3d at 195 n.1.

committed to the litigation, the ever-present risk of nonpayment from De Beers's tenuous status in the United States, the absence of substantial objections, and the achievement of both monetary and injunctive relief without any governmental investigation or assistance all weighed in favor of approving the Special Master's recommended 25% attorneys' fee award. (App'x 311-21.) The objectors do not contend that the District Court applied incorrect legal standards or procedures or that the Court improperly "brushed over our required analysis." *In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 735 (3d Cir. 2001)*. **[**147]** Rather, they disagree with the Court's factual findings as to two of the factors; they contend that we **[*331]** should find an abuse of discretion because this case is "'neither legally nor factually complex and did not require significant motion practice or discovery' by class counsel." (Quinn Br. at 65 (quoting *Cendant PRIDES, 243 F.3d at 743*).)

Because of the objectors' narrow focus before us and the District Court's thorough analysis of each of the *Gunter* and *Prudential* factors, we will only address the specific objections raised herein. As an initial matter, the objectors neglect to mention the primary reason for our finding of error in *Cendant PRIDES* — the principal case advanced in support of their position. There, we criticized the district court's failure to "explicitly consider any of [the *Gunter*] factors," and its neglect to "'make its reasoning and application of the fee-awards jurisprudence clear.'" *Cendant PRIDES, 243 F.3d at 734-35* (quoting *Gunter, 223 F.3d at 196*). We engaged in our own analysis of the propriety of the fee award only because the district court failed to consider the fee award factors that we had deemed "essential to a proper exercise of discretion." *Id. at 735*; *see also* *Ne. Women's Ctr. v. McMonagle, 889 F.2d 466, 475 (3d Cir. 1989)* ("[A]n appellate court, which relies on a cold record, is even more poorly positioned to assess the nature and quality of the legal services performed at the trial **[**149]** court level."). We have no such concern here, as the District Court clearly set forth its reasoning for the fee award. Indeed, the objectors never explain exactly where in its lengthy analysis the District Court misapplied the *Gunter* factors; the objectors simply dislike the conclusion reached by the Court. *See generally* *McMonagle, 889 F.2d at 475* ("[T]he appellate court may not upset a trial court's exercise of discretion on the basis of a visceral disagreement with the lower court's decision.") (citation & quotations omitted).

Moreover, the District Court's factual findings as to the complexity and demands of this case further distinguish the instant circumstances from *Cendant PRIDES* and do not suggest an abuse of discretion. As we discussed in *Rite Aid*, the *Cendant PRIDES* counsel "only spent approximately 5,600 hours on the action," "Cendant had conceded liability and no risks pertaining to liability or collection were pertinent." *396 F.3d at 304* (discussing *Cendant PRIDES, 243 F.3d at 735*). These factors are absent in this case. Contrary to the objectors' contention, the Special Master and District Court both observed that counsel devoted nearly 39,000 hours to litigating this matter **[**150]** in the various federal and state courts and to the subsequent negotiations and disputes pertaining to the settlement itself. The Court noted that, apart from addressing complicated legal questions and the secrecy surrounding the diamond industry, plaintiffs' counsel was forced to litigate against opposition from intervenors and amicus curiae, engaged in protracted settlement negotiations lasting approximately one year, and ultimately confronted the difficult settlement, distribution, and injunctive issues addressed in this appeal. (App'x 317-18.) Given the complexity of the legal and factual issues implicated and the difficult questions raised in the post-settlement process, we find no abuse of discretion in the District Court's conclusion that the complexity and duration of the litigation supported the requested fee.[64]

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[63] The *Prudential* factors are:

> (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) **[**148]** any innovative terms of settlement.

Diet Drugs, 582 F.3d at 541 (citing *Prudential, 148 F.3d at 338-40*).

[64] The objectors' further contention that the size of the percentage fee award should decrease in light of the large size of the overall settlement, (Quinn Br. at 66), is premised on several of our opinions in which we stated that "the percentage of a recovery devoted to attorneys' fees should decrease as the size of the overall settlement or recovery increases." *Cendant, 264*

[*332] Furthermore, unlike in Cendant PRIDES, the risk of nonpayment here remained ever-present throughout the litigation and settlement proceedings. The objectors dispute that counsel faced such risk after agreeing to settle and the depositing of the settlement amount into an escrow account. It is unclear, however, whether an agreement to settle after inception and prosecution of a matter should play a role in a court's evaluation of the risk of nonpayment; indeed, our case law has "never addressed whether courts must reconsider the risk of nonpayment as the action evolves." Diet Drugs, 582 F.3d at 543. Although we previously approved a district court's evaluation of risk "as of 'the inception of the action and not through the rosy lens of hindsight,'" we emphasized that our endorsement took into consideration the district court's "more comprehensive" reevaluation of the risk over the course of the proceedings. Id. (quoting In re Diet Drugs, 553 F. Supp. 2d 442, 478 (E.D. Pa. 2008)). There, we did not directly resolve whether a district court should reassess risk **[**153]** throughout a litigation, but found the risk of nonpayment to be ongoing, noting that while a settlement agreement and "the escrow funds undoubtedly reduced the risk of nonpayment, those funds were but one part of an intricate agreement" and the efforts of counsel could still "have been for naught." Id.

Here, we are similarly satisfied that counsel faced a legitimate risk of nonpayment throughout the litigation. The District Court found that De Beers possessed few assets in the United States against which a judgment could be enforced and effectively dodged jurisdiction in the United States for over fifty years, evidencing a cognizable risk of nonpayment at the inception stage. (App'x 319.) Although the District Court's order did not address the prospects for nonpayment post-settlement, it is evident that De Beers never conceded liability or admitted any wrongdoing, and that the escrow funds "were but one part of an intricate agreement" that — as demonstrated by the Panel's original decision to reject settlement class certification — continued to pose a genuine risk of nonpayment to counsel. As such, the objectors' "view of the risk of nonpayment is more myopic than the Court's," Diet Drugs, 582 F.3d at 543, **[**154]** and we are not persuaded that the District Court abused its discretion in finding this factor to favor the requested fee.

Finally, the objectors' assertion that the award improperly exceeds the awards in similar cases is equally unavailing. In *Cendant PRIDES*, we discussed fee awards in class actions in which the settlement fund exceeded $100 million and which relied upon the POR method, finding **[*333]** that "the attorneys' fee awards ranged from 2.8% to 36% of the total settlement fund." 243 F.3d at 737. Similarly, in *Rite Aid*, we found no abuse of discretion in a district court's reliance on three studies that demonstrated an average percentage fee recovery in large class action settlements of 31%, 27-30%, and 25-30%. 396 F.3d at 303. Here, the District Court determined that the 25% fee requested by counsel fell within this range. (App'x 320.)

We are cognizant that a comparison of this award to fees ordered in other cases is a complex analytical task, in light of variations in the efforts exerted by attorneys and the presence of complex legal and factual issues. That said, we have emphasized "that **HN46**[] a district court may not rely on a formulaic application of the appropriate range in awarding **[**155]** fees but must consider the relevant circumstances of the particular case." Cendant PRIDES, 243 F.3d at 736. Although this case may have lacked some of the contested motion practice and extensive discovery elicited in some of the other cases receiving similar percentage awards, *see* id. at 740-41, the case presented other challenges, including "De Beers'[s] denial of jurisdiction [and liability], the secrecy of the diamond industry, and unavailability of ordinary discovery methods, the substantial risk of non-collection of a U.S.

F.3d at 284 n.55 **[**151]** (citations & quotations omitted). We so ruled because "in many instances the increase in recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *Id*. In particular, we have vacated large fee awards "'when much of the settlement apparently resulted from the work of state regulators and a multi-state insurance task force.'" Rite Aid, 396 F.3d at 303 (quoting Prudential, 148 F.3d at 338-342). But "there is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund," and we have approved large settlements where "class counsel's efforts played a significant role in augmenting and obtaining an immense fund." *Id*. Ultimately, "the fact-intensive *Prudential/Gunter* analysis" must trump all other considerations. *Id*.

Here, plaintiffs' counsel prosecuted this matter through settlement with no certainty as to their ability to enforce any judgment against De Beers. The District Court's fact-intensive Gunter analysis found that plaintiffs' counsel deftly and efficiently handled this complex matter and played a significant role in the outcome. Accordingly, we disagree that the size of the **[**152]** overall settlement bears no relationship to the efforts of counsel and will defer to the District Court's considered judgment.

judgment in foreign countries and the historic injunction obtained." (February 15, 2008 Report and Recommendation of Special Master on Incentive Awards, Cost Reimbursement & Attorneys' Fee Awards at 31.) The District Court here properly considered the relevant *Gunter* and *Prudential* factors, and determined that the case presented all of the factors we had recognized as supporting a higher award: "complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel." (App'x 320 (quoting *Cendant PRIDES, 243 F.3d at 741*).)

Because the District Court employed the "correct **[**156]** standards and procedures" and its findings of fact are not clearly erroneous, we do not find an abuse of discretion in its calculation of the attorneys' fee award. *Rite Aid, 396 F.3d at 299*.[65]

IV. Conclusion

For the foregoing reasons, we will affirm the District Court's Order.

Concur by: SCIRICA

Concur

SCIRICA, *Circuit Judge*, concurring.

I fully concur in the Court's opinion. I write separately to address this case in the wider context of the evolving law on settlement classes.

Ever since the Supreme Court's landmark decisions in *Amchem Products Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* and *Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, **[*334]** 144 L. Ed. 2d 715 (1999)*, one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law. Grounded in equitable concepts of structural and procedural fairness for absent plaintiffs—competent and conflict-free representation, fair allocation of settlement, absence of collusion—*Amchem* and *Ortiz* set down important standards and guidelines for settlement classes.[1]

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[65] We also reject the sole objection pertaining to the District Court's decision to grant incentive awards to class representatives. ***HN47***[] "Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class." *Lorazepam, 205 F.R.D. at 400* (internal quotations omitted). "The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation," and to "reward the public service of contributing to the enforcement of mandatory laws." *Bredbenner v. Liberty Travel, Inc., No. 09-905, 2011 U.S. Dist. LEXIS 38663, 2011 WL 1344745, at *22 (D.N.J. Apr. 8, 2011)* (citations & quotations omitted). Contrary to the objectors' contention, the District Court — relying upon the Special Master's more detailed findings — discussed the role played by the several class representatives and the risks taken by these parties in prosecuting this matter. (App'x 326-27; R&R on Awards at 42-46.) **[**157]** We find no error in the District Court's decision.

[1] The class action device has a venerable pedigree in equity practice. As early as the seventeenth century, English chancery courts employed bills of peace to facilitate representative suits analogous to "common question" suits under *Rule 23(b)(3)*. Geoffrey C. Hazard, **[**158]** Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, *146 U. Pa. L. Rev. 1849, 1861-65 (1998)*. Inchoate class actions continued in the American legal system until codified under *Rule 23 in Federal Rules of Civil Procedure* in 1938. *Id. at 1878-1942*. The 1966 amendments to *Rule 23* substantially modified earlier practice and ushered in a class action "revolution" by introducing most of the current aspects of class action litigation, particularly the broad provisions of *23(b)(3)* and the concomitant procedural safeguards requiring predominance and notice. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, *156 U. Pa. L. Rev. 1439, 1484-89 (2008)*.

Despite initial uncertainty the opinions might pose formidable obstacles for settling massive, complex cases, this has not, for the most part, proved to be the case. Nonetheless, class settlement in mass tort cases (especially personal injury claims) remains problematic, leading some practitioners to avoid the class action device—most prominently in the recent $4.85 billion mass settlement of 50,000 claims arising out of use of the drug Vioxx. In fact, some observers believe there **[**159]** has been a shift in mass personal injury claims to aggregate non-class settlements. "The *Zyprexa* and *Ephedra* settlements, as well as the more recent *Guidant* and *Vioxx* settlements, suggest that the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements." Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after* Ortiz, *58 U. Kan. L. Rev. 775, 801 (2010)*; *see also* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make*?, *81 Notre Dame L. Rev. 591, 636* tbl. 12 (2006) (presenting evidence that, in sample, 41% of cases denied class certification ended in non-class settlement). This is significant, for outside the federal rules governing class actions,[2] there is no prescribed independent review of the structural and substantive fairness of a settlement including evaluation of attorneys' fees, potential conflicts of interest, and counsel's allocation of settlement funds among class members.[3]

Because of the pivotal role and ensuing consequences of the class certification decision, trial courts must conduct a "rigorous analysis" of *Rule 23*'s prerequisites. *Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S. Ct. 2541, 2551-52, 180 L. Ed. 2d 374* ***[*335]*** *(2011)*; *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 315-21 (3d Cir. 2008)*; *In re Initial Pub. Offering Secs. Litig., 471 F.3d 24, 31-42 (2d Cir. 2006)*.[4] The **[**161]** same analytical rigor is required for litigation and settlement certification, but some inquiries essential to litigation class certification are no longer problematic in the settlement context. A key question in a litigation class action is manageability—how the case will or can be tried, and whether there are questions of fact or law that are capable of common proof. But the settlement class presents no management problems because the case will not be tried. Conversely, other inquiries assume heightened importance and heightened scrutiny because of the danger of conflicts of interest, collusion, and unfair allocation. *See* *Amchem, 521 U.S. at 620* ("[O]ther specifications of the Rule [23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.").

In conducting a "rigorous analysis" under *Rule 23*, lower courts have applied the strictures laid down in *Amchem* and *Ortiz*, and added some of their own. So far, the developing jurisprudence appears to have justified the judgment of the Judicial Conference's Committee on Rules of Practice and Procedure and Advisory Committee on Civil Rules to defer consideration of a variant rule for settlement class actions.

Rule 23(a) sensibly provides that every certified class must share common questions of law or fact. For (b)(3) classes, common questions must predominate over individual questions, claims must be typical, and the class action device must be superior to other available methods for fairly and efficiently adjudicating the controversy.

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[2] Bankruptcy may also provide a vehicle for some measure of compensation to mass claimants (creditors) **[**160]** and for resolution of liability.

[3] Nevertheless, some MDL transferee judges have treated the MDL proceedings as quasi class actions and restricted contingent fee agreements in non-class aggregate settlements under their equitable and supervisory powers. *See* *In re Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 558-62 (E.D. La. 2009)*; *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 U.S. Dist. LEXIS 17535, 2008 WL 682174 (D. Minn. Mar. 7, 2008)*; *In re Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006)*.

[4] For a litigation class, the key decision is whether or not to certify the class. Once a class is certified, the dynamics of the case change dramatically. For many plaintiffs, denial of certification may sound the death knell of the action because the claims are too small to be prosecuted individually. For many defendants, class certification **[**162]** may create hydraulic pressure to settle, even for claims defendants deem non-meritorious. For these reasons, the Supreme Court adopted *Federal Rule of Civil Procedure 23(f)* to permit a discretionary interlocutory appeal from the grant or denial of class certification.

Naturally, there is some overlap in the requirements for commonality, typicality, and predominance—all of which must be shown.

Commonality for a settlement class should be satisfied under the **[**163]** standard for supplemental jurisdiction first set forth in *United Mine Workers of America v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*, allowing joinder of claims deriving from a common nucleus of operative fact. *See also* *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., ___ U.S. ___, 130 S. Ct. 1431, 1443, 176 L. Ed. 2d 311 (2010)* (Scalia, J., plurality opinion) ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits."). Variation in state law should not necessarily bar class certification. The focus in the settlement context should be on the conduct (or misconduct) of the defendant and the injury suffered as a consequence. The claim or claims must be related and cohesive and should all arise out of the same nucleus of operative fact. The "common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes, 131 S.Ct. at 2551*. The interests of the class members should be aligned.

[*336] The nature **[**164]** of the predominance analysis reflects the purpose of the inquiry, which is to determine whether "a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem, 521 U.S. at 615* (quoting *Fed. R. Civ. P. 23* advisory committee note). This is important even though, in the settlement context, a court need not worry about the challenge of litigating the claims to a verdict in a single proceeding. If the class presented a grab-bag of unrelated claims, a trial court would be unable to ensure that absent class members' interests were protected. The question, then, is what kind of common issues a settlement class must share to satisfy commonality and predominance.

In certain areas, such as antitrust, common issues tend to predominate because a major focus is the allegedly anticompetitive conduct of the defendant and its downstream effects on plaintiffs. *See* *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 268 (3d Cir. 2009)*. Commonality and predominance are usually met in the antitrust settlement context when all class **[**165]** members' claims present common issues including (1) whether the defendant's conduct was actionably anticompetitive under antitrust standards; and (2) whether that conduct produced anticompetitive effects within the relevant product and geographic markets. *See* *id. at 267*.

Even when a settlement class satisfies the predominance requirement, the inclusion of members who have a questionable chance of a favorable adjudication may present fairness concerns that demand the district court's attention. Trial courts must enforce the *Rule 23(a)* and *(b)* requirements in order to obtain a "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem, 521 U.S. at 627*. In discharging this responsibility, district courts have a number of ways to address fairness concerns.[5] Due to the context-specific nature of these judgments, district courts should be afforded a broad ambit of discretion.

For viable settlement classes, *Amchem* and *Ortiz* made clear that expediency could not negate the requirements of *Rule 23*, which serve to protect absent class members. **[**167]** *See* *Amchem, 521 U.S. at 621* ("*Subdivisions (a)*

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[5] Trial courts can certify subclasses in situations where divergent interests implicate fair allocation—a situation not presented here, as all indirect class members have aligned interests. Certifying subclasses may be proper "[w]here a class is found to include subclasses **[**166]** divergent in interest." *In re Ins. Brokerage Antitrust Litig, 579 F.3d at 271* (quoting *Fed. R. Civ. P. 23(c)* advisory committee note). Even the conflicts in *Amchem* were amenable to resolution through sub-classes. *See* *Ortiz, 527 U.S. at 856* (explaining that *Amchem* requires "a class divided between holders of present and future claims" to be "divi[ded] into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel"). Objector Quinn, in her answer to the petition for rehearing, states that subclasses would adequately address the *Illinois Brick*-based disparities in this case; she does not argue that it would be categorically improper to afford class treatment to indirect purchasers governed by *Illinois Brick. See* Quinn Answer at 11. The District Court here examined whether indirect purchasers' interests diverged depending on the law applied to their claims, and found such differences to be irrelevant in the context of this settlement. I find no abuse of discretion in such a conclusion.

and (b) [of Rule 23] focus court attention on whether a proposed class has sufficient unity so that absent members can be fairly bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed."). The principal danger of collusion **[*337]** lies in the prospect that class counsel, induced by defendants' offer of attorneys' fees, will "trade away" the claims of some or all class members for inadequate compensation. There is also the possibility that a settlement will not serve the interests of all of the class members, which may be in tension. In *Amchem*, for instance, the Court concluded the settlement was not demonstrably fair—there was insufficient allocation to asbestos claimants who were seriously injured (e.g. mesothelioma) and insufficient protection of non-impaired plaintiffs. 521 U.S. at 625-28. The Court worried that the claims of the exposure-only class members were being released without adequate protection. *Id; see also* In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 315 (3d Cir. 1998) ("*Prudential*") (identifying and distinguishing *Amchem*'s concerns); In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig., 55 F.3d 768, 784-86 (3d Cir. 1995) **[**168]** (providing summary of the debate regarding propriety of mass tort settlements prior to *Amchem*).

These observations elucidate the issues of predominance and fairness present in this case. Here, the objectors contend certain claims (claims under state-law following *Illinois Brick*) are not viable--that is, they fail to state a cause of action.[6] For this reason, objectors believe that defendants are barred from settling these claims in a settlement class action because of the predominance requirement. Under objectors' view of Rule 23, trial courts would be obligated at the settlement class certification stage to decide which state's law would govern for that particular plaintiff, and whether a plaintiff has stated a valid cause of action, even if no defendant has raised a Rule 12(b)(6) objection—the usual way to contest the validity of a claim. Objectors contend they seek to protect absent class members, but fail to explain how absent class members—all of whom claim injury—are harmed by the defendants' willingness to settle all potential claims.

This **[**169]** interpretation also presents significant administrative problems. Objectors view the indirect purchaser class as composed of members who either have valid claims under the laws of states with *Illinois Brick* repealers or members who have invalid claims under the laws of non-repealer states. But a claim cannot be declared invalid without proper analysis, which would require a choice-of-law examination for each class member's claim. Such analyses may pose difficulties in cases where the residence of the class member is not the sole consideration; modern choice-of-law standards often consider an array of factors particular to individual plaintiffs. Consequently, individual 12(b)(6) inquiries for settlement class certification could present serious difficulties in administration and greatly increase costs and fees, and may deplete rather than increase the recovery of even successful plaintiffs.[7]

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[6] Objectors also claim that variance on state claims (based on consumer protection and unjust enrichment laws) defeats predominance as well.

[7] The purported "overbreadth" of the putative class at issue here is qualitatively different from the Supreme Court's concerns in Amchem. Under *Amchem* the significance of variations in state laws is properly assessed in terms of the interests of absent class members. The proposed Amchem settlement, **[**170]** extinguishing claims for different injuries with different onsets incurred at different times due to conduct of different defendants, undercompensated exposure-only claims and those with mesothelioma. Here, objectors contend some class members do not have a valid cause of action, but these class members with non-repealer state law claims have lost nothing through inclusion in the class. Objectors speculate inclusion of non-repealer state law claims necessarily diminishes the settlement accrued to class members whom they contend have undisputedly valid claims. But they provided no support for their assertion. In Amchem the objectors provided evidence of intraclass conflicts detrimental to class members. For example, 15% of the proposed *Amchem* settlement's mesothelioma claims arose in California, where the average recovery for a mesothelioma claim was more than double their maximum recovery in the settlement. Amchem, 521 U.S. at 610 n.14.

The objectors have not shown that plaintiffs suffering identical economic injuries due to a single course of conduct on the part of the defendant have conflicting interests solely because some class members may have stronger claims depending upon variation **[**171]** in state law. Objectors assume that the non-repealer state claims have zero settlement value and that defendants would contribute the same amount to the common settlement fund regardless of how many claims the settlement may extinguish. But the settlement of the considerable bulk of claims against the defendants for a prior course of conduct may

[*338] Issues of predominance and fairness do not undermine this settlement. All plaintiffs here claim injury that by reason of defendants' conduct—market manipulation and fraud—has caused a common and measurable form of economic damage. They seek redress under federal antitrust laws and state antitrust, consumer protection, and unjust enrichment laws. All claims arise out of the same course of defendants' conduct; all share a common nucleus of operative fact, supplying the necessary cohesion. Class members' interests are aligned. The entire DeBeers settlement class consists of members with some pleaded claim (but **[**172]** not necessarily the exact same one) arising out of the same course of allegedly wrongful conduct such that shared issues of fact or law outweigh issues not common to the class and individual issues do not predominate. As the class structure and settlement assure fairness to all class members, there appears to be nothing in *Rule 23* that would prohibit certification and settlement approval.

Moreover, the focus on the alleged insufficiency of some members' claims is misplaced. Settlement of a class action is not an adjudication of the merits of the members' claims. It is a contract between the parties governed by the requirements of *Rule 23(a)*, *(b)*, and particularly *(e)*,[8] and establishes a contractual obligation as well as a contractual defense against future claims. Here, class members and DeBeers want to settle all state and federal claims arising out of defendant's alleged misconduct. *Amchem* recognized the legitimacy of such a settlement under *Rule 23*, **[*339]** setting forth applicable parameters. The court's responsibility is to supervise and assume control over a responsible and fair settlement. Those requirements have been met here.

A responsible and fair settlement serves the interests of both plaintiffs and defendants and furthers the aims of the class action device. Plaintiffs receive redress of their claimed **[**174]** injuries without the burden of litigating individually. Defendants receive finality. Having released their claims for consideration, class members are precluded from continuing to press their claims. Collateral attack of settlements and parallel proceedings in multiple fora are common realities in modern class actions—features that can imperil the feasibility of settlements if defendants lack an effective way to protect bargained-for rights. *See* *Prudential, 314 F.3d at 104-05*. If the in direct-purchaser claims at issue here were excluded, nothing would bar the plaintiffs from bringing them as separate class actions or as aggregate individual actions, leaving defendants "exposed to countless suits in state court" despite the settlement. *In re Prudential Ins. Co. of Am. Sales Practice Litig., 261 F.3d 355, 367 (3d Cir. 2001)* ("*Prudential II*"). (Here, prior to removal and MDL consolidation, it appears an Illinois state court certified a nationwide litigation class asserting indirect-purchaser claims under the laws of all 50 states.) Perhaps a defendant will be willing and able to defend or settle all of these actions separately, or perhaps it won't. Either way, the costs (direct and indirect) **[**175]** and risks of continuing litigation will be greater. A defendant, therefore, may be motivated to pay class

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be of substantially greater value to defendants than a settlement of only the strongest claims against them. And, unlike in *Amchem,* objectors have not shown the inclusion of more claims was achieved by grossly underpaying some class members.

[8] *Rule 23(e)* is especially relevant in this context because **[**173]** it governs the settlement, dismissal, or compromise of a class action. It requires court approval of any agreement, and establishes five procedural requirements that must be satisfied:

> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) If the class action was previously certified under *Rule 23(b)(3)*, the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e).

members a premium and achieve a global settlement in order to avoid additional lawsuits, even ones where it might be able to file a straightforward motion to dismiss for failure to state a claim.[9]

Finally, new limitations such as those proposed by objectors would, I believe, undercut the policy goals of the Class Action Fairness Act of 2005 ("CAFA"), *Pub. L. No. 109-2, 119 Stat. 4*, and the Multidistrict Litigation Statute, *28 U.S.C. § 1407*, both of which are designed to encourage the consolidation of mass claims national in scope—and in the case of CAFA, with particular **[**176]** reference to class actions based on state law claims. Of course, district courts must fully enforce the requirements of *Rule 23*. But the limitations objectors propose here "would seriously undermine the possibility for settling any large, multi district class action." *Prudential II, 261 F.3d at 367*.[10]

[*340] The **[**178]** class action device and the concept of the private attorney general are powerful instruments of social and economic policy. Despite inherent tensions, they have proven efficacious in resolving mass claims when courts have insisted on structural, procedural, and substantive fairness. Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality. Arguably a legal system that permits robust litigation of mass claims should also provide ways to fairly and effectively resolve those claims. Otherwise, mass claims will likely be resolved without independent review and court supervision.[11]

Dissent by: JORDAN

Dissent

JORDAN, *Circuit Judge*, joined by SMITH, *Circuit Judge*, dissenting

This is the Majority's considered view of the law: in certifying a class action, it makes no difference whether the class is defined to include members who lack any claim at all. As my colleagues in the Majority see it, "were we to mandate that a class include only those alleging 'colorable' claims, we would effectively rule out the ability of a defendant to achieve 'global peace' by obtaining releases from all those who might wish to assert claims,

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[9] Facing liability for alleged misconduct, a defendant may desire global settlement for several possible reasons: (1) redressing plaintiffs' injuries; (2) the possibility of liability; (3) the direct costs of defending suits, often in multiple fora; (4) the risk of financially unmanageable jury verdicts which may threaten bankruptcy; (5) the effects of pending or impending mass litigation on its stock price or access to capital markets; (6) the stigma of brand-damaging litigation; and (7) maintaining financial stability.

[10] In *Prudential II*, we affirmed the grant of an injunction enjoining a state-court action brought by policyholders who were members of the *Prudential* class to the extent the state-law claims were based on or related to claims released in the class action. We agreed with the district court that allowing the policyholders to prosecute their civil actions in state court "would allow an end run around the Class settlement by affording them (and other class members who might later attempt the same strategy) an opportunity for relitigation of the released claims." *261 F.3d at 367* (internal quotation marks omitted). We noted that the position urged by the policyholders "would seriously undermine the possibility for settling any large, multi district class action. Defendants in such suits would always be concerned that a settlement of the federal class action would leave them exposed to countless **[**177]** suits in state court despite settlement of the federal claims. . . . [S]uch state suits could number in the millions." *Id*. It is for this reason that releases of all claims—whether state or federal—have been held valid, "provided they are based on the same factual predicate." *Prudential, 148 F.3d at 326 n.82*. So long as a sufficient factual predicate exists, a release can even bar later claims which could not have been brought in the court rendering the settlement judgment. *Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 377, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996)*.

[11] The final draft of the American Law Institute's *Principles of the Law of Aggregate Litigation* points out the current lack of judicial oversight over non-class aggregate settlement. ***§ 3.15 cmt. a*** (2010). It notes that, unlike class settlements, "[n]on-class aggregate settlements are governed primarily by ethical rules and are rarely subject to court review or approval for fairness" and so advocates "a fresh look . . . at how non-class aggregate settlements should be regulated." *Id*. In particular, it proposes a rule to provide each plaintiff **[**179]** a nonwaivable right to challenge in court a settlement that is allegedly "not procedurally and substantively fair and reasonable." ***§ 3.18(a)***. The ALI *Principles* analogizes these proposed requirements to those applied to class settlements. ***§ 3.17 cmt. e***.

meritorious or not." (Slip Op. at *66.)* So, "come one, come all," regardless of substantive legal rights. That remarkable declaration sets the class action ship in our Circuit badly adrift.

To be clear, the problem with the enormous, nationwide class most particularly at issue in this case is not that it may include people with marginal or dubious claims. The class of indirect purchasers of De Beers diamonds actually presents **[**180]** a far more troubling problem than that. It includes people who have no legal claim whatsoever. That is clear on the face of the statutory and decisional law of several states whose laws are invoked as the basis for this class action,[1] and no one has been able to mount a cogent argument to the contrary. Despite the Majority's elaborate construction and dismantling of straw man arguments about commonality and predominance, those state laws ought to stand as an insurmountable barrier to any proper certification of a nationwide indirect purchaser class. By treating the dictates of state law as irrelevant, to be passed over in the name of "global peace," the Majority has endorsed the fabrication of substantive rights where none before existed. This is, in short, a bad day for **[*341]** *Rule 23*, for federalism, and for those who thought the Rules Enabling Act was a restraint on judicial legislating. I therefore dissent.

I. Where We Agree

The Majority devotes much **[**181]** attention to the question of whether "commonality and predominance are defeated merely because available rights and remedies differ under the several laws that form the basis for the class claims." (Slip Op. at 45-46.) In addressing that question, the Majority inaccurately characterizes the now-vacated panel opinion as having required "that everyone in a class must allege precisely identical or 'uniform' causes of action."[2] (Slip Op. at 48 (citing *Sullivan v. DB Investments, Inc., 613 F.3d 134, 149 (3d Cir. 2010)*, *reh'g en banc granted and vacated by* *Sullivan v. DB Investments, Inc., 619 F.3d 287 (3d Cir. 2010))*. But the panel opinion made no such statement, nor have the objectors claimed that all class members must share a "uniform cause of action." The only "uniformity" required by the panel opinion, or argued for by the objectors, is that at least some "question of law or fact regarding [class members'] legal rights [be] uniform throughout the class." *Sullivan, 613 F.3d at 149*. Insisting that there be a uniform question of law or fact is nothing more than an application of the *Rule 23(a)(2)* requirement that there be "questions of law or fact common to the class." The Majority's **[**182]** assertion that the panel demanded there be uniform causes of action — a requirement far different than requiring uniform questions — is unfounded and should not detain us any longer.

On this much we can agree: that, as the Majority says, "where a defendant's singular conduct gives rise to one cause of action in one state, while providing for a different cause of action in another jurisdiction, the courts may group both claims in a single class action." (Slip Op. at 48.) If that were the case before us, we would have unanimity. The problem, though, is that the defendants' singular conduct here gives rise to causes of action in some states while providing for no cause of action at all in others. Under these circumstances, there can be no grouping of claims into a single class action, because, by definition, some would-be class members have no claim. As a result, and as discussed in the following section, there can be no common questions of law or fact with respect to

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[1] More precisely, we are dealing here with a set of class actions, since the settlement involves the resolution of several cases, as the Majority opinion notes. For ease of reference, however, I will often refer to these matters in the singular.

[2] The Majority is oddly persistent in this confusion. Despite the clear language in the panel opinion and repeated assurance in this dissent that class members need not all share a "uniform cause of action" to satisfy the requirements of *Rule 23*, the Majority continues to say by implication and assertion that the panel opinion suggested that all members of the class must assert a "uniform" cause of action or "identical ... issues or claims." *See* Slip Op. at 46 ("We have never required the presentation of identical or uniform issues or claims as a prerequisite to certification of a class."); *id*. at 48 ("Nothing in our case law or the language of *Rule 23* commands that everyone in a class must allege precisely identical or 'uniform' causes of action ... and statutory variations do not defeat predominance in the presence of other exceedingly common issues." (internal citations omitted)); *id*. at 60 n.36 ("The Panel ... seemingly conclude[ed] that plaintiffs could only prevail if each putative class member alleged **[**183]** either a 'uniform' antitrust cause of action, a 'uniform' consumer protection cause of action, or a 'uniform' unjust enrichment claim.").

that subset of would-be class members and, therefore, neither the commonality requirement of *Rule 23(a)(2)* nor the predominance requirement of *Rule 23(b)(3)* can be satisfied.

II. Commonality And Predominance Under Rule 23

The objectors[3] have challenged the commonality **[**184]** of the indirect purchaser **[*342]** class, stating that "putative class members who do not even have an arguable cause of action under applicable law do not qualify for inclusion in a class action for failure to satisfy [the] *Rule 23(a)(2)* requirement of 'questions of law or fact common to the class.'" (Supplemental Brief of Appellant Susan M. Quinn on Rehearing En Banc at 11-12 (quoting *Fed. R. Civ. P. 23(a)(2)*.) While they initially couched their arguments about commonality in terms of predominance under *Rule 23(b)(3)*, the objectors' position has always been that common questions of law or fact do not predominate because there simply are no questions of law or fact common to the entire class of indirect purchasers. (*See, e.g.*, Brief for Appellant Susan M. Quinn at 32 ("The evidence supporting a lack of commonality is abundant."); *id*. at 38 ("[T]he question of antitrust conspiracy is not common to the class."); *id*. at 44 ("The district court did not even determine that there was a common question involving unjust enrichment."); *id*. at 45 ("The district court did not find a common question regarding [the consumer protection/deceptive trade practice] claims.").) The panel opinion thus addressed **[**185]** the objectors' arguments in that light, holding that there was no predominance because there were no questions of law or fact common to the entire class. *Sullivan, 613 F.3d at 148* ("[T]here can be no certification of a nationwide class of state indirect purchaser plaintiffs because there is no common question of law or material fact.").

Ultimately, though, whether the objectors' argument is framed as a *Rule 23(a)(2)* commonality challenge or a *Rule 23(b)(3)* predominance challenge is immaterial.[4] As noted by the Majority, we have said before that "'we consider the *Rule 23(a)* commonality requirement to be incorporated into the more stringent *Rule 23(b)(3)* predominance requirement, and therefore deem it appropriate to analyze the two factors together.'" (Slip Op. at 37 (quoting *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 266 (3d Cir. 2009))*.) Whatever label we hang on the objectors' argument, it always has been clear that their basic contention is that there are no questions **[**186]** of law or fact common to all class members, which necessarily means that common questions do not predominate. Whether coined as a *Rule 23(a)(2)* problem or as a **[*343]** *Rule 23(b)(3)* problem, the determinative question of commonality is the same.

The Majority spends little time explaining what makes questions "common," but the principle they seem to espouse is that questions are common when the "defendant's conduct was common as to all of the class members" and when "all of the class members were harmed by the defendant's conduct." (Slip Op. at 38.) Based on that, the Majority asserts that, as to the indirect purchaser class, "each class member shares a similar *legal* question arising

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[3] Both before the panel and the en banc court, objector Susan M. Quinn has taken the lead on the issues of commonality and predominance, and my references to the arguments of the objectors come from her briefs.

[4] Although the parties do not particularly press the issue in their briefs, an argument can be made that the proposed class might also fail to meet the requirements of *Rule 23(a)(4)*, which provides that a court may certify a class only if "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. By proposing a class that consists of individuals who have no cause of action under state or federal law, the class representatives have diluted the recovery for those who actually have claims. Moreover, the class representatives also unnecessarily incur the cost of giving notice under *Rule 23* to individuals who have no right to relief, as well as the cost of compensating class counsel for undertaking unnecessary tasks associated with such notice. *Cf. In the Matter of Aqua Dots Prods. Liability Litig., 654 F.3d 748, 2011 WL 3629723, at *3 (7th Cir. 2011)* ("A representative who proposes that high transaction **[**187]** costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that is already on offer is not adequately protecting the class members' interests." (citing *Thorogood v. Sears, Roebuck & Co., 627 F.3d 289, 293-94 (7th Cir. 2010)))*. Those costs reduce the total amount of recovery available to the appropriate members of the proposed class (*i.e.*, individuals who may assert an antitrust claim under federal or state law). In other words, a class representative who unnecessarily increases the cost of litigating a class action by including improper plaintiffs in the class definition is at risk of being found to not "adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*.

from whether De Beers engaged in **[**188]** a broad conspiracy that was aimed to and did affect diamond prices in the United States" (Slip Op. at 43 (internal quotation marks omitted)) and shares "common *factual* questions as to whether De Beers 'acted in concert to artificially fix, maintain, and stabilize prices and to monopolize trade and commerce in the market for polished diamonds.'" (Slip Op. at 43 (quoting App. 278-79).) Those questions are common to the class, according to the Majority, because the "allegations are unaffected by the particularized conduct of individual class members, as proof of liability and liability itself would depend entirely upon De Beers's allegedly anticompetitive activities." (Slip Op. at 43.)

In seeking to justify its "welcome all comers" approach to class certification, the Majority has produced an internally inconsistent definition of commonality. On the one hand, as just noted, the Majority emphasizes that "proof of liability and liability itself would depend entirely upon De Beers's allegedly anticompetitive activities" (Slip Op. at 43), as if no reference need be made to the status of individual class members. Indeed, if one examines what the Majority identifies as "common *factual* **[**189]** questions" and "similar *legal* question[s,]" it is apparent that no reference to anyone but De Beers is called for, which means that the class is entirely unbounded. Everyone in the world could share in a class defined on those lines.[5] On the other hand, evidently recognizing the problem with a commonality definition that looks only at De Beers's activities, the Majority adds as something of an afterthought that, well yes, there must be some limiting feature of the class and that feature is injury; class members must have been injured by De Beers's unlawful conduct. (Slip Op. at 38.)

Of course, as soon as one acknowledges that commonality requires a consideration of whether class members have sustained injury, one ought also have to acknowledge, by logic grounded in hornbook law, that "injury" is not an abstraction but rather refers to a concrete and legally **[**190]** cognizable injury. A definition of commonality that says, in effect, "if you feel wronged, you have a claim" is a giant step away from precedent and the underlying premise of *Rule 23*, which is designed to efficiently handle claims recognized by law, not to create new claims. *Cf. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442, 176 L. Ed. 2d 311 (2010)* ("Congress authorized ... promulgat[ion] [of] rules of procedure subject to its review, *28 U.S.C. § 2072(a)*, but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right,' *§ 2072(b)*."). Never before has any court, to my knowledge, tried to take the position effectively adopted by the Majority here, namely that, in deciding commonality, one need not be concerned **[*344]** with whether the alleged injuries of class members are legally cognizable.[6]

In stark contrast to the Majority's practically limitless definition of commonality is the measured definition provided by the Supreme Court in its recent decision in *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. The Court there clarified the meaning of "commonality" under *Rule 23*, saying that the concept is "easy to misread." *Id. at 2551*. In a passage particularly apropos of the Majority's new rule, the Supreme Court said:

> [A]ny competently crafted class complaint literally raises common 'questions,' For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting those questions is not sufficient to obtain class certification.

Id. (internal quotation marks and citations **[**192]** omitted). Emphasizing a point that the Majority ignores, the Court explained that "'[w]hat matters to class certification ... is not the raising of common 'questions' — even in droves — but, rather the capacity of a classwide proceeding to generate *answers* apt to drive the resolution of the litigation.'"

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[5] If one were actually to accept a test that looked solely at the behavior of the alleged wrongdoer, it would make no difference who was in the class. Thus, in this case, it would be appropriate to certify a class consisting of everyone on earth, regardless of diamond purchases, since the supposedly common questions would stay the same.

[6] While trying to distance itself from the consequences of its own ruling today, the Majority asserts that the "[indirect purchaser] class members ... possess a legally cognizable injury acknowledged in hornbook law, as their injuries are real, and stem not from simply feeling 'wronged,' as the dissent suggests ..., but from De Beers's alleged anticompetitive **[**191]** conduct, conduct which antitrust laws forbid." (Slip Op. at 44-45.) If only my colleagues in the Majority actually applied that assertion, this dissent would be unnecessary, since the assertion concedes that (1) recovery should be preconditioned on the existence of an injury that is legally cognizable, and (2) whether an injury is legally cognizable depends on the operative substantive law.

Id. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof* 84 N.Y.U. L. Rev. 97, 132 (2009)). In other words, common questions must have answers that "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. Thus, as defined by *Dukes*, "common questions" are those that, because they have answers that will affect the validity of all class members' claims, can be said to be legally relevant.[7]

A **[**193]** necessary corollary of that definition is that, for there to be any common questions, all class members must have at least some colorable legal claim.[8] Otherwise, it is nonsense to speak of "resolv[ing] an issue that is central to the validity of each one of the claims ...." *Id*. It cannot be sufficient, as the Concurring Opinion in this case suggests, simply for each class member to have "some pleaded claim." (Concurrence Slip Op. at 12.) Merely pleading a claim is not enough, because "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must ... prove that there are in fact ... common questions of law or fact. ... [S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." **[*345]** Dukes, 131 S. Ct. at 2551 (internal quotation marks omitted); *see* In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 (3d Cir. 2008) ("[T]he requirements set out in Rule 23 are not mere pleading rules. The court may delve beyond the pleadings to determine whether the requirements for class certification are satisfied." (internal quotation marks and citations omitted)). As the panel opinion explained **[**194]** it, "to obtain certification of an indirect purchaser class, plaintiffs would have to show that all class members share a right to recover for antitrust harms, such that one or more common issues affect all members' claims."[9] Sullivan, 613 F.3d at 154.

Dukes's instruction that, for questions to be "common" in the sense contemplated by Rule 23, their answers must affect the validity of claims, does not set forth a new principle.[10] In *Amchem Products, Inc. v. Windsor*, the Supreme Court, in a discussion of predominance, said that the common questions that matter are those "that qualify each class member's case as a genuine controversy." 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). It

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[7] Similarly, if predominance means anything, it must mean that the resolution of *something* will actually affect *somehow* the claims of all class members. The claims might vary among the class members, but, at a minimum, some legal right to recover has to be held by everyone in the class.

[8] A colorable claim is one that at least "appear[s] to be true, valid, or right." BLACK'S LAW DICTIONARY 301(9th ed. 2009). Requiring a district court to consider whether a claim appears to be valid before certifying class, when the court is expressly apprised of good reasons to doubt the same, does not transform the Rule 23 inquiry into one under Rule 12(b)(6), as I discuss *infra*.

[9] To the extent that the quoted statement, read in isolation, might suggest a rule that all class members had to share an antitrust claim, the context of the statement — coming after a discussion of other types of statutory or common law claims that might give rise to common questions — makes it clear that the panel was requiring only that all class members' right to recover arise from the same harm or injury — something unambiguously required under Supreme Court precedent. *See, e.g.,* Dukes, 131 S.Ct. at 2551 ("Commonality requires the plaintiff to demonstrate **[**195]** that the class members have suffered the same injury." (internal quotation marks omitted)).

[10] The following passage in the American Law Institute's *Principles of the Law of Aggregate Litigation* articulates this basic principle:

> The legal and factual issues involved in any individual civil claim are a function of applicable substantive law. ... Factual issues concern disputes about whether the evidence at trial demonstrates, under the applicable standard of proof, the existence of a given element. ... A factual issue may rise to the level of a common issue if ... a common body of evidence to be presented on behalf of multiple claimants at trial is capable of proving the existence of a material fact as to all such claimants.

ALI, Principles of Law: *Aggregate Litigation § 2.01(b)*(2010). Thus, the treatise supports the proposition that in order to satisfy Rule 23(b)(3)'s commonality requirement, there must be some "material" issue. Materiality is a "function of applicable substantive law." *See id;* In re Lemington Home for the Aged, 659 F.3d 282, 290 (3d Cir. 2011) ("A material fact is '[a] fact[] that might affect the outcome of the suit under the governing law.'" (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))). By necessary implication, if certain **[**197]** members of the proposed class cannot assert a claim under either federal or state law, then there can be no common questions of law or fact that are "material."

seems self-evident that there can be no "genuine controversy" with respect to plaintiffs whose claims are nonexistent as a matter of substantive law. Likewise, in *Hydrogen Peroxide*, we noted that Rule 23 requires plaintiffs to show that the elements of their claim are "capable of proof at trial through evidence that is common to the class rather than individual to its members." 552 F.3d at 311-12. Again, for plaintiffs who lack any claim, there are certainly no elements of a claim that are "capable of proof," either common or individual. Accordingly, in assessing commonality or predominance, an inherent step is deciding that class members possess at least some legal basis for asserting **[**196]** a claim.

By misconstruing Supreme Court precedent, the Majority denies that district courts have either the need or the power to take that essential step. My colleagues declare that "[a] court may inquire [at the class certification stage] whether the elements of asserted claims are *capable* of **[*346]** proof through common evidence, but lacks authority to adjudge the legal validity or soundness of the substantive elements of asserted claims." (Slip Op. at 55 (emphasis added).) However, the Majority's position is contrary to what the Supreme Court has just said in *Dukes*:

> A statement in one of our prior cases, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), is sometimes mistakenly cited ...: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." But in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety **[**198]** of certification under Rules 23(a) and (b) (he had already done that, *see* id. at 165), but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.

131 S. Ct. at 2552. Thus, any suggestion that a district court is prevented from "adjudging the legal validity or soundness of the substantive elements of asserted claims" at the class certification stage is clearly mistaken after *Dukes*. That should already have been clear, however, from our statement in *Hydrogen Peroxide* that "[a] concern for merits-avoidance should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements." 552 F.3d at 318 n.17 (internal quotation marks omitted).

The Majority repeatedly suggests that requiring adherence to substantive law would "introduce a Rule 12(b)(6) inquiry as to every claim in the class." (Slip Op. at **[**199]** 54.) More specifically, my colleagues in the Majority say that, if my approach were followed, "district courts would be obligated at the class certification stage to, *sua sponte*, conduct a thorough Rule 12(b)(6) analysis of every ... claim to ensure that each plaintiff ... possesses a valid cause of action ... ." (Slip Op. at 61.) That characterization is incorrect. Rather, I advocate a procedure essentially identical to the one that occurred here: A district court is approached with a class complaint requesting relief under a variety of state statutes. Because of differences among those statutes, it is clear that some class members are entirely without a cognizable claim. Objectors bring those issues to the district court's attention. Because "such variances ... are so significant as to defeat commonality and predominance even in a settlement class certification," In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 529-30 (3d Cir. 2004) (hereinafter "*Warfarin Sodium II*"), the district court should deny certification. Assuming the parties revise the class to eliminate claims clearly lacking a colorable legal basis, and assuming the class otherwise satisfies Rule 23, the district **[**200]** court could then certify the class.[11]

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[11] There are at least two other problems with the Majority's assertion that "[t]o adopt the position of the dissent and the objectors is to introduce a Rule 12(b)(6) inquiry as to every claim in the class before a class may be certified." (Slip Op. at 59.) First, it ducks the difficulty at the center of this case, which is not and never has been about merely dubious claims. Claims that are of doubtful quality still have, as the adjective indicates, some doubt about them, which means they still retain at least some superficial possibility of being valid. Such claims, because they cling to that possibility, will typically not need to cause a district judge any agita in addressing the certification of a class for settlement purposes. The central problem in this case, however, goes beyond factual disputes or debatable points of law. The problem here is that there are class members who, according to the plain terms of controlling law, have no claim at all, not even a dubious one. We are not rightfully at liberty to ignore that, nor was the District Court. The second problem with the Majority's parade-of-horribles rhetoric in response to the suggestion

[*347] Note that the court in this hypothetical has neither performed a *Rule 12(b)(6)* inquiry, nor conducted an individualized assessment of claims.[12] It has simply engaged in a straightforward analysis of the applicable law. This is by no means unusual in considering the certification of a settlement **[**202]** class. In *Prudential*, the plaintiffs "compiled a series of charts setting forth comprehensive analyses of the various states' laws potentially applicable to their common law claims." *148 F.3d at 315* (internal quotation marks omitted). There, we concurred with the district court's conclusion that "the elements of the[] common law claims are substantially similar and any differences fall into a limited number of predictable patterns." *Id*.

In short, I have proposed only what the law has heretofore **[**204]** always required: one must actually have a legal claim before getting in line for a legal recovery. When objections are raised that persuasively demonstrate that a portion of a proposed class does not have any such claim, courts of law are obliged to follow the law. That is the circumstance we face, as was detailed at length in the panel opinion and is again described briefly herein.

[*348] III. Some Class Members Lack A Claim

As noted by the Majority, the indirect purchasers in the consolidated actions "sought damages pursuant only to state antitrust, consumer protection, and unjust enrichment statutes and common law." (Slip Op. at 16.) Unlike the direct purchasers, the indirect purchasers did not seek damages under federal law, because, pursuant to the Supreme Court's decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, only direct purchasers may bring an antitrust claim under federal law.

Although most states have traditionally followed federal law in interpreting their own state antitrust laws, some have enacted "*Illinois Brick* Repealers," rejecting the rule that only direct purchasers may recover for an antitrust violation. *See, e.g*., *Cal Bus. & Prof. Code § 16750(a)*. By contrast, **[**205]** others have expressly followed *Illinois Brick* and declared unequivocally that, in their states, indirect purchasers lack standing to bring a claim. *See, e.g., Johnson v. Microsoft Corp., 106 Ohio St. 3d 278, 2005 Ohio 4985, 834 N.E.2d 791, 798 (Ohio 2005)*. Several states have been even more precise, explaining that indirect purchasers lack standing to bring what is effectively an antitrust claim, regardless of how the claim is labeled, so that recovery is precluded even if, for example, it is sought

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[201]** that class members should actually have claims (*see* Slip Op. at 60-66) is that objectors have always been entitled to raise a legal challenge to claims being included in a class, even a settlement class. *Cf. Hydrogen Peroxide, 552 F.3d at 320* ("[A] district court exercising proper discretion in deciding whether to certify a class will ... make findings that each *Rule 23* requirement is met or not met, having considered all relevant evidence and arguments presented by the parties."). In other words, district courts have always been required to ensure that the requisites of *Rule 23* have been met, and that includes an obligation to address the non-frivolous arguments and objections that are put to them. A court does not need to assess *sua sponte* every potential problem, nor need it engage in "an intensive cataloguing of each class member's claim" (Slip Op. at 62), but it must give objections their due.

[12] The Majority's recoiling at the individualized assessment of claims also reflects a failure to appreciate that some such assessment does typically take place at some point during the settlement process. The parties share a common interest in ensuring that individuals falling outside the class do not share the benefits of the settlement. For that reason, a class member here must submit a proof of claim demonstrating his or her purchase of a diamond within the relevant time period. As is often the case, parties to an antitrust settlement want to ensure that individuals seeking a share of the settlement actually bought a product with an allegedly inflated price, demonstrating their membership in the class. *See Warfarin Sodium II, 391 F.3d at 525*. Some **[**203]** settlements create elaborate systems for evaluating not only the validity but the severity of each class member's injury. *See In re Prudential Sales Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 295-96 (3d Cir. 1998)*. These proofs of claim are rarely evaluated by the court. "Although the court has general supervisory powers over settlements, it usually does not handle the actual administration. As a rule, the administration is delegated either to a special master or to the plaintiff's counsel or a committee of counsel." 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11:33 at 68-69 (4th ed. 2002). It is universally recognized that the special master, committee, or other body created to administer the settlement agreement is responsible for evaluating the validity of claims and calculating the individualized recovery of a particular class member. *See* David F. Herr, *Manual for Complex Litigation* § 21.661 (4th ed. 2011) ("The administrator or special master may be charged with reviewing the claims and deciding whether to allow claims that are late, deficient in documentation, or questionable for other reasons.").

under a consumer protection act ("CPA") or the common law. *See, e.g., Abbott Labs., Inc. (Ross Labs. Div.) v. Segura, 907 S.W.2d 503, 507 (Tex. 1995)* ("We will not interpret the [Texas CPA] in a manner that rewards creative pleading at the expense of consistent application of legal principles. ... Our holding today only forecloses the recovery of damages for seeking a prohibited antitrust recovery under the masquerade of our [CPA]."); *Johnson, 834 N.E.2d at 801* (holding that Ohio antitrust statute "provides the exclusive remedy for" claims predicated upon "monopolistic pricing practices," and thus dismissing claims under Ohio's CPA and common law). In at least some states, then, indirect purchasers are absolutely precluded **[**206]** from bringing an antitrust claim, no matter how they dress it up.[13]

[*349] Nevertheless, the Majority declares that those class members whose claims purportedly arise in states that preclude indirect purchaser recovery can still be part of the indirect purchaser class. The Majority offers two arguments in support of that conclusion. First, noting that indirect purchasers lack only statutory standing under *Illinois Brick*, rather than Article III standing, the Majority **[**208]** asserts that "statutory standing is simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place." (Slip Op. at 59.) The Majority does not cite any authority to support that assertion, and there is reason to doubt it.[14] But, in any

[13] For a more detailed discussion of which states preclude claims entirely, *see Sullivan, 613 F.3d at 147-48 & n.10-11, 150-51*. According to the Majority, the panel opinion "undertook a wide-ranging fact-finding review of state antitrust statutes ... ." (Slip Op. at 29.) That description is puzzling, however, because there was no fact-finding involved. The review of state law was just that: a review of law. The panel opinion took the very ordinary approach of examining the laws on which the plaintiffs purported to base their claims, including state antitrust laws. The opinion also stated:

> We are certainly not saying that nuanced differences among state laws will prevent the certification of a class, nor are we suggesting that a state-by-state cataloguing of differences in state law is necessary every time a multi-jurisdiction class is certified. We are saying that the difference between having an antitrust claim under state law and having none is no mere nuance and cannot be solved by any reconfiguration of the nationwide class short of changing it from a nationwide class to one or more classes that exclude those who **[**207]** have no claim.

Sullivan, 613 F.3d at 148 n.12. Both the Majority and the Concurring Opinions claim that it is wrong for us to pay attention to the differences in state law because, as the Concurrence puts it, "trial courts would be obligated at the settlement class certification stage to decide which state's law would govern ... ." (Concurrence Slip Op. at 9.) It bears repeating, then, that nothing said by the panel opinion or in this dissent would entail the cataloguing of differences in state law in the mine run of cases. However, when, as in this case, an objection has been raised pointing out that there is a body of claims that are undeniably impermissible under the law of the state which governs them, we are not free to shirk the responsibility of separating those unfounded claims from the class.

[14] It is not clear, to begin with, that the Majority's "statutory standing" label accurately describes the substantive law of the several states denying a claim to indirect purchasers. That aside, and although a dismissal for lack of statutory standing may be viewed as akin to a dismissal under *Federal Rule of Civil Procedure 12(b)(6)*, *see Baldwin v. Univ. of Pittsburgh Med. Ctr., 636 F.3d 69, 73 (3d Cir. 2011)* (noting that "[a] dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim"), compelling authority teaches that the absence of statutory standing can also implicate the court's power to adjudicate a dispute under Article III, *see Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* ("Dismissal for lack of subject-matter **[**210]** jurisdiction because of the adequacy of the federal claim is proper ... when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." (internal quotation marks omitted)). We have suggested this ourselves, *see Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd., 436 F.3d 349, 359 (3d Cir. 2006)* (stating that "non-Article III jurisdictional issues like statutory standing" fit within a category of cases somewhere between cases that have "jurisdictional issues that cannot be bypassed because Article III of our Constitution requires that they be addressed" and cases "with merits-related issues, which cannot be reached without first verifying jurisdiction" (internal citations and quotation marks omitted)), *rev'd on other grounds*, *549 U.S. 422, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007)*, and other circuits have held the same, *see Crawford v. Lamantia, 34 F.3d 28, 32 (1st Cir. 1994)* (statutory standing under ERISA) ("[W]e note that the basis for '[s]tanding, since it goes to the very power of the court to act, must exist at *all stages* of the proceeding, and not merely when the action is initiated or during an **[**211]** initial appeal.'"); *Alexander v. Anheuser Busch Co., 990 F.2d 536, 538 (10th Cir. 1993)* (statutory standing under ERISA) ("In reviewing Alexander's ERISA claims, we raise, sua sponte, the question whether he has standing to bring such claims. The issue of standing is jurisdictional in nature."); *Sommers Drug Stores Co. Employee Profit Sharing Trust v.*

event, it misses the point. Even if the Majority's *ipse dixit* were true as to antitrust claims under federal law, there is no basis for saying it is so with respect to claims under the laws of the several states that have adopted the ultimate holding of *Illinois Brick*. Indeed, in several of those states, courts have indicated that indirect purchasers are barred from asserting a claim because they lack standing.[15] For instance, the Ohio Supreme Court has stated that "an indirect **[*350]** purchaser of goods may not assert a Valentine Act [, i.e., a state antitrust act] claim for alleged violations of Ohio ***antitrust law***." *Johnson, 834 N.E.2d at 798*. Likewise, the New Jersey Supreme Court has held that "indirect purchasers ... have no standing to assert a private right of action under the New Jersey Antitrust Act." *Wilson v. Gen. Motors Corp., 190 N.J. 336, 921 A.2d 414, 416 (N.J. 2007)*. The Connecticut Supreme Court has **[**209]** said the same, explaining that Connecticut law allows "only those consumers who purchase directly from the antitrust defendant to bring suit under our state ***antitrust law***." *Vacco v. Microsoft Corp., 260 Conn. 59, 793 A.2d 1048, 1058 (Conn. 2002)*. Thus, it is clear that there are states that decidedly do treat statutory standing[16] as "a predicate for asserting a claim in the first place." (Slip Op. at 59.)

Second, the Majority asserts, using the Ohio Supreme Court's *Johnson* case as an example, that "although *Johnson* provides that an indirect purchaser lacking an antitrust claim under *Illinois Brick* cannot circumvent this limitation by relying upon the Ohio consumer protection statute, the Ohio Supreme Court did not, nor could it, preclude consumer protection claims predicated **[**213]** on fraud or deception." (*Id*. at 64 n.39.) The Majority then says that "claims settled here include allegations of fraud and deception separate from the antitrust allegations." (*Id*. at 64 n.39.) While the Majority is correct that Ohio does not "preclude consumer protection claims predicated on fraud or deception," it is not correct that such claims were brought in this case under the Ohio CPA — or under the CPA of any state following *Illinois Brick*. Of the seven complaints covered by the proposed class action settlement, only two made allegations referencing violations of the Ohio CPA, *Sullivan v. DB Investments, Inc*., No. 04-cv-02819 (D.N.J.) and *Null v. DB Investments, Inc*., No. 05-L-209 (S.D. Ill.), and both of those complaints predicated their Ohio CPA claims on monopolistic pricing practices. In *Sullivan*, the only allegation with respect to the Ohio CPA is that "Defendants' contract, combination and conspiracy in unreasonable restraint of trade and to monopolize and defendants' monopolization constitute a violation of various state antitrust and/or consumer protection and deceptive and unfair business practices acts and laws." (App. at 652 ¶ 47.) Likewise, the allegations in *Null* **[**214]** are that the CPA "laws of the various states" were violated "through one or more of the following unfair and/or deceptive acts and/or practices: illegally and artificially restraining trade and increasing the price of diamonds by controlling inventory, limiting supply, restricting purchase and falsely advertising the scarceness of diamonds." (App. at 629 ¶ 61, 626 ¶ 45.) Thus, the only claims brought under the Ohio CPA in any of the class actions now at issue were "predicated upon monopolistic pricing practices," and, therefore, according to the highest court in Ohio, those claims are precluded. *Johnson, 834 N.E.2d at 801*.

Corrigan, 883 F.2d 345, 349 (5th Cir. 1989) (statutory standing under ERISA) ("We have recognized, however, that standing is essential to the exercise of jurisdiction, and that lack of standing can be raised at any time by a party or by the court."); *cf. Mainstreet Org. of Realtors v. Calumet City, 505 F.3d 742, 747 (7th Cir. 2007)* (Posner, J.) (describing lack of statutory standing under *Illinois Brick* as "not jurisdictional, at least in the conventional sense[,]" but nonetheless "belong[ing] to an intermediate class of cases in which a court can notice an error and reverse on the basis of it even though no party has noticed it").

[15] Whether a party has standing under Article III is a distinct inquiry from whether the party may assert a cause of action under state or federal law. In *Bond v. United States, 131 S. Ct. 2355, 2362, 180 L. Ed. 2d 269 (2011)*, **[**212]** the Supreme Court made clear that a party may have standing under Article III, but fail to assert a cause of action under state law. *See id. at 2362* ("Still, the question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute, and conflation of the two concepts can cause confusion." (internal citation and quotation marks omitted)). However, even assuming indirect purchasers have standing under Article III, they have no claim under federal law and many of them lack standing to assert any claim under relevant state law. Because the proposed class includes such individuals, it cannot satisfy *Rule 23(b)(3)*'s commonality requirement.

[16] Again, assuming that "statutory standing" is the appropriate description of the principle under state law. *See supra* n. 13.

Moreover, even if any of the complaints could be construed as raising claims for fraud under some state CPAs,[17] those **[*351]** claims were, it appears, never brought to the attention of, or considered by, the District Court, nor were they raised before the Panel. As a result, the District Court made no findings with respect to fraud claims under state CPAs, including whether the elements of those claims could be proven by "evidence common to the class," as required by *Hydrogen Peroxide, 552 F.3d at 325*. Of the five common questions identified by the District Court, none pertain **[**215]** to fraud.[18] Thus, even if there were fraud claims for all class members — which, for the reasons I have identified, there are not — there has been no finding of commonality and predominance with respect to those claims and, therefore, the District Court's class certification cannot rightly be affirmed on that basis.

The bottom line is that, as to those class members who purport to bring claims under the laws of states following *Illinois Brick*, the status of being an indirect purchaser is not only the gateway to membership in the class, it is what entirely disqualifies them from asserting any claim based on De Beers's price-fixing conduct. That is a straightforward application of state law.[19] The class thus includes members who are barred from asserting a claim in the first place. And, because those class members lack any claim, there are no questions common to all class members for which the answers "will resolve an issue that is central to the validity of each one of the claims." *Dukes, 131 S.Ct. at 2551*. Consequently, pursuant to long-standing principles of aggregate **[**217]** litigation, most recently reaffirmed in *Dukes*, there is neither commonality nor predominance under *Rule 23*.[20]

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[17] The Majority uses Ohio's CPA as an example and does not discuss whether fraud claims were brought under the CPAs of other states following *Illinois Brick*. Nonetheless, the pleading deficiency is the same for allegations involving the laws of other states. The *Sullivan* and *Null* complaints are the only complaints to invoke the CPAs of the states following *Illinois Brick* and, as discussed above, neither of those complaints allege fraud; they merely pin the "fraud" label on the price-fixing behavior at issue. Consequently, there is no claim for fraud under the laws of any state adhering to *Illinois Brick*.

[18] Those questions are:

> (a) Whether [D]efendants combined or conspired with others to fix, raise, stabilize and maintain the prices of polished diamonds;
>
> (b) Whether [D]efendants monopolized or combined or conspired with others to monopolize the supply of polished diamonds;
>
> (c) **[**216]** Whether [D]efendants' conduct caused the prices of polished diamonds to be maintained at higher levels than would exist in a competitive market;
>
> (d) Whether [P]laintiffs and the Class[es] are entitled to injunctive relief; and
>
> (e) Whether [D]efendants' conduct caused injury to the business or property of [P]laintiffs and the other [Class and] Subclass Members and, if so, the appropriate class-wide measure of damages.

(App. at 276.)

[19] In its effort to diminish the significance of the state laws denying a cause of action to indirect purchasers, the Majority likens those laws to pre-suit notice requirements or other issues of form that may vary from state to state. (Slip Op. at 65.) But we are not talking here about the niceties of notice. In a class action invoking the laws of multiple jurisdictions, there will often be variations in the law pertaining to how a particular claim is to be presented. Those variations may at times be framed as prerequisites to the bringing of a cause of action or restrictions on the manner in which the action is brought. Were the aggregated claims to be brought individually, those prerequisites would in all likelihood be met on a claim-by-claim basis, but, since the claims are aggregated, those prerequisites are appropriately bypassed. They amount to nothing more than variations in form, not in kind, and neither the panel opinion in this case nor the objectors nor this dissent have advocated the elevation of form over substance. Differences in form are not at issue here; it **[**218]** is the very existence of any cause of action at all that is at stake. The distinction is crucial.

[20] I am not suggesting that no class of indirect purchasers could have been certified here. On the contrary, as the panel opinion noted,

> It may be that the antitrust and consumer protection statutes in a more limited number of states are sufficiently similar that common issues of law or fact would predominate with respect to plaintiffs in those jurisdictions. However, it was improper

[*352] IV. The Rules Enabling Act and Federalism

In addition to violating the terms of Rule 23, certifying this class violates the Rules Enabling Act and basic principles of federalism. The Rules Enabling Act authorizes the creation of "rules of practice and procedure," but states that "[s]uch rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(a), (b). In *Dukes*, the Supreme Court highlighted the **[**219]** role of the Rules Enabling Act in class certification decisions, holding that, "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" the proposed class could not be certified because it would have abridged Wal-Mart's statutory right to litigate certain defenses. 131 S.Ct. at 2561 (quoting 28 U.S.C. § 2072(b)). That point is consistent with the Court's past cautionary statements that an overly expansive reading of Rule 23 will violate the Rules Enabling Act. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 845, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) ("The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the rule can ignore the Act's mandate that rules of procedure shall not abridge, enlarge, or modify any substantive right." (internal quotation marks omitted)); Amchem, 521 U.S. at 613 ("We therefore follow the path taken by the Court of Appeals, mindful that Rule 23's requirements must be interpreted in keeping with Article III's constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" (quoting 28 U.S.C. § 2072(b))).

In this case, **[**220]** by approving certification of the indirect purchaser class, the Majority proceeds heedless of that advice and endorses the enlarging of substantive rights. Using the Majority's example of a member of the indirect purchaser class asserting under Ohio law a claim based on De Beers's price-fixing, it is indisputable that the same member would, if he tried to bring his claim individually in an Ohio court, be immediately shown the exit.[21] **[*353]** Controlling law allows no result but dismissal of such a claim. But, under the Majority's class action certification theory, that individual now has a right to share in the settlement fund based on a claim he is otherwise forbidden to bring. If that is not an enlargement or modification of substantive rights, it is hard to know what would be. *Cf.* Shady Grove Orthopedic Assocs., 130 S. Ct. at 1442 (stating that, for purposes of the Rules Enabling Act, a rule is substantive in nature if it alters the rules of decision by which courts adjudicate rights). The Majority seems to have a "no harm, no foul" feeling about dispensing new rights, but legitimate class members are harmed. If we enforced substantive law as we ought to, those who actually have claims **[**221]** would not be required to share the proceeds of a proper settlement with those who do not.[22]

> for the District Court to certify a nationwide class of plaintiffs based on state law when many states withhold antitrust standing from indirect purchasers and where the variability in consumer protection and unjust enrichment law in a context like this is extreme.

Sullivan, 613 F.3d at 153-54.

[21] The Majority tries to deny this, saying that a state court would only dismiss the invalid claim upon a motion by the defendant. (Slip Op. at 71 n.43.) But the procedural mechanism that prompts application of substantive law is irrelevant. Whether or not a motion brings to light a claim's fatal flaw, the flaw is there. To continue with the Ohio law example, there is clearly no colorable claim for an indirect purchaser, and that is true whether or not a defendant chooses to file a motion to dismiss. Ohio law does not depend on the whim of De Beers or any other defendant. It is telling that the Majority's rejoinder on this point is, in effect, "yes, the claimant could be tossed out of state court, but only if there were a motion." That seems a concession that the differing results that now obtain in this Circuit and in Ohio state courts reflect an expansion of substantive rights. As to the "there must be a motion" comment, irrelevant and of questionable accuracy though it may be, it prompts re-emphasis of this fact: there was a motion in this case, in the form of the objections to the nationwide **[**222]** settlement of the indirect purchaser class. Thus, the legal problem was squarely before the District Court, as it is now before us. It does not matter that the motion came from someone other than De Beers. The issue has been raised and cannot be dodged by saying no one brought it up. Nor can it be avoided by saying that De Beers could have settled an individual suit in Ohio. We are obviously not dealing with the settlement of a dispute between private parties in Ohio state court; we are dealing with a class action settlement binding on absent parties and sanctioned by a federal court purporting to apply Ohio law.

[22] Herein lies a fundamental flaw in the Concurring Opinion as well, which takes the view that "[u]nder *Amchem* the significance of variations in state law is properly assessed in terms of the interests of absent class members[,]" and that here class members from states adhering to *Illinois Brick* "have lost nothing through inclusion in the class." (Concurrence Slip Op. at 10 n.7.) Very

Certifying the indirect purchaser class is, for the same reasons, contrary to principles of federalism. The policy decisions of the constituent states of our country are "fundamental aspect[s] of our federal republic and must not be overridden in a quest to clear the queue in court." *In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002)*. When one of those states says to its citizens "you have no claim" — and the law covering many of the class members here is just that clear — but those under that edict nevertheless are joined in a class with people who do have a claim, by what logical process consistent with federalism can aggregating the "haves" and the "have-nots" imbue those "have-nots" with the very claim that the state has said is foreclosed **[**224]** to them? There is no sound answer to that question. There is only the Majority's and the Concurrence's policy preference, in derogation of controlling state law, for "global peace" through unfettered access to class action settlements.[23]

My colleagues in the Majority of course dispute that certifying this class implicates either the Rules Enabling Act or federalism. **[*354]** With respect to the Rules Enabling Act, they say that there has been a "voluntary settlement agreement between parties" (Slip Op. at 70 (quoting *Ehrheart v. Verizon Wireless, 609 F.3d 590, 593 (3d Cir. 2010))*, and "a district court's certification of a settlement simply recognizes **[**225]** the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action" (*id*.). That may be so when a settlement involves only private parties who all participate in the settlement process, but it is not true in a class action settlement. In that latter context, the Federal Rules of Civil Procedure require district courts to be intimately involved, because the approval of a class action settlement gives the government's imprimatur to the terms of the settlement and binds absent parties.[24] As already discussed, a court is not supposed to certify a class without determining that there is a "genuine controversy" or, in other words, that there is at least some legal basis for class members to claim relief. If a district court credits potential class members with having a valid claim when the underlying state law says there is none, the court has, by definition, enlarged and modified those class members' rights.

Moreover, while De Beers is now pleased to stipulate to liability in all fifty states, and, for its own purposes, is willing to forego legal arguments that it could have raised about the substantive rights of class members, a defendant's willingness to waive an argument is not a reason to ignore it. It is rather the very reason that collusive settlements are a problem. No matter how much De Beers wants to bind everyone in America, and no matter how much the attorneys involved stand to gain from their percentage of the settlement, and no matter how laudatory the "global" resolution of a price-fixing case may be as policy matter, there are limits on the power of federal courts to facilitate settlements and bind absent class members and objectors. **[**227]** *Amchem* admonishes courts approving settlement classes to pay "undiluted, even heightened, attention" to issues of predominance as well as to the other requirements of *Rule 23* to ensure that a certified class is not overbroad. *521 U.S. at 620*. Approving a class certification that groups together plaintiffs who have claims with those who plainly do not results in such a class.

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true. The problem here is not that some absent class members who deserve compensation are left out by the settlement. The problem is that some class members who deserve nothing are included in **[**223]** the settlement and hence are diluting the recovery of those who are entitled to make claims. That harm is real, and the cause of it, the overbreadth of the class, is akin to the problem in *Amchem. See Amchem, 521 U.S. at 620* ("But other specifications of [*Rule 23*] — those designed to protect absentees by blocking unwarranted or overbroad class definitions — demand undiluted, even heightened, attention in the settlement context.").

[23] The Majority cites *Warfarin Sodium II* in an effort to justify its decision today, but we were careful to say in that case that "there may be situations where variations in state law are so significant so as to defeat commonality and predominance even in a settlement class." *391 F.3d at 529*. That observation seems obvious and unassailable, and we are presented here with exactly that kind of situation. If we cannot bring ourselves to say plainly that the certification here was improper, one is forced to wonder what limit is left on the reach of *Rule 23*.

[24] The Majority also writes that, in *Prudential*, "we agreed with the district court that 'approval of a settlement under *Rule 23* merely recognizes the parties' voluntary compromise **[**226]** of their rights and does not itself affect their substantive state law rights," and, therefore, held that "the proposed settlement could not violate the Rules Enabling Act." (Slip Op. at 70 (quoting *Prudential, 148 F.3d at 324*).) However, we also held in *Prudential* that the proposed settlement was not contrary to the cited state law, and, therefore, the Rules Enabling Act could not possibly have been implicated. *Prudential, 148 F.3d at 324 & n.77*.

Furthermore, while the Majority speculates that the approach I suggest will seriously impede class action settlements, it is far from clear that limiting class certification to people who have legal claims would actually undermine the goal of global peace. Indeed, as the Concurrence acknowledges, similar concerns in other cases have proved largely unfounded. (Concurrence Slip Op. at 2.) But even if one assumes that the Majority's concerns about "global peace" have some merit, *Rule 23* remains the sole benchmark for determining whether a settlement class can be certified. In *Amchem*, the Supreme Court reiterated that point over Justice Breyer's criticism that the Court had given insufficient weight to the value of settlement. *See Amchem, 521 U.S. at 629* ("*Rule 23*, which must **[*355]** be interpreted with fidelity to the Rules **[**228]** Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it."); *id*. (Breyer, J., dissenting) ("I believe that the need for settlement of this mass tort case, with hundreds and thousands of lawsuits, is greater than the Court's opinion suggests."). In *Ortiz*, the Court rejected a settlement expressly designed for "total peace," *527 U.S. at 864-65*, even as several justices acknowledged the need for a resolution to the "elephantine mass of asbestos cases," *id. at 865* (Rehnquist, C.J., concurring). We are not free to rewrite the requirements of *Rule 23* simply because it would allegedly advance the goal of global peace.

The Majority also dismisses any federalism concern, reasoning that the policy concerns behind *Illinois Brick* do not apply. As the Majority sees it, "*Illinois Brick's* restriction on indirect purchaser recovery was motivated by prudential concerns for manageability; it does not reflect a categorical policy judgment that indirect purchasers do not merit antitrust protection." (Slip Op. at 72.) Thus, says the Majority, because the "District Court's certification order did **[**229]** not undermine these prudential concerns," the District Court did not "inappropriately subordinate[] state sovereignty in certifying the class." (Slip Op. at 74-75.) But regardless of the Majority's novel views about the policy judgments underlying *Illinois Brick* and whether "indirect purchasers ... merit antitrust protection," the states which have chosen to follow *Illinois Brick* have decided — and plainly stated — that indirect purchasers have no substantive right to recovery under their laws. Principles of federalism do not permit us to write our own exceptions into unambiguous state laws simply because we think that the states would see things differently if only they had our policy insights.[25] Somehow, though, the Majority thinks that "the class settlement posture of this case largely marginalizes the objectors' concern that state law variations undermine a finding of predominance." (Slip Op. at 49.) Once again, the promise of settlement trumps everything else, even variations in state laws as wide as "you have a claim" versus "you have none."

V. Conclusion

I cannot voice strongly enough my disagreement with this elevation of settlement to the status of ultimate and overriding good. (*See* Slip Op. at 66 ("[W]ere we to mandate that a class include only those alleging 'colorable' claims, we would effectively rule out the ability of a defendant to achieve 'global peace' by obtaining releases from all those who might wish to assert claims, meritorious or not."). It has been aptly observed that "[s]ocial peace is not the Article III mission." Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: the Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, **[**231]** *39 Ariz. L. Rev. 461, 475 (1997)*. Rather, we are to "decide cases or controversies." *Id*. Social **[*356]** peace becomes a natural and very welcome byproduct of focusing on that specific mission, "because for every carefully wrought judicial decision, there may be hundreds or thousands of matters that are privately resolved 'in the shadow' of the law." *Id*.

On its own terms, then, the Majority's decision is short-sighted and counterproductive. In the interest of short-term peace, it sacrifices long-term legitimacy and, with that, a more stable, lasting peace. By failing to enforce the limits of *Rule 23*, today's decision will encourage frivolous class action claims and have the predictable consequence of

[25] The Concurring Opinion's assertion that the settlement of a class action is merely "a contract between the parties" (Concurrence Slip Op. **[**230]** at 12) misses this point, though the opinion adds a reference to *Rule 23* (*id*. at 12-13 n.8). The states have an interest in not having their laws strained beyond recognition or ignored entirely. A class action settlement, whether it involves a settlement or a litigation class, is not simply a private contract. If it were, it would not need court approval, and federal courts called upon to supervise class actions, including resulting settlements, are obligated to see that *Rule 23* does not become a tool for modifying state law.

weakening the incentives — the sheltering shadow — under which non-frivolous disputes would otherwise be properly resolved.

In sum, when a federal court issues an order certifying that there are questions of fact or law common to all class members, it necessarily concludes, whether explicitly stated or not, that all class members have at least some colorable legal claim. When there are members of a putative class who do not, under the operative substantive law in a case, have a colorable claim, certification **[**232]** of the class enlarges the substantive rights of those members. Any such order is thus a violation of the Rules Enabling Act, and, when it occurs in a class whose only claims are based in state law, it also violates core principles of federalism. The damage done by that judicial usurpation is not made better by invoking the benefits of social peace through litigation settlement. Private parties have a free hand in settling their own disputes, but class action settlements require federal courts to determine the rights and obligations of people who are not there to speak for themselves — hence the Supreme Court's insistence that class action settlements "demand undiluted, even heightened, attention ...," especially when there is a risk of "unwarranted or overbroad class definitions," *Amchem, 521 U.S. at 620*. That risk has been realized here.

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Emery v. Wachovia Bank, N.A.

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

December 21, 2011, Decided; December 21, 2011, Filed

CIVIL ACTION NO. H-10-2213

Reporter

2011 U.S. Dist. LEXIS 161352 *

ROCKY and JULIE EMERY, Plaintiffs, v. WACHOVIA BANK, N.A., Defendant.

Core Terms

Plaintiffs', mortgage, holder, Savings, summary judgment motion, promissory note, gross negligence, preempted, negligent misrepresentation, default, breach of contract claim, motion to dismiss, escrow, amend, terms, ad valorem tax, counterclaim, consumer, adequate protection, summary judgment, trust deed, foreclosure, argues, merged, subject to dismissal, property taxes, overcharged, documents, monthly, pleaded

Counsel: **[*1]** For Rocky Emery, Julie Emery, Plaintiffs, Counter Defendants: Chad W Dunn, LEAD ATTORNEY, Brazil Dunn, Houston, TX USA.

For Wachovia Bank, N.A., Defendant, Counter Claimant: George Anthony Kurisky, Jr, Johnson DeLuca Kurisky & Gould, P.C., Houston, TX USA.

Judges: SIM LAKE, UNITED STATES DISTRICT JUDGE.

Opinion by: SIM LAKE

Opinion

MEMORANDUM OPINION AND ORDER

On June 22, 2010, defendant, Wachovia Bank, N.A. (Wachovia), removed this action from the 164th Judicial District Court of Harris County, Texas, where it was pending under Case No. 2010-33526 (Docket Entry No. 1). Pending before the court are Plaintiffs' Motion for Summary Judgment and Brief in Support (Docket Entry No. 22), Plaintiffs' Objection and Motion to Strike Affidavit (Docket Entry No. 30), Plaintiffs' request to amend included in their Response to Defendant's First Amended Motion to Dismiss (Docket Entry No. 39), Defendant's Motion for Adequate Protection (Docket Entry No. 41), Defendant's Corrected First Amended Motion to Dismiss Pursuant to *FRCP 12(b)(6)* (Docket Entry No. 43), and Counter-Plaintiff's Motion for Leave to File First Amended Counterclaim (Docket Entry No. 46). For the reasons explained below, plaintiffs' motion for summary judgment, objection and **[*2]** motion to strike affidavit, and request to amend will be denied. Defendant's motions to dismiss and for adequate protection will be granted in part and denied in part, and defendant's motion to file first amended counterclaim will be granted.

I. Factual and Procedural Background

Plaintiffs allege that in 2003 Rocky Emery executed a promissory note ("Note") payable to World Savings in the amount of $667,000.00 for an adjustable rate mortgage that the plaintiffs used to purchase a new home located at 2607 Sara Ridge Lane, Katy, Texas. The promissory note was secured by a deed of trust to the real property, which was executed by both Rocky Emery and his wife, Julie Emery. The property at issue is the plaintiffs' homestead. After the loan closed monthly payments of approximately $3,000.00 were drawn from Rocky Emery's personal bank account. In 2007 or 2008 Wachovia Bank purchased World Savings, including Rocky Emery's promissory note. Plaintiffs allege that in 2008 Wachovia over-charged Rocky Emery approximately $100,000.00 in mortgage payments. In 2009 Rocky Emery was unable to pay the 2008 property taxes on the home. Plaintiffs allege that Rocky Emery contracted with Wachovia to pay the **[*3]** taxes and have the amount added to the promissory note, thereby increasing the monthly payment to approximately $6,000.00. However, when plaintiffs attempted to submit the new payment amount, Wachovia refused to accept it insisting, instead, that the new monthly payment should be approximately $9,000.00 -- an amount sufficient to pay for insurance on the property. Because Rocky Emery maintained insurance on the property, the Emerys' refused to pay the $9,000.00 per month that Wachovia demanded.[1]

In approximately March of 2009 Rocky Emery applied for mortgage assistance from various government programs. Plaintiffs allege that once applications for such assistance were submitted mortgage payments were supposed to be suspended or stayed until a decision was made on their applications, but that Wachovia did not suspend or stay their mortgage payments. In approximately January of 2010, after having his applications for three separate mortgage assistance programs denied, Rocky Emery learned that Wachovia claimed that he owed between $30,000.00 and $60,000.00 in back mortgage payments, and these amounts included charges for insurance that Wachovia had improperly obtained. In May of 2010 plaintiffs **[*4]** learned that Wachovia intended to foreclose on Rocky Emery's promissory note on the first Monday of June 2010. Plaintiffs unsuccessfully contacted Wachovia in an effort to cure the alleged default. Plaintiffs allege that they did not receive written notice of foreclosure from Wachovia and that Wachovia did not follow the procedural and notice requirements pertaining to non-judicial foreclosures stated in Chapter 51 of the Texas Property Code.[2]

On May 28, 2010, plaintiffs filed an action in the 164th District Court of Harris County, Texas, styled Rocky and Julie Emery v. Wachovia Bank, N.A., Docket Number 2010-33526. On June 22, 2010, Wachovia filed its Notice of Removal (Docket Entry No. 1) pursuant to *28 U.S.C. §§ 1332*, *1441*, and *1446*, asserting that complete diversity exists for purposes of federal jurisdiction because plaintiffs are citizens of Texas and Wachovia Bank, N.A. is a South Dakota entity for diversity purposes.[3]

On November 19, 2010, plaintiffs filed Plaintiffs' First Amended Original Complaint and Request for Injunctive Relief (Docket Entry No. 17) in which they assert claims for breach of contract, promissory estoppel, violation of the *Real Estate Settlement Procedures Act of 1974 (RESPA)*, *12 U.S.C. § 2601*, negligent **[*5]** misrepresentation, negligence, and gross negligence. Plaintiffs seek to reinstate the loan and cure any alleged default. Plaintiffs also seek an accounting of the loan account, injunctive relief, and damages, including attorney's fees. Plaintiffs state that they are willing to post a reasonable bond, but ask the court to waive the bond requirement.[4] On the same day Wachovia filed a counterclaim for breach of contract alleging that plaintiffs are in breach of the Note by failing to make all payments timely as they came due. Wachovia also alleges that the claims plaintiffs have asserted in this action violate *Texas Civil Practices and Remedies Code §§ 9.011 et seq.* and *10.001 et seq.* because they are

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[1] Plaintiffs' First Amended Original Complaint and Request for Injunctive Relief ("Plaintiffs' First Amended Original Complaint"), Docket Entry No. 17, pp. 2-4.

[2] Id. at 4-5.

[3] Defendant's Notice of Removal, Docket Entry No. 1, p. 1.

[4] Plaintiffs' First Amended Original Complaint, Docket Entry No. 17, p. 10.

groundless and brought either in bad faith for the purpose of harassment, or for an improper purpose such as to cause unnecessary or needless increase in the cost of litigation.[5]

II. Plaintiffs' Motion for Summary Judgment

Plaintiffs argue that they are entitled to summary judgment on defendant's counterclaim to enforce the Note because defendant is unable to produce the original note, and is unable to prove the amount owed thereunder.[6] Defendant responds that plaintiffs are not entitled to summary judgment because defendant undisputedly possesses the original **[*6]** blue-ink signed note executed by Rocky Emery on November 25, 2003, and because

> 6. World Savings Bank, FSB, a Federal Savings Bank was the original owner and holder of the mortgage on Plaintiffs' home located at 2607 Sara Ridge Lane, Katy, Texas 77450.
>
> 7. It is common knowledge that in 2007 World Savings Bank, FSB, a Federal Savings Bank merged with Wachovia and became Wachovia Mortgage. In 2008, it is also common knowledge that Wachovia announced that it would be merging with Wells Fargo Bank, N.A.[7]

A. Standard of Review

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and the law entitles it to judgment. *Fed. R. Civ. P. 56(c)*. Disputes about material facts are "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)*. The Supreme Court has interpreted the plain language of *Rule 56(c)* to mandate the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)*. A party moving for summary judgment **[*7]** "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)* (en banc) (quoting *Celotex, 106 S.Ct. at 2553-2554*). If the moving party meets this burden, *Rule 56(c)* requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. Id. (citing *Celotex, 106 S.Ct. at 2553-2554*). In reviewing the evidence "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000)*. Factual controversies are to be resolved in favor of the nonmovant, "but only when . . . both parties have submitted evidence of contradictory facts." *Little, 37 F.3d at 1075*.

B. Analysis

1. Applicable Law

To recover a judgment against plaintiffs for suit on a note, Wachovia bears the burden of proving that (1) there is a note, (2) the plaintiffs were the makers of the note, (3) Wachovia is the legal holder or owner of the note, and (4) a certain balance is due and owing on the note. See *Clark v. Dedina, 658 S.W.2d 293, 295 (Tex. App. -- Houston [1st*

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[5] Wachovia Bank, N.A.'s Counterclaim, Docket Entry No. 20, pp. 3-4.

[6] Plaintiff's Motion for Summary Judgment, Docket Entry No. 22, p. 3.

[7] Defendant Wachovia Bank, N.A.'s Response to Plaintiffs' Motion for Summary Judgment ("Defendant's Response to Plaintiffs' Motion for Summary Judgment"), Docket Entry No. 25, p. 3. See also id. at 4-5 and Defendant's Surreply to Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment, Docket Entry No. 49, pp. 3-6 (asserting that Wachovia is the owner of the Note and that Wachovia has the right to enforce the Note).

Dist.] 1983, writ dism'd); Blankenship v. Robins, 899 S.W.2d 236, 238 (Tex. App. -- Houston [14th Dist.] 1994, no writ). In this case the dispute before the court concerns the third and fourth elements: whether Wachovia is the holder **[*8]** and/or owner of the Note, and whether Wachovia is able to prove that a certain balance is due and owing on the Note.

2. The Parties' Arguments and Summary Judgment Evidence

Asserting that "Wachovia Bank cannot prove that they are the proper holder of the alleged note and because Wachovia Bank cannot prove the amount owed,"[8] plaintiffs argue that they "are entitled to summary judgment on Defendant's claim seeking to enforce the terms of the note."[9] Citing *Reyna v. First National Bank in Edinburg, 55 S.W.3d 58 (Tex. App. -- Corpus Christi 2001, no writ)*, and *Priesmeyer v. Pacific Southwest Bank, F.S.B., 917 S.W.2d 937 (Tex. App. -- Austin 1996, no writ)* (per curiam), plaintiffs argue that

> [i]t is well settled that state law requires a claimant seeking to enforce the terms of a promissory note must prove it is a holder of the note and must provide evidence of the amount due. . . In this case, Plaintiffs executed a note with another financial institution. If Wachovia Bank wants to enforce that note, it must prove it is the holder of same. . . In short, Wachovia Bank must produce the original note bearing all the proper endorsements. Wachovia Bank also must prove the amount owed showing all credits and offsets. Because they have failed to do so, Plaintiffs are entitled to summary judgment.[10]

On March 25, 2011, Wachovia filed a response to plaintiffs' motion for summary judgment arguing **[*9]** that the plaintiffs' motion fails on its face because

> 5. On November 25, 2003, Plaintiff, Rocky Emery executed the loan documents.
> 6. World Savings Bank, FSB, a Federal Savings Bank was the original owner and holder of the mortgage on Plaintiffs' home located at 2607 Sara Ridge Lane, Katy, Texas 77450.
> 7. It is common knowledge that in 2007 World Savings Bank, FSB, a Federal Savings Bank merged with Wachovia and became Wachovia Mortgage. In 2008, it is also common knowledge that Wachovia announced that it would be merging with Wells Fargo Bank, N.A.
> 8. Defendant owns and continues to service Plaintiffs' mortgage just as it does hundreds of thousands of other mortgages throughout the United States.[11]

Wachovia cites four exhibits in support of this argument: the Note (Exhibit A), the Deed of Trust (Exhibit B), the Acceleration Letter (Exhibit C), and Defendant's Affidavit in Support of Response (Exhibit D).[12] Exhibits A-C were attached to Wachovia's Response to Plaintiffs' Motion for Summary Judgment (Docket Entry No. 25), but Exhibit D was not attached to Wachovia's response.

On March 28, 2011, plaintiffs filed a reply arguing that Wachovia's bare assertions that "it is common knowledge that **[*10]** in 2007 World Savings Bank, FSB . . . merged with Wachovia to become Wachovia Mortgage[, and that i]n 2008 . . . Wachovia announced that it would be merging with Wells Fargo Bank, N.A.,"[13] are not summary judgment evidence capable of raising a genuine issue of material fact for trial as to whether Wachovia is a holder in due course of the note at issue.[14] Plaintiffs explain that

> [t]hough it is known some transactions and sale of assets and/or liabilities occurred between World Savings Bank and Wachovia, it is not known which assets or liabilities were transferred. More importantly, there is no

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[8] Plaintiffs' Motion for Summary Judgment, Docket Entry No. 22, p. 3.

[9] Id.

[10] Id.

[11] Defendant's Response to Plaintiffs' Motion for Summary Judgment, Docket Entry No. 25, pp. 2-3 ¶¶ 5-8.

[12] Id. at 3 ¶ 9.

[13] Id. ¶ 7.

[14] Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment, Docket Entry No. 27, p. 2.

> evidence that Wachovia Bank purchased the mortgage security held by World Savings that forms the basis of this lawsuit. World Savings could have factored the mortgage or otherwise sold it on the derivative market. It was Plaintiffs understanding that Wachovia was merely a servicer for the note and not the holder of same.[15]

Later that same day, Wachovia filed Defendant's Affidavit in Support of Response to Plaintiffs' Motion for Summary Judgment (Docket Entry No. 28). The affidavit was signed by Wachovia's Operations Manager/Custodian of Records and states in pertinent part:

> 4. On November 25, 2003, Plaintiff, **[*11]** Rocky Emery executed the loan documents.
> 5. World Savings Bank, FSB, a Federal Savings Bank was the original owner and holder of the mortgage on Plaintiffs' home located at 2607 Sara Ridge Lane, Katy, Texas 77450.
> 6. In 2007 World Savings Bank, FSB, a Federal Savings Bank merged with Wachovia and became Wachovia Mortgage. In the merger, Wachovia became owner and holder of Plaintiffs' mortgage.
> 7. In 2008, Wachovia announced that it would be merging with Wells Fargo Bank, N.A. and has since merged with Wells Fargo Bank, N.A.
> 8. Wachovia is now Wells Fargo Bank, N.A. a/k/a Wachovia Mortgage, a Division of Wells Fargo Bank, N.A. and f/k/a Wachovia Mortgage, FSB.
> 9. Wachovia is the owner and holder of the Note and continues to service Plaintiffs' mortgage.
> 10. Wachovia is in the process of preparing a current Payoff Statement and will provide Plaintiffs with a copy of same upon completion.[16]

On April 6, 2011, plaintiffs filed objections to defendant's affidavit citing *Federal Rules of Civil Procedure 56(c)(2)* and *(4)*. Plaintiffs object to the affidavit because "[n]o foundation whatsoever is laid for the affiant having personal knowledge of the facts stated therein. Other than a bare assertion that the affiant was 'personally acquainted with **[*12]** the facts' therein, there is no such basis for that statement."[17] Thus,

> Plaintiffs ask the Court to strike paragraphs 5, 6, 7 and 9 since there is no foundation for such evidence.
> Absent this evidence, the only evidence offered by Defendant to show it is a holder of the note is the actual note itself. Unfortunately, the note reflects the original lender, World Savings Bank. It contains only one endorsement that appears to be signed by a Wachovia official. There are no endorsements signed by World Savings or Wells Fargo the two earlier institutions that were alleged to be holders of the note. Therefore, Defendant has failed to meet its burden under the Motion for Summary Judgment procedure.
>
> Finally, Plaintiffs object to the late filed summary judgment affidavit because it is not the best evidence of the matter sought to prove. In fact, the affidavit is nothing more than hearsay stacked upon hearsay. The best evidence of transfer of the loan from World Savings and ultimately to Defendant would be proper endorsements on the actual note. Because the actual note does not contain such endorsements, Defendant cannot prove it is a holder in due course of same. . . The untimely affidavit offered **[*13]** by Defendant simply seeks to summarize alleged purchase and transfer agreements without including such agreements and without laying a foundation of the witness's personal knowledge of same.[18]

On September 1, 2001, Wachovia filed Defendant's Motion for Leave to File Surreply (Docket Entry No. 48), which the court granted the next day (Docket Entry No. 53). On September 2, 2011, Wachovia filed Defendant's Surreply to Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment (Docket Entry No. 54). Wachovia also filed a new Defendant's Affidavit in Support of Surreply to Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment (Docket Entry No. 55). Citing *Texas Business and Commerce Code §§ 3.201*, *3.203*, and *3.301*, and *Waters v. Waters, 498 S.W.2d 236, 242 (Tex. Civ. App. -- Tyler 1973, writ ref'd n.r.e.)*,

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[15] Id. at 2-3.

[16] Defendant's Affidavit in Support of Response to Plaintiffs' Motion for Summary Judgment, Docket Entry No. 28.

[17] Plaintiffs', Rocky and Julie Emery, Objection and Motion to Strike Affidavit, Docket Entry No. 30, p. 2.

[18] Id. at 3-4.

Wachovia argues that it need not be a holder to enforce the Note. Wachovia explains that under *Texas Business and Commerce Code § 3.301*, an owner of a Note is entitled to enforce the Note by foreclosure and deficiency judgment, and that under *Texas Business and Commerce Code §§ 3.201* and *3.203*, "[o]wnership of a Note may be transferred by possession, even if it is not endorsed by the transferee. . . [and that t]he transferee then acquires the rights of the transferor, but he does not become the holder."[19] In Waters the court explained that

> [t]he fact that a transferee **[*14]** lacking a necessary indorsement is not the holder does not mean that the transferee cannot establish his right as assignee and enforce the obligation. To the contrary, a transferee although he has neglected to obtain the indorsement necessary to make him a holder may enforce a note, foreclos[e] on collateral, and obtain a deficiency judgment against the debtor.[20]

Waters, 498 S.W.2d at 242. Wachovia thus asserts that all the requirements for enforcing the Note exist in this case because

> 18. Plaintiffs admit in paragraphs 10 and 11 of their First Amended Complaint that "on or about 2003, Rocky executes a promissory note payable to World Savings in the amount of $667,000.00 for a new home in Houston, Texas. Said promissory note was secured by a deed of trust to the real property commonly described as 2607 Sara Ridge Lane; Katy, Texas 77450." *See paragraphs 10 and 11 of Plaintiffs' First Amended Complaint*.
>
> 19. Likewise, Defendant has provided proof that (i) it is the owner of the Note and (ii) a certain balance is due and owing. *See paragraphs 7 and 10 on page 2 of Defendant's Affidavit attached hereto*.[21]

Filed together with Wachovia's surreply is the affidavit of Michael Dolan, which states in pertinent part:

> 3. I, on behalf of **[*15]** Wachovia, am the custodian of records pertaining to this loan, and I have personally reviewed the loan file pertaining to Rocky Emery's loan owned, held, and serviced by WELLS FARGO BANK, N.A. A/K/A WACHOVIA MORTGAGE, A DIVISION OF WELLS FARGO BANK, N.A. AND F/K/A WACHOVIA MORTGAGE, FSB F/K/A WORLD SAVINGS BANK, FSB. As such, I have personal knowledge of the facts herein. The Adjustable Rate Mortgage Note and Deed of Trust (Exhibits "A" and "B" respectively) attached hereto are exact duplicates and true and correct copies of the original.
> 4. On November 25, 2003, Rocky Emery executed the Adjustable Rate Mortgage Note, and on November 25, 2003, Rocky Emery and Julie K. Emery executed the Deed of Trust.
> 5. World Savings Bank, FSB was the original lender.
> 6. On December 31, 2007, World Savings changed its name to Wachovia Mortgage, FSB, and on November 1, 2009, Wachovia merged into Wells Fargo Bank, N.A.
> 7. WELLS FARGO BANK, N.A. A/K/A WACHOVIA MORTGAGE, A DIVISION OF WELLS FARGO BANK, N.A. AND F/K/A WACHOVIA MORTGAGE, FSB, F/K/A WORLD SAVINGS BANK, FSB, is the owner of the Note and is in possession of the original Note.
> 8. Rocky Emery is currently in default under the terms of the Note.
>
> 9. **[*16]** As a result of the default, Wells Fargo Bank, N.A. accelerated the indebtedness.
>
> 10. The most recent official Payoff Statement was generated on March 28, 2011, and sent to Rocky Emery. It is attached hereto as Exhibit "C" to this Affidavit and incorporated herein by reference. As of March 28, 2011, the total secured debt owed by Rocky Emery was $869,594.23 which includes principal of $712,619.07,

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[19] Defendant's Surreply to Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment, Docket Entry No. 54, p. 3 ¶ 12.

[20] Id. at 4 ¶ 14.

[21] Id. at 4 ¶¶ 18-19.

accrued interest of $78,854.69, escrow advances for *ad valorem* taxes and hazard insurance $76,487.40, corporate advances of $1,387.07, property inspection fees of $230.00, and recording fees of $16.00.[22]

3. Application of the Law to the Summary Judgment Evidence

(a) A Genuine Issue of Material Fact Exists as to Whether Defendant Owns the Note

Plaintiffs argue that they are entitled to summary judgment because Wachovia cannot establish that it is the holder of the Note by producing the original Note bearing all the proper endorsements. Texas law defines "holder" as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]" *Tex. Bus. & Com. Code § 1.201(b)(21)(A)*. "A person can become the holder of an instrument when the instrument is issued to that **[*17]** person; or he can become a holder by negotiation." *Leavings v. Mills, 175 S.W.3d 301, 309 (Tex. App. -- Houston [1st Dist.] 2004, no pet.)* (citing *Tex. Bus. & Com. Code § 3.201* cmt. 1). "Negotiation is the 'transfer of possession of an instrument . . . by a person other than the issuer to a person who thereby becomes its holder.'" Id. (quoting *Tex. Bus. & Com. Code § 3.201(b)*). "The indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed to it as to become part of it. . . If an instrument not in the possession of the original holder lacks a written indorsement and proof of the chain of title, the person in possession does not have the status of a holder." *Id., 175 S.W.3d at 309*. Nevertheless, Texas law makes clear that a party does not have to be a holder to enforce a negotiable instrument, including a note. Id. ("[E]ven if a person is not the holder of a note, he may still be able to prove that he is the owner and entitled to enforce the note, foreclose on collateral and obtain a deficiency judgment under common-law principles of assignment."). See also *SMS Fin., Ltd. Liability Co. v. ABCO Homes, Inc., 167 F.3d 235, 238 (5th Cir. 1999)* (explaining that a party seeking to enforce a promissory note must establish that he "is the owner or holder of the note").

An "owner" of a negotiable instrument means a person who is entitled to exercise the rights conveyed by an instrument, as determined **[*18]** by the principles of property law. See *Priesmeyer, 917 S.W.2d at 939*. To prove that it owns the Note, Wachovia must prove the series of transfers by which it acquired the Note. Id. An owner of a note may prove the transfer of a note by testimony or documentation. Id. (citing *Christian v. University Federal Savings Association, 792 S.W.2d 533, 534 (Tex. App. -- Houston [1st Dist.] 1990, no writ)* (affidavit sufficient to establish ownership of note)). See also *Lawson v. Finance America Private Brands, Inc., 537 S.W.2d 483, 485 (Tex. App. -- El Paso 1976, no writ)* (testimony by defendant sufficient to establish right to enforce an instrument). In *Leavings, 175 S.W.3d at 309*, the court explained how a party establishes that it is the owner of an instrument: "A person not identified in a note who is seeking to enforce it as the owner or holder must prove the transfer by which he acquired the note. . . An issue of material fact on the issue of ownership of a note is presented when there is an unexplained gap in the chain of title." Importantly, transfer of an instrument does not require the transferee to endorse that instrument. *Id*.

For present purposes, there is only one meaningful difference between being a holder and an owner. A holder is presumed to be entitled to enforce the instrument merely by showing possession of that instrument. On the other hand, an owner may not invoke such a presumption merely by showing possession; instead, an owner must prove the transfer **[*19]** by showing possession and establishing an unbroken chain of title. See *Tex. Bus. & Com. Code § 3.203* cmt. 2 (2011) ("Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it."). *Resolution Trust Corp. v. Starkey, 41 F.3d 1018, 1023 (5th Cir. 1995)* ("In the absence of an indorsement, there is no presumption that the transferee of a note is its owner, and possession must then be demonstrated by proving the transaction whereby the note was acquired.").

The undisputed evidence in this case is that Wachovia is in physical possession of the original Note executed by Rocky Emery. Wachovia has attached an exact duplicate of the Note to both its Response to Plaintiffs' Motion for

[22] Defendant's Affidavit in Support of Surreply to Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment, Docket Entry No. 55, pp. 1-2 ¶¶ 3-10.

Summary Judgment, and to its Surreply to Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment. Wachovia has also presented affidavit evidence demonstrating the Note's chain of title and stating that Wachovia is the owner of the Note. Plaintiffs have neither identified nor presented controverting **[*20]** evidence. Nor have plaintiffs pointed to any evidence in the record indicating that some other entity might later approach them demanding payment. Although plaintiffs objected to the affidavit that Wachovia submitted in support of its initial response to plaintiffs' motion for summary judgment, plaintiffs have not objected to the Dolan affidavit that Wachovia submitted in support of its surreply to plaintiffs' motion for summary judgment.

Under Texas law an unequivocal statement of ownership of a note, if uncontroverted, is sufficient to establish ownership as a matter of law even in the absence of supporting documents. See *First Gibraltar Bank, FSB v. Farley, 895 S.W.2d 425, 428 (Tex. App. -- San Antonio 1995, writ denied)* ("Testimony in an affidavit that a particular person or entity owns a note is sufficient to conclusively establish ownership even in the absence of supporting documentation if there is no controverting summary judgment evidence."). See also *Resolution Trust Corp. v. Camp, 965 F.2d 25, 29 (5th Cir. 1992)* (uncontroverted affidavits — based upon personal knowledge that a party is the holder or owner of a promissory note — are generally sufficient summary judgment evidence). Moreover, as a nonmovant contesting the promissor's right to summary judgment, Wachovia is only required to present evidence sufficient to raise a genuine **[*21]** issue of material fact for trial. Accordingly, the court concludes that the Dolan affidavit, together with the corroborating evidence that Wachovia is in possession of the original Note, suffices to raise a genuine issue of material fact for trial as to whether Wachovia is the owner of the Note.

(b) A Genuine Issue of Material Fact Exists as to the Amount Owed Under the Note

Plaintiffs argue that they are entitled to summary judgment because Wachovia cannot prove the amount owed showing all credits and offsets.[23] The Dolan affidavit states that

> [t]he most recent official Payoff Statement was generated on March 28, 2011, and sent to Rocky Emery. It is attached hereto as Exhibit "C" to this Affidavit and incorporated herein by reference. As of March 28, 2011, the total secured debt owed by Rocky Emery was $869,594.23 which includes principal of $712,619.07, accrued interest of $78,854.69, escrow advances for *ad valorem* taxes and hazard insurance $76,487.40, corporate advances of $1,387.07, property inspection fees of $230.00, and recording fees of $16.00.[24]

There is no dispute that Rocky Emery signed the Note, that the Note was secured by a deed of trust on real property, and that Rocky Emery defaulted **[*22]** in payment of the Note. Evidence that Rocky Emery defaulted on the Note is found in the Plaintiffs' First Amended Original Complaint and Request for Injunctive Relief (Docket Entry No. 17), in which plaintiffs allege that "due to an unforeseen decline in the United States economy, Rocky was not able to pay the 2008 property taxes on the homestead and contracted with Wachovia to pay the taxes and the amount would be added to the promissory note,"[25] that when the plaintiffs attempted "to pay the new contracted amount, Wachovia refused acceptance of payment,"[26] and that "[i]n approximately January 2010, after being denied for three separate mortgage assistance programs . . . Rocky was made aware that . . . he owed between $30,000 — $60,000 in back payments, including amounts for insurance. . ."[27] Since plaintiffs' allegations establish that an amount is due and owing on the note, and Dolan's affidavit quantifies that amount, the court concludes that the amount due and owing is a genuine issue of fact for trial. Accordingly, plaintiffs' motion for summary judgment on Wachovia's counter-claim to enforce the Note will be denied.

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[23] Plaintiffs' Motion for Summary Judgment and Brief in Support, Docket Entry No. 22, p. 3.

[24] Defendant's Affidavit in Support of Surreply to Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment, Docket Entry No. 55, p. 2 ¶ 10.

[25] Plaintiff's First Amended Original Complaint, Docket Entry No. 17, p. 4 ¶ 19.

[26] Id. ¶ 20.

[27] Id. at 5 ¶ 26.

C. Plaintiffs' Objection and Motion to Strike Affidavit

Citing *Federal Rules of Civil Procedure 56(c)(2)* and **[*23]** *(4)*, plaintiffs object to the initial affidavit that Wachovia submitted in support of its Response to Plaintiffs' Motion for Summary Judgment on grounds that the affidavit fails to establish that the affiant has personal knowledge of the facts stated, the affidavit is not the best evidence of transfer of the loan from World Savings to Wachovia, and the affidavit was filed late.[28] Since the court has been able to resolve the issues presented by the plaintiffs' motion for summary judgment without referring to the affidavit to which the plaintiffs object, plaintiffs' objections to that affidavit and motion to strike portions of it will be denied as moot.

III. Defendant's Motion to Dismiss

Wachovia contends that (1) plaintiffs' claims for breach of contract, negligence, negligent misrepresentation, and gross negligence should be dismissed because they are preempted by the *Homeowner's Loan Act (HOLA)*; (2) plaintiffs have not stated a claim and cannot state a claim under the Texas Deceptive Trade Practices Act; (3) plaintiffs have not stated and cannot state a claim for violations of the Real Estate Settlement and Procedures Act (RESPA); and (4) independent of HOLA, plaintiffs have not stated a **[*24]** claim for breach of contract, negligent misrepresentation, negligence, or gross negligence. On August 29, 2011, defendants filed a Corrected First Amended Motion to Dismiss Pursuant to *Federal Rule of Civil Procedure 12(b)(6)* solely to reflect that the proper defendant -- improperly named by Plaintiffs as Wachovia Bank, N.A. -- is Wells Fargo Bank, N.A.[29]

A. Standard of Review

A motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim for which relief may be granted tests the formal sufficiency of the pleadings and is "appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim." *Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001)*, cert. denied sub nom *Cloud v. United States*, *536 U.S. 960, 122 S.Ct. 2665, 153 L. Ed. 2d 839 (2002)*. The court must accept the factual allegations of the complaint as true, view them in a light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. Id.

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S.Ct. 992, 997, 152 L. Ed. 2d 1 (2002) (quoting *Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974))*. To avoid dismissal a plaintiff must allege "enough facts **[*25]** to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting *Twombly, 127 S.Ct. at 1966*).[30]

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[28] Plaintiffs', Rocky and Julie Emery, Objection and Motion to Strike Affidavit, Docket Entry No. 30.

[29] Defendant's Corrected First Amended Motion to Dismiss Pursuant to *FRCP 12(b)(6)* ("Defendant's Corrected First Amended Motion to Dismiss"), Docket Entry No. 43, p. 1.

[30] Before Twombly dismissal under *Rule 12(b)(6)* would not be appropriate unless it appeared beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99,*

B. Analysis

1. Plaintiffs' Claims for Breach of Contract, Negligence, Negligent Misrepresentation, and Gross Negligence are Not Preempted by HOLA

Asserting that plaintiffs' claims "purport to directly attack loan servicing issues both generally and as they relate to the foreclosure process,"[31] Wachovia argues that "[s]uch claims, including those arising under *§ 51.002 of the Texas Property Code*, are clearly pre-empted by HOLA"[32] (the Home Owner's Loan Act of 1933, *12 U.S.C. § 1461, et seq.*). Wachovia explains that through HOLA and its implementing regulation, *12 C.F.R. § 560*, "Congress authorized and delegated power and authority to the Office of Thrift Supervision (OTS) to regulate and govern 'every federal savings and loan association from its cradle to its corporate grave.'"[33] Wachovia argues **[*26]** that HOLA preempts the plaintiffs' claims because World Savings Bank was a federal savings bank regulated by the OTS in 2003 when plaintiffs' loan originated, and because HOLA expressly preempts state laws relating to mortgage services, including laws regarding terms of credit, escrow and impound accounts, processing, origination, servicing, sale or purchase of mortgages, and disbursements and repayments. *12 C.F.R. § 560.2(b)(4)*, *(6)*, *(9)*, *(10)*, and *(11)*. Citing *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation, 491 F.3d 638, 642 (7th Cir. 2007)*, Wachovia argues that it can assert a HOLA preemption defense because "[t]he foundations for Plaintiffs' entire First Amended Complaint [Docket No. 17] are the allegation that (i) Defendant violated *§ 51.002 of the Texas Property Code* regarding notice and opportunity to cure prior to acceleration of their indebtedness and (ii) Defendant in multiple ways mishandled the servicing of Plaintiffs' loan."[34] Also citing *Ocwen, 491 F.3d at 638*, Plaintiffs respond that their breach of contract and negligence claims are not preempted by HOLA.[35]

(a) *HOLA*

In *Ocwen, 491 F.3d at 638*, the Seventh Circuit addressed the question of whether HOLA and the OTS regulations promulgated thereunder preempted claims based on state contract and tort law. The court noted that HOLA's preemptive force gave OTS the "exclusive authority to regulate the savings and loan **[*27]** industry in the sense of fixing fees (including penalties), setting licensing requirements, prescribing certain terms in mortgages, establishing requirements for disclosure of credit information to customers, and setting standards for processing and servicing mortgages," *id. at 643*, but that the OTS "has no power to adjudicate disputes between S&Ls [savings and loan associations] and their customers," and "HOLA creates no private right to sue to enforce the provisions of the statute or the OTS's regulations." Id.

"Against this background of limited remedial authority," the court held that HOLA did not preempt "basic state common-law type remedies" for people harmed by the actions of savings and loans. Id. The court explained that if a saving and loan association entered a mortgage agreement with an annual interest rate of 6 percent, and then proceeded to bill the homeowner at a rate of 10 percent and instituted foreclosure proceedings when the

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102, 2 L. Ed. 2d 80 (1957). In *Twombly, 127 S.Ct. at 1966*, the Supreme Court disavowed the "no set of facts" language from Conley. The Supreme Court explained that "[t]his phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id. at 1969*. Courts have applied this change generally and not limited its application to cases like Twombly that involve ***antitrust law***. Although this court's decision to grant in part Wachovia's Motion to Dismiss rests on the standard expressed in Twombly and Iqbal, the court would have reached the same decision had it applied the standard expressed in Conley.

[31] Defendant's Corrected First Amended Motion to Dismiss, Docket Entry No. 43, p. 6 ¶ 22.

[32] Id.

[33] Id. at 4 ¶ 18.

[34] Id. at 7 ¶ 25.

[35] Plaintiffs' Response to Defendant's First Amended Motion to Dismiss, Docket Entry No. 39, pp. 6-13.

homeowner refused to pay, "[i]t would be surprising for a federal regulation to forbid the homeowner's state to give the homeowner a defense based on the mortgagee's breach of contract." *Id. at 643-44*. The Ocwen court also observed that "if the mortgagee (or a servicer **[*28]** like Ocwen) fraudulently represents to the mortgagor that it will forgive a default, and then forecloses, it would be surprising for a federal regulation to bar a suit for fraud." *Id. at 644*. The court stated that "[e]nforcement of state law in either of the mortgage-servicing examples above would complement rather than substitute for the federal regulatory scheme." Id. The court also gave examples of claims that are clearly preempted: claims based upon a mortgagee's "failing to provide mortgagors with adequate monthly statements of their account balances, assessing 'excessive' late fees, and 'force placing insurance on properties that already have insurance coverage.'" *Id. at 646*. These claims, the court held, "could interfere with federal regulation of disclosures, fees, and credit terms." Id.

(b) Plaintiffs' Breach of Contract Claims are Not Preempted

In their breach of contract claims plaintiffs allege that:

> 34. Plaintiffs and Defendant entered into a contract by the executed loan agreement, promissory note, security agreement, and deed of trust.
> 35. The terms of these agreements prohibited any acceleration of the indebtedness unless all Texas laws regarding homesteads were followed.
>
> 36. Defendant failed to follow **[*29]** *Texas Property Code Section 51.002(d)* regarding notice and the opportunity to cure.
> 37. Thus, Defendant breached the contract by placing Plaintiffs' homestead for foreclosure sale without meeting the terms of the agreement and the statutory requirements for foreclosure sale.
> 38. Defendant wrongfully withdrew $100,000 of mortgage payments.
> 39. In light of the above described facts, Plaintiffs seek recovery from Defendant for breach of contract.[36]

Wachovia argues that HOLA preempts plaintiffs' breach of contract claims because they arise out of the servicing and processing of the loan and concern disbursements and repayment.[37] Since, however, plaintiffs allege that the source of the rights they seek to enforce is not state law but, instead, the loan documents that allegedly incorporate state law rights, plaintiffs' breach of contract claims are not preempted because they seek to hold the defendant liable for failing to perform obligations imposed by the loan documents. See *Ocwen, 491 F.3d at 643-44* ("[i]t would be surprising for a federal regulation to forbid the homeowner's state to give the homeowner a defense based on the mortgagee's breach of the contract").

(c) Plaintiffs' Negligence Claims Are Not Preempted

Plaintiffs' negligence claims are based **[*30]** on allegations that

> 50. Wachovia provided false information to Plaintiffs in the course of servicing Plaintiff's promissory note.
> 51. Wachovia did not exercise proper care or competence in obtaining or communicating information about suspending payments on Plaintiffs' promissory note and withdrawing approximately $100,000 over and above what the promissory note required.
> 52. Plaintiffs suffered pecuniary loss by relying on the information Wachovia provided to them.
> 53. Wachovia knew their misrepresentations or omissions were false when made, or made recklessly without any knowledge of the truth and as a positive assertion, or made negligently.
> 54. Wachovia made these representations or omissions with the intention Plaintiffs would act on them.
> 55. Plaintiffs acted in reliance on Wachovia's misrepresentations and omissions and as a result suffered damages.
> 56. Wachovia's negligence was also gross negligence.[38]

[36] Plaintiffs' First Amended Original Complaint, Docket Entry No. 17, p. 6 ¶¶ 34-39.

[37] Defendant's Corrected First Amended Motion to Dismiss, Docket Entry No. 43, pp. 11-12 ¶¶ 43-44.

[38] Plaintiffs' First Amended Original Complaint, Docket Entry No. 17, pp. 8-9 ¶¶ 50-56.

Asserting that "Plaintiffs specifically allege that Defendant 'provided false information to Plaintiffs[] in the course of servicing Plaintiffs' promissory note,'"[39] Wachovia argues that plaintiffs' claims for negligent misrepresentation, negligence, and gross negligence are preempted by HOLA **[*31]** because plaintiffs admit that these claims arise out of the servicing and processing of plaintiffs' loan. The court is not persuaded by Wachovia's argument. Plaintiffs' negligence claims are not preempted because they are not based on misrepresentations that were allegedly made in relation to the formation of the underlying contract but, instead, in relation to plaintiffs' attempt to cure a default. See *Ocwen, 491 F.3d at 644* ("if the mortgagee . . . fraudulently represents to the mortgagor that it will forgive a default, and then forecloses, it would be surprising for a federal regulation to bar a suit for fraud").

2. Plaintiffs' Texas DTPA Claims are Subject to Dismissal

Wachovia argues that plaintiffs' claims for violation of the *Texas Deceptive Trade Practices Act* should be dismissed "[b]ecause [p]laintiffs cannot claim 'consumer' status as a matter of law."[40] Citing *Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707-08 (Tex. 1983)*, plaintiffs respond that they are able to maintain a DTPA action against Wachovia because the object of the transaction at issue is a good, i.e., their home.[41]

A person qualifies as a consumer under the *DTPA* by meeting two requirements: (1) the person must seek or acquire goods or services by lease or purchase, *Tex. Bus. & Com. Code. § 17.45(4)*; and (2) the goods or services sought or acquired **[*32]** must form the basis of the person's complaint. *Melody Home Manufacturing Co. v. Barnes, 741 S.W.2d 349, 351-52 (Tex. 1987)*. Whether a person meets these requirements is a question of law. *Johnson v. Walker, 824 S.W.2d 184, 187 (Tex. App. -- Fort Worth 1991, writ denied)*. In determining whether a plaintiff is a consumer, the focus is on the plaintiff's relationship to the transaction, not the contractual relationship between the parties. See *Ortiz v. Collins, 203 S.W.3d 414, 424 (Tex. App. -- Houston [14th Dist.] 2006, no pet.)* (citing *Flenniken, 661 S.W.2d at 707*). Generally, a person cannot qualify as a consumer if the underlying transaction is a loan because money is considered neither a good nor a service. *Riverside National Bank v. Lewis, 603 S.W.2d 169, 173-76 (Tex. 1980)* (holding that the refinancing of a car loan did not confer consumer status on the debtor). See also *Walker v. FDIC, 970 F.2d 114, 123-24 (5th Cir. 1992)* (holding that loan transactions are not covered by the Texas DTPA). Other courts have applied the Riverside holding to modifications of existing loans, concluding that loan modifications are neither goods nor services and cannot form the basis of a claim under the DTPA. See *Fix v. Flagstar Bank, FSB, 242 S.W.3d 147, 160 (Tex. App. -- Fort Worth 2007, pet. denied)* ("Because the Fixes had already purchased their house, the Flagstar refinance merely extended credit to the Fixes. As such, the refinance cannot qualify as a good or a service under the DTPA.").

Citing *Flenniken, 661 S.W.2d at 706*, plaintiffs assert that they qualify as consumers because their real property qualifies as a good, which is the basis of his complaint. In *Flenniken* the plaintiffs executed **[*33]** a note and materialman's lien to a builder for the construction of a home on their property. On the same day, the builder assigned the note and the lien to a bank in return for interim financing on the construction job. The bank disbursed the entire loan amount to the builder even though the builder completed only twenty percent of the work. The builder subsequently abandoned the job, and the plaintiffs stopped paying on the note. The bank then foreclosed on the property under the terms of the deed of trust. The bank later conceded that the foreclosure was wrongful. See *Longview Bank & Trust Co. v. Flenniken, 642 S.W.2d 568, 570 n.2 (Tex. App. -- Tyler 1982)*, rev'd, *661 S.W.2d 705 (Tex. 1983)*. Without overruling *Riverside, 603 S.W.2d at 169*, the Texas Supreme Court held the bank liable on a DTPA claim. See *Flenniken, 661 S.W.2d at 706*. In so doing, the Texas Supreme Court did not differentiate between the plaintiffs' transaction with the builder and the builder's transaction with the bank but, instead, viewed the transaction as a whole from the buyer's perspective. Id. The court reasoned that the plaintiffs were consumers because they "did not seek to borrow money; they sought to acquire a house." *Id. at 707-08*.

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[39] Defendant's Corrected First Amended Motion to Dismiss, Docket Entry No. 43, p. 12 ¶ 47 (emphasis in original).

[40] Id. at 18 ¶ 67.

[41] Plaintiffs' Response to Defendant's First Amended Motion to Dismiss, Docket Entry No. 39, p. 15.

The rationale in *Flenniken* is inapplicable here. Although plaintiffs argue that their real property qualifies as a good, their complaint makes clear that **[*34]** they are actually complaining about Wachovia's failure to extend additional credit by modifying their loan as allegedly promised. Plaintiffs do not complain about a defect with their house, and they do not complain that they were denied a house they borrowed money to buy because of an error by the bank as occurred in Flenniken. Instead, when the acts about which the plaintiffs complain occurred, plaintiffs already owned the house that is subject to the mortgage at issue. Since the plaintiffs' house is not the basis of their complaint, the court concludes as a matter of law that plaintiffs' DTPA claim is subject to dismissal because plaintiffs do not qualify as "consumers" under the DTPA. See *Walker v. Fed. Deposit Ins. Corp., 970 F.2d 114, 123 (5th Cir. 1992)* (distinguishing cases where complaints concern tangible property as opposed to a loan, the court held that a plaintiff who borrows money, even if incidental to a completed mortgage loan, is not a consumer for purposes of the DTPA, and noting that the "strict interpretation" line of cases in which courts decline to find that similarly situated loan recipients were consumers, represented "the wisest and most logical course"). See also *Fix, 242 S.W.3d at 160-61* (holding that refinancing of purchased home is not a good or **[*35]** service for purposes of qualifying as a consumer under the DTPA).

3. Plaintiffs' RESPA Claims are Subject to Dismissal

Wachovia argues that plaintiffs' claims for violation of the Real Estate Settlement Procedures Act (RESPA) should be dismissed because plaintiffs allege that Wachovia has incorrectly administered their escrow account and a private cause of action does not exist for such acts.[42] Plaintiffs respond that

> Defendant violated *Section 2605(g)* which requires the servicer of a loan to make payments from an escrow account in a timely manner as such payments become due. *12 U.S.C. § 2605(g)*. Defendant violated this provision by failing to make the proper payments from he escrow account in a timely manner.[43]

In support of the argument that their RESPA claims should not be dismissed, plaintiffs cite ¶¶ 18-20 of their complaint, which allege:

> 18. Wachovia intentionally and deceptively overcharged Rocky approximately $100,000 in mortgage payments during the year 2008.
>
> 19. In 2009, due to an unforeseen decline in the United States economy, Rocky was not able to pay the 2008 property taxes on the homestead and contracted with Wachovia to pay the taxes and the amount would be added to the promissory note, making the previous $3,000/month **[*36]** payment, approximately $6,000/month.
> 20. When attempting to pay the new contracted amount, Wachovia refused acceptance of payment and instead instructed Julie Emery the new amount would be approximately $9,000 a month because Wachovia had to pay for insurance on the property.[44]

Plaintiffs point to *§ 2605(g)* as the section that Wachovia violated, but plaintiffs' complaint does not allege facts that would support claims for violation of this section. Instead, plaintiffs complain that Wachovia overcharged Rocky $100,000 in mortgage payments during the year 2008. Because plaintiffs have not alleged that Wachovia failed to make timely payments on their behalf, plaintiffs have failed to state claims for which relief may be granted under *12 U.S.C. § 2605(g)*. Accordingly, the court concludes that **[*37]** plaintiffs' RESPA claims are subject to dismissal.

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[42] Defendant's Corrected First Amended Motion to Dismiss, Docket Entry No. 43, p. 18 ¶¶ 68-71.

[43] Plaintiffs' Response to Defendant's First Amended Motion to Dismiss, Docket Entry No. 39, p. 17. *Section 2605(g)* provides:

> If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.

12 U.S.C. § 2605(g).

[44] Plaintiffs' First Amended Original Complaint, Docket Entry No. 17, p. 4 ¶¶ 18-20.

4. Plaintiffs' Negligence Claims are Subject to Dismissal

Wachovia argues that plaintiffs' claims for negligent misrepresentation, negligence, and gross negligence should be dismissed because these claims are conclusory allegations unsupported by any facts.[45] Plaintiffs respond that these claims are sufficiently pleaded.[46]

(a) Negligent Misrepresentation Claims

The elements of negligent misrepresentation under Texas law are: (1) the representation is made by a defendant in the course of his business, or in a transaction in which the defendant has a pecuniary interest; (2) the defendant supplied false information for the guidance of others in their businesses; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *Horizon Shipbuilding, Inc. v. BLyn II Holding, LLC, 324 S.W.3d 840, 850 (Tex. App. -- Houston [14th Dist.] 2010, no pet.)* (citing *Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 686 n.24 (Tex. 2002))*. "In a cause of action for negligent misrepresentation, the misrepresentation at issue must be one of existing fact." *BCY Water Supply Corp. v. Residential Investments, Inc., 170 S.W.3d 596, 603 (Tex. App. -- Tyler 2005, pet. denied)*. "A promise to do or refrain from doing an act in the future is not actionable because it does not concern an existing fact." Id. (citing *Miksch v. Exxon Corp., 979 S.W.2d 700, 706 (Tex. App. -- Houston [14th Dist.] 1998, pet. denied))*.

Plaintiffs **[*38]** argue that their claims for negligent misrepresentation are sufficient to withstand Wachovia's motion to dismiss because they have alleged that

> Defendant told the Emerys the new amount under their loan was to include the loan payment and the 2008 property taxes. . . However, after the modification was entered into, Defendant stated the new amount was to include the original loan payment, 2008 property taxes, and insurance for the property despite the fact that the Emerys paid for insurance out of their own pocket. . . Defendant also represented that the Emerys' loan payments would be suspended during their application for government assistance. . . However, again, once the Emerys relied on the representations that their loan payment would be suspended and stopped making payments, Defendant charged them for the payments during the application period.[47]

Plaintiffs' claims for negligent misrepresentation fail because the misrepresentations about which they complain are not misrepresentations of existing fact but are, instead, promises to do or refrain from doing an act in the future. Promises of future conduct are insufficient to support a claim for negligent misrepresentation. *BCY Water Supply, 170 S.W.3d at 603*. Accordingly, **[*39]** plaintiff's claims for negligent misrepresentation will be dismissed.

(b) Negligence Claims

Under Texas law the elements of a negligence claim are: (1) a legal duty owed by one person to another, (2) breach of that duty, and (3) damages proximately caused by the breach. See *Lane v. Halliburton, 529 F.3d 548, 565 (5th Cir. 2008)* (citing *Sport Supply Group, Inc. v. Columbia Casualty Co., 335 F.3d 453, 466 (5th Cir. 2003))*. Where there is a contract between the parties, the duty must arise independently of the fact that a contract exists between the parties (i.e., there must be an independent obligation/duty imposed by law). See *American National Ins. Co. v. IBM Corp., 933 S.W.2d 685, 686 (Tex. App. -- San Antonio 1996, writ denied)*. See *Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex. 1986)* ("The 'nature of the injury' most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of the contract itself, the action sounds in contract alone."). Moreover, "[t]o be entitled to damages for negligence, a party must plead and prove something more than mere economic harm." *Blanche v. First Nationwide Mortgage Corp., 74 S.W.3d 444, 453 (Tex. App. -- Dallas 2002, no pet.)*.

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[45] Defendant's Corrected First Amended Motion to Dismiss, Docket Entry No. 43, p. 19 ¶ 74.

[46] Plaintiffs' Response to Defendant's First Amended Motion to Dismiss, Docket Entry No. 39, pp. 17-19.

[47] Id. at 18-19.

Plaintiffs argue that their claims for negligence are sufficient to withstand Wachovia's motion to dismiss because they have alleged that "Defendant's overcharging of their account of approximately $100,000 for improper payments under the loan agreements amounted to negligence."[48] Plaintiffs' claims for negligence fail because there is a contract between the parties and **[*40]** the duty not to overcharge arises from that contract, see *American National Ins., 933 S.W.2d at 686*, and because the only harm the plaintiffs allege they suffered is economic harm. See *Blanche, 74 S.W.3d at 453* (to be entitled to damages for negligence, a party must plead and prove something more than mere economic harm).

(c) Gross Negligence Claims

Under Texas law gross negligence is a heightened form of negligence. In addition to the ordinary elements of negligence, a claim for gross negligence requires proof of (1) an act or omission that viewed objectively from the actor's standpoint involved "an extreme degree of risk;" and (2) the actor had actual, subjective awareness of the risk and proceeded, nevertheless, with a conscious indifference by the negligent actor. See *Lane, 529 F.3d at 565* (citing *Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 921 (Tex. 1998))*.

Plaintiffs argue that their claims for gross negligence are sufficient to withstand Wachovia's motion to dismiss because they have alleged that

> Defendant held a grudge against Rocky Emery prior to their purchase of his home mortgage . . . Defendant's history with Rocky Emery demonstrates that Defendant had actual, subjective awareness of the wrongful treatment of the Emerys and its improper actions with regard to their loan, but Defendant proceeded with a conscious indifference **[*41]** to the rights, safety, or welfare of the Emerys. . . Further, the objective component is met in that a lender in the same position as Defendant would know that its actions toward the Emerys was wrong and would cause them to likely lose their home, yet Defendant proceeded anyway.[49]

Plaintiffs' claims for gross negligence fail for the same reasons that their claims for ordinary negligence fail, i.e., because the parties have a contract and the duties that the plaintiffs claim Wachovia breached arise from that contract, see *American National Ins., 933 S.W.2d at 686*, and because the only harm the plaintiffs allege they suffered as a result of Wachovia's gross negligence is economic harm. See *Blanche, 74 S.W.3d at 453* (to be entitled to damages for negligence a party must plead and prove something more than mere economic harm).

5. Plaintiffs' Breach of Contract Claims are Not Subject to Dismissal

Wachovia argues that plaintiffs' breach of contract claims should be dismissed because the plaintiffs admit to having defaulted under the terms of the Note and the Deed of Trust.[50] Wachovia explains that plaintiffs' admission that they have defaulted under the terms of the Note and the Deed of Trust means that their breach of contract claims are not adequately, specifically, **[*42]** or properly pleaded.[51] Plaintiffs respond that their breach of contract claims are sufficiently pleaded and not subject to dismissal because

> a close reading of the Emerys' Complaint demonstrates that they did not fail to comply with the Agreements because they negotiated a modification to include the 2008 property taxes and Defendant would not accept the proper payment under the modification. . . Further, the Emerys' allegations regarding overcharges totaling approximately $100,000 occurred prior to any default on payments.[52]

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[48] Id. at 19.

[49] Id.

[50] Defendant's Corrected First Amended Motion to Dismiss, Docket Entry No. 43, p. 16 ¶ 56.

[51] Id. ¶ 57.

[52] Plaintiffs' Response to Defendant's First Amended Motion to Dismiss, Docket Entry No. 39, pp. 14-15.

Wachovia's argument that the plaintiffs' breach of contract claims should be dismissed because they are not adequately pleaded is unpersuasive. Plaintiffs have alleged that Wachovia breached the terms of the loan documents by overcharging them approximately $100,000.00 in 2008. Although plaintiffs admit that in 2009 they were unable to pay the 2008 property taxes, since the default arising from their failure to pay property taxes did not occur until after plaintiffs allege that Wachovia overcharged them in breach of the parties' contract, plaintiffs have alleged sufficient facts to withstand Wachovia's motion to dismiss their breach of contract claims based **[*43]** on overcharging that occurred in 2008. Plaintiffs have also alleged that Wachovia breached the terms of the loan documents by placing their homestead for foreclosure sale in 2010. Although plaintiffs admit to not having paid the 2008 property taxes in 2009, plaintiffs allege that Wachovia agreed to modify the terms of the loan by increasing the monthly payment from approximately $3,000.00 to approximately $6,000.00; that plaintiffs made payments under the terms of the modified agreement; and that notwithstanding those payments, plaintiffs endured injury when Wachovia set their home for foreclosure sale without meeting the terms of the parties' agreement regarding notice and opportunity to cure. These allegations are sufficient to withstand Wachovia's *Rule 12(b)(6)* motion to dismiss plaintiffs' breach of contract claims. See *Aguiar v. Segal, 167 S.W.3d 443, 450 (Tex. App. -- Houston [14th Dist.] 2005, pet. denied)* ("The essential elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach.").

IV. Motions to Amend

Both parties seek leave to amend. *Federal Rule of Civil Procedure 15(a)* requires a trial court "to grant leave to amend **[*44]** 'freely,' and the language of this rule 'evinces a bias in favor of granting leave to amend.'" *Lyn-Lea Travel Corp. v. American Airlines, 283 F.3d 282, 286 (5th Cir. 2002)*. A trial court must possess a "substantial reason" to deny a request for leave to amend, id., but "leave to amend is by no means automatic." *Halbert v. City of Sherman, 33 F.3d 526, 529 (5th Cir. 1994)*. Decisions concerning motions to amend are "entrusted to the sound discretion of the district court." *Quintanilla v. Texas Television, Inc., 139 F.3d 494, 499 (5th Cir. 1998)*. In deciding whether to grant leave to amend the district court may consider the variety of factors in exercising its discretion, including undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment. *Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 598 (5th Cir. 1981)*. See also *Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L. Ed. 2d 222 (1962)* (recognizing bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment as plausible reasons for a district court to deny a party's request for leave to amend).

A. Plaintiffs' Request for Leave to Amend

The last section of plaintiffs' response to Wachovia's motion to dismiss is titled "Request for leave to **[*45]** amend."[53] Plaintiffs state that "if the Court is inclined to grant Defendant's request on any of the claims addressed in the Motion, [they] ask for leave to amend their Complaint to further set forth the factual basis of their claims with more particularity."[54] Plaintiffs acknowledge that they have amended their complaint once, but argue that leave to amend should be freely granted.[55] Although the plaintiffs were aware of the defendant's objections to their complaint as written because those objections appeared in the defendant's motion to dismiss, plaintiffs failed to furnish the court with a proposed amended complaint and failed to alert the court to any additional facts not previously pleaded that could cure the pleading defects raised by the defendant. Under these circumstances the

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[53] Id. at 20.

[54] Id.

[55] Id.

court is not persuaded that plaintiffs should receive another opportunity to plead their claims. See *McKinney v. Irving Independent School Dist., 309 F.3d 308, 315 (5th Cir. 2002)*, cert. denied, *537 U.S. 1194, 123 S.Ct. 1332, 154 L. Ed. 2d 1030 (2003)* (finding no abuse of discretion in the district court's denial of request for leave to amend where the plaintiffs failed to submit a proposed amended complaint together with a request for leave to amend and failed to alert the court to the substance of any proposed amendment). Accordingly, **[*46]** plaintiffs' request for leave to amend will be denied.

B. Wachovia's Motion for Leave to File First Amended Counterclaim

Wachovia seeks leave to file an amended counterclaim "to correct its legal name and assert that it is the owner and/or holder of the Note, which Counter-Defendants dispute."[56] Wachovia explains that "Counter-Defendants did not take this position in the Complaint, but have subsequently argued this position in briefings filed with the Court. Counter-Defendants will not be caused any unfair prejudice. . ."[57] Wachovia's proposed First Amended Counterclaim is attached to the pending motion. Plaintiffs have not objected to Wachovia's motion to file an amended counterclaim. Under these circumstances the court is persuaded that Wachovia's motion to file its first amended counterclaim should be granted.

V. Defendant's Motion for Adequate Protection

Asserting that the Note has been accelerated and that it remains in accelerated status, that since June of 2009 plaintiffs have continued to reside in the house without remitting mortgage payments or rent, and that Wachovia continues to pay ad valorem taxes on the property, Wachovia

> seeks adequate protection from the Court starting **[*47]** immediately, and it prays that the Court order Plaintiff[s] to pay into the Registry of the Court, for the benefit of Defendant, or to Defendant directly reasonabl[y] adequate protection/rent payments of at least the current principal, interest and escrow payment.[58]

Plaintiffs respond that they "are not opposed to the Motion with some exceptions."[59] Plaintiffs explain that they

> are unwilling to make payments to the Defendants directly. Furthermore, payments to the Court registry require needless expense and accounting. Therefore . . Plaintiffs are willing to make payments in the amount of $3,400, slightly more than their standard payment amount, into their attorneys' trust account until such time as this case is resolved. Plaintiffs' counsel will make a monthly accounting to Defendants to confirm such payments have been made. Plaintiffs will continue to maintain the insurance and taxes. Payments would . . . continue on the first of the month until such time as this case is resolved.[60]

Defendant replies that "[a]s of June 2009, Plaintiffs' contractual due date, Plaintiffs' monthly principal and interest payment was $3,490.66, exclusive of *ad valorem* taxes and hazard insurance,"[61] "Plaintiffs' monthly escrow payment for ongoing, **[*48]** current year's *ad valorem* taxes was $2,531.39,"[62] "Defendant was not escrowing Plaintiffs' loan for ongoing hazard insurance,"[63] "Plaintiffs' total monthly principal and interest and escrow for

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[56] Counter-Plaintiff's Motion for Leave to File First Amended Counterclaim, Docket Entry No. 46, p. 3 ¶ 11.

[57] Id.

[58] Defendant's Motion for Adequate Protection, Docket Entry No. 41, p. 3 ¶ 9.

[59] Plaintiffs', Rocky and Julie Emery, Response to Defendant's Motion for Protection, Docket Entry No. 56, p. 2.

[60] Id. at 2-3.

[61] Defendant's Reply to Plaintiffs' Response to Motion for Adequate Protection, Docket Entry No. 57, p. 2 ¶ 4.

[62] Id. ¶ 5.

ongoing, current year's taxes was $6,022.05,"[64] and "Plaintiffs also owned $3,515.66 per month towards the escrow shortage associated with Plaintiffs' loan following Defendant's payment of delinquent property taxes."[65] Wachovia asserts that it "has paid all known *ad valorem* taxes on the Property since the 2008 calendar year and all penalties and interest associated with same."[66]

Although plaintiffs' proposal for adequate protection payments does not include sums for escrow of *ad valorem* taxes and property insurance, plaintiffs admit that they were unable to pay the 2008 *ad valorem* taxes, and have neither alleged nor submitted any evidence that contradicts Wachovia's assertion that Wachovia -- not plaintiffs -- has paid all known *ad valorem* taxes on the property since the 2008 calendar year. Nor have plaintiffs explained why making adequate protection payments into the registry of the court would require needless expense and/or accounting. Accordingly, the court concludes that starting on **[*49]** January 10, 2012, and continuing on the 10th of each month until such time as this case is resolved, plaintiffs shall make adequate protection payments in the amount of $6,022.05 per month into the registry of the court. Plaintiffs will continue to maintain the insurance, and Wachovia will continue to pay the *ad valorem* taxes.

VI. Conclusions and Order

For the reasons explained in § II, above, the court concludes that Plaintiffs' Motion for Summary Judgment (Docket Entry No. 22) is **DENIED;** and Plaintiffs', Rocky and Julie Emery, Objection and Motion to Strike Affidavit (Docket Entry No. 30) is **DENIED as MOOT**.

For the reasons explained in § III, above, the court concludes that Wachovia has carried its burden of proving that plaintiffs' claims for violation of the Texas Deceptive Trade Practices Act, the Real Estate Settlement Practices Act, and for negligent misrepresentation, negligence, and gross negligence are subject to dismissal for failure to state a claim for which relief may be granted; but that Wachovia has not carried its burden of proving that plaintiffs' claims for breach of contract are subject to dismissal for failure to state a claim for which relief may be granted. Accordingly, **[*50]** Defendants' Corrected First Amended Motion to Dismiss Pursuant to *FRCP 12(b)(6)* (Docket Entry No. 43) is **GRANTED IN PART and DENIED IN PART**; and plaintiffs' claims for violation of the Texas Deceptive Trade Practices Act, the Real Estate Settlement Practices Act, and for negligent misrepresentation, negligence, and gross negligence are **DISMISSED**.

For the reasons explained in § IV, above, plaintiffs' request to amend their complaint contained in Plaintiffs' Response to Defendant's First Amended Motion to Dismiss (Docket Entry No. 39) is **DENIED**, and Counter-Plaintiff's Motion for Leave to File First Amended Counterclaim (Docket Entry No. 46) is **GRANTED**.

For the reasons explained in § V, above, Defendant's Motion for Adequate Protection (Docket Entry No. 41) is **GRANTED in PART and DENIED in PART**. Starting on January 10, 2012, and continuing on the 10th of each month until such time as this case is resolved, plaintiffs shall make adequate protection payments in the amount of $6,022.05 per month into the registry of the court. Plaintiffs will continue to maintain the insurance, and Wachovia will continue to pay the *ad valorem* taxes.

This case will be controlled by the following schedule:

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[63] Id.

[64] Id.

[65] Id.

[66] Id. ¶ 7.

1. February 17, **[*51]** 2012 COMPLETION OF DISCOVERY Written discovery requests are not timely if they are filed so close to this deadline that the recipient would not be required under the Federal Rules of Civil Procedure to respond until after the deadline.

2. March 2, 2012 JOINT PRETRIAL ORDER AND MOTIONS IN LIMINE Plaintiff is responsible for timely filing the complete joint pretrial order. The court will not accept separate versions of the pretrial order.

3. March 9, 2012 DOCKET CALL No instrument filed 4:00 p.m. within 7 days of docket call will be considered. All pending motions may be ruled on at docket call, and the case will be set for trial if the complete joint pretrial order has been filed.

No further dispositive motions will be allowed.

SIGNED at Houston, Texas, on this 21st day of December, 2011.

/s/ Sim Lake

SIM LAKE

UNITED STATES DISTRICT JUDGE

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Havens v. Mobex Network Servs., LLC

United States District Court for the District of New Jersey

December 22, 2011, Decided; December 22, 2011, Filed

Civ. Action No. 11-993 (KSH)

Reporter

2011 U.S. Dist. LEXIS 148654 *; 2011 WL 6826104

WARREN HAVENS, et al., Plaintiffs, v. MOBEX NETWORK SERVICES, LLC, et al., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Reconsideration denied by *Havens v. Mobex Network Servs., LLC, 2012 U.S. Dist. LEXIS 117947 (D.N.J., Aug. 20, 2012)*

Request denied by *Havens v. Mobex Network Servs., LLC, 2014 U.S. Dist. LEXIS 49968 (D.N.J., Apr. 8, 2014)*

Motion granted by *Havens v. Mobex Network Servs., 2014 U.S. Dist. LEXIS 67144 (D.N.J., May 14, 2014)*

Motion granted by, Sanctions disallowed by *Havens v. Mar. Communications/Land Mobile, LLC, 2014 U.S. Dist. LEXIS 68786 (D.N.J., May 20, 2014)*

Findings of fact/conclusions of law at, Judgment entered by *Havens v. Mar. Communications/Land Mobile, LLC, 2014 U.S. Dist. LEXIS 121729 (D.N.J., Sept. 2, 2014)*

Related proceeding at *Havens v. Mar. Communs./Land Mobile LLC, 2017 U.S. Dist. LEXIS 91425 (N.D. Miss., June 14, 2017)*

Related proceeding at *Havens v. Mar. Communs./Land Mobile Llc, 2017 U.S. Dist. LEXIS 91426 (N.D. Miss., June 14, 2017)*

Prior History: *In re Mobex Network Servs., LLC, 25 F.C.C.R. 3390, 2010 FCC LEXIS 1650 (F.C.C., Mar. 16, 2010)*
Havens v. Mobex Network Services et al., 2009 Cal. App. LEXIS 1773 (Cal. App. 1st Dist., Oct. 23, 2009)

Core Terms

licenses, Site-Based, Geographic, stations, licensees, plaintiffs', Communications, Sherman Act, Cooperation, antitrust, allegations, defendants', anti-competitive, monopolize, regulation, contour, res judicata, orders, spectrum, collateral estoppel, state court, competitors, concerted, counts, calculate, monopoly, carrier, amended complaint, motion to dismiss, radio frequency

Counsel: **[*1]** For WARREN HAVENS, SKYBRIDGE SPECTRUM FOUNDATION, a Delaware nonprofit corporation, TELESAURUS VPC, LLC, a Delaware limited liability company, AMTS CONSORTIUM, LLC, a Delaware Limited Liability Company, INTELLIGENT TRANSPORTATION & MONITORING, LLC, a Delaware Limited Liability Company, TELESAURUS GB, LLC, a Delaware Limited Liability Company, Plaintiffs: RODNEY NEILL TENDAI RICHARDS, WINNE, BANTA, HETHERINGTON, BASRALIAN, & KAHN, PC, HACKENSACK, NJ.

For PAGING SYSTEMS, INC., a California corporation, TOUCH TEL CORPORATION, a California corporation, Defendants: KENNETH FRIEDMAN, MANATT, PHELPS, & PHILLIPS, LLP, NEW YORK, NY.

Judges: Katharine S. Hayden, United States District Judge.

Opinion by: Katharine S. Hayden

Opinion

Katharine S. Hayden, U.S.D.J.

I. Introduction

This matter arises from a dispute over Federal Communication Commission ("FCC") licenses that permit the operation of Automated Maritime Telecommunications System ("AMTS") radio frequencies. Plaintiffs Warren Havens, Skybridge Spectrum Foundation, Telesaurus, VPC, LLC, AMTS Consortium, LLC, Intelligent Transportation & Monitoring, LLC, and Telesaurus GB, LLC (collectively "plaintiffs") assert that defendants Mobex Network Services, LLC, Mobex Communications, **[*2]** Inc., Maritime Communications/Land Mobile LLC, Paging Systems, Inc., and Touch Tel Corporation, are engaged in a scheme to hoard certain types of AMTS licenses, in violation of FCC regulations, with the goal of harming plaintiff's business. To that end, plaintiffs assert claims under the Federal Communications Act of 1934 and the Sherman Antitrust Act. In this motion to dismiss, defendants allege that plaintiffs' claims are barred under res judicata and collateral estoppel, and that plaintiffs' complaint fails to put forth an adequate claim on each of its three counts.

II. Factual Background and Procedural History

A. The Facts as Pleaded

The following facts are derived from plaintiff's second amended complaint.

Plaintiff Warren Havens is in the business of obtaining FCC Geographic licenses in the AMTS radio service. (Second Am. Compl. ¶ 2.) He is "the founder, majority owner, manager, and president of the other Plaintiffs." (*Id.*) Those plaintiffs are each either limited liability companies or nonprofit corporations in the business of obtaining FCC licenses for AMTS radio service "to provide spectrum and wireless telecommunications services to governmental and non-governmental entities **[*3]** within the State of New Jersey and other states." (*Id.* ¶¶ 3-7.)

The case involves three defendants. The first, Paging Systems, Inc. ("PSI"), is the holder of "Site-Based" AMTS licenses, including some with stations designated for location in New Jersey. (*Id.* ¶ 10.) The second, Touch Tel Corp. ("Touch Tel"), constructs and operates PSI's AMTS stations across the country. (*Id.*) Although the complaint equivocates as to precisely who owns each company, that issue is not relevant for purposes of this motion, and it suffices to say that Robert and Susan Cooper, husband and wife, together own and operate the companies in their joint operations. (*Id.*) The third and fourth defendants are Maritime Communications/Land Mobile, LLC ("MCLM") [1] and Mobex Network Services LLC ("Mobex"). MCLM is the holder of site-based licenses in New Jersey, which it obtained upon its purchase of Mobex. (*Id.* ¶ 8-9.) The sole owner of MCLM is Rev. Sandra Depriest, though plaintiffs allege that her husband, Donald Depriest, actually controls MCLM's operations. (*Id.* ¶ 8.)

This case revolves around FCC-issued ATMS licenses. "AMTS is a common-carrier Commercial Mobile Radio Service . . . licensed throughout the United States, which provides when in operation voice and communications to

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[1] Because of ongoing bankruptcy proceedings in the Northern District of Mississippi, the litigation is presently stayed as to MCLM. MCLM figured in the **[*4]** parties' submissions on the motion to dismiss because those submissions were filed prior to the entry of the stay order. The stay precludes anything in this opinion from affecting MCLM at this time.

customers." (*Id.* ¶ 16.) Originally created for the benefit of maritime customers along costal and navigable water routes, it has expanded to include land service along the Northeast Corridor. (*Id.*) AMTS licenses fall into two categories: Site-Based and Geographic. A Site-Based license is a "license issued by the FCC on a first-come, first-served basis, at no cost (except for nominal application processing fees)." (*Id.* ¶ 17.) These licenses provide for operation only at a specific station whose location is provided in the license. (*Id.*) Until 2004, all AMTS licenses were Site-Based. (*Id.* ¶ 18.)

The second type of license is a Geographic license, which is "issued by the FCC to a high bidder in a public auction, which authorizes to the licensee exclusive use of specified radio frequencies **[*5]** to construct and operate wireless telecommunications stations within a defined wide geographic area." (*Id.* ¶ 17.) The FCC began auctioning AMTS Geographic licenses in 2004. (*Id.* ¶ 18.)

To protect Site-Based license holders whose licenses incorporate areas located within the same area granted in a Geographic license, FCC regulations provide that Site-based stations are entitled to "continue their station operations without excessively close-spaced co-channel Geographic-Licensed Stations that may cause radio interference." (*Id.*) To that end, "the Geographic Licensee [may] build and operate stations no closer than a certain range of lawful stations operated under a valid co-channel (same frequencies) Site-based AMTS license." (*Id.* ¶ 21.) That distance is the shorter of 120 kilometers and the actual transmitting distance of the Site-Based station as determined through a specific, technical formula. (*Id.* (citing *47 C.F.R. § 80.385*).) If a Site-Based license is terminated, revoked, or found invalid, its covered radio frequencies will revert to the overlapping Geographic license for that area. (*Id.* ¶ 18.)

The plaintiffs in this case collectively hold AMTS Geographic Licenses covering a majority **[*6]** of the United States, including New Jersey. (*Id.* ¶ 19.) Defendants hold the AMTS Site-Based licenses in various places across the country including New Jersey. (*Id.* ¶ 20.) Plaintiffs assert that Site-Based licensees are expected to provide information to the overlapping Geographic licensees so that the Geographic licensees may calculate the Site-Based station's transmitting distance. (*Id.* ¶ 22.)

Plaintiffs and defendants are competitors, and plaintiffs complain that defendants have failed to provide them with the necessary information to allow them to know the protected contour of the defendants' stations. (*Id.* ¶ 23.) Defendants have refused to provide this information notwithstanding three FCC "Cooperation Orders" and the FCC's regulatory disclosure requirements. (*Id.*)

Plaintiffs assert that defendants are "motivated by an anticompetitive purpose and intend to block and restrain Plaintiffs as competitors." (*Id.* ¶ 27.) Specifically, plaintiffs allege that even though FCC regulations require Site-Based AMTS licensees to construct stations within two years of obtaining a license, defendants have not actually constructed those stations and are therefore refusing to disclose their stations' **[*7]** operating contours because such disclosure would reveal that the stations do not exist, thereby resulting in the Site-Based license rights reverting to plaintiffs as the Geographic licensees for the relevant region. (*Id.* ¶¶ 27-30.) This practice is known as "warehousing," and it "occurs when a party acquired spectrum licenses without the intent to utilize them lawfully" and instead "squat[s]' on the spectrum until a buyer is found." (*Id.* ¶ 31.)

In the course of discussions with defendants, Havens learned that PSI and the company now known as Mobex were cooperating on management of their licenses, such as that they would locate their stations at the same sites to reduce costs, and that Mobex held an option on PSI's licenses. (*Id.* ¶¶ 36-39.)

Plaintiffs' first count demands an injunction under *47 U.S.C. § 401(b)* to require defendants to disclose the information necessary to calculate the contours of their Site-Based stations. (*Id.* ¶¶ 46-54.) Plaintiffs' second count seeks damages for violations of the Federal Communications Act, as permitted under *47 U.S.C §§ 206-07*. (*Id.* ¶¶ 55-63.) Plaintiffs' third count seeks damages for violations of the Sherman Act, *15 U.S.C. § 1-2*. (*Id.* ¶¶ 64-73.)

B. [*8] The California Litigation

In 2005, plaintiffs (except for Skybridge Spectrum Foundation) filed a complaint in California Superior Court against Mobex and MCLM, claiming interference with prospective economic advantage, fraud, negligent misrepresentation, unfair competition, and breach of contract. (Friedman Cert., Ex. A.) Defendants removed the case to the Northern District of California, and the plaintiffs filed an amended complaint and later voluntarily dismissed the action. (Friedman Cert., Exs. A & B.)

In 2007, plaintiffs (except for Skybridge Spectrum Foundation) filed another complaint in California Superior Court against Mobex, MCLM, and PSI, this time alleging a violation of the Cartwright Act (a California state ***antitrust law***), two counts of interference with prospective economic advantage, two counts of fraud, negligent misrepresentation, two counts of unfair competition, intentional interference with contracts, and two counts of conversion. (Mauriello Cert., Ex. I.) On June 2, 2008, the California state court dismissed the action, holding that the claims were preempted under the Federal Communications Act ("FCA"), *see* *47 U.S.C. § 332(c)(3)(A)*, because determination of the **[*9]** matter would require the court to assess whether defendants violated the FCA. (Mauriello Cert., Ex. J.)

C. Procedural History

On June 20, 2008, plaintiffs filed a complaint in the District of New Jersey, originally under civil docket number 08-3094. On October 14, 2008, plaintiffs filed a first amended complaint. After the California matter concluded and defendants filed a motion to dismiss on February 7, 2011, plaintiffs submitted a second amended complaint under docket number 11-993. Defendants filed a motion to dismiss.

On August 4, 2011, defendants MCLM and Mobex Network Services, LLC submitted to the Court a Notice of Bankruptcy Case Filing. On August 10, 2011, the Court entered an order staying this matter as to those defendants pending the disposition of the bankruptcy matter. On November 7, 2011, the Court lifted the order as to Mobex because only MCLM actually filed for bankruptcy.

III. Standard of Review

Federal Rule of Civil Procedure 8(a)(2) provides that a claim for relief must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Although a plaintiff need not submit "detailed factual allegations" to plead a case, the *Rule* requires **[*10]** that the complaint include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Mere "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do,'" unless the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly, 550 U.S. at 556-57, 570)*. Ultimately, the complaint must contain sufficient facts to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also* Phillips v. Cnty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008).

When a court decides a motion under *Rule 12(b)(6)*, it "must accept as true all of the allegations contained in a complaint," provided that they are factual allegations and not masked legal conclusions. *Iqbal, 129 S. Ct. at 1949-50*.

IV. Discussion

Defendants argue first that the Court is barred from deciding this case under principles of res judicata and collateral estoppel. They then argue that plaintiffs have failed to state a claim on each of **[*11]** the three counts in the complaint.

A. The California Litigation

1. Res Judicata

Defendants argue that res judicata applies because the facts underlying this case are the same as the facts upon which the now-dismissed California state litigation was based.

The purpose of res judicata is to "promote[] judicial economy and protect[] defendants from having to defend multiple or nearly identical lawsuits by 'bar[ing] not only claims that were brought in a previous action, but also claims that could have been brought.'" *Morgan v. Covington Twp., 648 F.3d 172, 177 (3d Cir. 2011)* (quoting *In re Mullarkey, 536 F.3d 215, 225 (3d Cir. 2008))* (third alteration in original). To that end, a second suit is barred "when there exists '(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action.'" *Id.* (quoting *Mullarkey, 536 F.3d at 225*). Res judicata applies whenever "there is an 'essential similarity of the underlying events giving rise to the various legal claims.'" *CoreStates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 194 (3d Cir 1999)* (quoting *United States v. Athlone Industries, Inc., 746 F.2d 977, 984 (3d Cir. 1984)*). **[*12]** In other words, res judicata will prevent a party from re-litigating not only the precise theory of recovery, but also any other theory invoking the same underlying facts.

The doctrine, however, is not without its limitations. "Ordinarily, a party will not be precluded from raising a claim by a prior adjudication if the party did not have the opportunity to fully and fairly litigate the claim." *Id. at 197* (citing *Restatement (Second) of Judgments § 26(1)(c)*). A claim will not be extinguished if "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on subject matter jurisdiction of the courts." *Restatement (Second) of Judgments § 26(1)(c)*.

Here, the complaint alleges claims under the Federal Communications Act ("FCA") and the Sherman Act. Both of these statutes explicitly limit a plaintiff's recourse in court to federal district courts. *See* *15 U.S.C. § 15(a)*; *47 U.S.C. § 207*. These claims could not have been brought to the California state court in the previous action. Defendants acknowledge as much, arguing that "Plaintiffs conveniently ignore that they could have filed (but did **[*13]** not) the California Action in federal district court rather than state court." (Defs.' Reply Br. Supp. Mot. Dismiss 3.) This argument twists the res judicata exception for exclusive federal jurisdiction into a requirement that plaintiffs either bring their initial claims to the federal forum or forfeit their federal counts. Plaintiffs could have sought relief in federal court, but they did not. Instead they brought their claims in a state court that lacked jurisdiction to entertain the FCA and Sherman Act claims. Therefore, res judicata cannot apply.

2. Collateral Estoppel

Defendants argue that collateral estoppel precludes re-litigation of the following issues because they were decided in the motion to dismiss the California case:

> (1) plaintiffs failed to establish a predicate wrong under the Communications Act because they failed to allege facts sufficient to show that the FCC has finally determined that Defendants wrongfully retained cancelled licenses; (2) alleging that certain licenses have 'automatically terminated and were subsequently identified by the FCC as cancelled' is not sufficient to establish a predicate wrong under the Communications Act; and (3) the determination of **[*14]** whether there was a predicate wrong under the Communications Act is a question for the FCC, not a court of law.
> (Defs.' Br. Supp. Mot. Dismiss 18.)

Collateral estoppel provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 247 (3d Cir. 2010)* (quoting *Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979))*. Application of collateral estoppel requires the satisfaction of four elements: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." Id. at 247-48 (quoting Szehinskyj v. Attorney Gen. of the United States, 432 F.3d 253, 255 (3d Cir. 2005)). [2]

Here, the claim for collateral estoppel fails on the first element because the identical issue has not already been decided. The California court dismissed the case because "the claims set forth in the [Second Amended Complaint] come within the express preemption clause of the Federal Communications Act ("FCA") at 47 U.S.C. § 332(c)(3)(A)." (Mauriello Cert., Ex. J, at 3, 4.) The court's decision was relatively narrow, and defendants overstate its depth. For example, although the court found that plaintiffs' allegation "that certain licenses have 'automatically terminated and were subsequently identified by the FCC as cancelled'" was insufficient to demonstrate that the FCC has made a final decision on the matter, the court addressed that claim only in the context of making certain that the FCC had not decided potentially preempted claims. (*See id.* at 3, 4.) Moreover, the court never said that the determination of a predicate wrong is strictly one for the FCC; rather, it simply observed that state courts are precluded from addressing such questions under 47 U.S.C. § 332(c)(3)(A). **[*16]** (*See id.*)

The California court determined that state courts lack jurisdiction to hear certain claims under the FCA. Because this Court is not a state court, that determination is irrelevant and does not bar this Court's consideration of the issues presented in that prior litigation.

B. Availability of Relief Under 47 U.S.C. § 401(b)

Defendants argue that plaintiffs are not entitled to relief under 47 U.S.C. § 401(b) because that provision does not provide a private right of action in these circumstances. Section 401(b) provides that

> [i]f any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, . . . any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or **[*17]** to enjoin upon it or them obedience to the same.

Plaintiffs' complaint seeks to have the Court enter an order "directing Defendants . . . to comply with the Cooperation Orders and 47 C.F.R. 80.385(b)(1), and specifically requiring Defendants to provide Plaintiffs the required information to enable Plaintiffs to calculate the protected contour of Defendants' Site-Based AMTS stations and thus the portions of Plaintiffs' same-channel Geographic licenses they may use." (Second Am. Compl. ¶¶ 32-33.) Defendants counter that neither the "Cooperation Orders" nor 47 C.F.R. § 80.385(b)(1) constitute "orders" within the meaning of the FCA.

The definition of the term "order" has generated a circuit split and the Third Circuit has yet to address the question. In *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine, 742 F.2d 1, 4 (1st Cir. 1984)* (Breyer, J.), the First Circuit held that an FCC decision that arose via the Commission's rulemaking authority was not an "order" under section 401(b). The court based its reasoning on several factors: first, the Administrative Procedure Act defines the word "order" as including "final **[*18]** dispositions . . . in a matter other than rulemaking," *New Eng. Tel. & Tel. Co., 742 F.2d at 5* (quoting 5 U.S.C. § 551(6)); second, a broad definition of the term "order" would threaten the principle that enforcement should be left to the FCC, *id.*; third, a broad definition would "threaten[] the sound development of a coherent nationwide communications policy," *id.*; fourth, given that review of an FCC decision is obtained through the courts of appeals, "the Act's statutory review provisions can be read more

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[2] The parties cite the five-factor test articulated in California courts. *See* Lucido v. Super. Ct. of Mendocino Cnty., 51 Cal. 3d 335, 272 Cal. Rptr. 767, 795 P.2d 1223, 1225 (Cal. 1990), *cert. denied*, ***500 U.S. 920, 111 S. Ct. 2021, 114 L. Ed. 2d 107 (1991)***. Because the **[*15]** tests are substantively the same in all respects relevant here, the different articulations do not change the outcome.

fairly and coherently if *401(b)* is construed narrowly" to limit the ability of district courts to engage in interpretation of agency decisions, *id. at 6*; fifth, other provisions of the Communications Act "use the word 'order' in a way that seems to envision Commission decisions requiring specific actions of specific carriers," *id. at 7*; and sixth, a narrower view of the definition helps avoid "issue splitting and procedural complexity," *id.* Accordingly, the court concluded that the term "order" in *section 401(b)* refers only to "adjudicatory" orders. *Id. at 9*.

At the other end, in *Hawaiian Telephone Co. v. Public Utilities Commission of State of Hawaii, 827 F.2d 1264, 1271 (9th Cir. 1987)*, **[*19]** the Ninth Circuit explicitly rejected the First Circuit's interpretation. Specifically, the Ninth Circuit saw no reason to import definitions from the Administrative Procedure act into *section 401(b)* and did not share the First Circuit's concern that the broader definition of the word "order" would hinder the FCC's enforcement role. *Hawaiian Tel. Co., 824 F.2d at 1271-72*. The court ultimately reserved judgment on the issue of "whether every rule, order, or regulation promulgated by the FCC is an enforceable order under *§ 401(b)*," holding that the order immediately at issue met the necessary criteria because it "require[d] particular actions be taken by [defendant] and private carriers providing service to Hawaii." *Id. at 1272*.

In its only case confronting this issue, the Third Circuit concluded that "an agency regulation should be considered an 'order' if it requires a defendant to take concrete actions." *Mallenbaum v. Adelphia Commc'ns Corp., 74 F.3d 465, 468 (3d Cir. 1996)*. The court recognized the circuit split but held that it did not need to take sides because the "order" at issue did not require "a particular action to be taken by the defendant." *Id. at 468 & n.5*.

Here, plaintiffs' **[*20]** *section 401(b)* claim seeks an order requiring defendants to disclose "the protected contour of [their] Site-Based AMTS stations." To that end, plaintiffs point to three orders. The first order is a response to MCLM's request for clarification on FCC rules. (Second Am. Compl., Ex. 1.) The Commission granted the request in part and denied it in part. With regard to one part of the request for clarification, the Commission held that a "geographic licensee's co-channel interference protection obligations" should be based on "actual operating parameters" rather than "maximum permissible operating parameters." (*Id.*) In a footnote to this remark, the Commission cited a prior order in another case and added that "[a]s we noted in that decision, we expect incumbent AMTS licensees 'to cooperate with geographic licenses in order to avoid and resolve interference issues. This includes, at a minimum, providing upon request sufficient information to enable geographic licensees to calculate the site-based station's protected contour.'" (*Id.*)

The second order addressed an application that touched on PSI's site-based AMTS license at the World Trade Center. (Second Am. Compl., Ex. 2.) The Commission **[*21]** noted that the petitioner in that case "had to make certain assumptions regarding Station WQA216's technical parameters, given the destruction of the WTC on September 11, 2001." (*Id.*) In a footnote to that statement, the Commission again stated that "AMTS site-based incumbents are expected to cooperate with geographic licensees in order to avoid and resolve interference issues. . . . This includes, at a minimum, providing upon request sufficient information to enable geographic licensees to calculate the site-based station's protected contour." (*Id.*)

The third order is a motion for reconsideration regarding the earlier co-channel interference decision. The Commission declined to reconsider its decision to "abandon the use of actual ERP for determining co-channel interference protection," again observing that "AMTS site-based licensees are expected to cooperate with geographic licensees in avoiding and resolving interference issues and that this obligation requires, at a minimum, that the site-based licensee 'provid[e] upon request sufficient information to enable geographic licensees to calculate the site-based station's protected contour.'" (Second Am. Compl., Ex. 3.)

The Court need **[*22]** not decide which circuit's definition of the term "order" is correct because the cited orders fall short under either definition. In each of the three orders, the FCC discussed matters related to the interplay between Site-Based licenses and Geographic licenses, but the FCC never explicitly confronted the question of how much cooperation is necessary. To be sure, each order offered interpretive guidance, but the orders never required defendants engage in any particular disclosure. Rather, the FCC addressed the cooperation requirements in terms of "expectations," not specific mandates capable of judicial enforcement. Similarly, *47 C.F.R. § 80.385(b)(1)* also does not "require[] a particular action to be taken by a defendant," *Mallenbaum, 74 F.3d at 468*, because it dictates only where a Geographic licensee may locate its stations, not what technical details the Site-Based licensees must disclose. In the absence of an FCC order against defendants on this issue, the Court may not enter an injunction requiring defendants' compliance, and plaintiffs have failed to state a claim.

C. Private Right of Action under *47 U.S.C § 201(b)*

Plaintiffs seek recovery for damages under *47 U.S.C. § 207*, which **[*23]** provides that

> [a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

With regard to liability for damages in general, a common carrier such as defendants, who "do[es], or cause[s] or permit[s] to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or . . . omit[s] to do any act, matter, or thing in this chapter required to be done," is "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter." *47 U.S.C. § 206*.

In substance, plaintiffs claim that defendants violated *47 U.S.C. § 201(b)*, which states: "All charges, practices, classifications, and regulations for and in connection with [a common carrier] communication service, shall be just and reasonable, and any such **[*24]** charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." Therefore, if defendants' alleged conduct is "unjust or unreasonable," then it is unlawful and plaintiffs have stated a claim.

Notwithstanding the grant of jurisdiction in *section 207*, courts are constrained in what they may and may not find to be a violation. Specifically, "the lawsuit is proper if the FCC could properly hold that [the challenged practice] is an 'unreasonable practice' deemed unlawful under *§ 201(b)*." *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45, 52-53, 127 S. Ct. 1513, 167 L. Ed. 2d 422 (2007)*. Accordingly, as the Ninth Circuit stated in a case on which both parties rely, "[I]t is within the Commission's purview to determine whether a particular practice constitutes a violation for which there is a private right to compensation." *N. Cnty. Commc'ns Corp. v. Cal. Catalog & Tech., 594 F.3d 1149, 1158 (9th Cir. 2010)*. If a party asks a court to find a violation of *section 201(b)* in the absence of an FCC determination that the defendant's conduct generally violates that provision, then it is a request "that the federal courts fill in the analytical gap," and such a **[*25]** request cannot be granted because it would "put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission." *Id.* (quoting *Greene v. Sprint Communs. Co., 340 F.3d 1047, 1053 (9th Cir. 2003)* (quoting *Conboy v. AT&T Corp., 241 F.3d 242, 253 (2d Cir. 2001))*).

To support its claim that it is a violation of *section 201(b)* to "warehouse" AMTS licenses, plaintiffs cite to FCC determinations that it is a violation of *section 201(b)* for a party to "warehouse" toll free numbers without identified subscribers. *See, e.g., In re Toll Free Serv. Access Codes, 12 FCC Rcd 11162 (1997)*; *Patients Plus, Inc. v. Long Distance Telecomm. Serv., 12 FCC Rcd 13258 (1997)*. Although these determinations support the proposition that the FCC has found warehousing to be disfavored in one particular context, the determinations do not address the precise type of conduct at issue in this case, or even a sufficient number of similar types of conduct for the Court to infer the FCC's distaste for warehousing as a general practice. The Court cannot risk disturbing the delicate regulatory framework that the Commission **[*26]** is tasked with maintaining. Cf. *Hoffman v. Rashid, 388 F. App'x 121, 123 (3d Cir. 2010)* ("[I]t is within the purview of the Federal Communications Commission, not [plaintiff], 'to determine whether a particular practice constitutes a violation for which there is a private right to compensation.'" (quoting *N. Cnty. Commc'ns Corp., 594 F.3d at 1158*)). [3]

For the **[*27]** foregoing reasons, plaintiffs' claims under the Federal Communications Act fail, and are dismissed.

D. Sherman Act

1. Preemption

Defendants argue that the FCA established an elaborate framework under which the FCC regulates radio frequency allocation, and that the FCA therefore preempts Sherman Act claims because those claims may interfere with FCC radio frequency determinations. Absent from defendants' argument, however, is any authority to suggest that a court should abstain from hearing a case within its jurisdiction merely because it touches on an area subject to sophisticated agency regulation. *Cf. Raritan Baykeeper v. Edison Wetlands Ass'n, Inc., 660 F.3d 686, 691 (3d Cir. 2011)* (in context of primary jurisdiction doctrine, noting that "[w]hen 'the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility'" (quoting *MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1094 (3d Cir. 1995)* (further citations omitted))).

More to the point, defendants' argument ignores *47 U.S.C. § 152*, in which an uncodified amendment states that "nothing in this Act **[*28]** or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Pub. L. No. 104-104, § 601(b)(1) (1996). The amendment further clarifies that the term "antitrust laws" includes the Sherman Act. Pub. L. No. 104-104, § 601(e)(4). The legislative history of this amendment clarifies that when Congress enacted the Telecommunications Act of 1996, it sought to ensure that the FCC could not "confer antitrust immunity" through the course of its decisionmaking. See S. Rep. No. 104-230, at 178-79 (1996) (Conf. Rep.). Thus, Congress envisioned a system in which the FCC could consider antitrust matters when reaching decisions, but that the FCC's decisions would not preclude the operation of independent antitrust statutes. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (holding that notwithstanding arguments for implied immunity, "the savings clause preserves those claims that satisfy established antitrust standards" (citation and quotation marks omitted)). Accordingly, the FCA does not preempt plaintiffs' Sherman Act claim.

2. Standing

To establish standing, plaintiffs must show that **[*29]** they suffered an antitrust injury, meaning an injury that is "the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation." *Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. This injury must "reflect[] an activity's anti-competitive effect on the competitive market," and "an individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market. *Id.* (citations omitted).

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[3] Defendants assert that plaintiffs' *section 207* claim is time-barred under *47 U.S.C. § 415(b)*. Having found that plaintiffs failed to state a claim under *section 207*, the Court need not address this issue in depth. The Third Circuit has spoken on the issue, holding that "when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period." *Brenner v. Local 514, United Bhd. of Carpenters & Joiners of Am., 927 F.2d 1283, 1295 (3d Cir. 1991)*. Here, plaintiffs' claim is that the defendants' unjust and unreasonable practice is the continuing disregard of Commission regulations and orders, and the continued warehousing of AMTS licenses. Because these are ongoing activities, the statute of limitations has not yet started to run.

Defendants suggest that plaintiffs are complaining about injury to their status as competitors rather than an injury suffered by the overall competitive market. But plaintiffs' complaint pleads a broader injury than that. After recounting defendants' course of conduct, the complaint states that "[t]hese acts produced anti-competitive effects within the relevant geographic market for AMTS, are manifestly anticompetitive and constitute **[*30]** a per se violation of the Sherman Act." (Second Am. Compl. ¶ 66.) The complaint further alleges that the conduct "had a wider impact on the relevant AMTS market." (*Id.* ¶ 69.) These statements are not mere "labels and conclusions," nor are they "a formulaic recitation of the elements of the cause" or "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal, 129 S. Ct. at 1949* (quoting *Twombly, 550 U.S. at 555, 557)*. Rather, they are the logical and plausible inferences to be drawn from plaintiffs' factual allegations. Plaintiffs allege that defendants have refused to provide necessary information about the contours of their Site-Based stations (Second Am. Compl. ¶ 25), that they have done so to avoid the loss of their licenses (*id.* ¶ 30), and that their ultimate goal is to "warehouse" the licenses to make the neighboring Geographic licenses "less economically viable to competitors in upcoming auctions, so that [defendants] as the 'Incumbent' Station licensees could succeed in the auctions with less competition and at lower prices" (*id.* ¶¶ 31-33). These allegations, accepted as true, present not only allegations that plaintiffs themselves have suffered harm, but also that **[*31]** defendants' conduct affects the overall competitive market for AMTS frequencies. Accordingly, plaintiffs have established antitrust standing.

3. Sherman Act Section 1 Claim

A claim under section one of the Sherman Act, *15 U.S.C. § 1*, consists of four elements: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action[was] illegal; and (4) . . . [plaintiff] was injured as a proximate result of the concerted action." *Howard Hess Dental Labs., Inc., 602 F.3d at 253* (quoting *Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005))*. Defendant alleges that the complaint fails to satisfy the first element because it does not allege that defendants "conspired or agreed to act in concert with any other party, let alone the other defendants." (Defs.' Br. Supp. Mot. Dismiss 39.) *See also* *Twombly, 127 S. Ct. at 1961* (in antitrust case, insufficient to allege "parallel conduct unfavorable to competition" without "some factual context suggesting agreement, as distinct from identical, independent action").

The facts here, however, are distinguishable from the facts in *Twombly.* Here, plaintiff **[*32]** has stated sufficient facts to "allow[] the court to draw the reasonable inference that" defendants had the requisite intent to act in concert. *Iqbal, 129 S. Ct. at 1949* (citing *Twombly, 127 S. Ct. at 1965*). First, plaintiff alleges specific reasons for the defendants' decisions to act in concert, such as that the defendants made a spectrum-splitting arrangement to allow each to share in the benefits of the AMTS licenses. (*See* Second Am. Compl. ¶ 36.) Moreover, Havens learned through communications with PSI that PSI and Mobex were cooperating and had an intertwined financial stake in the AMTS spectrums at issue. (*Id.* ¶ 38.) Cooperation could also be seen in other areas, such as Mobex and PSI locating stations at the same sites in order to reduce costs. (*Id.* ¶ 39.) This cooperation extended beyond physical interactions, as Mobex and PSI jointly petitioned the FCC on certain matters regarding the licenses. (*Id.* ¶ 41.)

The complaint alleges a history of cooperation and interactions between the companies on the very licenses at issue in this case. This makes plausible plaintiffs' allegation of concerted action, and plaintiffs have therefore stated a claim on which relief can be granted.

4. [*33] Sherman Act *Section 2* Claim

Under *15 U.S.C. § 2*, it is unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." Plaintiffs alleging a conspiracy to monopolize must demonstrate four elements: "(1) an agreement to monopolize; (2) an overt act in furtherance of the conspiracy; (3) a specific intent to monopolize; and (4) a causal connection between the conspiracy and the injury alleged." *Howard Hess Dental Labs., 602 F.3d at 253*. To plead monopolization, "a plaintiff must allege: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.'" *Crossroads Cogeneration Corp. v. Orange & Rockland Cntys. Util., Inc., 159 F.3d 129, 141 (3d Cir. 1998)* (quoting *Schuylkill Energy Res. v. Pa. Power & Light Co., 113 F.3d 405, 412-13 (3d Cir)*, *cert. denied*, *522 U.S. 977, 118 S. Ct. 435, 139 L. Ed. 2d 335 (1997)*). Similarly, to claim attempted monopolization, "a plaintiff must allege '(1) that the defendant **[*34]** has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" *Id.* (quoting *Schuykill Energy Res., 113 F.3d at 413*).

Plaintiffs' complaint specifically cites the "essential facilities doctrine," which requires demonstrating: "(1) control of the essential facility by a monopolist; (2) the competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 748 (3d Cir. 1996)* (quoting *Del. Health Care, Inc. v. MCD Holding Co., 893 F. Supp. 1279 (D. Del. 1995))*.

Here, even assuming that the contour information is an "essential facility," plaintiffs' claim falls short because the complaint does not set forth a case that defendants are monopolists, have established a monopoly, or are attempting to establish a monopoly. Indeed, a claim of attempted monopolization is largely inconsistent with the overall theory of plaintiffs' case. The complaint does not allege that defendants were warehousing AMTS spectrum in order to **[*35]** generate a monopoly. Instead, the complaint states that defendants' goal in warehousing the Site-Based licenses was to make the remaining licenses less attractive to competitors, or to create an opportunity to reap a profit by selling or leasing their licenses to the adjacent Geographic licensees. (Second Am. Compl. ¶ 33.) (Notably, if this were defendant's plan, it apparently failed, as plaintiffs won the auctions for the Geographic licenses and now own them across most of the country.) Although this practice, if true, may serve to give defendants an edge in the market, it does not lay any meaningful groundwork for the establishment of a monopoly, especially because plaintiffs own most of the Geographic licenses for New Jersey and would therefore appear to have a comparable bargaining position to that of defendants. Additionally, the FCC tightly regulates the distribution of the pertinent licenses and could be made aware of any potential abuses. *Cf.* *Verizon Commc'ns, Inc., 540 U.S. at 412* ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm."). Accordingly, plaintiffs have failed to set forth a claim under **[*36]** section two of the Sherman Act.

E. Administrative Exhaustion and the Primary Jurisdiction Doctrine

Defendants last argue that the Court should dismiss the complaint because plaintiffs have not exhausted their administrative remedies and because the primary jurisdiction doctrine suggests that the matter should be heard by the FCC. Because the Court has determined that plaintiffs failed to state a claim under the FCA, and because the FCC does not have jurisdiction over claims under the Sherman Act, *15 U.S.C. § 15(a)*, the Court need not address that argument.

V. Conclusion

For the foregoing reasons, the motion to dismiss is granted as to plaintiffs' claims under the FCA and *section 2 of the Sherman Act*, and the motion is denied as to plaintiffs' claim under *section 1* of the Sherman Act.

December 22, 2011

/s/ Katharine S. Hayden

Katharine S. Hayden, U.S.D.J.

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Metro West Ambulance v. Clark County

United States District Court for the Western District of Washington

December 22, 2011, Decided; December 22, 2011, Filed

CASE NO. C10-5809RJB

Reporter

2011 U.S. Dist. LEXIS 147590 *; 2011-2 Trade Cas. (CCH) P77,732; 2011 WL 7153926

METRO WEST AMBULANCE, Plaintiff, v. CLARK COUNTY, WASHINGTON, a municipal corporation; CLARK COUNTY BOARD OF COMMISSIONERS, being Tom Mielke, Marc Boldt, and Steve Stuart, in their official capacities as current commissioners of Clark County; and CLARK COUNTY EMERGENCY MEDICAL SERVICES DISTRICT NO. 2, an emergency medical services district, Defendants.

Core Terms

ambulance service, Ordinance, transports, ambulance, regulations, interstate commerce, provider, patient, originating, Veterans, immunity, emergency medical services, settlement agreement, single-franchise, requests, state action, exempt, summary judgment motion, legislative authority, antitrust, emergency, franchise, discriminate, contends, partial summary judgment, local government, antitrust claim, Sherman Act, non-emergency, nonmoving party

Counsel: **[*1]** For Metro West Ambulance, an Oregon corporation, Plaintiff: Mark Rosencrantz, BALL JANIK LLP (SEA), SEATTLE, WA; Bruce H Cahn, BALL JANIK, PORTLAND, OR.

For Clark County, a municipal corporation, Clark County Board of Commissioners, being Tom Mielke, Marc Boldt, and Steve Stuart, in their official capacities as current commissioners of Clark County, Clark County Emergency Medical Services District No. 2, an emergency medical services district, Defendants, Counter Claimants: Christopher Horne, CLARK COUNTY PROSECUTING ATTORNEY'S OFFICE, VANCOUVER, WA.

For American Medical Response Northwest, Inc., Defendant: Bryan D Doran, PFAU COCHRAN VERTETIS KOSNOFF PLLC (TACOMA), TACOMA, WA; Leslie C Clark, Paul J Dayton, SHORT CRESSMAN & BURGESS, SEATTLE, WA.

For City of Vancouver, Intervenor Defendant: Debra Y B Quinn, Jonathan James Young, CITY OF VANCOUVER, VANCOUVER, WA.

For Metro West Ambulance, an Oregon corporation, Counter Defendant: Matthew W Osborne, BALL JANIK LLP (SEA), SEATTLE, WA; Bruce H Cahn, BALL JANIK, PORTLAND, OR.

Judges: ROBERT J. BRYAN, United States District Judge.

Opinion by: ROBERT J. BRYAN

Opinion

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The matter comes before the court on the parties' motions and cross motions **[*2]** for summary judgment. Dkt. 58, 66, 71, 72, and 74. The court has reviewed and considered all of the pleadings filed by the parties and the remainder of the file herein, and is fully advised.

INTRODUCTION

It appears that this case involves two ambulance companies fighting about money, and dragging Clark County and the City of Vancouver into that fight.

PROCEDURAL HISTORY

On November 5, 2010, plaintiff Metro West Ambulance (Metro West) filed a complaint for declaratory judgment and injunctive relief against (1) Clark County, Washington, and the Clark County Board of Commissioners, being Tom Mielke, Marc Boldt, and Steve Stuart, in their official capacities as current commissioners of Clark County (collectively referred to as Clark County); and the Clark County Emergency Medical Services District No. 2. Dkt. 1.

On March 22, 2011, Metro West filed a First Amended Complaint for Declaratory Judgment. Dkt. 28.

On April 12, 2011, Clark County filed an answer and a counterclaim, seeking an injunction to prevent Metro West from providing non-emergency ambulance service within the regulated service area of Clark County, without complying with the Clark County Code. Dkt. 32.

On March 25, 2011, the court **[*3]** granted the motion of American Medical Response to intervene as a defendant. Dkt. 30. On April 25, 2011, the then-existing parties stipulated to intervention by the City of Vancouver (Dkt. 33); although the City of Vancouver did not file a formal motion to intervene, the city has filed pleadings and has apparently acquiesced to status as a party defendant.

AMENDED COMPLAINT

In the amended complaint, Metro West makes the following claims regarding Clark County Code Section 5.48A.025 (EMS Ordinance): (1) Federal law preempts the EMS Ordinance because it conflicts with federal antitrust policy, is a hybrid restraint of trade, and constitutes a *per se* violation of the Sherman Act. *15 U.S.C. § 1* et al.; (2) Metro West's provision of ambulance/emergency services pursuant to its contract with the VA Medical Centers preempts the EMS Ordinance; and (3) the EMS Ordinance violates the *Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3*, because the EMS Ordinance directly regulates interstate commerce, burdens interstate commerce, increases health care costs, and decreases access to specialized health care services for Clark County patients. Dkt. 28. The amended complaint **[*4]** requests declaratory and injunctive relief. Dkt. 28, at 16-17.

On April 12, 2011, Clark County filed an answer and asserted a counterclaim, requesting a permanent injunction, enjoining Metro West from providing non-emergency ambulance service within the regulated service area of Clark County, without complying with the Clark County Code. Dkt. 32, at 7.

PROCEDURAL BACKGROUND AND RELEVANT FACTS

The Parties. Clark County is a municipal corporation under the laws of Washington. The Clark County Board of Commissioners provides legislative authority for Clark County. The three current members of the Board of Commissioners are Tom Mielke, Marc Boldt, and Steve Stuart. Clark County Emergency Medical Services District No. 2 (hereafter the District) is an emergency medical service district under *RCW 36.32.480* ("A county legislative authority may adopt an ordinance creating an emergency medical service district in all or a portion of the unincorporated area of the county, and ... within the corporate limits of any city or town...."). The District covers Clark County and the City of Vancouver.

Federal Lawsuit. In 1987, the Clark County Board of Commissioners created the District. The commissioners **[*5]** found that creation of this district was necessary for the protection of public health, safety and welfare. By 1990, the Board determined that additional changes were necessary, and adopted Ordinance 1990-07-303 to establish oversight and regulatory standards for the provision of pre-hospital emergency medical services. This ordinance required a license for all providers of emergency medical services and imposed standards regulating issuance of licenses. Service providers were required to respond to calls within 4-60 minutes depending on the remoteness of the area, and ambulances were required to be appropriately staffed based on status from "Basic Life Support" to "Advanced Life Support".

In 1991, an antitrust suit was filed in Federal Court, alleging that Clark County's system of allocation of ambulance service between two ambulance providers violated the Sherman Act. *Buck Medical Services, Inc. v. Clark County, et al.* C91-5229B. The Clark County Board of Commissioners, on behalf of the District, faced with the antitrust allegations, adopted resolution 1991-06-1 to both provide emergency medical services based on a competitive selection process and to assign interim services in a **[*6]** fashion to minimize disruption of services. The Clark County Board of Commissioners found and concluded that the county should be divided between the two providers: Buck Medical Services, an Oregon corporation; and American Ambulance, provided that the federal court conclude that the District possessed the authority to allocate calls and that such actions and its competitive process did not violate antitrust laws. Finally the Board authorized the District to petition for intervention and to authorize other cities to join the District by interlocal agreement.

The federal lawsuit proceeded until October 11, 1991, when the court approved a Settlement Agreement and an entered an agreed order of dismissal. Dkt. 69-5.

The Settlement Agreement referenced EMS District Resolution No. 1991-06-01, which provided that 911 medical request calls would be allocated to one EMS provider selected pursuant to an open, competitive process; and provided an interim allocation until the single source provider could be selected. Dkt. 69-5, at 9. The Settlement Agreement provided that the Resolution "was contingent upon this Court's upholding the authority of the EMS District to implement the Resolution and **[*7]** the validity of the Resolution under federal ***antitrust law***." Dkt. 69-5, at 9.

The Settlement Agreement included a copy of Resolution M-2744, adopted by the Vancouver City Council on September 16, 1991, which found, among other things, that existing private ambulance service in Vancouver would become inadequate under *RCW 35.21.766* if the EMS District were served by a single contract EMS provider while Vancouver were served by one of more EMS providers under a different system. Dkt. 69-5, at 10.

The Settlement Agreement included the following provision:

> WHEREAS, Clark County, the EMS District and Vancouver have the authority under federal and Washington State law to undertake the actions described in this Settlement Agreement, and such actions are valid under federal antitrust laws....

Dkt. 69-5, at 11.

On October 10, 1991, the parties sent a letter to the undersigned judge, stating in relevant part as follows:

> Because substantial taxpayer revenues and County and City resources are necessary to implement the single provider system and interim reallocation measures called for by the Settlement Agreement, Clark County, the City of Vancouver, and the EMS District seek to obtain the Court's approval **[*8]** of the settlement terms prior to expending these sums and resources.

Dkt. 69-6, at 3.

The Settlement Agreement also included the procedure for an open competitive process that may be for 911 calls only, or the process may include the entire market including both 911 calls and calls for "assumed" routine transport services. Dkt. 69-5, at 19-20.

On October 11, 1991, the court approved the Settlement Agreement and dismissed the action. Dkt. 69-5, at 2-3.

Emergency Medical Service. Clark County Code Section 5.48A covers the provision of Emergency Medical Services within the District.

" 'Emergency medical service' means medical treatment and care which may be rendered at the scene of any medical emergency or while transporting any patient in an ambulance to an appropriate medical facility, including ambulance transportation between medical facilities." *RCW 18.73.030(10)*.

Washington State law governs authority of local governments related to provision of emergency medical service.

Ambulance Services. The EMS Ordinance covers provision of ambulance services in the district.

" 'Ambulance' means a ground or air vehicle designed and used to transport the ill and injured and to provide personnel, facilities, **[*9]** and equipment to treat patients before and during transportation." *RCW 18.73.030(4)*.

Washington State law governs authority of local governments concerning ambulance services.

RCW 36.01.100 provides the authority for counties, as it relates to ambulance services:

> The legislative authority of any county may by appropriate legislation provide for the establishment of a system of ambulance service for the entire county or for portions thereof, and award contracts for ambulance services: PROVIDED, That such legislation may not provide for the establishment of any system which would compete with any existing private system.

RCW 36.01.095 provides as follows:

> Any county may establish a system of emergency medical services as defined by [*RCW 18.73.030* was amended by 2000 c 93 § 16, changing subsection (11) to subsection (9).] RCW 18.73.030(11). The county legislative authority may adopt by resolution procedures to collect reasonable fees in order to reimburse the county in whole or in part for its costs of providing such service: PROVIDED, That any county which provides emergency medical services supported by an excess levy may waive such charges for service: PROVIDED FURTHER, That whenever the **[*10]** county legislative authority determines that the county or a substantial portion of the county is not adequately served by existing private ambulance service, and existing private ambulance service cannot be encouraged to expand service on a contract basis, the emergency medical service that is established by the county shall not be deemed to compete with any existing private ambulance service as provided for in RCW 36.01.100.

RCW 35.21.766 provides the authority for cities and towns, as it relates to ambulance services:

> Whenever the legislative authority of any city or town determines that the city or town or a substantial portion of the city or town is not adequately served by existing private ambulance service, the legislative authority may by appropriate legislation provide for the establishment of a system of ambulance service to be operated as a public utility of the city or town or operated by contract after a call for bids.

EMS Ordinance. Clark County Code Section 5.48A.025 provides as follows:

> Exclusive ambulance service provider.
>
> Except as provided for in Section 5.48A.110, no person or entity shall provide ambulance service for either emergency and nonemergency transport of ambulance **[*11]** patients (language specific to county "within the regulated service area" unless under contract to do so with the district. (Sec. 2 of Ord. 1995-04-04; amended by Exh. A of Res. 2003-04-23)

Dkt. 60, at 5.

Clark County Code Section 5.48A.100 contains eight exemptions from the provisions of Section 5.48A. Dkt. 60, at 8. Three of those exemptions are relevant here.

> B. Vehicles owned or controlled by the United States government;
>
> * * * * * * * *
>
> F. Persons or vehicles providing ambulance service for patient transports originating outside the regulated service area or nonstop patient transports through the regulated service area.
>
> * * * * * * * *
>
> H. Persons or vehicles providing non-911 ambulance service for inter-county patient transports originating inside the regulated service area in excess of thirty (30) loaded miles.

Dkt. 60, at 8 and 9.

Violation of the EMS Ordinance constitutes a misdemeanor punishable upon conviction by not more than one year in jail and/or a fine not to exceed $5,000. Clark County Code 5.48A.240; Dkt. 60, at 11.

The City of Vancouver VMC 5.84.015 states: "Except as provided for in VMC 5.84.110, no person or entity shall provide ambulance service for either emergency or nonemergency **[*12]** transport of ambulance patients within the city limits of Vancouver unless under contract to do so with the district." VMC 5.84.110(2) provides that the chapter does not apply to "Vehicles owned or controlled by the United States Government".

Contract between the District and American Medical Response. Following dismissal of *Buck Medical Services. v. Clark County*, Clark County, in compliance with the Settlement Agreement, received requests for proposals from both providers. Following execution of an agreement with Buck Medical, the County adopted Ordinance 1992-06-26. The first ambulance agreement was limited to 911 services and contained specific response times for emergency calls, penalties for non-compliance, a required performance bond sufficient to allow the county to take over in the event of a default, a rental agreement that would allow the county to take over facilities and equipment. Access to the non-emergency market was open to American Ambulance.

By 1995, following a joint city/county/District work session that included an anti-trust legal analysis, the City of Vancouver and Clark County determined that the public was at risk under the then-current system, and that the public **[*13]** was best served by a unified system of ambulance service. The District requested proposals from all providers wishing to provide exclusive ambulance service for both 911 and non-emergency transport. A new Request for Proposal was issued in 2004.

On June 24, 2004, Clark County, through the District, entered into a contract with American Medical Response. Dkt. 61, at 2-87. The contract ran from June 29, 2004 through 2010. The contract has been extended to 2014.

The contract states that American Medical Response "is the winner of a competitive allocation of ambulance service market rights and responsibilities, conducted by the District in accordance with the terms of Settlement Agreement No. C91-5229B[.]". Dkt. 61, at 5.

The contract includes a rationale, as follows:

> SECTION III. FAIL SAFE FRANCHISE MODEL DESIGN RATIONALE
>
> Competition Within the Market Has Proven Ineffective. The historical track record of the ambulance industry conclusively reveals that retail competition *within* a geographic market fails to provide and reward efficient production of quality patient care due to the following economic distortions:
>
> > 1. Emergency victims have little opportunity and less inclination to "comparison **[*14]** shop" for ambulance services at the time service is required;
> > 2. Even where multiple firms operate within the same area, few potential ambulance service customers prepare to be effective buyers in their moment of need, by comparing services and costs of suppliers in advance;
> > 3. The typical consumer of ambulance services purchases such services too infrequently (i.e., about twice in a lifetime) to develop skills as a shrewd and experienced buyer of ambulance services;

> > 4. Ambulance services are becoming increasingly sophisticated, both clinically and technologically, to an extent that few customers are able to make useful distinctions in quality of patient care.
> > 5. Persons dialing 911 in a medical emergency have no opportunity to choose from among competing suppliers of ambulance service, have no way of knowing which firm's ambulance is nearest their location and staffed and equipped for their needs, and thus cannot reasonably be expected to choose from a selection of available firms;
> > 6. The retail market transaction is often rendered economically ineffective because the person choosing the ambulance company is neither the patient nor the payer;
> >
> > 7. Unlike other health care services, the primary **[*15]** cost of ambulance service is the cost of providing geographic coverage, which cost is only increased when multiple firms must duplicate coverage of the same geographic area; and
> > 8. Economies of scale in ambulance service industry are such that the total population of the Contract Service Area is inadequate to support the economically stable delivery of totally or substantially unsubsidized paramedic ambulance services delivered at reasonable rates, if fee-for-service income must support the fixed costs and overhead of multiple firms. Thus, dividing the Contract Service Area into two or more zones for allocation among two or more firms is not in the public interest, clinically or economically.
>
> Competition for the Market Can Be a Powerful and Positive Force. Experience of communities across the U.S. has shown conclusively that, although effective use of competitive market allocation is among the most complex of all procurements, managed competition for the market has reliably generated the EMS industry's highest levels of clinical and response time reliability at costs (subsidies and fee structures combined) far below those of systems which have eliminated competition entirely (i.e., socialized **[*16]** systems), and below those of systems depending on retail competition within the market. Thus, this process involves a competitive "group purchase" of ambulance services on behalf of the residents of the "Contract Service Area."

Dkt. 61, at 16-17. *Emphasis in the original.*

Under the contract, American Medical Response is "awarded exclusive rights and responsibilities for provision of all 911 and 'Routine Transfer' ambulance service originating within the Contract Service Area, for an initial term of s (6) years with the possibility of up to three (3) 'earned' two (2) year extensions." Dkt. 61, at 16.

The contract further provides as follows:

> A. EXCLUSIVE MARKET RIGHTS. The Contractor is awarded exclusive market rights (911) and "Routine Transfer"), for provision of all ground ambulance services originating within the Contract Service Area, regardless of whether the patient's destination is within or outside the State of Washington, subject to the following exceptions:
>
> > 1. Long-Distance, Inter-County Transports. Other firms may compete with the Contractor on a retail basis for the sale of inter-county ambulance transports originating within the Contract Service Area involving "Routine Transfers" **[*17]** more than 30 loaded miles.
> > 2. VA Contractors. Ambulances operating under federal contract for direct purchase of ambulance services (e.g., VA contracts) shall be exempt from provisions of exclusivity. For purposes of this provision, Medicare and Medicaid provider agreements shall be considered a reimbursement arrangement—not a federal contract for direct purchase of ambulance services.
> > ******************************

Dkt. 61, at 24.

Under the terms of the contract, the District refers all medical emergency "911" calls within Clark County to American Medical Response. The emergency response center is operated by Clark Regional Emergency Services Agency (CRESA). CRESA is a political subdivision of Clark County, funded by a fee charged, pursuant to the contract, on all ambulance services provided within the District by American Medical Response. In addition, under the terms of the contract, American Medical Response is entitled to every ambulance call originating in the District regardless whether the request comes through CRESA or not, or whether it is an emergency transport or not.

VA Contract with Metro West. In 2009, Metro West submitted a bid in response to a Request for Proposal from **[*18]** the United States Department of Veterans Affairs (VA) to transport beneficiaries of the VA within the Portland metropolitan area, including beneficiaries located within Clark County. Dkt. 65. The VA awarded the contract (VA contract) to Metro West on December 11, 2009, and the parties signed the contract on December 31, 2009. Dkt. 65, at 3; Dkt. 65-1, at 1-51.

In the Statement of Work, the VA contract provides in relevant part as follows:

> Purpose Statement: The purpose of this contract is to provide the Ambulance services for beneficiaries of the Department of Veterans Affairs Medical centers (VAMC) in Portland, Oregon, East Glisan SBOC and Hillsboro CBOC, and the VA Nursing Care Unit in Vancouver, Washington. The Contractor shall provide all vehicles, personnel, management, supplies, Transportation, equipment and reports necessary for all Ambulance services, as identified on the Schedule in Section B.

Dkt. 65-1, at 8.

In the Veterans Rights section, the VA contract provides in relevant part as follows:

> (b) Each veteran will be provided with safe and comfortable transportation to and/or from the Medical Center. The contractor will assume the total responsibility for the veteran's safety **[*19]** and comfort during the entire transfer process, from the time the Contractor's staff reaches the veteran, through the loading and unloading of the veteran into the vehicle, and until the time the veteran is properly delivered to the professional staff of the medical Center or other final destination.

Dkt. 65-1, at 20.

The VA contract requires that all Metro West ambulance services for Advanced Life Support services "for Portland, Oregon and Vancouver, Washington, East Glisan and Hillsboro CBOCs shall be in accordance with current Oregon and Washington State laws and regulations". Dkt. 92, at 5.

The VA contract further provides as follows:

> BLS [Basic Life Support] is defined as services required for non-critical veteran care in which veteran requires an ambulance, staffed in accordance with Washington State laws and regulations governing the certification and licensure of private ambulances....BLS services for Portland, Oregon and Vancouver, Washington, East Glisan and Hillsboro CBOCs shall be staffed and supplied in accordance with current Oregon and Washington State laws and regulations.

Dkt. 92, at 5-6.

According to the declaration of J.D. Fuiten, the president and CEO of Metro West, the **[*20]** VA provides Metro West with a service request for a pick-up of a VA beneficiary via the VA's dispatch center; the VA dispatch center provides dispatch directions for the VA beneficiary, regardless of the beneficiary's location; Metro West dispatches an ambulance to the address requested by the VA dispatcher; Metro West bills the VA for the ambulance services requested; and the VA pays the bills. Dkt. 65, at 5.

Action by Clark County. On July 10, 2010, the Clark County Prosecutor send a letter to Mr. Fuiten, President of Metro West, stating that Metro West violated the EMS Ordinance on June 13, 2010, when it provided ambulance service for a patient being transported from Legacy Salmon Creek Hospital to Portland Veterans Medical Center. Dkt. 65-2, at 2.

The letter stated as follows:

> Based on a June 16th email from your Business Development Director, Erin Miller to Doug Smith-Lee, CRESA's EMS Manager, I understand this was considered a Veterans Administration (VA) call. To meet the provision that exempts vehicles owned or controlled by the United States government, the ambulance service must: 1) be owned, or under contract with the federal government; and 2) the ambulance call must originate **[*21]** and end on federal property. Picking up a VA patient outside of federal property (i.e., Vancouver VA Medical Center) doesn't meet this exception.

Dkt.65-2, at 2.

The letter further stated that, at the time of the call, Metro West was not licensed to provide ambulance services in Washington, and that "[s]ince the call in question didn't originate on federal property, Metro West also violated Section 5.48A095 of the EMS Ordinance based on Metro West not being a licensed ambulance service for the State of Washington and the personnel not meeting the Medical Program Director's minimum staffing requirements (Clark County certified paramedic and EMT)". Dkt. 65-2, at 3.

MOTIONS FOR SUMMARY JUDGMENT

The parties have filed four motions for summary judgment. Dkt. 66 was improperly filed as a separate motion, but is the supporting memorandum for Dkt. 71.

1. Metro West filed a motion for summary judgment (Dkt. 58), requesting that the court declare that (a) Metro West is entitled to perform under the VA contract, either pursuant to Clark County Code § 5.48A.110(B) or federal preemption, without fear of prosecution by Clark County for alleged violations of the EMS Ordinance; (b) the EMS Ordinance violates **[*22]** the *Commerce Clause*; and (c) because the EMS Ordinance creates a hybrid restraint of trade by providing American Medical Response with a territorial monopoly, it constitutes a *per se* violation of the Sherman Act. Dkt. 58.

2. The Clark County defendants filed a motion for partial summary judgment (Dkt. 71) and a memorandum in support of that motion (Dkt. 66), requesting that the court dismiss Metro West's preemption claim and grant injunctive relief requiring Metro West to comply with local and state regulations for non-mandated transports in Clark County. Dkt. 66, at 17. It appears that "non-mandated" means "transports other than those that begin and end at VA facilities". Dkt. 66, at 9. The City of Vancouver joined in the Clark County defendants' motion for summary judgment (Dkt. 74).

3. American Medical Response filed a motion for partial summary judgment (Dkt. 72), requesting that the court dismiss Metro West's antitrust and *Commerce Clause* claims. The City of Vancouver joined in American Medical Response's motion for summary judgment (Dkt. 74).

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits **[*23]** show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c)*. The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1985)*. There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* *Fed.R.Civ.P. 56(e)*. Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987)*.

The determination of the existence of a material **[*24]** fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial —e.g., a preponderance of the evidence in most civil cases. *Anderson, 477 U.S. at 254*, *T.W. Elect. Service Inc., 809 F.2d at 630*. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc., 809 F.2d at 630* (relying on *Anderson, supra)*. Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)*.

DISCUSSION

1. VA Transports

Metro West requests that the court declare that Metro West is entitled to perform under the VA contract, pursuant to the exemption in Clark County Code Section 5.48A.110(B) or on the basis of federal preemption. Clark County requests that the court grant injunctive relief that **[*25]** requires Metro West to comply with local and state regulations for "non-mandated" transports in Clark County, that is, for transports other than those that begin and end at VA facilities.

RCW 36.01.100 provides that a legislative authority of a county may (1) by appropriate legislation; (2) provide for the establishment of a system of ambulance service; (3) award contracts for ambulance services; (4) but may not provide for the establishment of any system which would compete with any existing private system.

RCW 35.21.766 provides that a legislative city or town may (1) by appropriate legislation; (2) provide for the establishment of a system of ambulance service; (3) by contract after a call for bids; (4) when the legislative authority determines that the city or town is not adequately served by existing private ambulance service.

Clark County established the District. Clark County adopted the EMS Ordinance. The City of Vancouver determined that, given the intent of Clark County to award a single source competitive contract for ambulance services, the City of Vancouver would not be adequately served by the existing private ambulance service. The EMS District followed an open and competitive **[*26]** bid process for contracting for exclusive rights to ambulance services within the EMS District. The contract was awarded to American Medical Response. Clark County adopted the EMS Ordinance, which prohibited a person or entity from providing ambulance service for emergency and nonemergency transport of ambulance patients within the District unless under contract to do so with the district. The EMS Ordinance provided that "Vehicles owned or controlled by the United States government" are exempt from Clark County Code Chapter 5.48A.

Metro West entered into a contract with the VA. The purpose of this contract was to provide the ambulance services for beneficiaries of the Department of Veterans Affairs Medical centers (VAMC) in Portland, Oregon, East Glisan SBOC and Hillsboro CBOC, and the VA Nursing Care Unit in Vancouver, Washington.

A contract entered into by the United States and another party is controlled by general principles of federal contract law. *Tanadgusix v. Huber, 404 F.3d 1201,1205 (9th Cir. 2005)*. The court construes a contract by reading it as a whole and interpreting each part with reference to the entire contract. *Id.* The terms of the contract control, regardless of the **[*27]** parties' subjective intentions shown by extrinsic evidence. *Id.* Where there is no ambiguity in the contract, there is no genuine issue of fact. *Id.*

The ambulances operated by Metro West, are "controlled by the United States government" through the VA contract. The VA contract is unambiguous. The VA contract does not restrict or limit the pick-up or drop off of the beneficiaries to transports between VA facilities/hospitals. The VA contract provides for ambulance services for beneficiaries, not for ambulance services for hospitals. The VA contract does not restrict where a beneficiary can be picked up or dropped off.

American Medical Response argues that Metro West has not provided sufficient information in discovery to show whether the VA authorized, through the VA travel desk, pickups in Clark County; and that the information American Medical Response has shows that Metro West has no corroboration of VA authorization for 694 of the 1644 transports claimed by Metro West in the schedules Metro West provided in discovery. However, there is nothing to suggest that the pick-ups in Clark County for these 694 transports were not paid for and included in the VA contract, regardless whether **[*28]** those transports were authorized in advance.

Because the EMS Ordinance exempts ambulance services provided pursuant to the VA contract from Clark County Chapter 5.48A, Metro West is entitled to a declaration that it is entitled to perform under the VA contract, without fear of prosecution by Clark County for alleged violations of the EMS Ordinance.

In light of this conclusion, the court need not address Metro West's argument that the VA contract, pursuant to federal preemption, prohibits Clark County from prosecuting Metro West for violation of the EMS Ordinance. However, it would not be surprising to learn that the issue of federal preemption was considered by Clark County when the EMS Ordinance, and the exemption in Clark County Code Section 5.48A.110(B), were drafted and adopted.

2. Compliance with Licensing Requirements and Regulations

Clark County requests that the court grant injunctive relief, requiring that Metro West comply with local and state regulations for non-mandated transports in Clark County.

As discussed above, services performed by Metro West pursuant to the VA contract are exempt from Clark County Chapter 5.48A.

Certifications. Clark County further maintains that Metro **[*29]** West is in violation of the VA contract because it has not obtained the Clark County certifications required by the VA contract. That is an issue between the VA and Metro West. Further, Metro West contends that it cannot obtain Clark County certification because Clark County has taken the position that Metro West's personnel may not perform services provided under the VA contract. The certification is an issue that Clark County should be able to resolve, if necessary, in light of the court's determination that services performed pursuant to the VA contract with Metro West are exempt from Clark County Chapter 5.48A.

Discovery. Both Clark County and American Medical Response West claim that Metro West has refused to provide information in discovery that would show that Metro West is in compliance with the EMS Ordinance.

Metro West is required to comply with state and local regulations. An order of this court that it do so is not necessary or appropriate. According to the deposition of Michael Beaulieu, Metro West declines transports automatically when the transport originates in Clark County, unless the transport is pursuant to the VA contract. Dkt. 82, at 49. Clark County contends that **[*30]** Metro West has left flyers in nursing homes in the District, advertising its services. While that may be true, those flyers could legitimately be used by nursing home residents for the return trip from Oregon.

Finally, the EMS Ordinance provides for criminal penalties. Using a civil action to attempt to gain information for use in criminal prosecution is not appropriate.

Clark County's request that the court require that Metro West comply with local and state regulations for non-mandated transports in Clark County should be denied.

3. Antitrust

Metro West requests that the court grant summary judgment, declaring that the EMS Ordinance is invalid under the *Supremacy Clause*; and that the EMS Ordinance is preempted by the Sherman Antitrust Act, *15 U.S.C. § 1* *et al.*, because, through an agreement with American Medical Response, the District has created an artificial territorial monopoly in conflict with federal antitrust policy. Dkt. 58, at 20. Metro West maintains that the District is not immune under the state action doctrine because creation of this restraint of trade is not authorized by the enabling statutes. Dkt. 58, at 20.

American Medical Response requests that the court grant summary **[*31]** judgment, dismissing the antitrust claim, contending that the EMS Ordinance is immune from Sherman Act liability based on the doctrine of state action immunity; the EMS Ordinance is not a combination or agreement, which is required for a Sherman Act § 1 claim; Metro West has stated in discovery that analysis under the Rule of Reason does not apply, and has declined to identify or produce evidence of any anticompetitive effects or injuries; Metro West cannot prevail if the court applies the Rule of Reason analysis; the EMS Ordinance does not directly discriminate against interstate commerce and there are no incidental burdens on interstate commerce that are different from burdens imposed on intrastate commerce; and the EMS Ordinance advances legitimate legislative goals and Metro West offers no evidence indicating that those goals favor domestic industry. Dkt. 72, at 2-3.

Under the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. This law applies to local governments. *See* *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 408, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*.

In ***[*32]*** *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, the Supreme Court held that the Sherman Act was not intended to apply to acts of the States as sovereigns. The *Parker* state action exemption to antitrust laws insulates local governments from antitrust liability, provided that the local government demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy. *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*. The statutory provisions must plainly show that the legislature contemplated the kind of action complained of. *Id., at 44*, citing *Lafayette v. Louisiana Power & Light Co., supra.* An expression of state policy that is sufficient to establish *Parker* immunity is comprised of two elements: The legislature must have authorized the challenged activity, and it must have done so with an intent to displace competition. *See* *Community Communications Co. v. City of Boulder, supra, 455 U.S. 40, 51-52 (1982)*; *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 415*.

The EMS Ordinance is an enforcement mechanism for the single franchise contract between Clark County and American Medical Response.

The state action immunity doctrine has been applied **[*33]** to single franchise ambulance systems implemented by local governments pursuant to broad state statutory authority to regulate ambulance services. *See* *Gold Cross Ambulance Co. v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983)*; *Forest Ambulance Serv. v. Mercy Ambulance, 952 F.Supp. 296 (E.D. Va. 1997)*; *Central Ambulance Service, Inc. v. Dallas, 631 F. Supp. 366, 371 (N.D. Tex. 1986)*. *See also* *Gold Cross Ambulance Co. v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983)*(city's single franchise ambulance system immune from antitrust claims because system was enacted pursuant to statue, and single-franchise system was foreseeable consequence of statute).

State action immunity has been applied in the 9th Circuit to ambulance systems regulated by local governments. *See* *Springs Ambulance Service, Inc. v. Rancho Mirage, 745 F.2d 1270, 1273 (9th Cir. 1984)*(fire Commission servicing emergency ambulance needs of three cities did not violate antitrust laws because it was enacted pursuant to California statute that provided that "The legislative body of a city may contract for ambulance service to serve the residents of the city as convenience requires"); *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo, 791 F.2d 755, 757 (9th Cir. 1986)*(county's **[*34]** regulation of ambulance services upheld when "it is apparent that anti-competitive effects would result from a broad authority to regulate"); *Ambulance Service of Reno, Inc. v. Nevada Ambulance Services, Inc., 819 F.2d 910 (9th Cir. 1987)*(single franchise ambulance system protected by state action immunity from Sherman Act attacks). Accord, *A-1 Ambulance Serv. v. County of Monterey, 90 F.3d 333 (9th Cir. 1996)*(single franchise ambulance system protected by state action immunity); and *Redwood Empire Life Support v. County of Sonoma, 190 F.3d 949, 950-951 (9th Cir. 1999)*. *But see* *Medic Air Cor. v. Air Ambulance Authority, 843 F.2d 1187 (9th Cir. 1988)*(air ambulance service not protected by state action immunity when private provider exceeded authority granted it by local government).

In this case, Pursuant to *RCW 36.32.480*, Clark County created the District. *RCW 36.01.100* authorizes the legislative authority of any county, by appropriate legislation, to establish a system of ambulance service for the entire county or for portions thereof, and to award contracts for ambulance services. Clark County established a single franchise system for the District, and awarded the contract, following **[*35]** a competitive bid process, to American Medical Response. Clark County adopted the EMS Ordinance as an enforcement mechanism for the single provider contract. *RCW 36.01.100* restricted a county from providing for the establishment of any system which would compete with any existing private system. There is no evidence that Metro West operated as an existing private system, at the time the EMS Ordinance was adopted. The general grant of authority of *RCW 36.01.100* provided the board authority to regulate; it was apparent that anticompetitive acts would result from the broad authority to regulate ambulance systems. There is no indication that American Medical Response exceeded the authority granted to it by contract. State action immunity applies to insulate defendants from antitrust allegations against defendants.

Metro West argues that the county failed to make adequate findings that the county was not adequately served by existing private ambulance services, and that existing private ambulance services could not expand service on a contract basis, as is required by *RCW 36.01.095*. This statute does not apply in this case, because Metro West was not an existing private ambulance service **[*36]** at the time the EMS Ordinance was adopted. Even if Metro West could have been considered an existing private ambulance service, Clark County articulated the inadequacy of the system as it existed, and set forth reasons why expanding the existing services would not work, in the settlement agreement in *Buck Medical Services, inc. v. Clark County*, C91-5229B, and in the Fail Safe Franchise Model Design Rationale of the contract with American Medical Response.

State action immunity applies to insulate Clark County and American Medical Response from antitrust claims. It is unclear whether Metro West alleged antitrust claims against the City of Vancouver. *See* Amended Complaint, Dkt. 28. Assuming that it did, state action immunity insulates the City of Vancouver from antitrust claims. The City of Vancouver, pursuant to the authority granted it in *RCW 35.21.766*, enacted VMC 5.84.015, after adopting Resolution M-2744, which found that private ambulance service in Vancouver would become inadequate under *RCW 35.21.766* if the District were served by a single contract EMS provider while the City of Vancouver were served by one of more EMS providers under a different system.

Defendants are protected **[*37]** by state action immunity from Metro West's antitrust claims. The court should deny Metro West's motion for summary judgment as to the antitrust claims, grant American Medical Response's motion for partial summary judgment as to the antitrust claims, and grant the City of Vancouver's joinder in American Medical Response's motion for summary judgment.

4. *Commerce Clause*

Metro West contends that the EMS Ordinance violates the *Commerce Clause* because it directly regulates interstate ambulance trips and, therefore, interstate commerce; it discriminates against interstate commerce by creating a private monopoly; and it favors local economic interests in lowering the cost of emergency ambulance services at the expense of out of state consumers of ambulance services. Dkt. 58, at 4.

American Medical Response contends that the EMS Ordinance does not favor local business nor discriminate against interstate commerce because it does not directly regulate interstate commerce; does not create a private monopoly; does not favor local interests; does not discriminate against interstate commerce; and does not impose a burden that falls uniquely on interstate commerce. Dkt. 79, at 7-15.

In reviewing challenges **[*38]** to local regulations under the *Commerce Clause*, the court follows a two-tiered approach:

> [1] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. [2] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461, 466 (9th Cir. 2001), citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986); *see also* NCAA v. Miller, 10 F.3d 633, 638 (9th Cir.1993). The "central rationale" of the dormant Commerce Clause "is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d at 466, citing C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994).

Per [*39] Se Violation of *Commerce Clause*. In order to determine whether the EMS Ordinance is a *per se* violation of the Commerce Clause, the court asks whether the ordinance directly regulates interstate commerce; whether the ordinance discriminates against interstate commerce; or whether the ordinance favors in-state economic interests over out-of-state economic interests. *See* Healy v. Beer Institute, 491 U.S. 324, 337 n. 14, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989) (quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S at 579).

> *Directly Regulates Interstate Commerce.* Metro West contends that the EMS Ordinance directly regulates commerce by targeting interstate ambulance trips. Metro West contends that a significant proportion of ambulance trips originating in the District are destined for Oregon, within a 30-mile radius. Metro West also contends that Oregon health care providers who could, and arguably would, contract with Metro West for ambulance services originating in Clark County cannot do so because of the EMS Ordinance. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. *See* Healy v. Beer Institute, 491 U.S. at 336, citing **[*40]** Brown-Forman, 476 U.S., at 579.

The EMS Ordinance does not govern activities that take place wholly outside of Washington State borders. The EMS Ordinance applies only to those transports originating in Washington, even if those transports terminate in Oregon. Further, the EMS Ordinance does not interfere with any legitimate regulatory scheme that Oregon might adopt to regulate ambulance services in Oregon, since the single franchise contract/EMS Ordinance does not purport to control any transports that originate in Oregon.

> *Discriminates against Interstate Commerce.* The single-franchise contract between Clark County and American Medical Response did not discriminate against any out of state company or entity during the competitive bid process. In fact, the record shows that both Metro West and American Medical Response are Oregon companies. Further, the EMS Ordinance applies to all ambulance services, in-state or out-of-state, that were not awarded the single-franchise contract. The EMS Ordinance does not discriminate against Interstate Commerce.

> *Favors In-state over Out-of-state Interests*. The single-franchise contract was awarded without regard to whether the winner of the competitive **[*41]** bid process was a Washington company or an out-of-state company. The EMS Ordinance is an enforcement mechanism related to the single franchise contract. Metro West argues that an Oregon hospital/health system wishes to contract with Metro West, but is unable to do so because of the EMS Ordinance. That argument is speculative at best. However, even assuming that that is true, the EMS Ordinance applies equally to a Washington hospital/health system that wishes to contract for ambulance services. The EMS Ordinance does not favor in-state over out-of-state interests.

The record shows that the EMS Ordinance is not a *per se* violation of the Commerce Clause.

Indirect Effects on Interstate Commerce. If the EMS Ordinance has only indirect effects on interstate commerce, and it regulates evenhandedly, the court balances whether the burden on interstate commerce clearly exceeds the local benefits. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

A statute that regulates interstate and intrastate commerce even-handedly will only be declared unconstitutional if the burdens of the statute so outweigh the putative benefits as to make the statute unreasonable or irrational. Alaska Airlines, Inc. v. Long Beach, 951 F.2d 977, 983 (9th Cir. 1992).

In **[*42]** this case, the County found that the single-franchise system assured higher quality care at lower cost. The single-franchise contract was awarded following a competitive bid process, in which both Metro West and American Medical Response participated. The single-franchise system has been shown to reduce costs and improve quality of service. Dkt. 68, and Dkt. 73, at 104-107. The local benefits of a single-franchise system are significant.

Metro West contends that the single-franchise system is a mechanism that provides funding for CRESA, and that Oregon residents are forced by the single-franchise system to shoulder some of the cost of funding that local Washington entity.

While some Oregon residents may be picked up by ambulance within the District, and while some of the fees those services may be used to fund CRESA, this is, at most, a minor burden to interstate commerce, and does not clearly exceed the significant local benefits of the single-franchise system. Metro West has not shown that the burden on interstate commerce of the single-franchise system, and the EMS Ordinance that enforces that system, clearly exceed the local benefits.

The court should deny Metro West's motion for **[*43]** summary judgment as to the *Commerce Clause* claim, American Medical Response's motion for partial summary judgment as to the *Commerce Clause* claims, and grant the City of Vancouver's joinder in American Medical Response's motion for partial summary judgment.

Accordingly, it is hereby **ORDERED** that:

1. Plaintiff Metro West Ambulance's Motion for Summary Judgment (Dkt. 58) is **GRANTED IN PART AND DENIED IN PART** as follows: The motion is **GRANTED** with regard to Metro West's motion for declaratory and injunctive relief. Metro West is entitled to perform ambulance services that are included in and covered by the VA contract, without fear of prosecution by Clark County for alleged violations of the EMS Ordinance, Clark County Code Section 5.48A.025. The motion is **DENIED** in all other respects.

2. Clark County's Motion for Partial Summary Judgment (Dkt. 71 and 66) is **DENIED.** The City of Vancouver joined in Clark County's Motion for Partial Summary Judgment; that motion (Dkt. 74) is **DENIED**. Clark County's counterclaim, requesting a permanent injunction enjoining Metro West from providing non-emergency ambulance service within the regulated service area of Clark County, without complying with the Clark **[*44]** County Code, is **DISMISSED**.

3. American Medical Response Northwest, Inc.'s Motion for Partial Summary Judgment (Dkt. 72) is **GRANTED**. The City of Vancouver's joinder in that motion (Dkt. 74) is **GRANTED**. Metro West's claims that the EMS Ordinance, Clark County Code Section 5.48A.025, violate antitrust laws and the *Commerce Clause* are **DISMISSED**.

4. This case is **DISMISSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 22nd day of December, 2011.

/s/ Robert J. Bryan

ROBERT J. BRYAN

United States District Judge

End of Document

Layne Christensen Co. v. Bro-Tech Corp.

United States District Court for the District of Kansas

December 23, 2011, Decided; December 23, 2011, Filed

Case No. 09-2381-JWL

Reporter

836 F. Supp. 2d 1203 *; 2011 U.S. Dist. LEXIS 148443 **; 2011 WL 6742887

LAYNE CHRISTENSEN COMPANY and DR. ARUP K. SENGUPTA, Plaintiffs, v. BRO-TECH CORPORATION, d/b/a THE PUROLITE COMPANY, Defendant.

Prior History: Layne Christensen Co. v. Bro-Tech Corp., 2011 U.S. Dist. LEXIS 116174 (D. Kan., Oct. 6, 2011)

Core Terms

patent, summary judgment, specification, invention, argues, intellectual property, invalidity, plaintiffs', bead, salt, infringement, preamble, resin, dispersed, iron, oxidant, manufacture, anionic, metal, parties, damages, adsorbent, Media, matter of law, summary judgment motion, prior art, counterclaims, written description, claim for breach, iron oxide

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Judges: John W. Lungstrum, United States District Judge.

Opinion by: John W. Lungstrum

Opinion

[*1208] **MEMORANDUM AND ORDER**

[*1209] **TABLE OF CONTENTS**

[*1210] MEMORANDUM [2] AND ORDER**

This case arises from an agreement ("the Agreement") by which SolmeteX, Inc. ("SolmeteX") licensed certain technology for the removal of arsenic from water, to which it held rights under a patent, to defendant Bro-Tech Corporation, d/b/a The Purolite Company ("Purolite"). Plaintiff Layne Christensen Company ("Layne") acquired SolmeteX and asserts SolmeteX's rights under the patent and the Agreement. Layne terminated the Agreement. Layne now asserts claims against Purolite for patent infringement, and pursuant to a prior order of the Court, Arup SenGupta, the owner of the patent, was added as a required plaintiff. Layne also asserts claims against Purolite for breach of the Agreement. Purolite has asserted counterclaims against Layne for breach of contract, breach of the implied covenant of good faith and fair dealing, unfair competition, and restraint of trade.

This matter presently comes before the Court on various motions by the parties involving expert witnesses. As more fully set forth below, the Court rules on those motions as follows: Plaintiffs' motion to exclude testimony by Richard

Troxel (Doc. # 426) is **granted in part and denied in part**; the motion is granted with **[**3]** respect to opinions concerning Layne's claim for royalties and Purolite's claim for unpaid invoices, but is denied as moot with respect to damages on Purolite's other counterclaims. Plaintiffs' motion to exclude certain expert sur-rebuttal reports (Doc # 428) is **denied**. Purolite's motion to exclude testimony by Dennis Clifford (Doc. # 430) is **denied**. Plaintiffs' motion for leave to file a declaration by Dr. Clifford (Doc. # 542) is **granted**, and the proposed declaration is deemed filed.

This matter also comes before the Court on Layne's motion for summary judgment on certain of Purolite's counterclaims (Doc. # 404). That motion is **granted**, and Layne is awarded summary judgment on Purolite's counterclaims at issue in the motion, namely all claims for breach of contract other than Purolite's claim of a breach based on the failure to pay for product, and Purolite's claims for unfair competition, restraint of trade, and breach of the implied covenant of good faith and fair dealing.

The matter is also before the Court on Layne's motion for partial summary judgment on its claims for breach of contract (Doc. # 406). That motion is **granted in part and denied in part**. As it relates to Layne's **[**4]** claim for damages for unpaid royalties, the motion is granted with respect to Purolite's liability, but denied with respect to the amount of damages. As it relates to Layne's claim for a permanent injunction for breach of Section 11.2 of the Agreement, the motion is granted, and Purolite is hereby permanently enjoined from making, selling, or using the product FerrIX A33E or any substantially similar product that uses "Intellectual Property" (as defined in the Agreement) resulting from Purolite's activities under the Agreement.

The matter is also before the Court on plaintiffs' motion for summary judgment on its claims of patent infringement (Doc. # 408). That motion is **granted in part and denied in part**. The motion is granted with respect to the following, on which plaintiffs are awarded summary judgment: Purolite's theories that Claim 1 of the patent is not infringed based on the "by the action of the oxidant" and "salt of said metal" limitations; and Purolite's invalidity defenses based on an inoperable process under *35 U.S.C. § 112* (Claim 1), the lack of a written description under *35 U.S.C. § 112* (Claim 1), and obviousness under *35 U.S.C. § 103* **[*1211]** (Claim 15). The motion is denied **[**5]** in all other respects.

The matter is also before the Court on Purolite's motion for summary judgment on certain of plaintiffs' claims (Doc. # 410). That motion is **granted in part and denied in part**. The motion is granted with respect to the following, on which Purolite is awarded summary judgment: Layne's claim for breach of Section 10.1 of the Agreement, to the extent that such breach is based on an underlying breach of a separate non-disclosure agreement between SolmeteX and Purolite; with respect to patent infringement, plaintiffs' marking estoppel theory and any claims by plaintiff based on indirect infringement or the doctrine of equivalents; and with respect to patent invalidity, plaintiffs' license estoppel theory and Purolite's defense that Claim 15 of the patent is anticipated by prior art pursuant to *35 U.S.C. § 102*—and thus also plaintiffs' claim for infringement of Claim 15. The motion is denied is all other respects.

I. Motions Relating to Experts

A. Plaintiffs' Motion to Exclude Troxel Testimony (Doc. # 426)

Plaintiffs Layne and Dr. SenGupta move to exclude expert testimony by Purolite's damages expert, Richard Troxel. This motion is granted in part and denied in part.

First, **[**6]** the motion is granted with respect to Mr. Troxel's opinions concerning the amount of unpaid invoices for product sold to Layne on which Purolite seeks to recover. In his report, Mr. Troxel merely totaled up the balance due on three invoices to arrive at a total amount due. Purolite has not addressed this opinion in its response brief, and thus it has not disputed that at trial Mr. Troxel would be doing nothing more than simply adding three numbers. Because the Court agrees with plaintiffs that adding up the three invoices does not require expert testimony and because this argument is unopposed, the motion is granted as it relates to this opinion.

Second, by this opinion, the Court has granted Layne summary judgment on all other counterclaims asserted by Purolite. *See infra* Part III. Accordingly, the motion is denied as moot to the extent that it relates to Mr. Troxel's opinions concerning damages for those counterclaims.

Third, the motion is granted with respect to Mr. Troxel's opinions on plaintiffs' claims for damages for infringement of the patent. Plaintiffs object to this testimony on the basis that Mr. Troxel did not do any analysis himself, but merely relied on the opinion of **[**7]** a Purolite executive concerning an appropriate royalty percentage. Purolite has not responded to this argument. Based on the evidence submitted by plaintiffs, it does appear to the Court that Mr. Troxel has not articulated an independent opinion on that issue. *See* *Ash Grove Cement Co. v. Employers Ins. of Wausau, 246 F.R.D. 656, 661 (D. Kan. 2007)* (Lungstrum, J.) (expert may not simply parrot or recite opinions and knowledge of other witnesses). For that reason and because the motion is unopposed with respect to these opinions, Mr. Troxel's opinions on this issue of plaintiffs' infringement damages will not be admitted.

B. Plaintiffs' Motion to Exclude Sur-Rebuttal Reports (Doc. # 428)

Plaintiffs move to exclude expert reports by Mr. Troxel and by Daniel Stack, another Purolite expert, that were provided after the expiration of the Court's expert disclosure deadlines. Purolite concedes that these two reports were submitted in **[*1212]** rebuttal to plaintiffs' rebuttal expert reports. This motion is denied.

First, given the Court's rulings, *see supra* **[**8]** Part I.A, Mr. Troxel will not be offering expert testimony at trial. Accordingly, the motion is moot with respect to Mr. Troxel's additional report.

Second, the Court agrees that the sur-rebuttal report by Dr. Stack was not authorized by the Court's scheduling order. Nevertheless, as long as he does not offer any new opinions separate from those offered in his authorized report, Dr. Stack will of course be permitted at trial to comment on criticisms by plaintiffs' expert of Dr. Stack's opinions. Moreover, Purolite could have submitted Dr. Stack's sur-rebuttal opinions in the form of a declaration to be considered at summary judgment. Thus, plaintiffs have suffered no prejudice from the fact that those sur-rebuttal opinions were formalized in a report, and in fact plaintiffs may be better able to prepare to cross-examine Dr. Stack at trial. In ruling on summary judgment, the Court will not consider any new opinion offered by Dr. Stack that is not fairly contained in his other report, and any such objection to a new opinion may be asserted at trial when appropriate. Accordingly, the Court denies the motion to exclude the sur-rebuttal report by Dr. Stack. Plaintiffs' request for sanctions **[**9]** is also denied.

C. Purolite's Motion to Exclude Clifford Testimony (Doc. # 430)

The Court also denies Purolite's motion to exclude testimony by plaintiff's expert, Dennis Clifford. First, with respect to his opinions concerning infringement, the Court concludes that Dr. Clifford's opinions are sufficiently based on his experience and that Purolite's objections concerning his analysis and the lack of testing go to the weight of the opinions and not to their admissibility. Second, the Court will not exclude Dr. Clifford's invalidity opinions on the basis that they are too short, as Dr. Clifford addressed the issues at greater length in his rebuttal report. Of course, Dr. Clifford may not offer an opinion on a legal issue at trial, but the Court will defer consideration of any such objection in order to rule on it in the context of his testimony at trial as a whole. Third, the Court does not agree with Purolite that Dr. Clifford's opinions concerning contract issues constitute an improper attempt to construe terms in the Agreement.

D. Plaintiffs' Motion for Leave to File Declaration (Doc. # 542)

In opposing Purolite's summary judgment motion, plaintiffs have cited to Dr. Clifford's expert **[**10]** reports. Purolite has objected to those citations, on the basis that the reports were not sworn or supported by an affidavit or declaration, as required by the local rule. *See* D. Kan. 56.1(d).[1] To address that objection, plaintiffs now seek leave to file a declaration by Dr. Clifford supporting his prior reports. Purolite opposes the motion, arguing that the declaration is untimely and that an extension is unwarranted.[2]

Because it concludes that an extension of time is warranted for plaintiffs' reliance on such a declaration, the Court grants this motion. *See* *Bishop v. Corsentino, 371 F.3d 1203, 1206 (10th Cir. 2004)* (noting factors relevant to a determination of excusable neglect). Because Purolite addressed Dr. Clifford's evidence in its summary judgment briefs, Purolite will not **[*1213]** suffer any unfair prejudice from the extension. Although Purolite ominously suggests that further discovery could result, it **[**11]** has not identified any additional discovery that it would seek leave to pursue. The delay in the submission of the declaration will not affect judicial proceedings. Plaintiffs' failure to include a declaration with its summary judgment response is reasonable in light of the fact that Purolite cited to and attached Dr. Clifford's unsworn report (also in violation of the local rule) in the summary judgment brief to which plaintiffs were responding. Finally, Purolite's argument that plaintiffs lacked good faith appears nonsensical, as there could be no conceivable advantage gained by delaying compliance with the requirement of a declaration.

For these reasons, the Court finds that plaintiffs' failure to submit the declaration previously resulted from excusable neglect and that an extension of the deadline to submit the declaration is therefore warranted. Thus, the Court grants the present motion for leave, and the proposed declaration is deemed filed. The Court further overrules Purolite's objections to plaintiffs' citations to Dr. Clifford's reports in the summary judgment briefs.

II. Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates that there is **[**12]** "no genuine dispute as to any material fact" and that it is "entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Burke v. Utah Transit Auth. & Local 382, 462 F.3d 1253, 1258 (10th Cir. 2006)*. An issue of fact is "genuine" if "the evidence allows a reasonable jury to resolve the issue either way." *Haynes v. Level 3 Communications, LLC, 456 F.3d 1215, 1219 (10th Cir. 2006)*. A fact is "material" when "it is essential to the proper disposition of the claim." *Id*.

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Thom v. Bristol-Myers Squibb Co., 353 F.3d 848, 851 (10th Cir. 2003)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))*. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. **[**13]** *Id*. (citing *Celotex, 477 U.S. at 325*). If the movant carries this initial burden, the nonmovant may not simply rest upon the pleadings but must "bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which he or she carries the burden of proof." *Garrison v. Gambro, Inc., 428 F.3d 933, 935, 150 Fed. Appx. 819 (10th Cir. 2005)*.

Finally, the Court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex, 477 U.S. at 327* (quoting *Fed. R. Civ. P. 1*).

III. Purolite's Counterclaims

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[1] *Fed. R. Civ. P. 56*, as recently amended, requires only that parties support their factual statements by citation to materials in the record.

[2] The Court rejects Purolite's further argument that the proposed declaration is not sufficient for purposes of compliance with the local rule.

Layne moves for summary judgment on various counterclaims asserted by Purolite (Doc. # 404).

A. Consequential Damages

Layne asserts that any claim by Purolite for consequential damages is barred by Section 9.4 of the Agreement, which precludes the recovery of such damages, including lost profits. Purolite does not dispute that the damage limitation applies in **[*1214]** this case to preclude such damages generally; rather, Purolite only notes that the limitation contains an exception for breaches of Section 11 of the Agreement and that it has indeed brought a claim **[**14]** against Layne for breach of Section 11 (relating to alleged acts of competition by Layne). Layne agrees that the prohibition against consequential damages would not apply to Purolite's claim under Section 11. Accordingly, Layne is granted summary judgment on all claims by Purolite for consequential damages other than Purolite's claim for breach of Section 11 of the Agreement.

B. Breach of the Agreement — Specifications

Purolite claims that Layne's predecessor, SolmeteX, breached Section 1.2 of the Agreement by "providing a deficient and inoperable product specification." (See Pretrial Order ¶ 5.b.) Layne seeks summary judgment on that counterclaim based on both the statute of limitations and the merits of the claim.

1. STATUTE OF LIMITATIONS

The Court applies Kansas limitations law in this case. *See Miller v. Armstrong World Indus., 949 F.2d 1088, 1089 n.3 (10th Cir. 1991)* (for state-law claim, court applies substantive law, including statutes of limitation, that forum courts would apply); *see also Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)* (federal court sitting in diversity jurisdiction must apply forum state's choice of law rules to determine which state's substantive **[**15]** law applies). Kansas courts apply their own state's statutes of limitations. *See Green v. Kensinger, 199 Kan. 220, 223, 429 P.2d 95 (1967)*. The Court also applies Kansas's borrowing statute, *K.S.A. § 60-516*, as necessary. *See Garcia v. International Elevator Co., 358 F.3d 777, 779 (10th Cir. 2004)*.

Layne asserts that SolmeteX provided the specifications to Purolite prior to November 2004, and that Purolite's claim therefore accrued at the latest on November 15, 2004, when SolmeteX and Purolite executed the Agreement, to which the specifications were attached. Purolite did not assert this counterclaim until January 2010 at the earliest. Therefore, Layne argues that Purolite's claim is barred by Kansas's five-year statute of limitations. *See K.S.A. § 60-511(1)* (five years for action on written agreement).[3]

Purolite does not dispute that its claim accrued on November 15, 2004, or that it first asserted the claim more than five years later. Nevertheless, Purolite contends that, despite the running of the statute of limitations, it may assert the claim as a defense, to the extent of any recovery by Layne under the Agreement. **[*1215]** Indeed, *K.S.A. § 60-213*, relating to counterclaims, provides as follows:

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[3] The Court rejects Purolite's argument that Layne waived this defense of the statute of limitations by raising it for the first time in the Pretrial Order. Whether or not the defense was raised before, it has been included without objection in the Pretrial Order, and thus the defense is properly in the case. Purolite has not moved to amend the Pretrial Order to strike that defense. Moreover, it appears **[**16]** that any such motion to amend would not succeed, as Layne notes that Purolite did not plead this specific counterclaim regarding the specifications until the Pretrial Order was prepared.

The Court also rejects Layne's argument that this claim is barred by laches, waiver, or estoppel. Layne improperly raised this argument for the first time in its reply brief. *See, e.g., U.S. Fire Ins. Co. v. Bunge N. Am., Inc., 2008 U.S. Dist. LEXIS 59737, 2008 WL 3077074, at *9 n.7 (D. Kan. Aug. 4, 2008)* (court will not consider issues raised for first time in reply brief) (citing *Minshall v. McGraw Hill Broadcasting Co., 323 F.3d 1273, 1288 (10th Cir. 2003)*). Moreover, Layne failed to analyze the elements of any of those doctrines, and thus has failed to establish those affirmative defenses as a matter of law.

> If a party's claim arises out **[**17]** of the contract or transaction that is the basis of an opposing party's claim . . . and it could have been asserted as a counterclaim or crossclaim against a person if the person had asserted a claim against the party previously, the party's claim is not extinguished by . . . the expiration of the statute of limitations. However, the party's claim may be asserted in these circumstances only to the extent that it does not exceed the amount awarded to the opposing party.

See id. *§ 60-213(d)*. Under this statute, a time-barred claim may nonetheless be used to obtain a setoff against the opposing party's recovery under the same contract if the two parties' claims were coexisting at any particular time. *See* *Mynatt v. Collis, 274 Kan. 850, 866, 57 P.3d 513 (2002)* (citing *Lightcap v. Mobil Oil Corp., 221 Kan. 448, 464, 562 P.2d 1 (1977))*. Purolite argues that Layne's claim for royalties under the Agreement, which Purolite allegedly failed to pay beginning in "late 2008" (see Pretrial Order ¶ 5.a), did coexist for a period with its own claim, which did not become time-barred under the Kansas statute until November 2009.

Layne argues that the claims did not coexist. Layne argues that Purolite's claim arose in Pennsylvania, **[**18]** the home of Purolite's manufacturing facilities where Purolite would have received the specifications from SolmeteX. Thus, Layne argues that Kansas would borrow Pennsylvania's four-year statute of limitations for a claim for breach of a written agreement, *42 Pa. Cons. Stat. § 5525(a)(8)*. *See* *K.S.A. § 60-516* (borrowing statute). Finally, Layne argues that because its own claim did not accrue until after November 15, 2008, the parties' claims did not coexist and Purolite therefore cannot assert its claim even in defense. Purolite does not dispute that its claim arose in Pennsylvania or that a four-year statute of limitations would govern Purolite's assertion of an affirmative claim. Nevertheless, Purolite argues, without analysis or citation to authority, that the borrowing statute would not apply because it is asserting its claim only defensively.

The Court agrees with Layne that the Pennsylvania four-year statute of limitations applies through the Kansas borrowing statute for purposes of determining whether the two claims coexisted here at any point in time. The Kansas Supreme Court has described the coexistence requirement as follows:

> The statute, *60-213(d)*, supra, requires that before **[**19]** the cross-claim can be asserted the two demands, the plaintiff's demand and the defendant's demand, must have coexisted between persons under such circumstances that if one had brought an action against the other, a counterclaim could have been set up. In all cases this prerequisite requires that at some point in time there must be a coexistence of the two claims together. If the cross-claim asserted is barred prior to the existence of the claim asserted in the damage action by [the plaintiff], then the statute does not allow the assertion of the cross-claim, since the two claims at no time coexisted in time.

J.A. Tobin Constr. Co. v. Holtzman, 207 Kan. 525, 534, 485 P.2d 1276 (1971); *see also* *Lightcap, 221 Kan. at 464* (considering when claims were "alive" under applicable statutes of limitations in determining whether claims coexisted for purposes of *K.S.A. § 60-213(d)*). Thus, for Purolite to assert its claim as a defense, the claim must have been alive, and not time-barred as an affirmative cause of action, at the time Layne's own cause of action accrued. At any time after November 15, 2008, Layne could have relied on **[*1216]** the borrowing statute and the Pennsylvania statute of limitations, and thus Purolite **[**20]** could not have maintained an affirmative claim after that date. Thus, the parties' claims coexisted only if Layne's own claim accrued before November 15, 2008.

The Pretrial Order is not helpful in resolving this issue of fact; that document notes Layne's contention that Purolite stopped paying royalties under the Agreement in "late 2008," and it contains a stipulation that "Purolite suspended payment of royalties to Layne at the end of 2008." (Pretrial Order ¶¶ 4.a(7), 5.a.) Layne has provided a copy of a letter that it sent to Purolite on November 19, 2008, in which it demanded unpaid royalties. First, this evidence was submitted only with Layne's reply brief, and the Court will not consider Layne's argument, made for the first time in that brief, that its claim accrued on that specific date. Second, Layne has not explained how the letter establishes that its claim did not accrue earlier. In fact, the letter stated that the demand was based on an audit performed in June 2008. Therefore, the Court concludes that an issue of fact remains concerning the accrual date of Layne's claim and whether the parties' claims coexisted for purposes of *K.S.A. § 60-213(d)*.

Accordingly, the Court grants **[**21]** Layne's motion for summary judgment on the basis of the statute of limitations on Purolite's claim relating to the provision of specifications under Section 1.2 of the Agreement to the extent that that claim is asserted affirmatively. The Court denies the motion based on the statute of limitations to the extent that the claim is asserted defensively to the extent of any recovery by Layne on the Agreement.

2. MERITS OF THE CLAIM[4]

Layne also argues that it is entitled to summary judgment **[**22]** on this claim because Purolite has failed to provide evidence that SolmeteX in fact breached the contract. The relevant contract provision, Section 1.2 of the Agreement, follows:

> *Specifications*. Purolite and SolmeteX will finalize and attach to this Agreement the Manufacturing Specifications (as defined below) for the Media. The "Manufacturing Specifications" will include finished product specifications for the Media, and certain testing standards to determine compliance therewith. The Manufacturing Specifications will be attached to this Agreement as Appendices A [*sic*] hereto, respectively. The Manufacturing Specifications will be developed such that (a) Purolite need disclose no proprietary manufacturing information and (b) SolmeteX's disclosure of proprietary information is minimized. After the initial Manufacturing Specifications are established, (i) SolmeteX will be promptly notified of all changes made thereto, and (ii) Purolite agrees to use best efforts to promptly implement any change thereto requested by SolmeteX.

Purolite has stated its claim for breach of this provision as follows:

> Purolite contends that both parties to the Contract had the understanding that **[*1217]** SolmeteX had **[**23]** produced a finalized, completed, and marketable "resin primarily used in arsenic removal from aqueous streams" and that the Manufacturing Specifications attached to the Contract as Appendix A provided a finished and finalized manner of manufacturing the ArsenXnp product. SolmeteX breached the Contract by providing a deficient and inoperable product specification that caused Purolite to experience a number of manufacturing problems and incur additional, unanticipated costs.

(Pretrial Order ¶ 5.b.)

In seeking summary judgment, Layne argues that SolmeteX did provide specifications before the Agreement was executed and that Purolite in fact manufactured and sold the product before the date of the Agreement. Layne disputes that the Agreement imposed any obligation to provide "operable" product specifications or specifications that would need no improvement, and it cites other portions of the Agreement that refer to anticipated improvements to the Media. Layne further argues that any obligation to provide a "marketable" product (although it disputes the existence of such an obligation) was satisfied because Purolite did sell the product. Finally, Lanye notes that the Agreement imposed the **[**24]** obligation regarding the specification jointly on SolmeteX and Purolite, although it does not explain how that would relieve SolmeteX of any obligation under Section 1.2.

In response, Purolite argues that the requirement for the provision of "finished product specifications" (from the definition of "Manufacturing Specifications") demanded SolmeteX's provision of "finalized specifications for a finished product," from which "Purolite could manufacture non-defective, commercially marketable Media." In that regard, Purolite notes the introductory language to the Agreement stating that "SolmeteX has developed a resin primarily used in arsenic removal from aqueous streams . . ., comprised of SolmeteX's chemistry applied to a Purolite base bead . . . (the 'Media')." Purolites cites to evidence that in late 2004 and early 2005, the product had problems (the product easily broke up, was fragile, had a bad odor, and left a precipitate); and that the product finally reached a "commercially ready point" in May 2005. Purolite argues that that evidence raises a question of

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[4] Because the parties have agreed that Delaware law governs all claims for breach of the Agreement, pursuant to a choice-of-law provision therein, the Court has also applied Delaware law for purposes of resolving the parties' summary judgment motions. The parties have not addressed the scope of that choice-of-law provision, however, or whether the law of the place of performance could govern issues not relating to the interpretation of the Agreement. *See, e.g., Layne Christensen Co. v. Zurich Canada, 30 Kan. App. 2d 128, 142, 38 P.3d 757 (2002)* (noting difficulty is deciding whether to apply law of place of contracting or place of performance). Thus, the Court does not comment on which state's law will be applied at trial.

fact concerning whether SolmeteX "initially provided finished product specifications that yielded a commercially viable product."

The **[**25]** Court rejects Purolite's arguments. First, contrary to Purolite's interpretation, Section 1.2 does not require the provision of specifications that yield a perfect product, a marketable product, or a product free of any problems. The only obligation is to provide "finished product specifications." Thus, applying the ordinary meaning of the word "finished", SolmeteX was required only to provide specifications in their completed form, and not from some initial or earlier stage. As noted by Layne, the contract clearly contemplated that improvements would be made to the initial specifications—indeed, Section 1.2 itself speaks to future changes by Purolite to the "initial Manufacturing Specifications." Although Purolite points to the introductory language, it has not provided any evidence that SolmeteX in fact had *not* developed an arsenic removal resin comprising its chemistry and Purolite's bead. Purolite's evidence that there were issues demanding improvement to the product and that the product was not "commercially ready" does not constitute evidence that SolmeteX did not provide its "finished product specifications." Purolite does not controvert the fact that it did sell the product, **[**26]** based on SolmeteX's specifications, **[*1218]** even before the execution of the Agreement. Thus, Purolite has not submitted evidence that SolmeteX breached Section 1.2 of the Agreement. Accordingly, the Court awards summary judgment in favor of Layne on this claim for breach of contract (whether asserted affirmatively or merely as a defense).

C. Breach of the Agreement — Pursuit of Suspected Infringer

Purolite also claims that Layne breached Section 4.6.1 of the Agreement by failing to "pursue" parties suspected of infringing the patent. Layne argues that Purolite cannot produce evidence that it has suffered any damage from any such breach. In support of that argument, Layne notes that Purolite's damage expert could not identify any specific sales that Purolite lost because Layne did not pursue infringers, and he did not offer any opinion as to whether any such failure by Layne caused damage to Purolite. In response, Purolite concedes that it cannot establish the amount of its damages for this breach with the necessary certainty, but it argues that because it did suffer some damage from this breach, it may seek nominal damages. Purolite cites evidence that one suspected infringer, Resin Tech, did **[**27]** make some sales of an infringing product, and it argues that it was damaged because "those sales necessarily could have been made by Purolite."

The Court rejects this claim by Purolite for nominal damages for several reasons. First, Purolite has not explained why the Court should permit it essentially to seek a declaration of breach, in the guise of a claim for nominal damages, without pursuing any meaningful relief.[5] Second, any such damage in the form of lost sales would constitute consequential damages (which includes lost profits), the recovery of which the Agreement precludes—nominal or otherwise—as set forth above. Third, Purolite's statement in its brief that it could have made the sales that Resin Tech made is not sufficient to withstand summary judgment on this point. The only actual evidence cited by Purolite in support of that bit of speculation is the statement in the declaration of a Purolite executive that "[t]o the extent that Resin Tech sold its ASM-10-HP product in or around September of 2008, those requirements for an arsenic removal product could have been satisfied by the ArseneX product made by Purolite at that time." Purolite

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[5] In support of its claim for nominal damages, Purolite cites an unpublished opinion, *Ivize of Milwaukee, LLC v. Compex Litigation Support, LLC, 2009 Del. Ch. LEXIS 55, 2009 WL 1111179 (Del. Ch. Apr. 27, 2009)* (unpub. op.). In *Ivize*, the court stated that "the breach of a contractual obligation often warrants an award of nominal damages." *See 2009 Del. Ch. LEXIS 55, [WL] at *12* (citing *Palmer v. Moffat, 2004 Del. Super. LEXIS 51, 2004 WL 397051, at *4 (Del. Super. Feb. 27, 2004)* (unpub. op.)). In *Palmer*, however, an unpublished district court opinion on which the Ivize court relied, the court noted that "[e]ven where nominal damages are possible, a trial is not always warranted," and it refused to allow such a claim in that case because **[**29]** no loss was shown by the plaintiff and a trial on liability would have been a futile exercise. *See Palmer, 2004 Del. Super. LEXIS 51, 2004 WL 397051, at *4-5* (citing *22 Am. Jur. 2d, Damages § 9*, p.39). Similarly here, no purpose would be served by allowing this claim for nominal damages to proceed to trial (there is no claim for injunctive relief, for example), and Purolite has not cited any authority that would require the trial of such a claim for nominal damages for breach of contract. Moreover, the fact that Purolite cannot assert an affirmative claim for this breach does not preclude Purolite's assertion of the breach as an affirmative defense to Layne's own claim for breach of the Agreement.

has not provided any evidence concerning **[**28]** when any sales by Resin Tech occurred, however; nor is there evidence that the declarant had any personal knowledge about the volume or other details of **[*1219]** any sales by Resin Tech, or whether Resin Tech actually made any sales in September 2008. Thus, Purolite has not provided evidence that it could and would have made specific sales that Resin Tech made, and thus it has not shown that it did suffer actual damage from the alleged breach. Accordingly, Layne is awarded summary judgment on this claim by Purolite for breach of contract.[6]

D. Breach of the Agreement — Competitive Acts

Purolite also claims a breach of Section 11.1 of the Agreement, which provides as follows:

11. Non-Competition

> 11.1 *Restrictions on SolmeteX*. Except as otherwise set forth in this Agreement, SolmeteX agrees not to use any third party distributor as defined in section 3.2 for the Media in the Licensed Channels **[**30]** other than Purolite during the Term. Except as otherwise set forth in this Agreement, Solmetex agrees not to use any other supplier for Media and not to license any third party to manufacture Media for commercial sale during the Term. Notwithstanding anything herein to the contrary, there will be no limitation on SolmeteX's non-sales activities, including research and development related to Media.

Purolite claims that Layne breached this provision by engaging in the following "acts of competition" against Purolite:

> (1) activities with Thermax, including a purchase order to Thermax Inc. for 2,000 cubic feet of ArseXnp in July of 2005 and the subsequent production of ArseXnp by Thermax; (2) work with Mobile Process Technology ("MPT") on the development, promotion, and sale of "npRio", a competing arsenic removal product; (3) other activities with MPT, consisting of the formation and promotion of certain partnerships and joint ventures, MPT's manufacture of ArsenX on behalf of SolmeteX, and the project known as "Compliant Water"; and (4) the development, promotion, and sale of Layne's own competing products called Layne33 and Layne RT.

(Pretrial Order ¶ 5.b.)

1. DAMAGES

In seeking summary **[**31]** judgment on this claim, Layne argues that Purolite has not produced any evidence of damage attributable to this alleged breach.[7] Layne notes that Purolite's damage expert could not attribute specific amounts of damages to the alleged anti-competitive acts involving Thermax or MPT or Layne RT.

With respect to the amount of its damages, Purolite points to its expert's opinion by which he calculated a specific amount of damages suffered by Purolite for all of the competitive acts alleged (based on Purolite's lost sales to SolmeteX directly and to one other customer). Thus, Purolite has submitted evidence of the amount of its damages for this alleged breach. The Court does not agree with Layne that the expert's inability to allocate his damage amount for this breach among the alleged anti-competitive acts precludes this claim at this stage.

The Court does agree with Layne, however, that Purolite has failed to provide any evidence of the fact of any damage **[*1220]** suffered as a result of this alleged breach. On this issue of damages, Purolite's entire argument is as follows:

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[6] Because of this ruling, the Court need not address the merits of this claim, including the meaning of "pursue" and whether Layne did pursue Resin Tech as a matter of law.

[7] As noted above, the consequential damage limitation in the Agreement did not apply to breaches of Section 11 of the Agreement.

> Finally, **[**32]** [Layne] argues that there is no evidence of any damage to Purolite for any of these acts of competition. Not true. Those acts of competition directly led to the breakdown of the Agreement. SOF at ¶ 71. Indeed, without those acts of competition, the parties would still be working together to produce ArsenX today. SOF at ¶ 71. And the damage amounts to Purolite have been extensively explained by Purolite's damages expert Mr. Troxel. SOF ¶ 92. What's more, Purolite has suffered intangible, yet real, damage as result [sic] of these acts of competition including the loss of business and diminished reputation. SOF ¶ 71.

First, the citation to the expert report of Mr. Troxel (Purolite's damage expert) in Paragraph 92 of Purolite's Statement of Facts, as noted above, provides evidence of the amount of damage, but it does not provide any evidence of the fact of damage to Purolite. In his report, Mr. Troxel stated that in making his calculations, he assumed proof of the alleged breach,[8] and he calculated his lost sales figure for this claim based on Purolite's "belief" that it lost sales because of Layne's actions in the marketplace. Mr. Troxel did not provide any expert opinion that Purolite **[**33]** lost sales because of the alleged acts (and it is hard to imagine that he could do so as an expert); rather, he opined that if Purolite in fact lost sales, those sales totaled to a certain figure.

Purolite's only other citation to the record in support of its argument that it suffered damages (the breakdown of the Agreement and the relationship, "intangible" damages) is to Paragraph 71 of its statement of facts. That paragraph, however, relates only to Purolite's ability to make sales made by Resin Tech (addressed above). Neither that paragraph nor any other paragraph in Purolite's Statement of Facts in its response to this motion cites to evidence that Purolite suffered actual harm from the alleged anticompetitive acts by Layne. Accordingly, Purolite has not provided evidence, as required in opposing summary judgment, **[**34]** that it suffered damages as a result of the alleged breach, and summary judgment is therefore appropriate on this claim.

2. MERITS OF THE CLAIM

Layne is also entitled to summary judgment for another reason. In arguing that it did not breach Section 11.1 of the Agreement, Layne notes that all of the restrictions in that section relate to activities involving "Media". That term is defined in the introduction the Agreement:

> Whereas, SolmeteX has developed a resin primarily used in arsenic removal from aqueous streams, which is referred to as "AsXnp" or "ArsenXnp", comprised of SolmeteX's chemistry applied to a Purolite base bead (in this case, Purolite's A-500P base bead or improved alternate) (the "Media");

Layne has provided evidence that the alleged competitive acts involved products that did not use a Purolite bead, but instead used beads manufactured by others. Thus, Layne argues that any such acts did not involve "Media", which must by definition include a Purolite bead, and that it **[*1221]** therefore cannot be said to have breached Section 11.1.

Purolite does not dispute that the alleged acts of breach did not involve any product or resin using a Purolite bead. Rather, Purolite argues that the **[**35]** Court should not interpret "Media" to require the use of a Purolite bead, despite the plain language of the Agreement's definition. Purolite instead asks the Court to interpret "Media" to be a resin product with SolmeteX's chemistry on *any* substrate, which interpretation Purolilte asserts would be in keeping with the parties' intent. Purolite argues that following the plain language of the definition would be absurd and unreasonable, although it does not explain that absurdity. In support of its interpretation, Purolite argues that the title of the Agreement ("Exclusive . . . Agreement") and other terms in the Agreement show that the intent was for Purolite to be the exclusive manufacturer for the product (Purolite appointed as "exclusive manufacturer and supplier of the Media") and to prevent SolmeteX from competing with Purolite (Solmetex may not direct sell the

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[8] Under Delaware law, which the parties agree applies here, resulting damage from the breach is an element of a claim for breach of contract. *See H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129, 140 (Del. Ch. 2003)*; *see also Paul v. Deloitte & Touche, LLP, 974 A.2d 140 (Del. 2009)* (affirming summary judgment based on failure to show damage from alleged breach of contract).

Media to third party distributors, Purolite is lead distributor of the Media, Solmetex will use its best efforts to avoid competing directly at the same customers, and Purolite and SolmeteX will work together to penetrate the market).[9]

The Court rejects Purolite's alternative definition. The Agreement's definition of "Media" to include a Purolite base bead is unambiguous. The Agreement as a whole does not show that definition to be unreasonable or absurd, as the parties quite reasonably could have intended to restrict competing acts only to the extent that they involve the unique combination of SolmeteX's chemistry and Purolite's base bead, with which the product was originally constructed. The other terms from the Agreement cited by Purolite also relate to the Media and do not contradict the definition's plain language or Section 11.1; nor do they suggest that the parties intended to restrict SolmeteX's activities involving the use of a different bead. The Court therefore **[**37]** interprets Section 11.1, in conjunction with the Agreement's unambiguous definition of "Media", as prohibiting only certain activities by SolmeteX involving the use of product or resin that includes a Purolite base bead.

Purolite does not dispute that the alleged acts by Layne did not involve a product using a Purolite base bead, or provide evidence to the contrary. Accordingly, Purolite has not provided evidence that Layne breached Section 11.1 by those acts, and summary judgment is warranted on this claim for that reason as well.[10]

E. Breach of Implied Covenant of Good Faith and Fair Dealing

Purolite also asserts a counterclaim for breach of the Agreement's implied covenant of good faith and fair dealing, based on the same anti-competitive acts by Layne that Purolite alleged with respect to the counterclaim under Section 11.1.

[*1222] 1. DAMAGES

Layne again argues that Purolite has failed to provide evidence of damage, for the same reasons set forth above with respect to the claim under Section 11.1. In **[**38]** response, Purolite only incorporates its prior arguments concerning the claim under Section 11.1. As explained above, Purolite did not provide evidence of the fact of its damage from the alleged anti-competitive acts. Accordingly, summary judgment is also appropriate on Purolite's claim for breach of the implied covenant.[11]

2. MERITS OF THE CLAIM

The Court concludes that summary judgment on this claim is warranted for another reason as well. Delaware courts have expounded on this cause of action as follows:

> All contracts are subject to an implied covenant of good faith and fair dealing. This doctrine, however, does not provide a Delaware court with the authority to rewrite or supply omitted provisions to a written contract. Rather, a court should be cautious when implying a contractual obligation and do so only where obligations which can be understood from the text **[**39]** of the written agreement have nevertheless been omitted from the

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[9] Purolite also cites testimony by a SolmeteX executive that because of the definition of **[**36]** "Media", SolmeteX was in a better situation than he initially anticipated, and because of that "loophole", SolmeteX could have another company make the product with a non-Purolite bead. Of course, if a contract is unambiguous, such parol evidence is not admissible to alter or add a term to the contract or even to create an ambiguity, *see* *Capital Mgmt. Co. v. Brown, 813 A.2d 1094, 1097 (Del. 2002)*, and the Court concludes that there is no ambiguity here.

[10] Because of this ruling, the Court does not address the parties' arguments concerning the interpretation of "sales activities" and whether the alleged acts fell within the scope of that term.

[11] In addition, a claim for breach of the implied covenant does not fall within any of the exceptions in Section 9.4 of the Agreement; therefore, this claim, by which Purolite seeks damages for lost sales, would also be barred by that section's prohibition against the recovery of lost profits and other consequential damages.

> agreement in the literal sense. In this instance, a court's inquiry should focus on what the parties likely would have done if they had considered the issue involved. The express terms of a contract and not an implied covenant of good faith and fair dealing, however, will govern the parties' relations when the terms expressly address the dispute.

*Fitzgerald v. Cantor, 1998 Del. Ch. LEXIS 212, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998)* (unpub. op.) (footnotes and internal quotations omitted).

> Under Delaware law, the implied covenant of good faith and fair dealing is employed as a means of honoring the parties' reasonable expectations in forming a contract. Courts must interpret the reasonable expectations of the parties within the context of existing contract terms, however. Accordingly, the implied covenant cannot be asserted to circumvent the express terms of the parties' bargain or to create new duties unattached to the underlying contract, and courts should not imply alleged obligation where the contract addresses the subject of the alleged wrong but fails to include the obligation alleged. Thus, the Delaware Supreme Court has consistently **[**40]** held that obligations under the covenant of good faith and fair dealing should be implied only in rare instances.

*Homan v. Turoczy, 2005 Del. Ch. LEXIS 121, 2005 WL 2000756, at *18 (Del. Ch. Aug. 12, 2005)* (unpub. op.) (footnotes omitted).

With respect to this claim, Purolite asks the Court to recognize an implied term prohibiting Layne from engaging in the alleged anti-competitive acts, even if those acts do not involve products using the Purolite base bead and thus do not involve the "Media". The Agreement, however, contains specific terms concerning prohibited anticompetitive acts by SolmeteX. Thus, SolmeteX's (and Layne's) restrictions are expressly stated, and under Delaware law, this Court may not inject other obligations relating to non-competition by SolmeteX into the contract under the guise of the implied covenant of good faith and fair dealing. Accordingly, **[*1223]** Purolite's claim under this doctrine fails, and Layne is awarded summary judgment for this reason as well.

F. Unfair Competition

In the Pretrial Order, Purolite asserts a claim for "common law unfair competition." Layne seeks summary judgment on that claim on the basis that such a claim is not recognized under Kansas law. Purolite agrees that Kansas **[**41]** law applies and that Kansas does not recognize this claim. Purolite therefore states that it withdraws this claim. Based on Purolite's admission that the claim as asserted in the Pretrial Order cannot stand, however, the Court deems it appropriate to enter summary judgment in Layne's favor on this claim.

G. Restraint of Trade

Finally, Purolite seeks an injunction prohibiting Layne's enforcement of one provision of Section 11.2 of the Agreement. The provision in question reads as follows:

11. Non-Competition

> . . .
>
> 11.2. *Restrictions on Purolite*. . . . During the Term and hereafter, Purolite agrees not to directly or indirectly use any Intellectual Property resulting from its activities under this Agreement to directly or indirectly manufacture, sell, supply or use any products or media substantially similar to, or competitive with, the Media (excluding any existing product already manufactured by Purolite as of the date of this Agreement) or other products of SolmeteX. . . .

Purolite claims that this provision should be deemed void as an unreasonable restraint of trade in violation of one of Kansas's antitrust statutes, K.S.A. § 50-112. The statute reads as follows:

> All arrangements, contracts, **[**42]** agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix attorney or doctor fees, and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

Id. (emphasis added). Purolite argues that this provision in Section 11.2 of the Agreement unreasonably restricts its ability to compete with Layne because the restriction lacks any temporal or geographical limitation; the restriction goes beyond what is necessary to protect Layne's interest in its intellectual property, in light of protection under the **[**43]** patent laws and other terms in the Agreement; Purolite is restricted from using intellectual property jointly owned with Layne; a limited number of competitors operate in this market; and the product, which removes arsenic from water, benefits public health.

Layne seeks summary judgment on this claim, arguing as a matter of law that Purolite has not shown that this contractual provision is an unreasonable restraint of trade in violation of the Kansas antitrust statute. The Court concludes that the relevant caselaw indicates that the **[*1224]** Kansas Supreme Court would not deem this provision void as a violation of K.S.A. § 50-112. Accordingly, the Court agrees with Layne that summary judgment is appropriate here.

In 1999, the Kansas Supreme Court noted that, although Section 50-112 is broad on its face, "there has been no meaningful interpretation" of the statute since its enactment more than one hundred years ago, as only a few cases involving the statute had come before the supreme court, and none since 1959. *See* Bergstrom v. Noah, 266 Kan. 829, 843-44, 974 P.2d 520 (1999). That 1959 case, however, is at least somewhat instructive. In Okerberg v. Crable, 185 Kan. 211, 341 P.2d 966 (1959), the court placed the burden of **[**44]** proof on the party challenging the contract and applied a presumption of validity, in accordance with its earlier cases, as follows:

> There is no presumption that a contract is illegal. He who denies his liability under a contract which he admits having made, must make the fact of its illegality apparent. The burden of showing it wrong is on him who seeks to deny his obligation thereon. The presumption is in favor of innocence, and the taint of wrong is a matter of defense.

Id. at 217 (quoting Morrison v. Bandt, 145 Kan. 942, 945, 67 P.2d 584 (1937), which quoted an earlier case). The court also confirmed that the governing test under the statute is one of reasonableness:

> The old rule as to limitations of time and space with respect to contracts involving restraint of trade has given way to the modern doctrine of reasonableness and the real test is never whether there is any restraint but always whether the restraint is reasonable under the facts and circumstances of the particular case.

Id. (quoting Heckard v. Park, 164 Kan. 216, 188 P.2d 926, syl. ¶ 7 (1948)). The question of reasonableness depends "upon the fundamental elements of common fairness in view of the facts and circumstances of the parties." *Id*. (quoting **[**45]** Heckard, 164 Kan. at 224).

Applying these standards in *Okerberg*, the supreme court held that a restriction among milk haulers concerning routes was reasonable. *See* id. at 217-18. In so concluding, the court reviewed and distinguished several cases that involved either price-fixing or a monopolized market. *See* id. at 215-17.

At the time *Okerberg* was decided, the supreme court had last addressed Section 50-112 in Barton v. Hackney, 167 Kan. 754, 208 P.2d 590 (1949), which involved a contract for the sale of a restaurant that also prohibited the seller from competing in that city for a period of time. *See id*. In holding that that restraint was reasonable and did not violate *Section 50-112*, the court noted that the statute "was not passed with the intention of prohibiting such a contract as this made in connection with the sale of a business." *See id. at 760-61*.[12] The court also relied on its previous opinion in *Mills v. Ressler, 87 Kan. 549, 125 P. 58 (1912)*, in which the court had stated that the decisive test under this statute for contracts that do not restrain competition generally is the resulting injury to the public. *See Barton, 167 Kan. at 760* (quoting *Mills, 87 Kan. at 554*). The *Barton* court further noted **[**46]** that in *Mills*, for purposes of that inquiry, it had distinguished contracts "that stifled competition between public service and like **[*1225]** corporations." *See id. at 760* (citing *Mills, 87 Kan. at 554*). In *Mills*, the court upheld as valid under *Section 50-112* a contract by which a physician sold his practice and agreed not to practice or to disclose or sell certain formulas. *See Mills, 87 Kan. at 555*. In so finding in *Mills*, the supreme court applied a standard of reasonableness, as follows:

> [T]he validity of a contract in partial restraint of trade or business is not to be determined by the arbitrary measures of extent in time, extent in space, and the like, but by its reasonableness under all the circumstances, having regard both for the liberty of a person to make beneficial use of his own, and for the public consequences of such use.

Id. at 554. The court proceeded to make the distinction later affirmed in *Barton*:

> Therefore the subject of the contract belongs to a different class from those which involve competition between public service corporations like gas and electric light companies, or which involve natural competition in ordinary branches of trade.

Id.

The Kansas Supreme Court also upheld a contract against this statute in *Heckard v. Park, 164 Kan. 216, 188 P.2d 926 (1948)*, in which the contract allegedly restrained competition by prohibiting the defendant from taking singing lessons from any instructor other than the plaintiff. *See id*. The court applied the same standards from *Mills* that it later applied in *Barton* and *Okeberg*:

> The real question is never whether there is any restraint of trade, but always whether the restraint is reasonable in view of all the facts and circumstances and whether it is inimical to the public welfare. If it is reasonable and does not contravene public welfare the contract will be upheld. . . .
>
> The old rule as to limitations of time and space has given way to that of reasonableness. The question of reasonableness of a contract of this character frequently depends upon fundamental elements of common fairness in view of the facts and circumstances of the parties.

Id. at 223-24 (citations omitted). In finding the **[**48]** contract before it to be reasonable, the court distinguished one case involving the furnishing of electricity for the public and another involving price-fixing. *See id. at 224*.

The Court also notes the supreme court's opinion in *Gard v. Holmes' Estate, 132 Kan. 443, 295 P. 716 (1931)*, in which the supreme court invalidated under the Kansas antitrust statutes a secret agreement to hire away an undertaker in a particular city to control price and cost in that market. *See id*. The court noted in *Gard*, however, that if the plaintiffs had simply bought out the undertaker's business with an agreement for him not to compete there, the court would have had "little hesitation in upholding the contract." *See id. at 446*. Years later, in *Okerberg*, the supreme court relied on this distinction and reaffirmed that "relaxing" of the strict rule of earlier cases. *See Okerberg, 185 Kan. at 216* (citing *Gard, 132 Kan. at 446*).

Finally, even though the case does not specifically refer to *Section 50-112* in discussing the Kansas antitrust statutes generally, the Kansas Supreme Court's opinion in *Sage v. Oil Country Specialties Mfg. Co., 134 Kan. 215, 5 P.2d 1091 (1931)*, supports the Court's decision here. Like the present case, *Sage* **[**49]** involved an agreement for the license of patented technology **[*1226]** that had allegedly been breached by the sale of a competing product by the licensee. *See id*. The court held that the contract was not void under Kansas's anti-monopoly acts,

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[12] At one point in the opinion, **[**47]** the *Barton* court mistakenly referred to *Section 50-118*, but it referred at other places to the defendant's argument under *Section 50-112*, and it quoted and considered the latter statute. *See Barton, 167 Kan. 754, 208 P.2d 590*.

K.S.A. § 50-101 et seq. *See id. at 220*. The court noted that "[t]he main purpose of the anti-trust acts is to prevent a person or an association from gaining control of the market, shutting off competition, and fixing prices at will to the prejudice of the public," and that "[t]he protection of the public is the vital thing in the statute." *See id*. The court stressed that the defendant could still sell other products, as long as they didn't compete with plaintiff's product; that there was no monopoly to harm the public; and that competition generally was not restrained, as others could still sell competing products. *See id. at 219-20*.

Based on these cases from the Kansas Supreme Court, the Court concludes as a matter of law that Purolite has not met its burden to show that the provision in Section 11.2 of the Agreement is unreasonable in violation of *K.S.A. § 50-112*. Under Kansas law, the Agreement is presumed to be valid. As a part of the Agreement, Layne **[**50]** granted a license and disclosed its intellectual property to Purolite, and it was reasonable for the parties to agree to restrict Purolite's use of that intellectual property and any other intellectual property that resulted from activities under the Agreement to compete with Layne's own products. Purolite was not prohibited from competing with Layne altogether—it only had to forego competition using the intellectual property gained as a result of a contract that included benefits for Purolite and that Purolite willingly entered into. Nor did the Agreement stifle competition in the market generally, as Purolite has not shown that a monopoly existed here. Nor did the Agreement involve a public service corporation or the like. The fact that the restriction did not include temporal or geographic limitations is not especially pertinent, as the Kansas Supreme Court has made clear. This case does not involve a monopoly or price-fixing, as in the cases consistently distinguished by the supreme court. Moreover, if the right to compete could not be contracted away in this manner, companies would be discouraged from licensing their technology to other companies. Finally, Purolite has not cited **[**51]** any Kansas authority suggesting that Section 11.2 should be invalidated as a violation of *K.S.A. § 50-112*.

The Court is convinced that the Kansas Supreme Court would reject this challenge under *Section 50-112* and uphold Section 11.2 of the Agreement. Accordingly, the Court also rejects this challenge, and it awards summary judgment in favor of Layne on Purolite's counterclaim for restraint of trade.[13]

IV. Layne's Claims for Breach of Contract

Layne asserts various claims against Purolite for breach of the Agreement, which are the subject of summary judgment motions by the parties. Layne seeks summary judgment on its claim for breach of Purolite's obligation to pay royalties for sales of the product, and on its claim for a permanent injunction prohibiting the further breach of Section 11.2 of the Agreement (Doc. # 406). Purolite seeks summary judgment on any claims by Layne under Sections 10.1 and 11.2 of the Agreement (Doc. # 410).

[*1227] *A. Purolite's **[**52]** Defense of a Prior Material Breach*

Purolite seeks to avoid summary judgment based on the defense that its own performance under the Agreement was excused by a prior material breach of the Agreement by SolmeteX or Layne. *See, e.g., Eastern Elec. and Heating, Inc. v. Pike Creek Prof. Ctr., Inc., 1986 Del. LEXIS 1191, 1986 WL 9031, at *3 (Del. Aug. 5, 1986)* (unpub. op.) (noting the general rule that "the party first guilty of a material breach of contract cannot complain if the other party subsequently refuses to perform"); *DeMarie v. Neff, 2005 Del. Ch. LEXIS 5, 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005)* (unpub. op.) (material breach may excuse other party's performance). The Court addresses in turn each prior breach alleged by Purolite.

1. PROVISION OF SPECIFICATIONS

[13] After these rulings by the Court, the only remaining counterclaim is Purolite's claim for breach of contract, in the amount of $53,802.11, based on SolmeteX's alleged failure to pay for product sold to it by Purolite in 2009. (See Pretrial Order ¶ 5.b.)

Purolite contends that SolmeteX breached Section 1.2 of the Agreement by failing to provide sufficient specifications for the product, and in support, Purolite refers to the arguments that it made in opposition to summary judgment on its affirmative counterclaims. The Court has already concluded, however, that Purolite has not presented evidence to establish a breach of this provision. *See supra* Part III.B.2. Accordingly, Purolite may not rely on this alleged prior **[**53]** material breach in opposition to summary judgment on Layne's contract claims.[14]

2. COMPETITIVE ACTS

Purolite, again relying on its arguments in support of its affirmative counterclaim, also argues that Layne breached Section 11.1 of the Agreement and the implied covenant of good faith and fair dealing by engaging in certain competitive acts. Because the Court has already rejected this claim on its merits, *see supra* Parts III.D.2, III.E.2, Purolite may not rely on this alleged prior material breach.

3. PURSUIT OF SUSPECTED INFRINGER

Third, Purolite argues that Layne breached Section 4.6.1 of the Agreement by failing to pursue a party suspected of infringing the patent. The Court concludes, however, that this alleged breach by Layne was not in fact a material breach.

Delaware courts have recognized that a prior breach must be material to excuse later performance:

> Not all breaches will authorize the other party to abandon or refuse further performance. To justify termination, it is necessary that **[**54]** the failure of performance on the part of the other go to the substance of the contract. "Modern courts, and the Restatement (Second) of Contracts, recognize that something more than mere default is ordinarily necessary to excuse the other party's performance in the typical situation, subscribing to the general rule that where the performance of one party is due before that of the other party, such as when the former party's performance requires a period of time, an uncured failure of performance by the former can suspend or discharge the latter's duty of performance only if the failure is *material or substantial*." Thus, although a material breach excuses performance of a contract, a nonmaterial—or *de minimis*—breach will not allow the non-breaching party to avoid its obligations under the contract.

[*1228] *DeMarie, 2005 Del. Ch. LEXIS 5, 2005 WL 89403, at *4* (emphasis in original) (quoting 14 *Williston on Contracts* § 43:5 (4th ed. 2004)) (footnotes omitted). In *Hexion Specialty Chemicals, Inc. v. Huntsman Corp., 965 A.2d 715 (Del. Ch. 2008)*, the court further quoted from the Williston treatise's explanation of materiality as follows:

> Thus if the prior breach of such a contract was slight or minor, as opposed to material **[**55]** or substantial, the nonbreaching party is not relieved of his or her duty of performance, although he or she may recover damages for the breach. . . . Generally, such nonperformance will attain this level of materiality only when it goes to the root, heart or essence of the contract or is of such a nature as to defeat the object of the parties in making the contract, or, as it has sometimes been said, when the covenant not performed is of such importance that the contract would not have been made without it.

Id. at 752 n.99 (quoting 14 *Williston on Contracts* § 43:5-6).

The Court concludes that even if Layne did commit a breach by failing to pursue a single suspected infringer, Resin Tech (an issue that the Court does not decide), such a breach would not have been a material breach. First, Purolite has not offered any argument why this breach meets this standard of materiality. Second, the Agreement reveals that its essential purpose was to grant Purolite a license to use SolmeteX's intellectual property to manufacture and distribute a product, and the alleged failure by Layne to pursue Resin Tech was not so substantial as to defeat that object. In opposing summary judgment on its counterclaim **[**56]** based on this alleged breach, Purolite could not provide evidence that it suffered any resulting damage. Nor did Purolite dispute Layne's evidence that the degree of suspected infringement and the quality of the infringing product did not justify an infringement

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[14] In light of the parties' briefs relating to Purolite's counterclaims, the Court rejects Purolite's argument that Layne improperly failed to negate this defense in its initial brief on this motion.

lawsuit against Resin Tech. Nor did Purolite dispute Layne's contention that Purolite also elected not to pursue Resin Tech, although the Agreement gave it that right. These facts confirm that the alleged breach was minor and thus nonmaterial. Accordingly, Purolite may not rely on this alleged prior material breach in opposition to summary judgment on Layne's contract claims.[15]

4. FAILURE TO PAY FOR PRODUCT

Finally, Purolite relies on its claim that Layne breached the Agreement by failing to pay Purolite for product in January and February 2009. First, any such breach by Layne occurred after—and therefore cannot have excused—Purolite's failure to pay royalties beginning in late 2008, and thus Purolite may not rely on this alleged breach by Layne as a defense to Layne's claim for royalties. Second, with respect to Layne's claim based **[**57]** on Purolite's breach of Section 11.2, Purolite has not offered any argument as to why this alleged prior breach should be deemed material. The Court concludes that this alleged failure by Layne to pay for some product does not defeat the object of the Agreement and thus is not material, particularly because any such breach may be easily redressed by an award of damages. *See* 14 *Williston on Contracts* § 43:6 (Restatement's factors for materiality include the extent to which the party may otherwise be adequately compensated) (citing *Restatement (Second) of Contracts § 241*); *see also, e.g., BioLife Solutions, Inc. v.* ***[*1229]*** *Endocare, Inc., 838 A.2d 268, 278 (Del. Ch. 2003)* (applying factors for materiality from *Restatement § 241*). Accordingly, Purolite may not rely on any alleged prior material breach in opposition to Layne's contract claims.[16]

B. Claim for Unpaid Royalties

Layne seeks summary judgment on its claim against Purolite for $145,433.88 in unpaid royalties under the Agreement for sales of Purolite's product, ArseneXnp. Purolite **[**58]** has stipulated that it ceased paying such royalties to Layne at the end of 2008, even though it did not cease sales of that product until April 2009. In opposition to summary judgment on this claim, Purolite has only asserted the defense of a prior material breach by Layne, but the Court has now ruled that Purolite may not rely on that defense. Accordingly, Layne is entitled to summary judgment on this claim, at least with respect to the issue of Purolite's liability.

With respect to damages, the only evidence submitted by Layne to support the amount of royalties owed is a letter of June 5, 2009, from Purolite to Layne. In the letter, Purolite calculated a total of $145,433.88 in royalties due on sales of ArseneXnp. Purolite has objected to Layne's use of this document, on the basis that the letter is inadmissible under *Fed. R. Evid. 408*. That rule makes inadmissible any settlement offers or statements made in compromise negotiations "when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount." *Fed. R. Evid. 408(a)*. In this letter, Purolite began by stating its desire to settle outstanding payments at issue between the parties, **[**59]** and it set forth Purolite's positions and calculated the royalties in the process of proposing a settlement on particular terms. Accordingly, *Rule 408* bars Layne's use of this letter to prove the amount of its claim against Purolite.[17] Because Layne has offered no other evidence to support that amount, the issue remains for proof at trial, and the Court denies summary judgment on this claim with respect to the issue of the amount of damages.

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[15] The Court again declines to address the merits of this assertion of breach. *See supra* note 4.

[16] In light of these rulings, the Court need not address Layne's argument that Purolite elected not to repudiate the Agreement after the alleged prior breaches.

[17] The cases cited by Layne on this issue are inapposite. In two of the cases, the courts noted that *Rule 408* permits the use of statements in settlement negotiations for purposes other than those prohibited in the rule, such as to show an admission of fact. *See Vulcan Hart Corp. v. NLRB, 718 F.2d 269, 277 (8th Cir. 1983)*; *Urico v. Parnell Oil Co., 708 F.2d 852, 854 (1st Cir. 1983)*. In this case, however, Layne seeks to use the evidence to establish the amount of its claim—a use expressly prohibited by the rule. The other two cases cited by Layne were not decided by reference to *Rule 408*, and thus they are unhelpful. *See Cooper v. Brown, 126 F.2d 874, 878 (3d Cir. 1942)*; *Nebraska Drillers, Inc. v. Westchester Fire Ins. Co. of N.Y., 123 F. Supp. 678, 682 (D. Colo. 1954)*.

C. ***[**60]*** *Claim for Breach of Section 11.2*

Layne also seeks summary judgment on its claim for a permanent injunction based on Purolite's alleged breach of the following provision contained in Section 11.2 of the Agreement:

> 11.2 *Restrictions on Purolite*. . . . During the Term and thereafter, Purolite agrees not to directly or indirectly use any Intellectual Property resulting from its activities under this Agreement to directly or indirectly manufacture, sell, supply or use any products or media substantially similar to, or competitive with, the Media (excluding any existing product already manufactured by Purolite **[*1230]** as of the date of this Agreement) or other products of SolmeteX.

This provision essentially prohibits Purolite from using any "Intellectual Property" resulting from its acts under the Agreement to compete with Layne. Purolite does not dispute that an injunction would be appropriate if its breach of this provision is shown. Nevertheless, Purolite opposes summary judgment on this claim for three reasons, which the Court addresses in turn.

1. SURVIVAL OF TERMINATION

According to Section 11.2, this restriction applies "[d]uring the Term and thereafter." "Term" is defined in Section 8.1 of the **[**61]** Agreement as the initial ten-year term of the Agreement that is automatically renewed for another ten-year period if no contrary notice is given by either party. Purolite argues that, despite the language making the provision applicable during the Term "and thereafter," this provision should be deemed not to have survived Layne's termination of the Agreement.

Purolite first relies on the survival provision, Section 8.4, which reads as follows:

> 8.4 *Survival of Provisions*. Any provisions which by their nature should survive termination or expiration of this Agreement, will survive, including Sections 1.6, 4.4, 4.5, 4.6, 5.3, 6.5, 8.3, 8.4, 9, 10, 12, and 13.

Purolite notes the absence of Section 11.2 from the list of the surviving provisions, and it argues that the parties would have included Section 11.2 in that list if they intended this provision to survive termination. The Court rejects this argument. The parties did not simply list all surviving provisions; rather, Section 8.4 clearly provides that all provisions survive termination "which by their nature should survive termination." The list of specific sections in Section 8.4 is not described therein as exhaustive. Therefore, the **[**62]** issue is whether the provision in Section 11.2 is one that should survive by its nature.

Purolite also argues that the word "thereafter" in Section 11.2 should be interpreted to refer only to the "supplemental term" (Purolite's words) described in Section 8.3.3. That section provided that if the Agreement did not renew after the initial ten-year term, Purolite could nonetheless, for a period of two years, continue to supply the Media to SolmeteX and existing customers. Purolite argues that the parties used "thereafter" in Section 11.2 only to restrict Purolite during such a two-year additional period and not to restrict Purolite forever. The Court rejects this argument as well, as there is no support in the Agreement for such a reading. Section 11.2 did not make its restriction applicable only during the Term of the Agreement and during the two-year period following termination; rather, the parties used "thereafter" without further limitation in describing the applicability of the provision.

Thus, the Court does not agree with Purolite that the Agreement is ambiguous with respect to the survivability of this provision of Section 11.2. Section 8.4 plainly provides that provisions survive **[**63]** termination if they should survive by their nature. Section 11.2 is such a provision, as it plainly makes the restriction applicable while the Agreement is in force "and thereafter." Moreover, the nature of the provision itself is such that one would expect it to survive. Accordingly, the Court concludes as a matter of law that this provision in Section 11.2 did survive the termination of the Agreement, and Layne may therefore assert a breach of this provision occurring after the termination, as it **[*1231]** has done here.[18]

2. UNREASONABLE RESTRICTION ON COMPETITION

Second, in opposition to Layne's motion for summary on this claim, Purolite argues that this restriction should be invalidated as an unreasonable restriction on competition under Delaware law. Purolite also seeks summary judgment on this claim for this reason.

In support of this argument, Purolite relies on Delaware cases involving non-compete provisions in employment contracts **[**64]** or contracts for the sale of businesses, in which the courts applied the rule that such provisions must be reasonable, including with respect to geographical and temporal limits. *See, e.g.,* Tull v. Turek, 38 Del. Ch. 182, 186-90, 147 A.2d 658 (Del. 1958) (contract for sale of business); Faw, Casson & Co. v. Cranston, 375 A.2d 463, 465 (Del. Ch. 1977) (employment contract). Purolite also cites to *Section 188(1) of the Restatement,* which provides as follows:

> (1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if
> (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
> (b) The promissee's need is outweighed by the hardship to the promisor and the likely injury to the public.

Restatement (Second) of Contracts § 188(1). Purolite argues that this provision of Section 11.2 is an unreasonable restraint on its ability to compete for the same reasons discussed above with respect to Purolite's claim under Kansas law—the restraint is not limited by geography or duration; the restraint goes beyond that necessary to protect Layne's interests, in light of the patent **[**65]** statutes and the fact that Purolite's license terminates with the termination of the Agreement; and competition is suppressed in a limited market.[19]

The Court concludes that the restriction in Section 11.2 of the Agreement is not invalid. Under Delaware law, including the cases cited by Purolite, the ultimate inquiry is whether the restraint on competition is reasonable. **[**66]** *See, e.g.,* Faw, 375 A.2d at 467 (modern rule is "that a restrictive covenant should be enforced only to the extent that it is reasonable so to do"). Similarly, the general rule from the Restatement is that "[a] promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade." *Restatement (Second) of Contracts § 186(1)*. Purolite argues that the lack of any geographical or temporal limit makes the restriction in Section 11.2 unreasonable and unenforceable under Delaware law; that requirement is most often found in employment **[*1232]** contract cases, however, and such contracts, because they affect a person's ability to make a living, are subject to a heightened level of scrutiny. *See* Elite Cleaning Co. v. Capel, 2006 Del. Ch. LEXIS 105, 2006 WL 1565161, at *3 (Del. Ch. June 2, 2006) (unpub. op.) ("Where a restriction on the ability to be gainfully employed is involved, the customary sensitivity of a court of equity to the particular interests affected by its remedies is heightened.") (citing McCann Surveyors, Inc. v. Evans, 611 A.2d 1, 3-4 (Del. Ch. 1987)); Faw, 375 A.2d at 465 ("covenants are subject to somewhat greater scrutiny when contained in an employment contract as opposed to **[**67]** contracts for the sale of a business"). Indeed, Layne's interest as the promisee in restraining competition by the promisor is even greater than in the case of the sale of a business. In the latter case, the purchaser seeks to restrict competition generally by the buyer in a market to protect the value of the purchased business. In this case, the contractual provision does not merely restrain competition by Purolite; rather, Section 11.2 prohibits Purolite's

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[18] Given the plain language of Section 11.2 making this provision applicable after the Agreement is otherwise no longer in force, the Court rejects Purolite's argument that Layne was required to argue in its initial brief that the provision survived termination.

[19] Purolite argues that Layne must establish that the restraint on competition is reasonable by clear and convincing evidence, based on Delaware caselaw stating that a party seeking specific performance of a non-competition provision must meet that evidentiary standard. *See, e.g.,* American Homepatient, Inc. v. Collier, 2006 Del. Ch. LEXIS 79, 2006 WL 1134170, at *2 (Del. Ch. Apr. 19, 2006) (unpub. op.). The applicability of that standard to this case is not clear, however, in light of the fact that the provision here is not like the typical employment or sale-of-business non-compete analyzed by the Delaware courts, as discussed below. Nevertheless, the Court concludes that the result here would be the same whether or not that standard is applied, as the evidence showing the reasonableness of the provision is clear and convincing in this case.

use of certain intellectual property—intellectual property given to Purolite by SolmeteX or gained by Purolite because of the Agreement by which SolmeteX licensed Purolite's use of SolmeteX's intellectual property—to compete with SolmeteX (Layne). Thus, SolmeteX had (and Layne has) a great and legitimate interest in protecting that intellectual property by enforcement of the restriction in Section 11.2.

Other courts have recognized that this interest in protecting intellectual property is more worthy of protection than in the case of the typical non-compete. For instance, in *Harvey Barnett, Inc. v. Shidler, 338 F.3d 1125 (10th Cir. 2003)*, the Tenth Circuit held that the district court had erred in determining that a confidentiality **[**68]** provision was a disguised restrictive covenant that was unenforceable under Colorado law. *See id. at 1134*. The Tenth Circuit reasoned that confidentiality and non-disclosure agreements should not be characterized as restrictive covenants because they "serve entirely different purposes than do agreements not to compete and must be analyzed on the basis of those distinct purposes alone." *See id*. (quoting *MAI Basic Four, Inc. v. Basis, Inc., 880 F.2d 286, 288 (10th Cir. 1989))*.[20]

IDX Systems Corp. v. Epic Systems Corp., 285 F.3d 581 (7th Cir. 2002), is similarly instructive. In that case, the Seventh Circuit overturned the district court's conclusion that certain non-disclosure provisions were unenforceable under Wisconsin law because they were unlimited in temporal and geographical scope and thus unduly restrained trade. *See id. at 584-85*. The Seventh Circuit reasoned as follows:

> In reaching this conclusion, the district court relied on decisions requiring restrictive **[**69]** covenants limiting competition between employers and their ex-employees to be reasonable, and that in Wisconsin entails some restrictions on time and scope. Rules limiting the extent of no-compete clauses are based on the fact that they tie up human capital and, if widely adopted, may have the practical effect of preventing horizontal competition in economically significant markets. But neither rationale applies to contracts that restrict the use of particular information between businesses that have vertical (supplier-to-customer) rather than horizontal (competitor-to-competitor) **[*1233]** relations. IDX did not contract for limitations on Epic's ability to compete; contracts between IDX and the Foundation are vertical in nature and protect intellectual property without affecting competition. They may compel rivals such as Epic to do more work to develop software independently, but this promotes rather than restricts competition. *Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974)*, holds that trade-secret law is compatible with ***antitrust law***; the same can be said for contracts protecting intellectual property that, though not demonstrably a trade secret, is commercially valuable. Rivals such **[**70]** as Epic, as non-parties to the vertical arrangements, remain entitled to discover and use the information independently and to compete vigorously. Nothing in the antitrust laws gives one producer a right to sponge off another's intellectual property, even when the producer of that knowledge has a market share much larger than IDX's.
>
> The parties have not cited, and we have not found, any Wisconsin statute or decision subjecting non-disclosure agreements between suppliers and users of intellectual property to the rules that govern non-competition clauses between employers and employees. To the contrary, [a Wisconsin case] tells us that Wisconsin allows a much greater scope of restraint in contracts between vendor and vendee than between employer and employee. . . . Restrictions on disclosure may make intellectual property more valuable to its producer, and thus promote both the creation of knowledge and competitions against other firms in the same industry. No one doubts this with physical property: General Motors is entitled to control 100% of its own output of mufflers, without handing any of them over to Ford or Toyota or Volkswagen. Permitting a producer the full return on its investment **[**71]** in mufflers (or any other product) is essential to promote investment in productive assets and rivalry with other producers. Just so with knowledge, an increasingly vital input into production. Why should IDX or any other maker of intellectual property be placed under legal rules that effectively entitle its rivals to a chunk of that asset's value?

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[20] The Tenth Circuit stated that, although *MAI Basic* involved a contract dispute in New Mexico, its rationale was equally applicable in the case before it under Colorado law. *See Harvey Barnett, Inc., 338 F.3d at 1134 n.12*.

> No Wisconsin decision of which we are aware requires temporal or geographic limits as a condition to the enforcement of a non-disclosure agreement for intellectual property.

Id. at 585-86 (citations and internal quotation omitted). This analysis applies equally in this case, which also involves both a relationship that is more vertical than horizontal in nature and a lack of governing caselaw invalidating contracts intended to protect intellectual property.

Purolite attempts to distinguish these cases from the Tenth Circuit and the Seventh Circuit as involving non-disclosure provisions, unlike the present case involving a non-competition provision. As the Court explained above, however, the restriction in Section 11.2 does not simply prohibit competition by Purolite, but instead prohibits Purolite's use of intellectual property gained as a **[**72]** result of its relationship with SolmeteX in order to compete with SolmeteX. Thus, as in the case of a non-disclosure provision, the intent of the restriction is to protect intellectual property from its ultimate use by the promisor (as in the present case) or by a third party (in the case of a non-disclosure provision). Thus, the Court finds the reasoning of the Tenth Circuit and, especially, the Seventh Circuit to be helpful and persuasive.

[*1234] The Court concludes that the restriction in Section 11.2 is reasonable and therefore enforceable under Delaware law, for the reasons stated by the Seventh Circuit in *IDX* and those stated by this Court above in upholding this restriction against a challenge under the Kansas restraint-of-trade statute. *See supra* Part III.G. In short, the restriction represents a reasonable attempt by SolmeteX to protect its intellectual property. As in *IDX*, the competitor (Purolite) is entitled to compete with the promisee (Layne) by making and selling products not based on or resulting from the promisee's own intellectual property. The restriction is reasonable even without the type of geographical and temporal limitations required for other types of contractual **[**73]** non-compete provisions. The Court also rejects Purolite's argument that the restriction is greater than necessary; patent law is not sufficient by itself to protect Layne, as the restriction applies also to non-patented intellectual property, and the Agreement's license provisions would not necessarily protect Layne from Purolite's use of the intellectual property to create a different product that competes with Layne's products (as is alleged to have occurred here). Purolite has not cited any Delaware cases indicating that the type of restriction found in Section 11.2 relating to the use of intellectual property should be invalidated. The Court therefore concludes that the restriction is not invalid as an unreasonable restriction on competition, and Purolite's motion for summary judgment on Layne's claim under Section 11.2 is denied.

3. MERITS OF THE CLAIM

Purolite also argues that Layne's motion for summary judgment on this claim for breach of the restriction in Section 11.2 should be denied on the merits. Purolite first argues in this regard that the restriction should be interpreted not to apply to its use of intellectual property that is jointly-owned by the parties. Purolite contends **[**74]** that its interpretation is compelled by reading Section 11.2 in conjunction with Section 4.4 of the Agreement. Section 4.4, which required Purolite to use its best efforts to conduct research and development to improve the product, provides as follows:

> Any improvements, discoveries and changes by Purolite in the course of this R&D, and any Intellectual Property conceived, created or developed by Purolite in performance under this Agreement will be the joint property of both Purolite and SolmeteX (provided that all Intellectual Property concerning SolmeteX's chemistry will belong solely to SolmeteX, whether arising before, during, or after the Term).

Purolite argues that Section 4.4, which gives Purolite rights in improvements made during the course of the Agreement, would be defeated if Section 11.2 prohibited its own use of such improvements.

The Court rejects this interpretation by Purolite. "Intellectual Property" is defined in Section 4.1 of the Agreement to include all discoveries and improvements, whether patentable or not, as well as all patents, trade secrets, confidential information, copyrights, trademarks, and other similar rights relating to the Media. By its terms, Section 11.2 **[**75]** does not apply only to Purolite's use of SolmeteX's intellectual property; rather, it applies to Purolite's use of any "Intellectual Property," which would include improvements jointly owned by Purolite. Such an interpretation in accordance with the plain language of the Agreement would not defeat Rule 4.4, as the recognition or grant of a property right to Purolite is not inconsistent with a restriction, to which Purolite agreed in exchange for benefits under the Agreement, on Purolite's use of such property, **[*1235]** which exists only because of the Agreement, to compete with the party that provided that base technology. Accordingly, there is no basis to reject a plain reading of Section 11.2 to include jointly-owned intellectual property within the restriction.

In support of its claim of a breach by Purolite, Layne has provided evidence of the following: Purolite impregnated a resin with iron only after beginning the relationship with SolmeteX; SolmeteX brought that process to Purolite; the provision of that intellectual property to Purolite by SolmeteX constituted the basis for the Agreement; the final product manufactured by Purolite under the Agreement, named ArseneXnp, was identical (only **[**76]** the name was changed) to FerrIX, the product manufactured and sold by Purolite after the termination of the Agreement; and Purolite continues to sell FerrIX, a product that is competetive with Layne's products. Purolite has not controverted any of these facts, and the Court agrees with Layne that these facts establish a breach by Purolite of Section 11.2. Purolite has provided evidence that it made changes and improvements to the product over the course of the Agreement, and that its present product is therefore different from the product first licensed to it by SolmeteX, and it further argues that there is a question of fact whether its product uses SolmeteX's intellectual property (SolmeteX's chemistry). As noted above, however, whether Purolite's product uses SolmeteX's intellectual property is not determinative, as Section 11.2 prohibits Purolite's use of any intellectual property (including jointly-owned property) resulting from the Agreement to compete with Layne. Similarly, the fact that Purolite made improvements is immaterial, as any such improvements made during the Agreement would constitute "Intellectual Property" for purposes of this restriction in Section 11.2. Purolite **[**77]** has not disputed that its product is at least based on improvements to the initial product supplied by SolmeteX (as its executives have admitted that FerrIX is identical to the most-improved version of ArseneX). Accordingly, Layne has established a breach of Section 11.2 as a matter of law.

As noted above, Purolite has not disputed that an injunction would be appropriate here if a breach is shown. Accordingly, the Court grants Layne summary judgment on its claim for a permanent injunction, and Purolite is hereby permanently enjoined from further breaching Section 11.2, including making, selling, or using the product FerrIX A33E or any substantially similar product that uses "Intellectual Property" (as defined in the Agreement) resulting from Purolite's activities under the Agreement.[21]

D. Claim for Breach of Section 10.1

Purolite seeks summary judgment on Layne's claim for breach of Section 10.1 of the Agreement. Layne has not sought **[**78]** summary judgment on this claim. Section 10.1 provides as follows:

> 10.1 *Prior NDAs*. The parties have executed a Non-Disclosure Agreement dated as of March 10, 2004 (the "SolmeteX NDA") and a Non-Disclosure Agreement dated as of April 12, 2004 (the "Purolite NDA" and together with the SolmeteX NDA, the "NDAs"). Copies of the NDAs are attached hereto as Appendix D. The parties intend that the NDAs will continue to govern their relationship under this Agreement. Purolite agrees that it will not disclose to **[*1236]** or use or facilitate or permit others to use SolmeteX's Intellectual Property or confidential information for any reason or purpose including to compete with SolmeteX. Purolite will completely safeguard all of SolmeteX's Intellectual Property and confidential information.

In its motion, Purolite divides Section 10.1 into two potential breaches asserted by Layne: (1) breach of the first three sentences of Section 10.1 regarding NDAs, based on an alleged breach by Purolite of the underlying SolmeteX NDA; and (2) breach of the fourth and fifth sentences of Section 10.1, based on Purolite's alleged use of SolmeteX's intellectual property or confidential information. Purolite seeks summary **[**79]** judgment on each of these claims of breach.

1. INCORPORATION OF THE OTHER AGREEMENT

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[21] Layne did not move for summary judgment on its claim for damages for breach of this provision of Section 11.2; therefore, the amount of damages suffered by Layne for this breach (which has been established as a matter of law) remains an issue for trial.

Pursuant to explicit language in the contract by which Layne acquired the assets of SolmeteX, Layne assumed SolmeteX's rights under the Agreement, but it did not assume SolmeteX's rights under the SolmeteX NDA. Thus, although Layne has standing to assert SolmeteX's rights under the Agreement (as this Court has previously ruled), it would not have standing to bring a claim against Purolite for breach of the SolmeteX NDA. Layne does not dispute these facts. Layne argues, however, that Section 10.1 of the Agreement incorporates by reference the SolmeteX NDA. Thus, Layne argues that a breach of the SolmeteX NDA also constitutes a breach of the Agreement, which it has standing to enforce.

The Court agrees with Purolite, however, that Section 10.1 does not incorporate by reference the SolmeteX NDA. Section 10.1 does not contain language of incorporation or any other language evidencing an intent to include the terms of the SolmeteX NDA as terms of the Agreement. Instead, Section 10.1 merely recognizes the existence of the NDAs and states the parties' intent that the NDAs continue to have force. Thus, the parties **[**80]** provided that the Agreement did not supersede or otherwise invalidate the NDAs. The Court agrees with the following reasoning by a Delaware court:

> A mere reference in one agreement to another agreement, without more, does not incorporate the latter agreement into the former by reference. To incorporate one document into another, an explicit manifestation of intent is required.

*Wolfson v. Supermarkets General Holdings Corp., 2001 Del. Ch. LEXIS 6, 2001 WL 85679, at *5 (Del. Ch. Jan. 23, 2001)* (unpub. op.). Section 10.1 does not contain any language indicating an intent to do more than simply recognize and reaffirm the ongoing validity of the NDAs; therefore, the Court concludes as a matter of law that Section 10.1 does not incorporate the SolmeteX NDA by reference.

Layne does not dispute that it lacks standing to enforce the SolmeteX NDA.[22] Therefore, because Layne cannot enforce the NDA's terms through the Agreement, Purolite is awarded summary judgment on any claim by Layne for breach of the Agreement based on an alleged breach of the SolmeteX NDA.

2. USE OF INTELLECTUAL PROPERTY

The fourth sentence of Section 10.1 of the **[**81]** Agreement provides:

> **[*1237]** Purolite agrees that it will not disclose to or use or facilitate or permit others to use SolmeteX's Intellectual Property or confidential information for any reason or purpose including to compete with SolmeteX.

Layne asserts a claim for breach of this provision based on Purolite's alleged use of its intellectual property. It does not allege that Purolite disclosed its intellectual property to a third party in breach of Section 10.1.

In seeking summary judgment on this claim, Purolite argues that this provision effectively prohibits only its disclosure of intellectual property ("IP") to third parties, and that it does not prohibit its own use of such property. Purolite parses the words "will not disclose to or use or facilitate or permit others to use" to mean that it will not do the following: "disclose to . . . others" the IP; "use . . . others to use" the IP; "facilitate . . . others to use" the IP; or "permit others to use" the IP. Thus, under its interpretation, Purolite is not forbidden to "use" the IP; it is only forbidden to "use . . . others to use" the IP. Purolite argues that the parties would not have intended to prohibit Purolite's use of the IP in light **[**82]** of the Agreement's basic purpose to allow Purolite to use the IP to manufacture and supply the product based on SolmeteX's chemistry.

The Court concludes as a matter of law, however, that this provision in Section 10.1 of the Agreement does apply to and prohibit Purolite's own use of the IP. Purolite's interpretation depends on an intent by the parties to prohibit Purolite's "use of others to use" the IP. Such language is nonsensical, however. The only reasonable interpretation of the first "use" in the sentence is that it refers to use by Purolite of the IP, not use by Purolite of others. Although this sentence may not be a model of clarity and may have been inartfully drafted, the language unambiguously evidences an intent that Purolite be prohibited from using the IP. Moreover, such a prohibition does not conflict with

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[22] Moreover, Layne has not asserted a claim under the SolmeteX NDA in the Pretrial Order.

the Agreement as a whole, as the parties could quite reasonably have intended to prohibit Purolite's use of SolmeteX's IP except for purposes explicitly permitted in the Agreement—a general prohibition that would be absent from the Agreement under Purolite's interpretation. Indeed, this prohibition complements the restriction in Section 11.2 against Purolite's use **[**83]** of any IP gained under the Agreement (not only SolmeteX's IP) for the specific purpose of competing with SolmeteX.

Accordingly, the Court rejects Purolite's interpretation of this provision in Section 10.1 of the Agreement, and the Court denies Purolite's motion for summary judgment on Layne's claim for breach of Section 10.1 based on Purolite's use of Layne's intellectual property.

V. <u>Plaintiffs' Patent Claims</u>

Plaintiffs have moved for summary judgment on their claims for infringement of the patent, including with respect to Purolite's invalidity defenses (Doc. # 408). By cross-motion, Purolite also seeks summary judgment on plaintiffs' infringement claims and on various defenses to those claims.

A. <u>Infringement</u>

1. MARKING ESTOPPEL

Plaintiffs assert that Purolite is precluded from contesting the issue of infringement under the doctrine of marking estoppel. As adopted by some courts, this doctrine provides that, "under some circumstances, a party that marks its product with a patent number is estopped from asserting that the product is not covered by the patent." *See* *SmithKline Diagnostics, Inc. v. Helena Labs. Corp., 859 F.2d 878, 890 n.9 (Fed. Cir. 1988)* (citations **[*1238]** omitted). Plaintiffs **[**84]** note that, although Purolite did not mark either its product manufactured under the license from Layne (ArseneX) or its subsequent product (FerrIX) by reference to the patent, it did sell ArseneX (but not FerrIX) with the reference "patent pending." Plaintiffs argue that the marking estoppel doctrine should be extended to apply to such conduct.

The Court holds as a matter of law that plaintiffs may not rely on this doctrine in this case. First, the Federal Circuit has never adopted the doctrine, including in at least three instances when given the opportunity to do, and those opinions cast doubt on whether it would adopt and apply the doctrine in this case. *See* *SmithKline, 859 F.2d at 890-91* (concluding that, "[w]hatever the validity of the 'marking estoppel' line of cases," the doctrine would not apply in that case); *High Frequency Prods., Inc. v. Wynn's Climate Sys., Inc., 1996 U.S. App. LEXIS 9957, 1996 WL 217840, at *2 (Fed. Cir. Apr. 30, 1996)* (unpub. op.) (where district court concluded that the marking estoppel doctrine was no longer viable, court deemed it unnecessary to decide that issue because the doctrine would be inapplicable in that case at any rate); *Slip Track Sys., Inc. v. Metal Lite, Inc., 113 F. App'x 930, 934 (Fed. Cir. 2004)* **[**85]** (refusing to address the continued viability of the marking estoppel doctrine because it would not apply in that case). For instance, in the most recent case, the Federal Circuit concluded that the doctrine would not apply there in part because there was no evidence that the marking party believed its product to fall outside the patent's claim but nonetheless deliberately mismarked the product. *See* *Slip Track, 113 F. App'x at 934*. Similarly, in the present case, there is nothing to suggest that Purolite deliberately mismarked ArseneX with "patent pending" while believing that the product was not covered by the patent application that was the subject of its license agreement with SolmeteX.

Moreover, plaintiffs have not pointed to any authority (and the Court has found none) that would permit this doctrine to be extended beyond a reference to an actual patent to apply also to a "patent pending" reference. The Court does not agree that the rationale for the doctrine necessarily encompasses the "patent pending" situation. By referring to an actual patent, a manufacturer has represented to the public that the product falls with the scope of that patent; by saying "patent pending," however, **[**86]** the manufacturer cannot be telling the public that the product is covered by whatever patent issues, as there is no guarantee that the eventual patent (if issued) will not differ from the application. Without such supporting authority and in the absence of scienter, as discussed above, the Court cannot conclude that the Federal Circuit would both recognize the doctrine and allow the doctrine to be applied in this case. Accordingly, the Court denies plaintiffs' request for summary judgment on this issue, and it grants Purolite's motion for summary judgment on this theory asserted by plaintiffs.

2. EQUIVALENTS, INDIRECT INFRINGEMENT

Although Purolite expresses its uncertainty concerning whether plaintiffs are pursuing the theories (they are not mentioned in the Pretrial Order), Purolite moves for summary judgment on any claim by plaintiffs for infringement based on indirect infringement or the doctrine of equivalents, based on a lack of any evidence to support such theories. Plaintiffs have not opposed this request for summary judgment. Accordingly, the Court awards summary judgment in favor of Purolite on any claim for infringement asserted by plaintiffs based on a theory of **[*1239]** indirect **[**87]** infringement or the doctrine of equivalents.

3. "DISPERSALTHROUGHOUT" (CLAIMS 1 AND 15)

"Determining whether a patent claim has been infringed involves two steps: (1) claim construction to determine the scope of the claims, followed by (2) determination of whether the properly construed claim encompasses the accused structure." *Bai v. L & L Wings, Inc., 160 F.3d 1350, 1353 (Fed. Cir. 1998)* (citation omitted). The first step involves a question of law for the court, while the second presents a question of fact, although "a literal infringement issue is properly decided on summary judgment when no genuine issue of material fact exists, in particular, when no reasonable jury could find that every limitation recited in the properly construed claim either is or is not found in the accused device." *See id*. (citations omitted).

In support of summary judgment, plaintiffs have provided evidence and argued that the accused product, FerrIX, meets all of the limitations in, and thus infringes, Claim 1 (and dependent Claims 7, 10, 11, 12, and 13) and Claim 15. In response, and in its own motion for summary judgment, Purolite points to only three claim limitations (two in Claim 1, one in both Claim **[**88]** 1 and Claim 15) that it argues FerrIX does not satisfy.[23]

Purolite first argues that plaintiffs cannot satisfy the limitation in Claim 1 and Claim 15 of a dispersal "throughout the intermediate." Claim 1 of the patent states as follows:

> 1. A method for synthesizing a selective adsorbent, the method comprising the steps of:
>
> reacting a material that exhibits anion exchange behavior with an anionic oxidant to produce an intermediate; and
>
> reacting, with said intermediate, a solution of a salt of a metal, said salt being capable of being oxidized, thereby precipitating and <u>dispersing</u> a salt of said metal <u>throughout the intermediate</u> by the action of the oxidant and producing an adsorbent capable of exchanging anions.

(Emphasis added.) Claim 15 states as follows:

> 15. An adsorbent for the selective removal of ligands from fluids, said absorbent [*sic*] comprising a polymeric anion exchange resin containing particles of an oxygen-containing **[**89]** compound of iron <u>dispersed throughout the resin</u>.

(Emphasis added.) Plaintiffs contend that the limitation underlined above in each claim is met here because the accused product contains iron oxide in every part of the resin beads that make up the adsorbent, including the core section, the shell section, and even the ring or "halo" between the core and shell. Purolite responds that the iron oxide has not been dispersed "throughout" the intermediate or resin because only a very small percentage of the iron oxide has penetrated to the core of the bead in the accused product.

At the claim construction stage of the litigation, the parties disputed the proper construction of the terms "dispersing" / "dispersed" and "throughout". In its claim construction order, the Court construed "dispersing" and

[23] Purolite does not make any separate arguments concerning dependent Claims 7, 10, 11, 12, and 13. Instead, Purolite argues only that plaintiffs' inability to show infringement of independent Claim 1 also dooms their claims for infringement of those dependent claims.

"dispersed" to mean "distributing or spreading" and "distributed **[*1240]** or spread" respectively. The Court construed "throughout" as follows:

> Dispersion "throughout the intermediate" and "throughout the resin" in Claims 1 and 15 respectively means all the way through the intermediate or resin, or through the whole of it, or to every part of it, or everywhere in it. Dispersion "throughout" the intermediate **[**90]** or resin is not achieved merely by having some particles reach the interior or go beyond the periphery of the intermediate or resin. On the other hand, dispersion "throughout" the intermediate or resin does not require that a stoichiometric amount was used or that every possible exchange site was reached.

In arguing that the iron oxide in the accused product is not dispersed "throughout" the beads, Purolite relies on the analysis of finished beads by its expert, Dr. Stack. Dr. Stack measured the iron content in each of two beads at 19 points extending from the center of the bead to the outside. Those measurements showed that the iron was concentrated primarily in the outer part of each bead. For instance, Dr. Stack states that the iron concentration near the periphery was more than ten times greater than in the core of the bead and more than 40 times greater than in the halo of the bead; and that the iron contained in the core and halo make up only 0.8 percent of the total iron in the bead. Plaintiffs argue from this evidence that the iron has not been distributed "throughout" the bead—in every part of it or everywhere in it—because there are relatively few iron particles in the core, **[**91]** which therefore contains relatively large areas without iron.

The Court concludes, however, that the accused product does contain iron distributed "throughout" the beads as a matter of law. Dr. Stack's measurements establish, and thus it is undisputed, that there is at least some measurable amount of iron at each radial point in the bead.[24] This evidences establishes that a species of iron has been dispersed all the way through the bead, and through the whole of it, and in every part of it, and everywhere in it—and thus, "throughout" the bead, under the Court's construction of that term. The fact that there are gaps or areas in the bead without any iron does not alter that conclusion, as gaps necessarily occur when particles are dispersed (spread) in any concentration.

Purolite argues that, even if the Court did not require uniformity of concentration of the particles in construing "throughout", it should now construe the term to require at least a certain minimum concentration (such as one percent of the total amount in the bead) at each radial point in the bead (which standard the accused product would fail under Dr. Stack's measurements). The Court declines this invitation to alter its construction, however, as there is no basis in the claims or specification of the patent (or even in any extrinsic evidence) for construing "throughout" in that manner and thus adding a limitation to the claims (let alone any basis for choosing a standard of one percent at each of the points chosen by Dr. Stack).

[*1241] Accordingly, the undisputed evidence establishes as a matter of law that the accused product contains iron dispersed "throughout" the intermediate or resin, pursuant to the Court's construction of the pertinent claim limitation in Claims 1 and 15. Plaintiffs are therefore awarded summary judgment **[**93]** on that particular issue.

Purolite also points out that, even if some species of iron has been dispersed "throughout" each bead, the claims require that the dispersed substance be a salt of a metal (Claim 1) or an oxygen-containing compound of iron (Claim 15). Plaintiffs contend that those requirements are met because the dispersed particles in the accused product are iron oxide. Purolite concedes that the iron concentrated so heavily in each bead's shell section is indeed iron oxide. Purolite argues, however, that a question of fact arises concerning whether the iron that has been dispersed to the core of each bead—and thus whether the iron that has been distributed "throughout" each bead—is iron oxide as alleged or some other species of iron.

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[24] The Court rejects Purolite's argument that there is no evidence of iron within the halo between the bead's shell and core sections. Dr. Stack's graph of his iron measurements for each of the two beads shows a concentration above zero for the halo point, and, indeed, plaintiffs have argued that the concentration at the shell was more than 40 times that in the halo, which calculation presumes some measurable amount at **[**92]** the halo. Dr. Stack's deposition testimony that the halo "effectively" has no iron does not controvert his own measurements showing at least some amount of iron there.

The Court agrees that this issue presents a question of fact for trial. Plaintiffs rely on the testimony of certain employees of Purolite, who testified that the beads in the accused product are impregnated with iron oxide. Those witnesses did not testify, however, that iron oxide could be found in both the shell and the core of the beads, or that some other species of iron was not also contained in the beads. Although plaintiffs' expert, Dr. **[**94]** Clifford, opines that the iron in the core is iron oxide, Dr. Stack has challenged the bases for that opinion and has provided a reason why one may not presume that the iron in the core is iron oxide from the mere fact that the iron in the shell is iron oxide. Therefore, if the evidence is considered in the light most favorable to Purolite, plaintiffs cannot establish that the iron in the core is iron oxide and thus that iron oxide has been dispersed "throughout" the beads. Accordingly, an issue of fact remains, and neither side is entitled to summary judgment concerning this specific issue of whether iron oxide, and not merely iron or some other species of iron, has been dispersed "throughout" the intermediate or resin.

4. "BY THE ACTION OF THE OXIDANT" (CLAIM 1)

Purolite next argues that plaintiffs cannot satisfy the limitation in Claim 1 that the dispersal of the iron oxide be "by the action of the oxidant." The parties agree that in the case of the accused product, the oxidant is permanganate. In support of this argument, Purolite relies only on the evidence of a test conducted by Dr. Stack. In that test, when Dr. Stack loaded virgin beads with permangate in the concentration used **[**95]** in the manufacture of the accused product, he discovered that the permanganate did not travel to the core section of the beads. Purolite argues that this test demonstrates that the iron in the core was not dispersed there "by action of" the permanganate—and thus must have been dispersed there in some other way—because otherwise permanganate would have been found in the core of the tested beads.

The Court rejects this argument by Purolite for a number of reasons. First, Dr. Stack's test involving permanganate was not intended to test whether the iron in the core arrived there by action of the oxidant. Instead, Dr. Stack's report indicates that he loaded the beads with permanganate to confirm the stratification of the iron concentration in the bead (heavily concentrated in the shell section). Thus, it is not surprising that Dr. Stack's report does *not* contain a statement by which he opines that the iron in the core section of the bead in the accused product is not dispersed there "by action of" the permanganate. **[*1242]** Second, in conducting this test, Dr. Stack did not attempt to replicate the actual manufacturing process for the accused product, or even measure the manganese in the product **[**96]** itself. There is no basis to conclude that loading permanganate onto virgin beads would provide a reliable indication as to whether iron is dispersed to the core section in the finished product by action of the permanganate—although the lack of such a basis is not surprising given the fact that Dr. Stack does not appear to have intended that his test be used in that way. Thus, the test is not scientifically reliable to make the intended point. Third, Purolite has made an unwarranted inferential leap here. The fact that the permanganate does not accompany the iron to the core does not necessarily mean, as a matter of logic, that the permanganate, by its action, could not have caused the iron to travel to the core. Again, the lack of that foundation, which would require expert opinion in this case, is not surprising given Dr. Stack's different purpose in conducting the test.

Therefore, Purolite has failed to create an issue of fact by providing evidence to controvert plaintiffs' evidence that the iron has been dispersed throughout the beads of the accused product by action of the permanganate, as required for infringement of Claim 1. Accordingly, this defense fails as a matter of law; **[**97]** plaintiff's summary judgment motion is granted, and Purolite's summary judgment motion is denied, to that extent.

5. "SALT OF SAID METAL" (CLAIM 1)

Finally, Purolite argues that plaintiffs cannot satisfy the limitation in Claim 1 that the substance dispersed in the second step of the method in Claim 1 be a "salt of said metal." It is undisputed that in the accused product, the substance dispersed is ferric oxide. In support of this argument, Purolite relies solely on deposition testimony by Dr. SenGupta, the inventor, concerning the following excerpt from the patent's specification:

> The intermediate, produced by reacting the anion exchange material with an anionic oxidant, may be reacted with a solution of an oxidizable salt of a metal, preferably a ferrous salt such as ferrous sulphate, ferrous ammonium sulfate, ferrous chloride or ferrous acetate. The hydrated iron oxide particles precipitated in the anion exchange material can take various forms, such as hematite, [goethite], magnetite and ferrihydrite.

(Patent at 10:17-24.) In his deposition, Dr. SenGupta first confirmed that the "ferrous salts" listed in the excerpt are all "metal salts." Then Dr. SenGupta agreed that the four substances **[**98]** subsequently listed as exemplar forms of the "hydrated iron oxide particles" are all "metal oxides," different from "metal salts" such as the ferrous salts previously discussed. Based solely on that testimony, Purolite argues that because a metal oxide, such as iron (ferric) oxide, is different from a "metal salt," the accused product does not include a dispersed "salt of said metal," as required for infringement of Claim 1.

The Court also rejects this argument. The patent clearly contemplates that the substance dispersed may be an iron oxide. Thus, the Court construes "salt of said metal" as used in Claim 1 (an issue of law for the Court) to include iron oxides. The specification of the patent supports that construction, as the primary embodiments discussed by the patent's specification involve the dispersion of HFO ("Hydrated Fe Oxide"), an iron oxide. *See* Patent at 3:7-8 (summary of invention), 3:23-25 (summary), 3:36-37 (summary), 5:16-18, 6:62-64.

[*1243] The specification also confirms that the "salt of a metal" that is reacted in solution in Claim 1 is different from the "salt of said metal" that is dispersed:

> The step of reacting a solution of a salt of a metal with the intermediate is **[**99]** carried out by passing a solution of the salt through the intermediate, thereby oxidizing the metal, and causing precipitation and dispersion of another salt, in which the metal is in a higher oxidation state than in the original salt.

(Patent 2:47-53 (summary of invention) (emphasis added).) Dr. Clifford's report contains the opinion that the "salt of a metal" and the "salt of said metal" from Claim 1 are represented in the accused product by two different substances, ferrous sulfate heptahydrate and ferric oxide/hydroxide respectively. The language of Claim 1 supports this dichotomy—Claim 1 does not state that "said" salt of a metal (thus, the same "salt of a metal" that was reacted in solution) is dispersed; rather "a salt of said metal" (potentially, then, a different salt of the same metal) is dispersed.[25] Thus, the fact that Dr. SenGupta, in discussing the excerpt from the specification, distinguished the ferrous salts that are reacted in solution in the invention from the metal oxides that are dispersed is not surprising. Dr. SenGupta did *not* testify that the "salt of said metal" from Claim 1 cannot be iron oxide; indeed, such a statement would completely contradict the specification **[**100]** for his patent. Moreover, even if Dr. SenGupta had so testified, such extrinsic evidence could not be considered to contradict a construction compelled by the patent itself. *See* *Novartis Pharmaceuticals Corp. v. Abbott Labs., 375 F.3d 1328, 1335 (Fed. Cir. 2004)* (extrinsic evidence "may not be used to vary, contradict, expand, or limit the claim language from how it is defined, even by implication, in the specification or file history").

For these reasons, Dr. SenGupta's testimony does not provide evidence, in contravention of plaintiffs' **[**101]** evidence that the accused product meets the limitations in Claim 1, that the ferric oxide dispersed in the accused product is not a "salt of said metal" as that term has now been interpreted by the Court. Accordingly, this defense fails as a matter of law; plaintiff's summary judgment motion is granted, and Purolite's summary judgment motion is denied, to that extent.

6. SUMMARY OF INFRINGEMENT ISSUES

Thus, with respect to the issue of infringement, the only issue remaining for trial is whether the iron that is dispersed to the core section of the beads in the accused product is iron oxide, as required for infringement of Claim 1 (and thus dependent Claims 7, 10, 11, 12, and 13). In all other respects, plaintiffs have established infringement of Claim 1 as a matter of law, subject to Purolite's sole remaining invalidity defense, *see infra* Part V.B.5. Plaintiffs have established infringement of Claim 15 to the same extent, although, as discussed below, Purolite is entitled to

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[25] Based on an agreed construction, the Court construed the term "salt of a metal" to mean "the compound formed when the hydrogen of an acid is replaced by a metal, such as a solution of a ferrous salt, such as ferrous sulphate, ferrous ammonium sulfate, ferrous chloride, or ferrous acetate." These examples from the Court's construction are the same examples of the "oxidizable salt of a metal" that is reacted in solution, from the specification excerpt that Dr. SenGupta discussed in his deposition. Clearly, then, the Court construed only the term "salt of a metal" from Claim 1, and did not construe the term "salt of said metal" found later in Claim 1.

summary judgment on its defense that Claim 15 is invalid, *see infra* Part V.B.6. **[*1244]** Accordingly, Purolite is awarded summary judgment on plaintiffs' claim for infringement of Claim 15 of the patent.

B. Invalidity

1. LICENSE **[**102]** ESTOPPEL

Purolite seeks summary judgment on plaintiffs' theory that license estoppel precludes Purolite's assertion of patent invalidity. Plaintiffs concede that this theory has been abolished. Accordingly, the Court grants Purolite summary judgment on plaintiffs' theory of license estoppel.[26]

2. SCOPE OF INVALIDITY DEFENSES

a. Purolite argues that plaintiffs have not substantively opposed its motion for summary judgment with respect to the issue of invalidity based on (i) *35 U.S.C. § 112* as applied to Claim 15; or (ii) *35 U.S.C. § 112* ¶ 2 as applied to all of the patent's claims. The Court agrees with plaintiffs, however, that Purolite did not preserve any such claims in the Pretrial Order. Purolite argues that it did cite to *Section 112* in the Pretrial Order. In stating its contentions in that order, however, Purolite very specifically alleged three bases for invalidity: Claims 1-14 fail to meet the enablement requirement of *Section 112* because Claim 1 describes an inoperable **[**103]** process; the specification does not meet the written description and enablement requirements of *Section 112* with respect to Claims 1-14 (i.e., Claim 1 and its dependent claims); and Claim 15 is anticipated and rendered obvious by prior art, pursuant to *35 U.S.C. §§ 102*, *103*. (See Pretrial Order ¶ 5.b.) Purolite thus gave notice that it intended to pursue only those specific theories of invalidity as applied to those specific claims. Purolite has not moved to amend the Pretrial Order to include any additional claim. Accordingly, Purolite may not assert these invalidity theories, and Purolite's motion for summary judgment on these theories is therefore denied.

b. In opposing plaintiffs' motion for summary judgment, Purolite notes the statement in plaintiffs' statement of facts that performance of the reactions in Claims 1-14 is basic chemistry that has been practiced for decades. Purolite argues that by that statement plaintiffs have admitted that Claims 1-14 are invalid as anticipated under *35 U.S.C. § 102*. Again, however, this specific theory of invalidity has not been preserved in the Pretrial Order, and therefore Purolite may not rely on the theory.

3. INOPERABLE PROCESS (CLAIM 1)

The **[**104]** patent in this case is presumed valid, and the burden of establishing invalidity rests on Purolite, the party asserting such invalidity. *See 35 U.S.C. § 282*. Purolite must establish invalidity by a heightened standard requiring clear and convincing evidence. *See Microsoft Corp. v. i4i Ltd. Partnership, 131 S. Ct. 2238, 2244-49, 180 L. Ed. 2d 131 (2011)*; *see also Pfizer, Inc. v. Apotex, Inc., 480 F.3d 1348, 1359 n.5 (Fed. Cir. 2007)* ("The 'clear and convincing' standard is an intermediate standard which lies somewhere in between the 'beyond a reasonable doubt' and the 'preponderance of the evidence' standards of proof."). The "clear and convincing evidence" standard applies in the summary judgment context. *See Invitrogen Corp. v. Biocrest Mfg., L.P., 424 F.3d 1374, 1378 (Fed. Cir. 2005)*.

[*1245] Purolite asserts that Claim 1 of the patent is invalid in a number of respects under *35 U.S.C. § 112*, which provides in relevant part as follows:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, **[**105]** to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

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[26] Plaintiffs argue that Purolite nonetheless may not use invalidity as a defense to plaintiffs' claim for royalties. Because that claim is not at issue in these motions, the Court does not address that argument.

Id. ¶ 1. Purolite first argues that Claim 1 does not comply with the "enablement" requirement of *Section 112* because it recites an inoperable process. "A claimed invention having an inoperable or impossible claim limitation . . . lacks an enabling disclosure under *35 U.S.C. § 112*." *EMI Group N. Am., Inc. v. Cypress Semiconductor Corp., 268 F.3d 1342, 1348 (Fed. Cir. 2001)* (citation omitted).

Purolite argues that the process in Claim 1 is inoperable and impossible because, under the Court's constructions, an "anionic oxidant" cannot react as required in the first step of the claimed method. In the claims construction process, the Court adopted the parties' agreed construction of the term "anionic oxidant" to mean "any anionic compound, such as potassium permanganate." Purolite relies on the opinion of its expert, Dr. Stack, that a compound is technically neutral and does not carry a charge, and thus cannot react with another material. Purolite therefore argues that an "anionic oxidant," as construed by the Court cannot participate in the required reaction.

Purolite also **[**106]** points to dependent Claim 13, which claims the method from Claim 1 with a permanganate as the anionic oxidant. The Court previously adopted the parties' agreed construction of the term "permanganate" to mean "a salt containing the anion MnO4-, such as potassium permanganate." Dr. Stack also opines that a salt does not carry a charge and thus cannot engage in the reaction required in Claim 1's first step.

The Court concludes that the undisputed evidence demonstrates that Claim 1 is not inoperable as alleged by Purolite. Plaintiffs' expert, Dr. Clifford, has offered his opinion that the anionic oxidant, even though a compound or a salt, can react because the reaction may be done in a solution that dissociates the compound or salt into its charged constituent substances. Dr. Stack admitted in his deposition that compounds and salts may become charged (and thus able to react) after they are placed in a solution and undergo dissociation.[27] Claim 1 does not prohibit the first reaction from occurring in a solution (or prohibit the use of some other method to make the anionic oxidant able to react). The specification supports this construction of Claim 1 (an issue of law), as it repeatedly **[**107]** refers to the use of a solution for this reaction. *See* Patent at 2:44-47 (summary of invention) ("The step of reacting the material that exhibits anion exchange behavior with an anionic oxidant is preferably carried out by passing a solution of the anionic oxidant through the material."), 3:15-19 (passing a solution through the resin), 4:66-5:1 (passing a permanganate solution through the bed), 6:8-11 (resin immersed in solution of potassium permanganate), 7:5-8 (resin immersed in solution).

Purolite points to dependent Claim 2, which recites Claim 1's method with the first reaction "carried out by passing a **[*1246]** solution of said anionic oxidant through said material." Purolite argues that the doctrine of claim differentiation requires that Claim 1 thus be construed not to require the use of a solution. The Court disagrees. Claim 2 does not merely refer to the use of a solution, but rather to the particular method of passing a solution through the material. Purolite has not responded to plaintiffs' point—with which the Court agrees—that there could **[**108]** be other ways of using a solution to allow the reaction, including immersion as contemplated in multiple places in the specification. Thus, Purolite has not shown that Claim 1 must be construed to claim a reaction that does not require the use of a solution, and the Court declines to impose such a limitation that is not supported by the patent or any other evidence.

Because Dr. Stack has conceded that a compound or a salt may react if a solution is used, the process in Claim 1 would only be inoperable if the claim forbids the use of a solution for the first reaction. The Court does not construe Claim 1 in that manner. Accordingly, Purolite has not met its burden, as a matter of law, to show by clear and convincing evidence that Claim 1 is invalid under *Section 112* as inoperable. Plaintiffs are awarded summary judgment on this invalidity defense, and Purolite's summary judgment motion is denied as it relates to this defense.

4. WRITTEN DESCRIPTION (CLAIM 1)

Purolite next argues that Claim 1 is invalid under *35 U.S.C. § 112* because the patent does not comply with the statute's requirement that "[t]he specification shall contain a written description of the invention." The Federal Circuit **[**109]** recently described this requirement as follows:

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[27] Dr. Stack also conceded that he had used the terms "compound" and "salt" imprecisely in articles to refer to substances that carry a net charge.

> An adequate written description reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date. The hallmark of written description is disclosure. The specification must describe an invention understandable to a skilled artisan and show that the inventor actually invented the invention claimed. The purpose of the written description requirement is to ensure that the scope of the right to exclude, as set forth in the claims, does not overreach the scope of the inventor's contribution to the field of art as described in the patent's specification.

Atlantic Research Marketing Sys., Inc. v. Troy, 659 F.3d 1345, 1353-54 (Fed. Cir. 2011) (internal quotations omitted). "To overcome the presumption of the validity of patents, the accused must show that the claims lack a written description by clear and convincing evidence." *Hynix Semiconductor, Inc. v. Rambus Inc., 645 F.3d 1336, 1351 (Fed. Cir. 2011)*. "While compliance with the written description requirement is a question of fact, this issue is amenable to summary judgment in cases where no reasonable fact finder could return **[**110]** a verdict for the non-moving party." *Atlantic Research, 659 F.3d at 1353* (internal quotations omitted).

The Federal Circuit has adopted the standard for this requirement set out in the guidelines promulgated by the United States Patent and Trademark Office (PTO), found at *66 Fed. Reg. 1099 (2001)*. *See* *Invitrogen Corp. v. Clontech Labs., Inc., 429 F.3d 1052, 1072 & n. 19 (Fed. Cir. 2005)*. Those guidelines provide as follows:

> To satisfy the written description requirement, a patent specification must describe the claimed invention in sufficient detail that one skilled in the art can reasonably conclude that the inventor had possession of the claimed invention. An applicant shows possession of **[*1247]** the claimed invention by describing the claimed invention with all of its limitations using such descriptive means as words, structures, figures, diagrams, and formulas that fully set forth the claimed invention. Possession may be shown in a variety of ways including description of an actual reduction to practice, or by showing that the invention was "ready for patenting" such as by the disclosure of drawings or structural chemical formulas that show that the invention was complete, or by describing **[**111]** distinguishing identifying characteristics sufficient to show that the applicant was in possession of the claimed invention.

PTO Guidelines, 66 Fed. Reg. at 1104 (footnotes omitted).

The Court concludes as a matter of law that the patent's specification satisfies this standard. The specification describes the invention in detail with respect to each limitation in Claim 1, and it contains numerous drawings, chemical formulas, and detailed descriptions of each step in the claimed method. Thus, the specification shows possession of the claimed invention. Moreover, each of the examples set forth in the guidelines is present here, as the specification describes actual reductions to practice, discloses drawings and formulas showing that the invention is complete and "ready for patenting," and describes in detail many identifying characteristics of the invention.

In arguing that the written description requirement is not met here, Purolite notes that although the specification focuses on the use of certain materials (specific polymeric anionic exchange resins, either potassium permanganate or sodium hypochlorite, and ferrous sulfate), Claim 1 is actually broader, claiming a method using "a material **[**112]** that exhibits anion exchange behavior" (not merely the specific resins), "an anionic oxidant" (not merely permanganate or hypochlorite), and "a salt of a metal" (not merely ferrous sulfate). Thus, Purolite argues that the specification does not describe the full scope of the claim, which covers the use of any such material and oxidant and salt of a metal. *See* *Cooper Cameron Corp. v. Kvaerner Oilfield Prods., Inc., 291 F.3d 1317, 1323 (Fed. Cir. 2002)* ("a broad claim is invalid when the entirety of the specification clearly indicates that the invention is of a much narrower scope") (citing *Gentry Gallery, Inc. v. Berkline Corp., 134 F.3d 1473, 1479-80 (Fed. Cir. 1998))*.[28]

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[28] Because Purolite has not preserved a defense under *35 U.S.C. § 112* ¶ 2, *see supra* Part V.B.2, the Court does not address Purolite's argument that Claim 1 is invalid pursuant to that paragraph's requirement that the specification claim the subject matter that the applicant "regards as his invention."

The Court rejects this argument. The specification clearly encompasses a broader scope than the embodiments that use the specific resins, permangante/hypochlorite, and ferrous sulfate. *See* *Cordis Corp. v. Medtronic AVE, Inc., 339 F.3d 1352, 1365 (Fed. Cir. 2003)* **[**113]** ("A specification may, within the meaning of *35 U.S.C. § 112* para. 1, contain a written description of a broadly claimed invention without describing all species that the claim encompasses.") (quoting *Utter v. Hiraga, 845 F.2d 993, 998 (Fed. Cir. 1988))*. The specification does not state that the invention is limited to those particular materials, but rather describes the invention in the broader terms found in Claim 1. *See, e.g.*, Patent at 2:36-60. More specifically, the specification states that although certain resins are preferred, a wide variety of resins may be used, *see id*. at 2:61-3:2, 9:67-10:12 (listing several examples); that "any anionic oxidizing agent can be used in **[*1248]** place of permanganate," *see id*. at 10:13-16 (listing several examples); and that a solution of ferrous salt is merely the preferred metal salt, *see id*. at 3:3. Thus, because the specification does not limit the scope of the claimed invention to the particular materials used in the embodiments described in the most detail, there is no violation of the written description requirement. *See* *Cordis Corp. v. Medtronic AVE, Inc., 339 F.3d 1352, 1365 (Fed. Cir. 2003)* (written description requirement was not violated **[**114]** because "the patent disclosure provides ample support for the breadth of the term [and] it does not unambiguously limit the meaning of the term to the narrower embodiment") (quoting *Johnson Worldwide Assocs., Inc. v. Zebco Corp., 175 F.3d 985, 993 (Fed. Cir. 1999))*; *cf.* *Tronzo v. Biomet, Inc., 156 F.3d 1154, 1159 (Fed. Cir. 1998)* (requirement was violated because statements in the specification made clear that the patent disclosed only cups of a certain shape and nothing broader, without any suggestion that the patent encompassed other shapes or species of cup).

Purolite relies on the opinion of its expert, Dr. Stack. In his report, however, Dr. Stack noted the specification's language indicating that materials other than those used in the embodiments may be used. Moreover, Dr. Stack's opinion that "the specification would not convey to a person of ordinary skill in the art that the inventors were in possession of the alleged invention encompassed by the full scope of claim 1" is not supported by any analysis of the specification and its broad language.[29] At most, Dr. Stack states that the specification discloses two examples, but as the applicable caselaw makes clear, the specification **[**115]** need not describe in detail all possible examples. Thus, the Court concludes that Dr. Stack's conclusory statement does not provide clear and convincing evidence to rebut the presumption that the written description requirement has been satisfied.

Purolite also cites Dr. SenGupta's denials of the following three requests for admission:

> The Patent-in-Suit describes the method of claim 1 using every "anionic oxidant" known as of January 21, 2004.
>
> The Patent-in-Suit describes the method of claim 1 using every "solution of a salt of a metal" known as of January 21, 2004.
>
> The Patent-in-Suit describes the method of claim 1 using every "material that exhibits anion exchange behavior" known as of January 21, 2004.

Purolite concedes that these denials do not have the conclusive effect given to admissions under *Fed. R. Civ. P. 36*, *see, e.g.,* *Audiotext Communications Network, Inc. v. U.S. Telecom, Inc., 1995 U.S. Dist. LEXIS 15395, 1995 WL 625744, at *7 (D. Kan. Oct. 5, 1995)*; nevertheless, Purolite argues that the denials at least have evidentiary **[**116]** value and support its position that the patent does not satisfy the written description requirement. The Court, however, does not find Dr. SenGupta's bare denials, without further explanation, to be probative. The requests do not refer specifically to the written description requirement of *35 U.S.C. § 112*, and Dr. SenGupta has not denied that the patent complies with the statute. Moreover, as previously stated, the fact that a patent does not describe every possible example (listing every possible combination of the possible materials) does not indicate non-compliance with the statute. Thus, the denials **[*1249]** do not provide clear and convincing evidence in support of Purolite's position.

For these reasons, the Court concludes as a matter of law that Purolite has failed to meet its burden to provide clear and convincing evidence to overcome the presumption that Claim 1 of the patent satisfies *Section 112*'s

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[29] Dr. Stack's analysis of specific language in the specification and discovery from Dr. SenGupta related and is relevant only to his opinion on compliance with the enablement requirement.

written description requirement. Accordingly, the Court awards plaintiffs summary judgment on this invalidity defense asserted by Purolite, and it denies Purolite's motion for summary judgment as it relates to this defense.

5. ENABLEMENT (CLAIM 1)

Purolite next asserts that Claim 1 and its **[**117]** dependent claims fail to satisfy the "enablement" requirement of *35 U.S.C. § 112*. As noted above, *Section 112* contains the following requirement:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same . . . .

Id. ¶ 1. "The enablement requirement is satisfied when one skilled in the art, after reading the specification, could practice the claimed invention without undue experimentation." *Sitrick v. Dreamworks, LLC, 516 F.3d 993, 999 (Fed. Cir. 2008)* (internal quotation omitted).

Whether a claim satisfies the enablement requirement of *Section 112* is a question of law based on underlying facts. *See id*.; *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc., 617 F.3d 1296, 1305 (Fed. Cir. 2010)* (enablement "is a question of law with underlying questions of fact regarding undue experimentation"); *AK Steel Corp. v. Sollac and Ugine, 344 F.3d 1234, 1245 (Fed. Cir. 2003)* ("whether a patent complies with the enablement requirement **[**118]** depends upon a factually intensive inquiry regarding the amount of experimentation required"); *National Recovery Technologies, Inc. v. Magnetic Separation Sys., Inc., 166 F.3d 1190, 1197 (Fed. Cir. 1999)* ("Whether making and using the claimed invention would have required undue experimentation is a legal conclusion based upon underlying facts."). Because a patent is presumed valid, the party asserting invalidity must show that the enablement requirement is not satisfied to a standard requiring clear and convincing evidence. *See* *Sitrick, 516 F.3d at 999*.

Purolite again notes that Claim 1, which is not limited to any particular "material that exhibits anion exchange behavior," "anionic oxidant," or "salt of a metal," is broader than the specification's two examples that use specific materials. Purolite thus argues that Claim 1 and the dependent claims are not enabled because the specification teaches only how to practice the invention with those particular combinations of materials, and does not explain which other combinations of materials may be used to produce a selective adsorbent capable of exchanging anions, as required by the claim. *See id*. ("The full scope of the claimed invention **[**119]** must be enabled."); *National Recovery, 166 F.3d at 1196* ("The scope of the claims must be less than or equal to the scope of the enablement.").

Plaintiffs argue that the specification's two detailed examples are sufficient for enablement here, based on the general principle that "the enablement requirement is met if the description enables any mode of making and using the invention." *See* *Johns Hopkins Univ. v. CellPro, Inc., 152 F.3d 1342, 1361 (Fed. Cir. 1998)* (quoting *Engel Indus., Inc. v. Lockformer Co., **[*1250]** 946 F.2d 1528, 1533 (Fed. Cir. 1991))*. Plaintiffs also rely on cases in which the court did not require the specification at issue to have described all possible species covered by the claim. *See* *Atlas Powder Co. v. E.I. du Pont De Nemours & Co., 750 F.2d 1569, 1576 (Fed. Cir. 1984)*; *In re Application of Angstadt, 537 F.2d 498, 502-03 (C.C.P.A. 1976)*.

The Court does not agree the specification's inclusion of the two detailed examples entitles plaintiffs to summary judgment on this issue. As Purolite has pointed out, the scope of Claim 1 is much broader and covers various other materials under the claim's broad categories. Thus, the two examples do not show how a practitioner could **[**120]** practice the full scope of Claim 1 by using other materials covered by the claim. Moreover, although the specification lists alternative materials, the specification does not describe how any such alternative materials could be combined to allow the invention (as fully claimed) to be made and used. In cases in which the specification does not enable the full scope of a broad claim, the Federal Circuit has rejected similar arguments based on the "one mode" principle. *See* *Automotive Technologies Int'l, Inc. v. BMW of N. Am., Inc., 501 F.3d 1274, 1285 (Fed. Cir. 2007)*; *Liebel-Flarsheim Co. v. Medrad, Inc., 481 F.3d 1371, 1379-80 (Fed. Cir. 2007)*.

The other cases cited by plaintiffs, Angstadt and Atlas Powder, also suggest that further inquiry is needed. In *Angstadt*, the court stated that requiring disclosure of a test with every species covered by the claim would require the disclosure of information concerning thousands of catalysts and would force inventors to carry out a prohibitive number of actual experiments, thereby discouraging patent applications in unpredictable areas. *See* Angstadt, 537 F.2d at 502-03. The court proceeded, however, to examine whether the evidence showed that **[**121]** one skilled in the art could make and use other material without undue experimentation. *See* id. at 503-04. In *Atlas Powder*, the defendant essentially made the same argument made by Purolite in this case:

> Du Pont argues that the patent disclosure lists numerous salts, fuels, and emulsifiers that could form thousands of emulsions but there is no commensurate teaching as to which combination would work. The disclosure, according to Du Pont, is nothing more than "a list of candidate ingredients" from which one skilled in the art would have to select and experiment unduly to find an operable emulsion.

Atlas Powder, 750 F.2d at 1576. The court agreed with the district court's conclusion that listing all operable emulsions would have been impossible and was unnecessary. *See id*. Such detail was unnecessary, however, because the district court had found that a particular scientific principle allowed those skilled in the art to know how to select the particular ingredient substances. *See id*. The court noted, however, that "if the number of inoperative combinations becomes significant, and in effect forces one of ordinary skill in the art to experiment unduly in order to practice the claimed invention, **[**122]** the claims might indeed be invalid." *See* id. at 1576-77; *see also* Amgen Inc. v. Hoechst Marion Roussel, Inc., 314 F.3d 1313, 1335-37 (Fed. Cir. 2003) (affirming the district court's application of the "one mode" principle where the evidence showed that the claimed invention could be made and used "by experimentation falling short of undue").

Similarly in the present case, although the specification need not have listed every operable combination of materials covered by Claim 1, such combinations must be **[*1251]** able to be determined by one skilled in the art. As the Federal Circuit has stated:

> That is not to say that the specification itself must necessarily describe how to make and use every possible variant of the claimed invention, for the artisan's knowledge of the prior art and routine experimentation can often fill in gaps, interpolate between embodiments, and perhaps even extrapolate beyond the disclosed embodiments, depending upon the predictability of the art. But it does mean that, when a range is claimed, there must be reasonable enablement of the scope of the range.

AK Steel, 344 F.3d at 1244 (citations omitted).

Thus, the issue here becomes whether one skilled in the art could practice **[**123]** the full scope of Claim 1, using materials other than those disclosed in the specification's detailed embodiments, without undue experimentation.

> The determination of what constitutes undue experimentation in a given case requires the application of a standard of reasonableness, having due regard for the nature of the invention and the state of the art. The test is not merely quantitative, since a considerable amount of experimentation is permissible, if it is merely routine, or if the specification in question provides a reasonable amount of guidance with respect to the direction in which the experimentation should proceed.

In re Wands, 858 F.2d 731, 737 (Fed. Cir. 1988) (citation and footnote omitted); *accord* Elan Pharmaceuticals, Inc. v. Mayo Foundation for Med. Educ. and Research, 346 F.3d 1051, 1055 (Fed. Cir. 2003) (quoting *Wands*). The following factors may be considered in determining whether a disclosure requires undue experimentation:

> (1) the quantity of experimentation necessary, (2) the amount of direction or guidance presented, (3) the presence or absence of working examples, (4) the nature of the invention, (5) the state of the prior art, (6) the relative skill of those in **[**124]** the art, (7) the predictability or unpredictability of the art, and (8) the breadth of the claims.

ALZA Corp. v. Andrx Pharmaceuticals, LLC, 603 F.3d 935, 940 (Fed. Cir. 2010) (quoting Wands, 858 F.2d at 737).

The Court concludes that neither party is entitled to summary judgment on this defense on the present record before the Court. Purolite has presented evidence from its expert, Dr. Stack, who applied the factors set forth above and opined that undue experimentation would be required to practice the full scope of Claim 1 and its dependent claims. In particular, Dr. Stack cited the great number of possible combinations of materials, his opinion that the reason why some combinations would not work may not be apparent to one in the art, the lack of guidance and working examples in the specification, the patent's contention that the invention was pioneering, the unpredictable nature of the art, and the breadth of the claims. That evidence, viewed in the light most favorable to Purolite, precludes summary judgment in favor of plaintiffs. Plaintiffs rely on the opinions of their own expert, Dr. Clifford, who disagrees with Dr. Stack's conclusions. Plaintiffs also cite to Dr. Stack's deposition, **[**125]** in which he testified that various reactions and processes involved in practicing the invention are routine or constitute basic chemistry or are within the knowledge of one of ordinary skill in the art; that certain relevant data may be found in reference books or extrapolated by the practitioner; and that certain relevant results could be predicted by one in the art. This evidence, viewed in the light most favorable to plaintiffs, precludes summary **[*1252]** judgment in favor of Purolite on this issue.

Thus, the Court cannot rule on this issue of undue experimentation as a matter of law on the record presently before it. Accordingly, an issue of fact remains for trial, and both parties' summary judgment motions are denied as they relate to this defense of invalidity based on non-enablement.

6. ANTICIPATION BY PRIOR ART (CLAIM 15)

Purolite seeks summary judgment on its defense that Claim 15 of the patent is invalid as anticipated by prior art pursuant to *35 U.S.C. § 102*. Claim 15 states as follows:

> 15. An adsorbent for the selective removal of ligands from fluids, said absorbent [sic] comprising a polymeric anion exchange resin containing particles of an oxygen-containing compound of iron dispersed **[**126]** throughout the resin.

The Federal Circuit has described the anticipation defense as follows:

> Anticipation under *35 U.S.C. § 102* means lack of novelty, and is a question of fact. To anticipate, every element and limitation of the claimed invention must be found in a single prior art reference, arranged as in the claim. When a claim covers several structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claim is known in the prior art.

Brown v. 3M, 265 F.3d 1349, 1351 (Fed. Cir. 2001) (citations omitted).

Because of the statutory presumption of the validity of the patent, Purolite must prove anticipation by clear and convincing evidence. *See* *Tokai Corp. v. Easton Enters., Inc., 632 F.3d 1358, 1367 (Fed. Cir. 2011)*. Moreover, if the particular prior art was considered by the PTO during examination of the patent application, the challenger bears an enhanced burden of overcoming the deference that is due to the PTO's decision. *See id*.[30]

As a preliminary matter, Purolite argues that the phrase in the preamble to Claim 15 that describes the claimed adsorbent as one "for the selective removal of ligands from fluids" does not constitute a limitation on the claim for purposes of the anticipation analysis.

> While it is true that preamble language is often treated as nonlimiting in nature, it is not unusual for this court to treat preamble language as limiting . . . . Preamble language that merely states the purpose or intended use of an invention is generally not treated as limiting the scope of the claim. However, we have stated that there is no "litmus test" for determining whether preamble language is limiting. To the contrary, we have stated the whether to treat a preamble as a claim limitation is determined on the facts of each case in light of the claim as a whole and the invention described in the patent.

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[30] If a prior art reference was not before the PTO, there would, of course, be no deference, *see* *Tokai, 632 F.3d at 1367*; the clear-and-convincing evidence **[**127]** standard still applies, however, although it may be easier to meet that standard with respect to a reference not before the PTO, *see* *Microsoft Corp. v. i4i Ltd. Partnership, 131 S. Ct. 2238, 2251, 180 L. Ed. 2d 131 (2011)*.

Bicon, Inc. v. Straumann Co., 441 F.3d 945, 952 (Fed. Cir. 2006) (citations and internal quotations omitted). The **[**128]** Federal Circuit has explained at some length the relevant considerations for construing a preamble:

> **[*1253]** Whether to treat a preamble as a limitation is a determination resolved only on review of the entire patent to gain an understanding of what the inventors actually invented and intended to encompass by the claim.
> In general a preamble limits the invention if it recites essential structure or steps, or if it is necessary to give life, meaning, and vitality to the claim. Conversely, a preamble is not limiting where a patentee defines a structurally complete invention in the claim body and uses the preamble only to state a purpose or intended use for the invention.
>
> No litmus test defines when a preamble limits claim scope. Some guideposts, however, have emerged from various cases discussing the preamble's effect on claim scope. For example, this court has held that Jepson claiming generally indicates intent to use the preamble to define the claimed invention, thereby limiting claim scope. Additionally, dependence on a particular disputed preamble phrase for antedcedent basis may limit claim scope because it indicates a reliance on both the preamble and claim body to define the claimed invention. **[**129]** Likewise, when the preamble is essential to understand limitations or terms in the claim body, the preamble limits claim scope.
> Further, when reciting additional structure or steps underscored as important by the specification, the preamble may operate as a claim limitation.
> Moreover, clear reliance on the preamble during prosecution to distinguish the claimed invention from the prior art transforms the preamble into a claim limitation because such reliance indicates use of the preamble to define, in part, the claimed invention. Without such reliance, however, a preamble generally is not limiting when the claim body describes a structurally complete invention such that deletion of the preamble phrase does not affect the structure or steps of the claimed invention. Thus, preamble language merely extolling benefits or features of the claimed invention does not limit the claim scope without clear reliance on those benefits or features as patentably significant.
>
> Moreover, preambles describing the use of an invention generally do not limit the claims because the patentability of apparatus or composition claims depends on the claimed structure, not on the use or purpose of that structure. Indeed, **[**130]** the inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not. More specifically, this means that a patent grants the right to exclude others from making, using, selling, offering to sale, or importing the claimed apparatus or composition for any use of that apparatus or composition, whether or not the patentee envisioned such use. Again, statements of intended use or asserted benefits in the preamble may, in rare instances, limit apparatus claims, but only if the applicant clearly and unmistakably relied on those uses or benefits to distinguish prior art. Likewise, this principle does not mean that apparatus claims necessarily prevent a subsequent inventor from obtaining a patent on a new method of using the apparatus where that new method is useful and nonobvious.

Catalina Marketing Int'l, Inc. v. Coolsavings.com, Inc., 289 F.3d 801, 808-09 (Fed. Cir. 2002) (citations and internal quotations omitted). Whether the preamble is a limitation of the claim presents a question of law for the Court. *See* Intirtool, Ltd. v. Texar Corp., 369 F.3d 1289, 1293-94 (Fed. Cir. 2004).

[*1254] The Court concludes as **[**131]** a matter of law, based on this guidance from the Federal Circuit, that the disputed portion of the preamble in Claim 15 ("for the selective removal of ligands from fluids") does not represent a limitation of that claim. On its face, the preamble describes the use of the invention—it is used for the selective removal of ligands from fluids. Plaintiffs argue that the patent and its specification show that the invention is a ligand-selective adsorbent. In that regard, they point to the title of the patent ("Hybrid Anion Exchanger for Selective Removal of Contaminating Ligands from Fluids . . .")[31] and the patent's first substantive sentence ("The invention relates to the manufacture and application of hybrid anion exchangers for selective removal of contaminants from

[31] Although Purolite points out that the title was changed by the PTO examiner, the application contained a similar title.

ligands."). Those references do include the words "selective removal" with respect to ligands; however, they modify "hybrid anion exchanger" by stating the exchanger's use. Indeed, if the title has some relevance, as plaintiffs argue, it suggests only that the invention is the exchanger, the composition of which is described in the body of Claim 15. Similarly, the excerpts to the specification that plaintiffs cite refer to **[**132]** the invention's use or purpose of ligand-selective removal. *See* Patent at 2:16-18, 2:36-37, 3:15-19, 3:28-32, 9:67-10:2. Thus, the patent does not indicate that the inventor considered a ligand-selective adsorbent or the disputed portion of the preamble to be part of the invention claimed in Claim 15. Plaintiffs have not argued or shown how the preamble is necessary to the claimed structure.

Moreover, the patent's prosecution history confirms that the preamble was not added to overcome or to distinguish any prior art. Plaintiffs note that the PTO examiner first rejected the similar preamble to Claim 1 on the basis that "selective" was indefinite (before ultimately acknowledging a particular definition and withdrawing the objection). Plaintiffs have not cited any authority, however, that would indicate that an examiner would not have lodged an indefiniteness objection unless the preamble was deemed a claim limitation. Nor have plaintiffs cited any authority supporting the argument that the Court should consider the examiner's thoughts in construing a claim.[32]

The other considerations cited by the Federal Circuit do not favor treatment of the preamble in Claim 15 as a limitation. The preamble is not essential to the structure described in the body of the claim, and the structure is complete without reference to the preamble. The body of the claim does not rely on the preamble as an antecedent to its terms, and the preamble is not essential to an understanding of the terms or limitations in the claim. The preamble does not recite an additional structure, and as noted above, the inventor did not rely on the preamble to distinguish prior art. Claim 15 is an apparatus or composition claim, and thus the patentability does not depend on the use of the invention. The Court concludes that this is not one of the "rare instances" in which a preamble to such a claim that states the invention's use should be deemed a limitation, and the Court construes Claim 15 **[**134]** in that manner as a matter of law.

As another preliminary matter, the Court addresses the proper construction **[*1255]** of the term "adsorbent", which is found in various claims of the patent, including Claim 15. After the claim construction briefing and hearing, the Court construed "adsorbent" to mean "a substance that has the ability to condense or hold molecules of other substances on its surface." With respect to a number of prior art references, plaintiffs argue that the inventions described therein do not meet Claim 15's requirement of an "adsorbent" because they involve holding ions (in a process of ion exchange), which plaintiffs argue are distinct from the "molecules" required by the Court's construction.

The Court declines to interpret "adsorbent" in the patent claims to exclude holding ions. This particular issue was not raised by the parties at the claim construction stage, and thus the Court did not consider the issue in originally construing "adsorbent". In its claim construction order, the Court intended to construe "adsorbent" in accordance with its ordinary meaning in the art as reflected in a scientific dictionary. *See* Memorandum and Order of July 22, 2011, at 8 (Doc. # 344). **[**135]** The Court followed Purolite's proposed construction, which had been taken from the dictionary's definition of "adsorbent" as "[a] substance which has the ability to condense or hold molecules of other substances on its surface." *See id*. The same dictionary defines "adsorption", however, to mean "[a]dherence of the atoms, ions, or molecules of a gas or liquid to the surface of another substance, called the adsorbent." That definition indicates that "adsorbent" and "adsorption" are related in scope and are not limited to some technical definition of "molecules" that could exclude ions or particular kinds of atoms. Moreover, in its prior ruling, the Court stated that "this same definition was cited by the applicant in the application process for the Patent." *See id*. That statement was not quite accurate, as the applicant had cited this dictionary's definition of "adsorption," while the Court adopted the dictionary's definition of "adsorbent". The fact that the applicant relied on a definition including "atoms, ions, and molecules," however, supports the Court's conclusion that the patent was not intended to exclude a substance that hold ions on the surface in referring to an "adsorbent".

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[32] The **[**133]** Court also rejects plaintiffs' argument based on Purolite's request for a construction by the Court of the word "ligand". The Court does not consider Purolite, by such request, to have admitted or to be estopped from disputing that the preamble should be deemed a claim limitation in Claim 15.

This **[**136]** revised construction is further supported by the fact that plaintiffs' proposed construction of "adsorbent" would have included "an anion exchange resin" as an example. Indeed, at the claim construction hearing, plaintiffs' counsel conceded that the starting material—the "material that exhibits anion exchange behavior"—may be an adsorbent. The Court also noted in its prior order that the starting "material that exhibits anion exchange behavior" may be an adsorbent. *See id*. at 11. Finally, plaintiffs' expert concedes that practitioners in the art often include the process of ion exchange within the scope of the definition of adsorption.

For these reasons, the Court revises its prior construction, and it construes "adsorbent" in the patent's claims as a matter of law to mean "a substance that has the ability to condense or hold atoms, ions, or molecules of other substances on its surface."[33]

The Court then moves to the ten particular prior art references cited by Purolite **[**137]** and its expert, Dr. Stack, as invalidating Claim 15 as anticipated under *35 U.S.C. § 102*. Five of the references are **[*1256]** understood by the parties to relate to the same product, known as MIEX, manufactured by a company named Orica. The Court concludes that four of these five MIEX references show as a matter of law that Claim 15 is invalid as anticipated by prior art.

As an initial matter, plaintiffs do not dispute that these MIEX references were not placed before the PTO examiner. Accordingly, as recognized by the Supreme Court, Purolite may more easily satisfy the clear-and-convincing evidence standard with respect to these references. *See* *Microsoft Corp., 131 S. Ct. at 2251*.

In evidence submitted by Purolite, Dr. Stack has shown how these references satisfy each of the limitations contained in Claim 15. In response, plaintiffs and their expert, Dr. Clifford, make two primary arguments. First, they argue that these references do not describe an adsorbent that is selective for ligands. As the Court ruled above, however, Claim 15 does not include as a limitation the preamble's reference to the selective removal of ligands. Thus, that argument fails as a matter of law. Second, they argue that **[**138]** the references do not describe an "adsorbent" because they instead describe ion exchangers. Again, however, the Court has rejected such an interpretation of "adsorbent" as a matter of law. Plaintiffs have not offered any other reasons why these references do not meet all of the limitations of Claim 15 as presently construed by the Court. In particular, plaintiffs do not dispute that these references, which are all described as containing an iron compound "throughout" the resin, satisfy the "dispersed throughout" limitation of claim 15.[34]

Therefore, the Court concludes as a matter of law that Purolite has shown, by clear and convincing evidence, that Claim 15 is invalid under *35 U.S.C. § 102* as anticipated by four of the MIEX references—the Nguyen patent, the Ballard patent, the Ballard patent application, and the MIEX product itself.[35] Accordingly, **[**139]** Purolite is awarded summary judgment on this invalidity defense, and thus is also awarded summary judgment on plaintiffs' claim for infringement of Claim 15 of the patent.[36]

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[33] Because of this construction, the Court need not construe the term "molecules" or determine whether that term excludes ions, as suggested by plaintiffs' expert, or whether it does include ions under its ordinary defintion.

[34] With respect to the fifth MIEX reference, the Singer and Bilyk article, the Court concludes that a question of fact remains whether the article, which refers only to iron oxide "integrated into the resin structure," satisfies the "dispersed throughout" limitation; thus, that reference does not support a finding of invalidity as a matter of law.

[35] The Court rejects plaintiffs' argument that the MIEX product was not "in public use or on sale in this country" early enough for consideration as prior art under *35 U.S.C. § 102(b)*. Orica's representative testified that the product was in public use before the relevant date, and plaintiffs' citation to evidence that the first *sale* was later does not controvert that testimony. Moreover, the representative was not required to have personal knowledge of that fact because the deposition was conducted pursuant to *Fed. R. Civ. P. 30(b)(6)*. *See, e.g.,* *Payless Shoesource Worldwide, Inc. v. Target Corp., 2008 U.S. Dist. LEXIS 28878, 2008 WL 973118, at *9 (D. Kan. Apr. 8, 2008)* (*Rule 30(b)(6)* deponent's discharge of his duty does not require personal knowledge).

[36] Remaining issues of fact, particularly with respect to the "dispersed throughout" limitation, preclude reliance on the other five prior art references cited by Purolite for purposes of summary judgment on this defense.

7. OBVIOUSNESS (CLAIM 15)

Although the Court has ruled Claim 15 to be invalid, **[**140]** the Court nonetheless addresses Purolite's alternative defense of obviousness. In its motion for summary judgment, Purolite has not made any argument that Claim 15 is invalid as obvious pursuant to *35 U.S.C. § 103*. **[*1257]** In their own motion, plaintiffs note that Purolite's expert has not offered an opinion concerning Claim 15's obviousness, and they argue that Purolite cannot meet is burden to show by clear and convincing evidence that Claim 15 is obvious under *Section 103*. In response to that argument, Purolite cites the Federal Circuit's conclusion in *Wyers v. Master Lock Co., 616 F.3d 1231 (Fed. Cir. 2010)*, that in appropriate cases (where the technology is easily understandable, for instance), expert testimony may not be necessary on the issue of obviousness. *See* *id. at 1239-40*. Purolite further notes that both sides' experts have offered opinions on prior art with respect to Claim 15 as it bears on the issue of anticipation. Purolite's sole argument, however, is that the obviousness inquiry is not complex here, and that plaintiffs "fail to show how any difference between claim 15 and any prior art reference of record would require recourse to anything beyond 'logic, judgment, and common **[**141]** sense.'"

The Court concludes that Purolite has failed to provide evidence or even show by argument that Claim 15 is invalid as obvious in light of the prior art. The burden does not fall to plaintiffs to show that particular evidence is required. Purolite has not cited any expert opinion that Claim 15 is obvious, and in fact, Purolite's counsel represented at Dr. Stack's deposition that Purolite would not rely on any expert testimony for its assertion of obviousness. Purolite has not shown or even tried to explain how logic or common sense makes Claim 15 obvious in light of any particular prior art. Accordingly, Purolite has not met its burden in opposing summary judgment, including the heightened burden of proof on this issue, and summary judgment in plaintiffs' favor on this issue is therefore appropriate.

8. SUMMARY OF INVALIDITY ISSUES

With respect to Claim 1 of the patent, only Purolite's defense based on the enablement requirement remains for trial, and plaintiffs are awarded summary judgment on Purolite's other theories of invalidity. The Court rules that Claim 15 is invalid as anticipated by prior art as a matter of law, and Purolite is awarded summary judgment on that defense **[**142]** and thus on plaintiffs' claim for infringement of Claim 15.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' motion to exclude expert testimony by Richard Troxel (Doc. # 426) is **granted in part and denied in part**; the motion is granted with respect to opinions concerning Layne's claim for royalties and Purolite's claim for unpaid invoices, but is denied as moot with respect to damages on Purolite's other counterclaims.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion to exclude certain expert sur-rebuttal reports (Doc # 428) is **denied**.

IT IS FURTHER ORDERED BY THE COURT THAT defendant Purolite's motion to exclude expert testimony by Dennis Clifford (Doc. # 430) is **denied**.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion for leave to file a declaration by Dr. Clifford (Doc. # 542) is **granted**, and the proposed declaration is deemed filed.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiff Layne's motion for summary judgment on certain of Purolite's counterclaims (Doc. # 404) is **granted**, and Layne is awarded summary judgment on Purolite's counterclaims at issue in the motion, namely all claims for breach of contract other than Purolite's claim of a breach based on the **[**143]** failure to pay for **[*1258]** product, and Purolite's claims for unfair competition, restraint of trade, and breach of the implied covenant of good faith and fair dealing.

IT IS FURTHER ORDERED BY THE COURT THAT Layne's motion for partial summary judgment on its claims for breach of contract (Doc. # 406) is **granted in part and denied in part**. As it relates to Layne's claim for damages for unpaid royalties, the motion is granted with respect to Purolite's liability, but denied with respect to the amount of damages. As it relates to Layne's claim for a permanent injunction for breach of Section 11.2 of the Agreement, the motion is granted, and Purolite is hereby permanently enjoined from making, selling, or using the product FerrIX

A33E or any substantially similar product that uses "Intellectual Property" (as defined in the Agreement) resulting from Purolite's activities under the Agreement.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion for summary judgment on its claims of patent infringement (Doc. # 408) is **granted in part and denied in part**. The motion is granted with respect to the following, on which plaintiffs are awarded summary judgment: Purolite's theories that Claim 1 of the **[**144]** patent is not infringed based on the "by the action of the oxidant" and "salt of said metal" limitations; and Purolite's invalidity defenses based on an inoperable process under *35 U.S.C. § 112* (Claim 1), the lack of a written description under *35 U.S.C. § 112* (Claim 1), and obviousness under *35 U.S.C. § 103* (Claim 15). The motion is denied in all other respects.

IT IS FURTHER ORDERED BY THE COURT THAT Purolite's motion for summary judgment on certain of plaintiffs' claims (Doc. # 410) is **granted in part and denied in part**. The motion is granted with respect to the following, on which Purolite is awarded summary judgment: Layne's claim for breach of Section 10.1 of the Agreement, to the extent that such breach is based on an underlying breach of a separate non-disclosure agreement between SolmeteX and Purolite; with respect to patent infringement, plaintiffs' marking estoppel theory and any claims by plaintiff based on indirect infringement or the doctrine of equivalents; and with respect to patent invalidity, plaintiffs' license estoppel theory and Purolite's defense that Claim 15 of the patent is anticipated by prior art pursuant to *35 U.S.C. § 102*—and thus also plaintiffs' claim **[**145]** for infringement of Claim 15. The motion is denied is all other respects.

IT IS SO ORDERED.

Dated this 23rd day of December, 2011, in Kansas City, Kansas.

/s/ John W. Lungstrum

John W. Lungstrum

United States District Judge

End of Document

In re Cox Enters.

United States District Court for the Western District of Oklahoma

December 28, 2011, Decided; December 28, 2011, Filed

Case No. 09-ML-2048-C

Reporter

2011 U.S. Dist. LEXIS 149656 *; 2012-1 Trade Cas. (CCH) P77,756; 2011 WL 6826813

In re: COX ENTERPRISES, INC. SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION

Subsequent History: Petition denied by Gelder v. Coxcom Inc., 696 F.3d 966, 2012 U.S. App. LEXIS 16536 (10th Cir., 2012)

Related proceeding at In re Cox Enters., 2013 U.S. Dist. LEXIS 4091 (W.D. Okla., Jan. 9, 2013)

Related proceeding at Healy v. Cox Communs. Inc., 2013 U.S. Dist. LEXIS 3328 (W.D. Okla., Jan. 9, 2013)

Prior History: In re Cox Enters. Set-Top Cable Television Box Antitrust Litigation, 2011 U.S. Dist. LEXIS 156874 (W.D. Okla., Sept. 16, 2011)

Core Terms

cable, box, set-top, customers, premium, geographic, class member, rent, tied product, interactive, programming, Plaintiffs', tying product, digital, coercion, subscribed, consumer, products, tie, class certification, antitrust, courts, member of the class, predominate, market power, conditions, named plaintiff, class action, providers, prices

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Judges: ROBIN J. CAUTHRON, United States District Judge.

Opinion by: ROBIN J. CAUTHRON

Opinion

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Plaintiffs filed the present suit against Defendant Cox Enterprises, Inc. ("Cox") alleging that Defendant illegally forces customers to rent a Cox set-top box ("STB") in order to gain full access to Cox's premium cable services in violation of the Sherman Act, *15 U.S.C. § 1*. Presently, Plaintiffs move this Court to certify the class pursuant to *Fed. R. Civ. P. 23*.

II. BACKGROUND

Plaintiffs bring this action on behalf of themselves and the following putative class: All persons in the United States who subscribed to Cox for premium cable and paid Cox a monthly rental fee for an accompanying set-top box. [1] Additionally, Plaintiffs Elizabeth Ann Brady, John Joseph Brady, and Sharon Coughlin seek certification of the following subclass: All persons in the State of California who subscribed to Cox for premium cable and paid Cox a monthly rental fee for an accompanying set-top box.

Cox is one of the five largest cable providers of multi-channel video programming distribution ("MVPD") in the United States and provides cable service to customers across the nation in 19 different states. (Pls.' Compl., Dkt. No. 17, at 4; Def.'s Br., Dkt. No. 181, at 10.) Cox offers several different tiers of cable packages, including basic cable and digital cable. [2] Before a customer may subscribe to digital video programming, that customer must subscribe to Cox TV Starter, formerly Cox Limited Basic ("basic cable"). Basic cable is primarily over-the-air broadcast stations, without interactive digital programming. (Class Certification Hr'g Tr. 110, Nov. 16, 2011.) Under Federal Communications Commission ("FCC") regulations, **[*16]** every cable subscriber must buy basic cable before being permitted to subscribe to premium cable.

Specific channels and digital cable tiers available to customers vary across Cox's national footprint, as do prices. (Def.'s Br., Dkt. No. 181 Ex. 11.) Unlike basic cable, customers need a device that will unscramble the encrypted signals in order to access digital programming. (Pls.' Compl., Dkt. No. 17, at 6-7.) One such device is a set-top box. Set-top boxes perform another function: they allow cable providers and their customers to communicate back and forth ("bi-directionally") so that customers can utilize features—Pay-Per-View ("PPV"), Video on Demand ("VOD"),

[1] Plaintiffs exclude the following people from their definition of the class: Plaintiffs' counsel; Defendant's employees; government **[*15]** agencies; this Court and the immediate family members and staff of the Court. Originally, Plaintiffs also excluded addresses where the consumer receives multi-channel video programming distribution ("MVPD") service from at least one other cable MVPD. However, Plaintiffs no longer exclude this category of people and offer to file another amended complaint to reflect this change. Because Plaintiffs' Motion for Class Certification is herein denied, this request is moot.

[2] For example, Cox customers can subscribe to various Paks based on their particular interests, like the Sports & Information Pak and the Movie Pak. (Def.'s Br., Dkt. No. 181, at 11 & n.26 (describing the different channels available in the Sports and Information Pak depending on the region).)

and Interactive Programming Guide ("IPG")—that require such communication. While specific packages vary, all Cox customers who subscribe to digital video programming and rent a Cox set-top box have access to Cox's IPG, VOD, and PPV.

Originally, **[*17]** set-top boxes included integrated technology that would descramble the signal and allow customers to watch digital programming. In 2004, the FCC required cable operators to offer the descrambling technology in separate devices, called CableCards. (Def.'s Br., Dkt. No. 209 Ex. 2, at 4 & n.13.) Instead of renting a set-top box, Cox customers could rent, for roughly two dollars per month, a CableCard from Cox that would descramble the encrypted signals. (Hr'g Tr. at 49; Def.'s Br., Dkt. No. 181, at 18.) Unlike Cox's set-top box, however, CableCards do not grant access to Cox's interactive features, such as Cox's IPG or VOD. (Pls.' Compl., Dkt. No. 17, at 6-7.) Additionally, in order to function, CableCards require a reader slot, either directly into a CableCard ready television or other CableCard enabled device. (Id. at 11.) In 2007, the FCC prohibited cable companies from integrating the technology into set-top boxes and required that boxes have CableCard slots and separate CableCards. (Id.; Def.'s Br., Dkt. No. 181, at 18.)

Instead of or in addition to renting a set-top box directly from Cox, Cox customers can purchase their own set-top box, such as TiVO or Moxi, which allows access **[*18]** to cable programming, but not Cox's interactive programming like IPG or VOD. (Def.'s Br., Dkt. No. 181, at 17.) Additionally, other MVPD providers compete with Cox for digital programming subscriptions, including AT&T U-Verse, Qwest/CenturyLink, Verizon FiOS, EATEL, Wide Open West, LUS Fiber/Lafeyette Utility Services, and the direct broadcasting satellite ("DBS") providers, DISH Network and DirecTV. (Id. at 13-17.)

In 2009, multiple Cox premium cable subscribers filed class action suits in various jurisdictions against Cox for allegedly illegally tying its premium cable service to rental of a Cox set-top box. (Pls.' Br., Dkt. No. 160, at 4-5.) At Defendant's request, the United States Judicial Panel on Multidistrict Litigation ("JPML") consolidated these actions and transferred them to this Court for resolution. (Order, Dkt. No. 1.) For two years following that transfer, the parties have conducted discovery and litigated this matter. On November 16 and 17, 2011, the Court held a hearing on Plaintiffs' Motion for Class Certification where the parties presented argument and their respective expert witnesses testified.

III. CLASS CERTIFICATION STANDARD

Before a plaintiff may represent a **[*19]** class in an action, the Court must first find that the plaintiff has satisfied the requirements of *Rule 23*. The first subpart of this Rule requires that

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Once *Rule 23(a)* has been satisfied, then the plaintiff must show that it meets one of the three types of actions under *Rule 23(b)*. Here, Plaintiffs assert that this action fits within subpart *(b)(3)*, which requires:

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Fed. R. Civ. P. 23(b).

Before deciding whether to certify a class, the Court must conduct a "rigorous analysis" of whether Plaintiffs have met their strict burden of proof that the *Rule 23* requirements have been **[*20]** met. *Rex v. Owens ex rel. State of Okla., 585 F.2d 432, 435 (10th Cir. 1978)*. While conducting this analysis may involve considerations enmeshed in the factual and legal issues comprising a plaintiff's cause of action, the court is not to pass judgment on whether plaintiffs will prevail on the merits. *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*; *Vallario v. Vandehey, 554 F.3d 1259, 1266 (10th Cir. 2009)* (stating that "no 'impermeable wall' exists between the merits of a case and a district court's decision whether to certify a class."). "*Rule 23* does not set forth a mere pleading standard. [Parties] seeking class certification must affirmatively demonstrate [their] compliance with the Rule—that is, [they] must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)*.

IV. DISCUSSION

Before analyzing whether the *Rule 23* requirements have been met, the Court must first determine whether the suit has been brought by "[o]ne or more members of [the] class." *Fed. R. Civ. P. 23(a)*; *Paton v. N.M. Highlands Univ., 275 F.3d 1274, 1278 (10th Cir. 2002)*. **[*21]** All of the named Plaintiffs live within the United States, subscribed to Cox's premium cable, and rented a Cox set-top box during the relevant period. [3] Therefore, members of the class have brought the present suit, and the Court may proceed in its analysis of whether Plaintiffs have satisfied *Rule 23*'s requirements.

A. *Rule 23(a)*

1. Numerosity

To satisfy this element, "[t]he burden is upon plaintiffs seeking to represent a class to establish that the class is so numerous as to make joinder impracticable." *Peterson v. Okla. City Hous. Auth., 545 F.2d 1270, 1273 (10th Cir. 1976)*. The Tenth Circuit has not adopted a set number as presumptively sufficient to meet this burden, and there is '"no set formula to determine if the class is so numerous that it should be so certified."' *Trevizo v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006)* (quoting *Rex v. Owens ex rel. State of Okla., 585 F.2d 432, 436 (10th Cir. 1978))*. **[*22]** Whether a class satisfies the numerosity requirement is "a fact-specific inquiry" that district courts have "wide latitude" when determining. Id.

Here, the purported class includes more than three million current or former Cox customers, scattered across nineteen states, who subscribed to premium cable and rented a Cox set-top box. (Pls.' Br., Dkt. No. 160 Ex. 3, at 62.) Considering the large number of class members dispersed across the nation, Plaintiffs have established that the number is too great to render individual joinder of the class members practicable. Accordingly, Plaintiffs have satisfied the requirements of *Rule 23(a)(1)*.

2. Commonality

This requirement is generally established when the plaintiff's claims have "questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. However, it is not enough to allege that all members of the class "have . . . suffered a violation of the same provision of law." *Wal-Mart Stores, Inc., __ U.S. at __, 131 S. Ct. at 2551*. Rather, the plaintiff must prove a common contention that can be remedied with classwide resolution. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" **[*23]** Id. (quoting *Falcon, 457 U.S. at 157*). For purposes of commonality, "'[e]ven a single [common] question' will do." *Id. at 2556* (alterations in original) (quoting *id. at 2566 n.9* (Ginsburg, J., dissenting)).

Here, the same practices—namely, the alleged tie that Cox customers are required to rent a Cox set-top box to access Cox's interactive features—"touch and concern all members of the class." (quoting *id. at 2566 n.7* (Ginsburg, J., dissenting)). The complained-of conduct is a common practice that Cox applied to all members of the class, regardless of what specific package they subscribed to or the geographic region in which they lived. (Pls.' Br., Dkt. No. 160 Ex. 13, 18, 19 (stating that "[i]n order to receive Interactive TV services offered by Cox, such as the Interactive Programming Guide, On Demand, and Pay-Per-View, and all programming options, you must rent a

[3] The named representatives include the following people: David Abdullah; Bobby Bowick; Elizabeth and John Brady; Sharon Coughlin; Jessica Diket; Bradley Gelder; Trevor Haynes; Michael Helmstetter, Jr.; Henry Holmes; Barksdale Hortenstine; Ernest Johnson; Sandra Prezgay; Danielle Smith; and Ron Strobo.

[Cox set-top box]").) It is this conduct that serves as the basis for Plaintiffs' illegal tying claim, and the resolution of multiple elements of this claim, such as whether the products are separate, would be common to the class. Because a common question—whether Cox illegally tied access to its interactive programming **[*24]** to rental of a Cox set-top box—arises as to all members of the class and a classwide proceeding will generate a common answer that drives the resolution of the litigation, the requirements of *Rule 23(a)(2)* are satisfied. [4] Wal-Mart, __ U.S. at __, 131 S.Ct. at 2551.

3. Typicality

Rule 23(a)'s commonality and typicality requirements "tend to merge," and both facilitate the determination of "whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected **[*25]** in their absence." *Falcon, 457 U.S. at 157-58 n.13*. Typicality is satisfied when the class representatives' claims and proposed class members' claims are "based on the same legal or remedial theory." *Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988)*. Moreover, "differing fact situations of class members do not defeat typicality under *Rule 23(a)(3)* so long as the claims of the class representative and class members are based on the same legal or remedial theory." Id.

Here, Plaintiffs complain of one policy of conduct that they allege amounts to an illegal tie, which is the same claim of the named representatives and the class members. While Defendant argues that it will have different defenses against different class members, this difference does not preclude a finding that Plaintiffs have satisfied the requirements of *Rule 23(a)(3)*. *DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1199 (10th Cir. 2010)* (finding that "typicality exists where, as here, all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances."). Nor does the fact that there may be a damage disparity mean that the claims of the class representatives **[*26]** and the class members are atypical. Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1764, at 266-69 & n.13 (3d ed. 2005); see *Milonas v. Williams, 691 F.2d 931, 938 (10th Cir. 1982)*. Named Plaintiffs' and the class members' claims are based on the same legal theories and arise from the same pattern of conduct by Defendant. Accordingly, Plaintiffs have satisfied this requirement.

4. Adequacy

Adequacy of representation depends on resolution of two questions: "'(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" [5] *Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1187-88 (10th Cir. 2002)* (quoting *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998))*. *Lanner v. Wimmer, 662 F.2d 1349, 1357 (10th Cir. 1981)* ("It is not fatal if some members of the class might prefer not to have violations of their rights remedied.") (internal quotation marks and citations omitted).

Plaintiffs contend there are no conflicts between the named Plaintiffs and the class members, and Defendant has proffered none. For two years, the named Plaintiffs have pursued this litigation diligently and adequately represented all members of the class. Therefore, Plaintiffs have satisfied *Rule 23(a)(4)*. Because the requirements of *Rule 23(a)* have been met, Plaintiffs must now establish that the case fits into one of the three categories under *Rule 23(b)*. Here, Plaintiffs allege the case satisfies the requirements of *Rule 23(b)(3)*.

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[4] "In a class action brought under *Rule 23(b)(3)*, the commonality requirement of *Rule 23(a)(2)* is subsumed under, or superseded by, the more stringent *Rule 23(b)(3)* requirement that questions common to the class predominate over other questions." *Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 146 n.4 (4th Cir. 2001)* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))* (internal quotation marks omitted). The *Rule 23(b)(3)* predominance requirement is "far more demanding" than *Rule 23(a)(2)*'s commonality requirement. *Amchem Prods., 521 U.S. at 623*.

[5] In 2003, *Rule 23* was amended so that the determination of whether class counsel would fairly and adequately represent the class occurs **[*27]** after the class has been certified. *Fed. R. Civ. P. 23(g)*.

B. Rule 23(b)(3)

Under this subpart, Plaintiffs must show that the common issues will predominate over any individualized issues and that a class action is the superior method for adjudicating the action. Rule 23(b)(3) points to the following factors when making this determination: "the class members' interests in individually controlling the prosecution . . . of separate actions; . . . the extent and nature of any litigation concerning the controversy already begun by . . . class members; . . . the desirability or undesirability of concentrating the litigation of the claims in the particular forum; **[*28]** and . . . the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)—(D).

1. Whether Common Issues Predominate

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). In order to determine whether common issues will predominate over individualized issues, the underlying elements of the substantive claim—here, the tying claim—must be identified. See, e.g., Alabama v. Blue Bird Body Co. Inc., 573 F.2d 309, 316 (5th Cir. 1978); Freeland v. AT&T Corp., 238 F.R.D. 130, 142 (S.D.N.Y. 2006) ("In making [the predominance] determination, a court considers whether the putative class members 'could establish each of the . . . required elements of [their] claim[s] . . . using common evidence.'" (quoting In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001), superseded by statute on other grounds, Fed. R. Civ. P. 23, as recognized in Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79, 238 F.R.D. 82, 100 (S.D.N.Y. 2006), and overruled on other grounds by In re Initial Pub. Offering Sec. Litig., 471 F.3d 24, 40 (2d Cir. 2006))).

a. **[*29]** The Tying Claim

In order to establish a violation of § 1, a party must show the existence of "'a contract, combination or conspiracy that unreasonably restrains trade in the relevant market.'" Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 756 (10th Cir. 1999) (quoting TV Commc'ns Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1027 (10th Cir. 1992)); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.").

To succeed on their tying claim, Plaintiffs must establish the following elements: (1) two separate products or services are involved; (2) the sale or agreement to sell one product or service is coerced or conditioned upon the purchase of another; (3) the seller has sufficient power in the tying product market to enable it to restrain trade in the tied product market; and (4) a not insubstantial amount of interstate commerce in the tied product is affected. MultiState Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 63 F.3d 1540, 1546 (10th Cir. 1995). Additionally, **[*30]** Plaintiffs must establish that the class has suffered an antitrust injury or impact.

"Tying arrangements are unlawful '[b]ecause they deny competitive access to the tied product market on the basis of the seller's leverage in the tying product market, and force buyers to forego free choice between sellers.'" Abraham v. Intermountain Health Care, Inc., 461 F.3d 1249, 1264 (10th Cir. 2006) (alteration in original) (quoting Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 834 (7th Cir. 1978)). "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984), abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006).

i. Separate Tying and Tied Products

"[T]he test for determining whether two components are separate products turns not on their function, but on the nature of any consumer demand for them." Multistate Legal Studies, Inc., 63 F.3d at 1547. "For two items at issue to be considered distinct products, 'there must be sufficient consumer demand **[*31]** so that it is efficient for a firm to provide [one] separate from [the other].'" Id. (quoting Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)). "'The courts uniformly consider the issue whether the tying arrangement consists of separate tying and tied products to be common to all members of the class.'" *In re Visa Check/Mastermoney Antitrust Litig., 192 F.R.D. 68, 87 (E.D.N.Y. 2000)* (quoting Herbert Hovenkamp, Tying Arrangements and Class Actions, *36 Vand. L. Rev. 213, 220 (1983)*).

Plaintiffs define the tying product as premium cable, or Advanced TV, and the tied product as the basic set-top boxes. Plaintiffs use "premium cable" as a label for digital offerings by MVPDs that provide interactive programming, which, Plaintiffs argue, is defined in light of the complained-of conduct. [6] This definition includes "the option to enjoy the interactive channel guide" or VOD, but not the actual downloaded movies or content. (Hr'g Tr. 32.) Plaintiffs' definition is not determined by the Paks or variations thereof to which customers may have subscribed. (Pls.' Br., Dkt. No. 160 Exs. 7-9.) Rather, these are additional features that are marginal to the Plaintiffs' understanding **[*32]** of premium cable. Plaintiffs define the tied product as the basic set-top box that allows the customer to access Cox's IPG and VOD, regardless of the additional features of the set-top box such as the HD and DVR features. (Id. at 19-20 & n.5.) Defendant asserts that "premium cable" is a term entirely of Plaintiffs' invention and that the services actually offered by Cox are too varied to operate under one label. Plaintiffs admit that Cox does not offer a service labeled "premium cable," but dispute that this lack of recognition impacts the use of premium cable as a label, or shorthand, for the tying product for litigation purposes.

Plaintiffs offer the following evidence to establish that these products are separate: Defendant's expert's, Michelle Burtis, statement that the set-top box and premium cable are separate products; [7] evidence of separate marketing, sales, and pricing of these products; and Cox materials **[*33]** reflecting the same. (Pls.' Br., Dkt. No. 160 Exs. 7, 16, 17 ("Q. Is there any circumstances under which you would say that a set-top box and Advanced TV are not separate products? A. I think they are separate products.").) Accordingly, while Defendant may disagree with Plaintiffs' conclusions, Plaintiffs have shown that the determination of whether the tied and tying products are separate can be established with common evidence.

ii. Condition or Coercion

Often, coercion is one of the determinative elements in evaluating whether common evidence predominates in tying claims. When the alleged restraint is in a written agreement, such as a contractual provision requiring purchase of the tied product, many courts have found that common proof predominated and class certification was appropriate. See *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 452 (1977)*; *In re Visa Check, 192 F.R.D. at 88* **[*34]** ("[I]n cases such as this one, in which the alleged tie is the product of an undisputed contractual provision, the 'requisite coercion' is established."); see *George Lussier Enters., Inc. v. Subaru of New England, Inc., No. Civ. 99-109-B, 2001 U.S. Dist. LEXIS 12054, 2001 WL 920060, at *11-12 (D. N.H. Aug. 3, 2001)*. Likewise, when no contract exists and common proof of coercion was lacking, many courts have found that coercion must be shown on an individual basis rendering class certification inappropriate. *Hewitt v. Joyce Beverages of Wis., Inc., 721 F.2d 625, 628-29 & nn.2-3 (7th Cir. 1983)*; *Abrams v. Interco Inc., 719 F.2d 23 (2d Cir. 1983)*; *Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1226 & n.17 (3d Cir. 1976)*.

Plaintiffs do not claim that Cox contractually ties the products. Rather, Plaintiffs allege that Cox degrades the quality of the tying product—by limiting the customer's access to Cox's interactive features—for customers who choose not to purchase the tied product, rent a Cox set-top box. (Pls.' Br., Dkt. No. 160 at 24.) Therefore, Plaintiffs assert, Cox is forcing, or coercing, customers to comply with the tie and purchase the tied product from only Cox. Plaintiffs contend that Cox imposes **[*35]** a penalty price on the stand-alone tying product, premium cable, by degrading service if the customer chooses not to purchase the tied product. (Id.) As support for this argument, Plaintiffs rely on their expert, Dr. Singer, who concluded that Cox's imposition of this penalty price has the practical economic effect

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[6] Plaintiffs also include the channels available through basic cable as an inframarginal feature, or a feature that you must subscribe to in order to subscribe to premium cable. (Hr'g Tr. 31, 112 (stating that subscribers to only basic cable would not be included in the class).)

[7] At the class certification hearing, Dr. Burtis testified that she did not intend to concede that premium cable and set-top boxes were separate products. (Hr'g Tr. 158.) This clarification does not influence the Court's decision for present purposes that common evidence could establish whether these products are separate.

of forcing Cox customers to rent a Cox set-top box. [8] (Id. Ex. 13.) Plaintiffs argue that Cox customers were coerced, even if they would have rented from Cox absent the tie, because the customer's choices were altered through Cox's requirement. (Hr'g Tr. 55.) Additionally, Plaintiffs offer statistics of the number of Cox customers that complied with the tie, roughly 99% of Cox customers, as indirect evidence of coercion. (Hr'g Tr. 42.)

Defendant argues that because no written contract exists requiring the purchase of the tied product, individualized proof is necessary to prove coercion in this case. (Def.'s Br., Dkt. No. 181, at 23-24.) Defendant contends that in a practical effects tying case, coercion can only be established by deposing each class member to discern whether each was forced to rent a Cox set-top box. [9] As support for its conclusion that coercion can only be proven with individualized proof, Defendant cites *Freeland, 238 F.R.D. 130*, where the district court found class certification of the plaintiffs' tying claim improper. Here, however, unlike the defendant in *Freeland*, Defendant states that it required rental of a Cox set-top box in order to receive full access to all interactive digital **[*37]** features, and Plaintiffs point to Cox material stating as much as evidence of coercion. *Freeland, 238 F.R.D. at 154* (describing that coercion is subject to generalized proof in two circumstances: (1) when the policy of conditioned sales is admitted to by the defendant; and (2) when a contractual provision requiring the tie applies to all members of the class); see also *Hill v. A-T-O, Inc., 535 F.2d 1349, 1355 (2d Cir. 1976)* (describing the defendants' admission "to a policy of never offering the FBP buying plan membership separately from the sale of the Compact cleaner"). (Def.'s Br., Dkt. No. 181, at 26.)

While there is no contractual provision requiring that Cox customers rent a Cox set-top **[*38]** box, there is direct, common evidence of classwide policies, practices, and statements that Cox customers had to rent a Cox set-top box in order to participate in the full panoply of digital services. [10] Cox stated on its website and other material that "[i]n order to receive interactive TV services offered by Cox, such as IPG, PPV, and all advanced TV programming options, you must rent a digital receiver." (Def.'s Br., Dkt. No. 181 Ex. 26; Pls.' Br., Dkt. No. 160 Ex. 13, 18, 19 (stating that "[i]n order to receive Interactive TV services offered by Cox, such as the Interactive Programming Guide, On Demand, and Pay-Per-View, and all programming options, you must rent a [Cox set-top box]").) This requirement was constant across Cox's national footprint and advertised nationally. [11] See *Freeland, 238 F.R.D. at 154* ("Because the ultimate question is whether the purchase of the tying product was in fact conditioned on the

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[8] Dr. Singer relies on a method called revealed preferences to reach his conclusion that customers rent a set-top box to gain access to its interactive features and not its other features, such as the clock and outlet jacks, due to the low replacement costs of those features. (Pls.' Br., Dkt. No. 209, at 13-14, Ex. 8, at 33-35; Hr'g Tr. 103 ("That [Ms. Coughlin] was willing to incur an additional $3.25 per month to get into the interactive realm **[*36]** is—reveals that she values the option to make use of those features. Whether she ever made use of the features in actuality is a different method[that] . . . is not very relevant to my analysis.").) Defendant's expert disagrees with this conclusion and argues that the only way to determine which features the customer preferred is by conducting individual evaluations. (Def.'s Br., Dkt. No 247, at 4-5, Ex. 2, at 4-5.)

[9] Defendant cites Ungar for the proposition that "[e]stablishing that buyers purchase products A and B from the seller does not establish that the seller ties the sale of product A to the purchase of product B. It merely establishes that buyers purchase products A and B from the seller." *Ungar, 531 F.2d at 1225*. While that may be true, here, Plaintiffs proffer common evidence that Cox allegedly provides a degraded product A when customers did not also purchase product B, which is a different scenario.

[10] *Chase Parkway Garage, Inc. v. Subaru of New England, Inc., 94 F.R.D. 330, 331-32 (D. Mass. 1982)* (agreeing with the Third Circuit's analysis in *Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977)*, "that proof of coercion on an individual basis was not required where a seller expressly conditioned the sale of one product upon the purchase of another"); *Ungar, 531 F.2d at 1222, 1226 & n.17* ("With regard to the doctrine of individual coercion we believe it is open to us to reject it, as the district court did, or to accept it. Having in mind the particular factual complex before us, we choose the latter course. . . . Where, as here, plaintiff franchisees place no reliance on express contractual tie-ins, each, individually, must prove that his purchases were coerced as an element of establishing a prima facie case of illegal tying.").

[11] While Cox also stated that its customers were free to rent a CableCard or obtain another set-top box, it explicitly stated that customers who chose this path would be unable to access certain **[*40]** interactive programming. (Def.'s Br., Dkt. No. 181 Exs. 25 & 26.)

purchase of the unwanted tied product, '[a]n unremitting policy of tie-in' will constitute coercion." (quoting Hill, 535 F.2d at 1355)); see also Martino v. McDonald's Sys., Inc., 81 F.R.D. 81, 88-89 (N.D. Ill. 1979) (finding that conditioning could be shown on a class-wide **[*39]** basis when common evidence showed a "firm policy" of conditioning). Accordingly, Plaintiffs have established that coercion is amenable to proof on a classwide basis.

iii. Market Power

"[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006). "Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'" Kodak, 504 U.S. at 464 (quoting Jefferson Parish, 466 U.S. at 14). "It has been defined as 'the ability of a single seller to raise price and restrict output.'" Id. (quoting Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)). Evaluation of the relevant market requires evidence of both a product market and geographic market. Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1026 (10th Cir. 2002).

> "There is no subject in ***antitrust law*** more confusing than market definition. One reason is that the concept, even in the pristine formulation of economists, is deliberately an attempt to oversimplify—for working purposes—the very complex economic interactions between a number of differently situated buyers and sellers, each **[*41]** of whom in reality has different costs, needs, and substitutes . . . ."

Telecor Communs., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1131 (10th Cir. 2002) (quoting SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 966 (10th Cir. 1994) (internal quotation marks, citations, and alterations omitted in original)).

(a). Product Market

The product market is defined by reference to the "reasonable interchangeability of use or the cross-elasticity of demand between the product [in question] and substitutes for it." Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962); see also Telecor, 305 F.3d at 1131. "'Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively.'" Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 437 (3d Cir. 1997) (quoting Allen-Myland, Inc. v. Int'l Bus. Machs. Corp., 33 F.3d 194, 206 (3d Cir. 1994) (internal quotations omitted in original)). Factors to be considered include price, use, and qualities. Id. "'Cross-elasticity of demand is a measure of the substitutability of products from the point of view **[*42]** of buyers. More technically, it measures the responsiveness of the demand for one product to changes in the price of a different product." Id. (quoting E. Thomas Sullivan and Jeffrey L. Harrison, Understanding Antitrust and its Economic Implications 217 (1994)).

Plaintiffs conclude that the relevant product market includes cable, satellite, and "telcos." (Pls.' Br., Dkt. No. 160, at 26.) As support for their definition of the relevant product market, Plaintiffs rely on the conclusion of their expert economist, Dr. Singer, who defined the market by using FCC pricing reports, product-feature comparisons, and market-structure analyses. While Dr. Singer concluded that satellite and telco providers' digital offerings do not offer the same level of product as cable digital providers, [12] he nevertheless included them in his product market definition to be conservative. (Pls.' Br., Dkt. No. 190, at 17.)

Plaintiffs and Defendant disagree whether over-the-top providers, such as Netflix, should be included in the **[*43]** product market. [13] While Plaintiffs concede that Netflix, and similar online video distributers, offers one aspect of premium cable comparable to VOD or PPV, Plaintiffs conclude that it is not a competitor with premium cable

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[12] Dr. Singer concludes that DBS providers are not true competitors of premium cable because "DBS often has weaker two-way service than other forms of MVPD." (Dkt. No. 160, Ex. 13 at 77.)

[13] Over-the-top providers do not have their own infrastructure. Rather, these services ride over the top of another entity's infrastructure, such as a broadband or high-speed Internet infrastructure. (Hr'g Tr. 60.)

because it lacks critical components of premium cable, the interactive guide and live programming. (Pls.' Br., Dkt. No. 160 Ex .13, at 78; at 60-61.) Online video distributers do not provide the feature that is implicated by Cox's complained-of conduct which is "central to the definition of the relevant tying product market." (Id. Ex. 13 at 78). Nor do they offer the premium channels. (Id. at 79.) Therefore, Dr. Singer was "not convinced that at least in this case, with respect to the set of services that are being withheld here [by Cox], that Netflix represents a — close substitute for customers to turn, when Cox degrades their two-way interactive services." (Pls.' Br., Dkt. No. 209 Ex. 8, at 68.)

Plaintiffs argue that Defendant's attempts to insert the **[*44]** consumer's subjective perception of what is "reasonably interchangeable" with premium cable are in error. Rather, Plaintiffs argue, this test is determined utilizing cross-elasticity of demand, not individual consumer's purchasing preferences. Defendant contends that Plaintiffs' description of the tying product as premium cable and the tied product as set-top boxes ignores the various cable packages available. Because of this variance, Defendant argues, the relevant product market definition cannot be proven with evidence common to the class.

Rather, Defendant argues that in order to determine the appropriate product market, consumers' different interests must be considered. (Def.'s Br., Dkt. No. 181, at 38.) Specifically, Defendant points to the difference between named Plaintiff Barksdale Hortenstine, who has a great interest in movies and VOD, and named Plaintiff Sharon Coughlin, who has no interest in VOD. (Id. at 39.) Such an in-depth review of individual consumer's preferences is not necessary to determine the relevant product market. *In re Live Concert Antitrust Litig., 247 F.R.D. 98, 127 (C.D. Cal. 2007)* (stating that "the 'least reliable' evidence in predicting the effects **[*45]** of a hypothetical price increase is ""subjective"" testimony by customers that they would or would not defect in response to a given price increase."' (quoting Areeda & Hovenkamp, ***Antitrust Law*** ¶ 538b)). "[W]hen calculating the cross-elasticity of demand, economists examine the aggregate demand of consumers as represented by a demand curve rather than the purchasing decisions of an individual consumer." Id. For present purposes, it is enough that evidence common to the class will define the relevant product market.

(b). Geographic Market in Tying Product

"The geographic market is '"the narrowest market which is wide enough so that products from adjacent areas . . . cannot compete on substantial parity with those included in the market."'" *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1222 (10th Cir. 1986)*. The geographic market consists of the area of effective competition, and defining the relevant market is an issue of fact. *Telecor, 305 F.3d at 1131*. "The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, *i.e.*, the 'cross-elasticity **[*46]** of demand.'" *Kodak, 504 U.S. at 469*. *Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 893 (10th Cir. 1991)*.

"The size of the relevant geographic market depends on a number of factors, including '[p]rice data and such corroborative factors as transportation costs, delivery limitations, customer convenience and preference, and the location and facilities of other producers and distributors.'" *Lantec, 306 F.3d at 1027* (quoting *T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc., 931 F.2d 816, 823 (11th Cir. 1991)*. "In other words, 'the outer boundary of the relevant product market is reached, if one were to raise the price of the product or limit its volume of production, while demand held constant, and supply from other sources beyond the boundary could not be expected to enter promptly enough and in large enough quantities to restore the old price or volume.'" *Westman, 796 F.2d at 1222* (quoting *Satellite Television & Associated Res., Inc. v. Continental Cablevision of Va., Inc., 714 F.2d 351, 356 (4th Cir. 1983))*.

Plaintiffs contend that the relevant geographic market is Cox's national footprint, which includes portions of Arizona, Arkansas, California, Connecticut, Florida, **[*47]** Georgia, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Rhode Island, and Virginia. (Pls.' Am. Compl., Dkt.

No. 17, ¶¶ 102-03.) [14] Plaintiffs also state in passing that an alternative market to the national one could be each local area individually. [15]

Defendant argues that due to the vast differences of competitors amongst the local markets, a national market is inappropriate. Defendant cites to and relies upon a Second Circuit case, *Heerwagen v. Clear Channel Communications, 435 F.3d 219 (2d Cir. 2006)*, overruled on other grounds by *Teamsters Local 445 Freight Division Pension Fund v. Bombardier, Inc., 546 F.3d 196, 200 (2d Cir. 2008)*, **[*49]** as support for its argument that the relevant geographic market is local, not national, despite Cox's nationally coordinated conduct. [16] Defendant contends that Plaintiffs' market analysis is divorced from a proper geographic market because it ignores the competitive variations amongst local cable markets.

As **[*50]** support for their conclusion that the relevant geographic market is national, not local, Plaintiffs rely heavily on Cox's nationally-coordinated conduct relating to its set-top box policies. (Pls.' Br., Dkt. No. 160, at 28, Exs. 26, 28, 29.) Similar to the plaintiffs in Heerwagen, Plaintiffs argue that the Supreme Court's decision in *United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*, supports finding a national market and certifying the class.

In Grinnell, the Supreme Court found that the relevant geographic market for central service stations was national—despite service stations' limited service area of 25 miles—due to the defendant's national conduct, which included utilizing national agreements, nationally scheduling prices, rates, and terms, certification by national insurers, and nationwide contracting. *Grinnell, 384 U.S. at 575-76*. Plaintiffs state that evidence of Defendant's statements regarding and determination of its market power, [17] national decision-making regarding set-top box manufacturing

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[14] In their First Amended Complaint, Plaintiffs state that "[t]he relevant geographic market is the area in which Cox provides Premium Cable. . . . Those areas are certain communities in: Arizona, Arkansas, California, Connecticut, Florida, Georgia, Iowa, Idaho, Kansas, Louisiana, Nebraska, Nevada, Ohio, Oklahoma, Rhode Island, and Virginia." (Amend. Compl., Dkt. No. 17, at 20.)

[15] Defendant claims that Plaintiffs have not raised individual markets as possible geographic markets. (Def.'s Br., Dkt. No. 181, at 36.) While Plaintiffs have stated that they seek certification based on numerous geographic subclasses, they have not supported this request with appropriate discussion. (Amend. Compl. Dkt. No. 17, at 21 ("In the alternative, each of the local areas in which Cox operates is a relevant geographic market."). In Plaintiffs' Motion to Certify the Class, they note that they "believe **[*48]** that one class that covers Cox's footprint is both the proper class to be certified and the most convenient. However, should the Court certify numerous classes that correspond to each of Cox's local markets, Plaintiffs respectfully request the opportunity to add class representatives who reside in those markets in which Plaintiffs have not yet named a class representative." (Pls.' Br., Dkt. No. 160, at 31 n.9.) While Plaintiffs have stated in passing that the appropriate geographic market could be regional markets, they have not fleshed out this argument in the briefs sufficiently to establish that *Rule 23* is satisfied as to each region, and the Court will not now undertake that responsibility itself. This, however, does not determine whether class actions would be appropriate at the regional market level. For present purposes, the Court only determines the market fully briefed: the national market.

[16] In Heerwagen, the Second Circuit upheld the district court's finding that a putative class of concert ticket buyers should not be certified because the defendant lacked "the power to control prices and exclude competition nationally." *Id. at 224-25, 229* ("In light of the substantial non-common issues regarding market power, and because we review the district court's factual determination as to the bounds of the relevant geographic market for clear error, it was not error for the district court to conclude that individualized questions would predominate." (citations omitted)). Specifically, the Second Circuit upheld the district court's conclusion that the defendant's national conduct—namely, nationally coordinating concert tours—was not enough to establish that common issues would predominate under *Rule 23(b)(3)* when the relevant geographic market for concert tickets was local. *Id. at 229*.

[17] Cox's own upper management admits **[*51]** to having pricing power in its investor documents. Pat Esser, President of Cox, stated in a 2006 overview that "[w]e believe we have Pricing Power[;] We have record low churn rates[;] . . . We have majority share in video and HSI." (Pls.' Hr'g Ex. H.)

and policy, [18] and churn rates are common to the class and support a finding that the relevant geographic market is Cox's national footprint.

Plaintiffs acknowledge that local markets vary regarding competitors, but argue that limiting the market is nonsensical in light of the complained-of conduct, which is based on nationally coordinated conduct. While the different markets may have slight variations of competitors, Plaintiffs argue, the competitive alternatives are not so varied as to prevent aggregating the local markets into a national footprint. But see *Grinnell, 384 U.S. at 574* (finding that no substitute service rose to "the same level as the central station service so as to meet the interchangeability test . . . .").

Basically, Plaintiffs assert, Cox customers face two rivals regardless of the local market **[*52]** in which they live: two direct broadcasting rivals, DirecTV and DISH Network. (Hr'g Tr. 58.) Dr. Singer stated that there was "no economic" reason why the relevant geographic market could not be national if the same competitive conditions existed in every market. (Pls.' Br., Dkt. No. 160 Ex. 13, at 86-87.) Despite agreeing that the competitive conditions in the markets vary—an additional 14% of Cox customers also have access to telco overbuilders, such as AT&T or Verizon—Dr. Singer concludes that such variations are not significant enough to affect Cox's market power. (Id.) But such a determination would require an evaluation of the actual competitive conditions of the market locally, not nationally.

Essentially, Plaintiffs ask the Court to ignore the economic reality that Cox customers face different options depending on where they live and that most customers will not relocate their homes in order to change their options for MVPD services. [19] *Heerwagen, 435 F.3d at 228* ("In certain service industries, the geographic market may be confined by the fact that it can be impractical for consumers to travel great distances to procure particular services."). Cox's national conduct regarding **[*53]** set-top boxes does not convert a local geographic market into a national one, and the determination of Cox's market power should not be divorced from the appropriate geographic market. See *TV Commc'ns Network, 964 F.2d at 1027* (holding a *15 U.S.C. § 1* unreasonable restraint of trade claim requires proof "the defendant entered a contract, combination or conspiracy that unreasonably restrains trade in the relevant market"); *Lantec, 306 F.3d at 1026* (stating that "proof of relevant market requires evidence of both a product market and a geographic market").

While the Second Circuit in Heerwagen read the *Grinnell* decision as "stand[ing] for the proposition that in some cases involving services that tend to be provided locally, the market for purposes of ***antitrust law*** still could be

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[18] Cox's national headquarters selected the manufacturer of the set-top box, the features of the set-top box, and determined the range of rates charged for the set-top box, with final approval over lease rates. (Pls.' Br., Dkt. No. 160 Ex. 42 at 11-12; Hr'g Tr. 302.)

[19] See *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses, 21 FCC Rcd. 8203, 8235-36 (July 21, 2006)* ("In the past, the Commission has concluded that the relevant geographic market for MVPD services is local because consumers make decisions based on the MVPD choices available to them at their residences and are unlikely to change residences to avoid a small but significant increase in the price of MVPD service. In order to simplify the analysis, the Commission has aggregated consumers that face the same choice in MVPD products into larger relevant geographic markets. We find it appropriate to continue **[*54]** this approach here. Because the major MVPD competitors in most areas are the local cable operator and the two DBS providers, and consistent with the Commission's approach in prior license transfer proceedings, we find that the franchise area of the local cable operator is the relevant geographic market for purposes of this analysis.") (footnotes omitted). Competitive Impact Statement, United States v. Comcast Corp., et al., No. 1:11-cv-00106, at 13 (D. D.C. Jan. 18, 2011) ("A consumer purchasing video programming distribution services selects from those distributors offering such services directly to that consumer's home. . . . A consumer cannot purchase video programming distribution services from a wireline distributor operating outside its area because that firm does not have the facilities to reach the consumer's home. Consequently, although the set of video programming distributors able to offer service to individual consumers' residences generally is the same within each local community, that set differs from one local community to another and can even vary within a local community. The markets for video programming distribution therefore are local."). See also *In re Set-Top Cable Television Box Antitrust Litig., Nos. 08-MD-1995 & 08-CIV-7616(PKC), 2011 U.S. Dist. LEXIS 39001, 2011 WL 1432036, at *13 (S.D.N.Y. Apr. 08, 2011)*; **[*55]** *Behrend v. Comcast Corp., 655 F.3d 182, 192 (3d Cir. 2011)*; (Def.'s Br., Dkt. No. 181, at 13-17, 30 n.68 (describing the various competitors Cox faces in different regions).)

national," this is not such a case. The determination of which competitors Cox faced in each geographic region cannot be proven with evidence common to a national class. [20] *Behrend v. Comcast Corp., 655 F.3d 182, 192 (3d Cir. 2011)* ("Defining the relevant geographic market . . . is an issue of the merits"). Nor can the competitive market be easily divided into two categories given the varying regional competitors and options available to class members. (See Def.'s Br., Dkt. No. 181 at 13-17, 30 n.68 (describing the various competitors in different regions.) At the class certification stage, a court need only be satisfied that issues?including the definition of a geographic **[*56]** market—will be capable of proof through evidence common to the class, which has not been established here. Accordingly, the determination of Cox's market power is not amenable to proof on a classwide basis.

iv. Substantial Amount of Commerce

Finally, Plaintiffs must show that a substantial amount of commerce in the tied product is involved, which is evaluated in terms of dollar volume, not market percentage. *Jefferson Parish, 466 U.S. at 16*; *Tic-X-Press, Inc. v. Omni Promotions Co. of Ga., 815 F.2d 1407, 1419 (11th Cir. 1987)*. This element was found more than satisfied when the dollar amount of commerce foreclosed by the tie was over two million dollars, with the dollar amount being measured by all sales subject to the tie, not just by the plaintiff's purchases. *Fortner, 394 U.S. at 501-02*. Here, **[*57]** Plaintiffs proffer evidence common to the class that since 2006, Cox received at least 250 million dollars' worth of revenue in set-top box leases per year. (Pls.' Br., Dkt. No. 160 Ex. 42, at 12.) Accordingly, whether Cox conducted a substantial amount of interstate commerce in the set-top box market can be proven with common evidence.

> b. Antitrust Injury or Impact
> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969))*. "Plaintiffs seeking class certification may carry their burden of establishing that injury is subject to generalized proof by submitting an expert report that 'posits class-wide injury resulting from every single class member's overpaying for [a tied product] **[*58]** as a direct result of the tie.'" *Freeland, 238 F.R.D. at 143* (citation omitted and alteration in original) (quoting *Visa Check, 280 F.3d at 137*); *Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003)* ("[W]e have repeatedly held that where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats *Rule 23(b)(3)* predominance."). All that must be shown at this stage in the proceeding is that injury is capable of proof through common evidence, which is distinguishable from actually calculating the amount of damages.

Plaintiffs allege that they suffered an antitrust impact by paying supracompetitive prices for the tied product, an overcharge imposed by Cox on set-top box rentals. Plaintiffs' expert, Dr. Singer, proposes the GRS Test—which "seeks to estimate the price effects of a particular vertical restraint, in this case, a bundled rebate or a tie-in"—as a method of evaluating the alleged tie's impact on Cox customers and a calculation of aggregate damages. [21] As an additional method of calculating aggregate damages, Dr. Singer proposes the Benchmark Method, which **[*59]** compares the prices that Canadian cable companies charge for set-top boxes with Cox's prices. (Pls.' Br.,

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[20] Plaintiffs' expert attempts to explain away variances in the market by citing an FCC report suggesting that telcos do not constrain cable providers' prices. (Hr'g Tr. 285; Def.'s Br., Dkt. No. 181 Ex. 22 ¶ 85.) While Dr. Singer agreed that telcos initially affected cable pricing, he concludes that their impact now has little or no affect on cable pricing. (Hr'g Tr. 288-89.) See infra note 24.

[21] GRS is an acronym of the method's creators' last names, Patrick Greenlee, David Reitman, and Davis S. Sibley, who began a working paper in 2004 and ultimately published their method in 2008. Patrick Greenlee, David Reitman & Davis S. Sibley, An Antitrust Analysis of Bundled Loyalty Discounts, 26 Int'l J. Indus. Org. 1132, 1132 (2008).

Dkt. No. 160, at 37; Hr'g Tr. 74.) The GRS Test seeks to distinguish procompetitive bundles from anticompetitive bundles, from a consumer-welfare focus. (Hr'g Tr. 75.) Utilizing this methodology, Dr. Singer concluded that Cox's bundle of premium cable and set-top box rental was anticompetitive and that Cox customers were overcharged for the set-top boxes they rented. (Pls.' Br., Dkt. No. 160, at 37.)

At the recent hearing, the parties' respective expert economists debated at length the appropriateness of applying the GRS Test in this case. Prior to the Supreme Court's decision in *Wal-Mart, Stores, Inc. v. Dukes, __ U.S. __, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*, the Court would have left Dr. Burtis's critiques of Dr. Singer's application of this method for resolution **[*60]** at the Daubert [22] motion stage. However, the Supreme Court recently suggested in dicta that Daubert applied to expert testimony at the class certification stage. [23] *Id. at 2553-54* ("The District Court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. We doubt this is so . . . .") (citation omitted). Therefore, the Court will evaluate Dr. Singer's use of the GRS Test in light of the requirements outlined in Daubert and its progeny.

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Courts function as gatekeepers to ensure that all expert testimony admitted at trial is both relevant and reliable. *Dodge v. Cotter Corp., 328 F.3d 1212, 1221 (10th Cir. 2003)*. The proponent of an expert bears the burden of demonstrating that the requisite admissibility requirements are met by a preponderance of the evidence. *Fed. R. Evid. 702* advisory committee's note.

This gatekeeping role necessitates a two-part inquiry. *Norris v. Baxter Healthcare Corp., 397 F.3d 878, 883 (10th Cir. 2005)*. First, courts **[*62]** must "'determine if the expert's proffered testimony . . . has "a reliable basis in the knowledge and experience of his discipline."'" *Id. at 883-84* (quoting *Bitler v. A.O. Smith Corp., 391 F.3d 1114, 1120 (10th Cir. 2004))*. At this stage of the analysis, courts must conduct a preliminary inquiry into the expert's qualifications and the admissibility of the proffered evidence. *Bitler, 391 F.3d at 1120*. This entails an examination of "'whether the reasoning or methodology underlying the testimony is scientifically valid.'" Id. (quoting *Daubert, 509 U.S. at 592-93*). Second, courts must "inquire into whether proposed testimony is sufficiently 'relevant to the task at hand.'" *Norris, 397 F.3d at 884* (quoting *Daubert, 509 U.S. at 597*). Here, courts examine whether the proposed testimony is logically related to a material issue and whether it would aid the trier of fact. Id. at n.2; *Bitler, 391 F.3d at 1121*. To assess the reliability of proffered expert testimony, courts should consider, among others, the following factors:

> (1) whether the opinion at issue is susceptible to testing and has been subjected to such testing; (2) whether the opinion has been subjected to peer review; (3) whether **[*63]** there is a known or potential rate of error

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[22] See *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

[23] Cf. *In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 627 (8th Cir. 2011)* (applying a focused Daubert analysis), pet. for cert. filed, No. 11-740 (Dec. 15, 2011); *Fosmire v. Progressive Max Ins., Co., 277 F.R.D. 625, 2011 U.S. Dist. LEXIS 117366, 2011 WL 4801915 (W.D. Wash. Oct. 11, 2011)* (applying the more focused Daubert inquiry delineated in Zurn at the class certification stage). See also *Smith v. Ceva Logistics U.S., Inc., No. CV 09-4957 CAS (RCx), 2011 U.S. Dist. LEXIS 82020, 2011 WL 3204682, at *7-8 (C.D. Cal. July 25, 2011)* (discussing impact of Wal-Mart on Daubert analysis at class-certification stage); *In re Taco Bell Wage & Hour Actions, No. 1:07-cv-01314-OWW-DLB, 2011 U.S. Dist. LEXIS 109169, 2011 WL 4479730, (E.D. Cal. Sept. 26, 2011)* **[*61]** (same); *In re Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 370 (C.D. Cal. 2011)* (same). December 27, 2011

> associated with the methodology used and whether there are standards controlling the technique's operation; and (4) whether the theory has been accepted in the scientific community.

Dodge, 328 F.3d at 1222. Rather than assessing the reliability of an expert's conclusions, courts should instead focus on the methodology and reasoning employed. Id. The Court's function as gatekeeper does not replace the adversary system, and "the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advisory committee's note.

Dr. Singer is a well-qualified economist, which Defendant does not dispute. [24] The GRS Test estimates the overcharge Cox customers paid on set-top boxes by determining the difference between the actual price paid by Cox customers and the price Cox customers would have paid absent the alleged tie, in the but-for world. (Pls.' Br. Dkt. No. 160 Ex. 13, at 63.) The proposed aggregate damages are the overcharge times the number of set-top boxes rented. (Id.)

Defendant argues that this test was created for use when a monopolist bundles rebates and that application of the GRS Test is only appropriate when the subject firm is a monopolist, which Cox is not. (Def.'s Br., Dkt. No. 181, at 61.) Plaintiffs counter that the GRS Test can be utilized when the subject firm faces a downward sloping demand curve for the tying product and the purchaser purchases multiple units of the tying product. (Pls.' Br., Dkt. No. 209, at 31-32.) Whether this test can be utilized in tying cases, and under what conditions, is an open question. See Patrick Greenlee, David Reitman & Davis S. Sibley, An Antitrust Analysis of Bundled Loyalty Discounts, 26 Int'l J. Indus. Econ. 1132, 1132 (2008) (finding that it is an "open question" whether their test applies in tying cases). While the test may be new, it was promulgated by serious economists who are experts in their field, peer reviewed, published and discussed in economic literature, [25] and previously used in other litigation. [26] These discussions, however, were in the context of a monopoly, which is not present here. Whether Dr. Singer's application of the GRS Test **[*65]** satisfies the requirements of Daubert is not easily resolved. However, because application of the GRS Test cannot be based on evidence common to the class, resolution at this point is unnecessary.

Whether the GRS Test can be utilized with common evidence is a separate issue. To implement this method, Dr. Singer relied on Cox's data on cable costs, academic estimates of elasticities of demand for premium cable service, and the Lerner equation to estimate the but-for price of premium cable. (Pls.' Br., Dkt. No. 160 Ex. 13 at 117.) The two elasticities of demand upon which Dr. Singer relies are not Cox specific and were estimated in academic writings in 2001 and 2004 respectively. (Id. Ex. 13, at 118 & nn. 329-30 **[*67]** (citing Tasneem Chipty, Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry, 91 Am. Econ. Rev. 428

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[24] Dr. Singer obtained his Ph.D. in Economics from Johns Hopkins University, teaches at Georgetown University, and he has been extensively published in his **[*64]** field. (Pls.' Br., Dkt. No. 160 Ex. 13, at 132-40.)

[25] Patrick Greenlee, David Reitman & Davis S. Sibley, An Antitrust Analysis of Bundled Loyalty Discounts, 26 Int'l J. Indus. Org. 1132 (2008); Timothy J. Muris & Vernon L. Smith, Antitrust and Bundled Discounts: An Experimental Analysis, 75 Antitrust L.J. 399 (2008); Patrick Greenlee, David Reitman & David S. Sibley, Comment on Muris and Smith, "Antitrust and Bundled Discounts: An Experimental Analysis," 77 Antitrust L.J. 669 (2011) (responding to Muris and Smith's critique of the GRS Test); Timothy J. Muris et al., Antitrust and Bundled Discounts: An Experimental Analysis—A Reply, 77 Antitrust L.J. 683 (2011) (responding to Greenlee, Reitman, and Sibley's response).

[26] Dr. Singer previously applied the GRS Test in a § 2 monopoly case involving the sale of antiviral drugs. Meijer, Inc. v. Abbott Labs., No. C 07-5985 CW, 2008 U.S. Dist. LEXIS 78219, 2008 WL 4065839, at *1, (N.D. Cal. Aug. 27, 2008). In granting the class certification motion, the court determined that "Plaintiffs intend[ed] to prove the fact of injury to **[*66]** the class by evidence that [was] predominately generalized. In addition, Dr. Singer's conclusion that class members paid more, not the same or less, for at least some purchases of Norvir and Kaletra following Abbott's price increases, [was] eminently plausible." Id. at *9. Whether the court relied upon Dr. Singer's application of the GRS Test specifically is not known, since the court does not explicitly reference the GRS Test and Dr. Singer proffered other elements to determine proof of impact. (Hr'g Tr. 284 ("Q. So did your expert report in the Norvir case contain any other proof of impact other than the GRS test? A. There might have been other elements to it . . . .").)

(2001), and Austan Goolsbee & Amil Petrin, The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV, 72 Econometrica 351 (2004)); Hr'g Tr. 134.)

Defendant argues that the elasticity of demand varies in different parts of the country and requires individualized market data to prove, not common evidence. (Hr'g Tr. 134-35.) And Plaintiffs' expert agreed. [27] (Id.) Because the elasticity of demand depends on the extent of competition in the market, which varies regionally, application of this factor in the GRS Test would not be conducive to evidence common to the class.

Plaintiffs expert also proffers another method for calculating aggregate damages, called the Benchmark method, where he compares rental rates of set-top boxes in the United States to rates in Canada. (Pls.' Br., Dkt. No. 209, at 37-38.) Defendant contends that this method is inappropriate given Dr. Singer's failure to evaluate the different Canadian and American regulations and the different costs of Canadian and American cable providers. (Def.'s Br., Dkt. No. 181, at 66-67.) In light of the failure to consider the differences regarding regulations and costs imposed on Canadian and American cable providers, the application of the Benchmark method rests on unstable ground. However, due to the lack of common evidence regarding Plaintiffs' proffered method of determining **[*69]** injury, whether this method satisfies Daubert need not presently be determined. Additionally, different geographic regions are subject to different levels of pricing regulation by the FCC, which Defendant intends to raise as a defense against Plaintiffs' claims, and which requires further inquiry that cannot be established with common evidence. [28]

While doubts regarding whether certification is appropriate should be resolved in favor of certification, **[*71]** before named Plaintiffs may proceed as a class, they must show that *Rule 23*'s requirements have in fact been satisfied. [29] See *Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968)* (stating that "if there is to be an error made, let it be in favor

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[27] At the class certification hearing on redirect, Plaintiffs' expert attempted to minimize the impact of this by stating that "in the worst-case scenario, at most [he] could envision two implementations of the GRS test," one for markets with telcos and another for markets without telcos. (Hr'g Tr. 278.) Plaintiffs' insistence that such variations can be glossed over for present purposes is unpersuasive given that the determination of telcos' impact on cable **[*68]** pricing must be made regionally. As support for his conclusion that telcos do not impact cable pricing, Dr. Singer cites a 2011 FCC report. (Id.) FCC reports, however, calculate impact with pricing data provided by cable operators at rate card prices, not limited term prices, which vary regionally and temporally. (Hr'g Tr. 291-92.) Accordingly, determining the impact of telcos on cable pricing would require regional analysis.

[28] Defendant asserts that Plaintiffs' claims are barred, in whole or in part, because the complained-of conduct is regulated by the FCC. *Crumley v. Time Warner Cable, 556 F.3d 879 (8th Cir. 2009)*; see *Coll v. First Am. Title Ins. Co., 642 F.3d 876, 890 (10th Cir. 2011)* ("'[T]he focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations.' The dispositive question, then, is whether, if plaintiffs succeed on their damages claims, the court's determination will impact the agency's rate determinations. If so, the 'filed rate' doctrine will bar the claim." (quoting *H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 489 (8th Cir. 1992)))*. Pursuant to FCC Form 1205, set-top box prices are regulated in communities where "cable systems . . . are not subject to such **[*70]** effective competition." *47 U.S.C. § 543(b)(3)*; *47 C.F.R. §§ 76.905(a)*, *76.910*, *76.933*.

Plaintiffs contend that this defense is not applicable because the complained-of conduct is tying, not overcharging on set-top box rentals. (Pls.' Br., Dkt. No. 209, at 38-39.) But Defendant raises this defense regarding Plaintiffs' alleged antitrust impact. (Def.'s Br., Dkt. No. 181, at 49.) And Plaintiffs admit that if valid, determination of whether class members lived in regulated or nonregulated areas, or if any class member moved between the two during the relevant time period, would need to be made. (Pls.' Br., Dkt. No. 209, at 41 ("In the unlikely event that a class member moved to an unregulated area during the class period, then damages would be allowed only for the time that he or she leased a STB in an unregulated area. The only information relevant to this determination is the geographic location of the class members.").) But this inquiry could not be done with evidence common to the class, individual determinations of who lived where during the relevant time period would be required.

[29] Despite Defendant's questioning whether this doctrine survived the recent Supreme Court's decision *Wal-Mart v. Duke, ___ U.S. ___, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*, until otherwise informed, the Court still finds it relevant. (Def.'s Br., Dkt. No. 181, at 23.) See *Lewis v. Alexander, 276 F.R.D. 421, __, 2011 WL 3678721, at *25 (E.D. Pa. Aug. 22, 2011)* (applying this doctrine post-Wal-Mart); *Hershey v. ExxonMobil Oil Corp., No. 07-1300-JTM, 2011 U.S. Dist. LEXIS 36317, 2011 WL 1234883, at *3-4 (D. Kan. Mar. 31, 2011)* (finding this doctrine relevant three **[*72]** months prior to Wal-Mart); *Clay v. Pelle, No. 10-cv-01840-WYD-BNB, 2011 U.S. Dist. LEXIS 27630, 2011 WL 843920, at *1 (D. Colo. Mar. 08, 2011)* (same).

and not against the maintenance of the class action"). Because market power and antitrust injury are not amenable to proof with common evidence, Plaintiffs have not met their burden of establishing that common issues predominate pursuant to *Rule 23(b)(3)*. Additionally, in light of the multiple regional analysis required to determine market power and impact, maintaining a class action on a national level would not be manageable.

V. CONCLUSION

Accordingly, the Court concludes that Plaintiffs have not met their burden of showing this case should proceed as a class action, and, therefore, Plaintiffs' Motion for Class Certification (Dkt. No. 160) is DENIED.

IT IS SO ORDERED this 28th day of December, 2011.

/s/ Robin J. Cauthron

ROBIN J. CAUTHRON

United States District Judge

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[BanxCorp v. Bankrate Inc.]

United States District Court for the District of New Jersey

December 30, 2011, Filed

Civil Action No. 07-3398 (ES) (CLW)

Reporter

2011 U.S. Dist. LEXIS 149912 *; 2011-2 Trade Cas. (CCH) P77,750; 2011 WL 6934836

BANXCORP, Plaintiff, v. BANKRATE INC., Defendant.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by, in part, Motion denied by, in part, Claim dismissed by *BanxCorp v. Bankrate Inc., 2012 U.S. Dist. LEXIS 106533 (D.N.J., July 30, 2012)*

Motion denied by, Sanctions disallowed by *Banxcorp v. Bankrate, Inc., 2014 U.S. Dist. LEXIS 198396 (D.N.J., Sept. 26, 2014)*

Prior History: *BanxCorp v. Bankrate, Inc., 2009 U.S. Dist. LEXIS 84151 (D.N.J., Sept. 14, 2009)*

Core Terms

pricing, predatory, allegations, competitors, conspiracy, price-fixing, co-branding, Website, listings, exclusionary, argues, relevant market, monopoly power, monopoly, bank rate, contracts, network, anticompetitive, conspirators, financial services, advertisers, providers, cartel, rates, monopolization, exclusive right, meetings, anticompetitive conduct, Sherman Act, co-conspirators

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN1[] **Anticompetitive & Predatory Practices, Predatory Pricing**

In cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in, "predatory pricing" means pricing below some appropriate measure of cost.

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

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

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

On a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, courts are required to accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. Contradictory factual assertions on the part of defendants must be ignored. Courts must determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. But, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Determining whether the allegations in a complaint are plausible is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. Courts are not required to credit bald assertions or legal conclusions draped in the guise of factual allegations.

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

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

HN3[] **Regulated Practices, Private Actions**

While antitrust complaints are to be liberally construed, they are not altogether exempt from the federal rules. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Additionally, in evaluating a plaintiff's claims, generally a court looks only to the facts alleged in the complaint and its attachments without reference to other parts of the record.

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

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

HN4[] **Motions to Dismiss, Failure to State Claim**

In Twombly, the U.S. Supreme Court has set forth the plausibility standard for overcoming a motion to dismiss. It refined this approach in Iqbal. A complaint satisfies the plausibility standard when the factual pleadings allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. This standard requires showing more than a sheer possibility that a defendant has acted unlawfully. A complaint that pleads facts merely consistent with a defendant's liability, stops short of the line between possibility and plausibility of entitlement of relief.

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

HN5[] **Motions to Dismiss, Failure to State Claim**

To determine the sufficiency of a complaint under Twombly and Iqbal, the court must take the following three steps: First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

HN6[] **Motion Practice, Opposing Memoranda**

The purpose of the reply brief is to respond to the opposition brief or explain a position that the respondent has refuted.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN7[] Conspiracy to Monopolize, Sherman Act

See *15 U.S.C.S. § 1*.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8[] Conspiracy to Monopolize, Elements

Plaintiffs asserting a *15 U.S.C.S. § 1* claim must allege four elements: (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action. Existence of a contract, combination or conspiracy is the hallmark of a *§ 1* claim. Over the years, courts have limited their attention to two essential elements: (1) that the defendant was a party to a contract, combination or conspiracy and (2) that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade.

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

HN9[] Conspiracy to Monopolize, Elements

As to the first element of a *15 U.S.C.S. § 1* claim, plaintiffs must establish the existence of an agreement or concerted action, and therefore, in order to state a claim for conspiracy to engage in predatory pricing, a plaintiff must plead that the defendant and co-conspirators conspired to price below some measure of cost. Unilateral activity by a defendant, no matter the motivation, cannot give rise to a *§ 1* violation. An agreement exists when there is a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme.

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

HN10[] Conspiracy to Monopolize, Elements

In the context of a *15 U.S.C.S. § 1* claim, a plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the two. Direct evidence of a conspiracy is evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted. Direct evidence of conspiracy, if credited, removes any ambiguities that might otherwise exist with respect to whether the parallel conduct in question is the result of independent or concerted action. If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question of whether an agreement has been adequately pled.

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

HN11[] Conspiracy to Monopolize, Elements

In its evaluation of circumstantial evidence in an antitrust case, a court must apply special considerations so that only reasonable inferences are drawn from the evidence. The reason is that ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN12[] Conspiracy to Monopolize, Elements

Certainly, an actionable horizontal conspiracy does not require direct communication among the competitors. But a *15 U.S.C.S. § 1* claim of conspiracy predicated on parallel conduct should be dismissed if common economic experience, or facts alleged in a complaint itself, show that independent self-interest is an obvious alternative explanation for defendants' common behavior. Thus some courts have denominated certain factors which, if present, may indicate the existence of a conspiratorial agreement. These factors include: (1) evidence that the defendant had a motive to enter into a conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy. Courts have cautioned that the first two factors may indicate that defendants operate in an oligopolistic market, and because such a market contains very few sellers, each defendant would be aware of each other's actions. Evidence of action that is against self-interest or motivated by profit must go beyond mere interdependence. Evidence of the third factor is non-economic evidence that there was an actual, manifest agreement not to compete, which may include proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

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

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

HN13[] Conspiracy to Monopolize, Elements

The second element of a *15 U.S.C.S. § 1* claim, an unreasonable restraint on trade, is analyzed under either the per se standard or the rule of reason standard. The per se illegality rule applies when a business practice on its face, has no purpose except stifling competition. A per se rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. Agreements that fall under established per se illegality categories are conclusively presumed to unreasonably restrain competition. Paradigmatic examples are horizontal agreements among competitors to fix prices or to divide markets. Per se illegality is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.

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

HN14[] Per Se Rule & Rule of Reason, Sherman Act

Plaintiffs pleading exclusively per se violations, as opposed to pleading rule of reason violations in the alternative — must be careful. If the court determines that the restraint at issue is sufficiently different from the per se archetypes to require application of the rule of reason, the plaintiff's claims will be dismissed. This is particularly true with certain restraints of trade that are highly suspicious yet sufficiently idiosyncratic that judicial experience with them is limited. In those cases, per se condemnation is inappropriate, but at the same time, the "inherently suspect" nature of the restraint obviates the sort of elaborate industry analysis required by the traditional rule-of-reason standard.

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

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

HN15[] **Conspiracy to Monopolize, Elements**

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of *15 U.S.C.S. § 1*. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN16[] **Conspiracy to Monopolize, Elements**

Under the United States Court of Appeals for the Third Circuit's three-step analysis of whether a plaintiff has sufficiently pled the conspiracy element of its predatory price-fixing theory, the Court begins by taking note of the elements of a conspiracy claim under *15 U.S.C.S. § 1*, which are (1) the existence of an agreement to engage in the alleged scheme, such as predatory (i.e., below-rate) price fixing and (2) that the conspiracy imposed an unreasonable restraint on trade.

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN17[] **Conspiracy to Monopolize, Elements**

To sufficiently plead the conspiracy element of its predatory price-fixing theory, a plaintiff must show the existence of an agreement among members of the conspiracy demonstrating a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme. The unity of purpose must point to the common scheme alleged in the complaint. In the antitrust context, "predatory" means pricing below some measure of cost. To prevail on a predatory pricing claim, a plaintiff must demonstrate that the prices complained of are below an appropriate measure of its rival's costs. In a typical predatory-pricing scheme, the predator reduces the sale price of its product (its output) to below cost, hoping to drive competitors out of business. The mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because cutting prices in order to increase business often is the very essence of competition, mistaken inferences are especially costly, because they chill the very conduct the antitrust laws are designed to protect.

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

HN18[] **Conspiracy to Monopolize, Elements**

To sufficiently plead a conspiracy under *15 U.S.C.S. § 1*, a plaintiff must plausibly allege that the conspirators agreed to enter a price fixing agreement for the purpose of pricing below a measure of cost. A party's failure to allege specifics as to the entrance and object of the agreement will lead to the dismissal of a conspiracy claim. In many cases where an agreement exists, parallel conduct—such as setting prices at the same level—is precisely the concerted action that is the conspiracy's object. Accordingly, the complaint must define the object of the horizontal agreement alleged in the complaint. The illegal object of a Sherman Act conspiracy must be identified in terms of an intended or achieved effect upon commerce in a relevant market.

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN19[] **Conspiracy to Monopolize, Elements**

At step two of the United States Court of Appeals for the Third Circuit's three-step analysis of whether a plaintiff has sufficiently pled the conspiracy element of its predatory price-fixing theory, the court identifies allegations that—without factual support—would not be entitled to the assumption of truth because they would be no more than mere conclusions.

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN20[] **Conspiracy to Monopolize, Elements**

Step three of the United States Court of Appeals for the Third Circuit's three-step analysis of whether a plaintiff has sufficiently pled the conspiracy element of its predatory price-fixing theory is to determine whether the bare allegations are echoed elsewhere in the complaint by well-pled allegations, and whether those allegations plausibly give rise to an entitlement for relief.

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN21[] **Conspiracy to Monopolize, Elements**

A memorandum produced by a defendant conspirator detailing the discussions from a meeting of a group of alleged conspirators would be sufficient direct evidence of a predatory price fixing conspiracy.

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN22[] **Conspiracy to Monopolize, Elements**

At the summary judgment stage a court may dispose of an antitrust conspiracy claim in the absence of any plausible motive to engage in the conduct charged.

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

HN23[] Actual Monopolization, Claims

See 15 U.S.C.S. § 2.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN24[] Actual Monopolization, Claims

The offense of monopoly has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN25[] Actual Monopolization, Monopoly Power

As to the first element of a 15 U.S.C.S. § 2 monopoly claim, the U.S. Supreme Court has defined "monopoly power" as the power to control prices or exclude competition. The existence of such power ordinarily may be inferred from the predominant share of the market.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN26[] Actual Monopolization, Claims

Monopoly power may be proven by direct or indirect evidence. The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output. To support an inference of monopoly power, a plaintiff typically must plead and prove that a firm has a dominant share in a relevant market, and that significant entry barriers protect that market. Barriers to entry are factors, such as regulatory requirements, high capital costs, or technological obstacles, which prevent new competition from entering a market in response to a monopolist's supracompetitive prices. Without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN27[] Actual Monopolization, Monopoly Power

Proving the existence of monopoly power through indirect evidence requires a definition of the relevant market. The scope of the market is a question of fact as to which the plaintiff bears the burden of proof. Competing products are in the same market if they are readily substitutable for one another; a market's outer boundaries are determined by the reasonable interchangeability of use between a product and its substitute, or by their cross-elasticity of demand. Failure to define the proposed relevant market in these terms may result in dismissal of the complaint (or claim).

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN28[] **Actual Monopolization, Claims**

As to the second element of a *15 U.S.C.S. § 2* claim, the acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor. Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits. Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive. Conduct that merely harms competitors, however, while not harming the competitive process itself, is not anticompetitive. It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.

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

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

HN29[] **Actual Monopolization, Claims**

It is possible for a plaintiff to unsuccessfully plead a *15 U.S.C.S. § 1* conspiracy claim but sufficiently plead a *15 U.S.C.S. § 2* unilateral action claim in the same complaint.

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

HN30[] **Actual Monopolization, Claims**

A sufficient pleading of a *15 U.S.C.S. § 2* claim requires something more, which may include the barriers to entry, the nature of the anticompetitive conduct, and the elasticity of consumer demand.

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

HN31[] **Actual Monopolization, Claims**

It is true that a one-year contract, taken alone, does not violate the antitrust laws. However,a court should consider a defendant's anticompetitive conduct as a whole rather than considering each aspect in isolation.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN32[] Actual Monopolization, Claims

The second element of a 15 U.S.C.S. § 2 claim requires a showing of maintenance of the monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Conduct that would satisfy this element includes conduct that would foreclose competition, allow the defendant to gain a competitive advantage, or destroy a competitor.

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

HN33[] Complaints, Requirements for Complaint

Pleading contradictory facts to support different claims is grounds for dismissal of those claims.

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

HN34[] Attempts to Monopolize, Elements

To state a claim for attempted monopolization, a plaintiff must establish (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

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

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

HN35[] Attempts to Monopolize, Elements

As to the first element of a claim for attempted monopolization, a firm engages in anticompetitive conduct when it attempts to exclude rivals on some basis other than efficiency or when it competes on some basis other than the merits. Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive. "Anticompetitive conduct" can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties. Allegations raised under 15 U.S.C.S. § 1 may be a proper basis on which to predicate a 15 U.S.C.S. § 2 claim.

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

HN36[] Attempts to Monopolize, Elements

As to the second element of a claim for attempted monopolization—specific intent to monopolize--a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were not predominantly motivated by legitimate business aims. Direct evidence of specific intent need not be shown; it may be inferred from predatory or exclusionary conduct.

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

HN37[] Attempts to Monopolize, Elements

As to the third element of a claim for attempted monopolization, a dangerous probability of monopoly may exist where the defendant firm possesses a significant market share when it undertakes the challenged anticompetitive conduct. However, alleging market share alone is insufficient to properly plead attempted monopolization. A sufficient pleading requires something more, which may include the strength of competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand. The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output.

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

HN38[] Amendment of Pleadings, Leave of Court

Fed. R. Civ. P. 15(a)(2) allows a party to amend its pleading by leave of court when justice so requires. Leave to amend pleadings is to be freely given. *Fed. R. Civ. P. 15(a)(2)*. The decision to grant leave to amend rests within the discretion of the court. Leave to amend may be denied on the basis of undue delay or bad faith. Only when these factors suggest that amendment would be unjust should the court deny leave.

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

HN39[] Amendment of Pleadings, Leave of Court

In determining whether an amendment should be denied for undue delay, the court must focus on the plaintiffs' motives for not amending their complaint to assert the proposed claim earlier. There is no presumptive period in which a motion for leave to amend is deemed timely or in which delay becomes undue. The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point, the delay will become undue, placing an unwarranted burden on the court. Delay may become undue when a movant has had previous opportunities to amend the complaint. In other words, the court should also consider whether new information came to light or was available earlier to the moving party.

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

HN40[] Amendment of Pleadings, Leave of Court

Allegations of bad faith must pertain to plaintiff's motives for not amending sooner, not to plaintiff's alleged litigation strategy. The question of undue delay, as well as the question of bad faith, requires that the court focus on the plaintiffs' motives for not amending their complaint to assert this claim earlier; the issue of prejudice requires that we focus on the effect on the defendants.

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Judges: Esther Salas, United States District Judge.

Opinion by: Esther Salas

Opinion

SALAS, DISTRICT JUDGE

This matter is before the Court by way of Bankrate Inc.'s ("Bankrate") Motion to Dismiss BanxCorp's Fourth Amended Complaint ("4AC") pursuant to *Fed. R. Civ. P. 12(b)(6)*. (D.E. 210). This Court has jurisdiction pursuant to *28 U.S.C. §§ 1331* and *1337(a)*, as well as *15 U.S.C. §§ 1* and *2*. Venue is proper pursuant to *28 U.S.C. §§ 1391(b)*, *(b)(2)*, as well as *15 U.S.C. §§ 15* and *22*. The Court's decision is based on its review of the briefs and exhibits related to Bankrate's motion to dismiss, and the Court hereby decides the motion without oral argument pursuant **[*2]** to *Fed. R. Civ. P. 78*. For the following reasons, Defendant's motion to dismiss is GRANTED as to the First Claim and DENIED as to the Second, Third, and Fifth claims.

I. BACKGROUND

A. Parties and Claims

The underlying issue in this case is whether Defendant Bankrate has engaged in anticompetitive practices in violation of federal and state antitrust laws, resulting in economic injury to Plaintiff BanxCorp.

BanxCorp is a corporation organized and existing under the laws of Delaware with its office located in Scarsdale, New York. (4AC, D.E. 204 ¶ 1). Plaintiff owns and operates the website BanxQuote.com. (*Id.* ¶ 1). "From its inception in 1984 until the present, Plaintiff has done business under the trade name and registered trademark 'BanxQuote.'" (*Id.*). BanxCorp is a provider of bank rate tables listing interest rates from financial institutions. (Compl., D.E. 1 ¶ 14). It publishes those rates in print as well as online. (Def. Moving Br., D.E. 7 at 5, 7).

Defendant Bankrate is a corporation organized and existing under the laws of Delaware, with its principal executive offices located in North Palm Beach, Florida. [1] (4AC ¶ 2). Primarily, Bankrate publishes financial data and advice online, **[*3]** controlling numerous websites that aggregate financial information. (Def. Moving Br., D.E. 210 at 6). It also owns and operates FastFind.com, a lead rate aggregation company. (Def. Moving Br. at 5). Individually and in partnership with various major website operators, Bankrate also operates websites on which financial institutions such as banks and mortgage brokers list their rates for various financial products, including certificates of deposit and mortgage notes. When consumers visit these websites—such as Bankrate's own Bankrate.com—to view the rates, they are able to click on the name of the financial institution listing the rate in order to get more information or transact business with the financial institution. (4AC ¶¶ 36-49).

BanxCorp alleges that Bankrate, with its co-branding partners or its distributors, has engaged in price-fixing, predatory price-fixing, and exclusionary conduct that would guarantee Bankrate a monopoly in the Bank Rate Website market. [2] (*Id.* ¶¶ 279-297). Its alleged partners **[*4]** in these schemes—its network—include approximately

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[1] On September 28, 2011, this Court entered an Order substituting Bankrate, Inc., a Delaware Corporation, as successor-in-interest to Bankrate, Inc., a Florida Corporation. (D.E. 282).

130 co-branding partners, which together control more than 300 partner sites that compete against each other and against Bankrate.com. (*Id.* ¶ 19). These partner-competitors include, among others, Dow Jones & Co., The New York Times, CNBC, CNN, MSNBC, Fox News, AOL, and Move Inc. (*Id.* ¶ 20). Plaintiff alleges that the co-branding partnership agreements granted Defendant the sole authority and/or exclusive right to sell rate table listings to its customers on the Internet at the same price on behalf of Defendant's "network," first on a flat fee basis (from the late 1990s until October 1, 2005), and after October 1, 2005, on a cost-per-click ("CPC") basis. (*Id.* ¶ 21). According to BanxCorp, "CPC or Cost-Per-Click is a fee paid by customers—the financial service providers—to list their rates on a Bank Rate Website. CPC transactions are consummated and charged every time an end user—a consumer—clicks on a hyperlinked rate listing at a Bank Rate Website." (*Id.* ¶ 21 n.3).

BanxCorp further alleges that since the late 1990s, Bankrate began giving away free rate listings to financial service providers and commingling free rate listings with paid rate listings, allowing Bankrate to charge far less than its competitors, often at a loss. (*Id.* ¶ 19). This alleged predatory pricing [3] essentially left most competitors with one of two choices: either exit the market or join Bankrate's network. (*Id.* ¶ 22). As Bankrate's predatory pricing scheme became effective, its network grew and some competitors, including BanxCorp, were left behind.

B. Procedural History

This case has a lengthy procedural history. BanxCorp originally filed suit against Bankrate on July 20, 2007, alleging violations of federal and state antitrust laws based on various types of anticompetitive conduct. (Compl., D.E. 1 ¶ 14). That complaint alleged exclusive dealing, bundling, tie-in, and predatory pricing in violation of *§§ 1* and *2 of the Sherman Act*. (*Id.* ¶¶ 167-196). The Court ordered BanxCorp to amend the complaint to address significant deficiencies in its definition of the relevant market. *See* *BanxCorp v. Bankrate, Inc. ("BanxCorp I"), 2008 U.S. Dist. LEXIS 51756, *15 (D.N.J. July 7, 2008)* (D.E. 20). It also granted leave to amend the bundling, tie-in, and LendingTree theories. *2008 U.S. Dist. LEXIS 51756 at *31*. [4]

On August 21, 2008, BanxCorp filed its First Amended Complaint. ("1AC", D.E. 25). Subsequently, before the Court could rule on the pending motion to dismiss, BanxCorp withdrew that complaint and filed its Second Amended Complaint ("2AC", D.E. 37), alleging predatory price-fixing, exclusive dealing, bundling, vendor lock-in, and tie-in arrangements with competitors or distributors, as well as monopoly and attempted monopolization. (2AC ¶¶ 114-146). In a September 14, 2009 opinion, the court granted BanxCorp leave to correct deficiencies in its market definition "one final time" and "one—and only one—" opportunity to correct deficiencies in its tying, bundling, and vendor lock-in theories. *See* *BanxCorp v. Bankrate, Inc. ("BanxCorp II"), 2009 U.S. Dist. LEXIS 84151, *9 (D.N.J. Sept. 14, 2009)* **[*8]** (D.E. 75). The Court then stated that "[l]eave is not granted to amend portions of the complaint

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[2] As defined by BanxCorp, the Bank Rate Website market "is the market for fee-based aggregated bank rate table listings with interactive functionalities on the Internet. It **[*5]** is often referred to as the 'Internet-based consumer banking marketplace,' or, simply, bank rate websites ("Bank Rate Websites"). The relevant geographic market for Bank Rate Websites is the whole of the United States." (4AC ¶¶ 35-36). These websites provide services and products similar to those offered by Bankrate, as described above. *See* Part I.A.

[3] Throughout this Opinion, the Court refers to "predatory pricing" or "predatory price-fixing." "This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps **[*6]** to deter potential entrants from coming in." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.8, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citation omitted). ***HN1***[ ] "In such cases, 'predatory pricing' means pricing below some appropriate measure of cost." *Id.* (citation omitted).

[4] In this action and a related action, *BanxCorp v. LendingTree LLC*, No. 10-2467, BanxCorp alleged that in 2007, Bankrate "entered into an anticompetitive agreement with LendingTree, a competitor with a dominant position **[*7]** in the mortgage lead generation and aggregation ('Mortgage Lead Aggregation') market. Defendant and Lending Tree combined, conspired to form a cartel, and agreed to divide and allocate revenues, Internet traffic and clicks, customers, accounts, and products in the savings sub-market for Bank Rate Websites, in exchange for revenues, Internet traffic and clicks in the Mortgage Lead Aggregation market." (4AC ¶ 27).

not addressed in this Opinion." *2009 U.S. Dist. LEXIS 84151 at *12*. The Court held that the price-fixing and exclusive dealing theories were adequately pled. *2009 U.S. Dist. LEXIS 84151 at *9*.

On October 19, 2009, BanxCorp filed its Third Amended Complaint ("3AC", D.E. 82), abandoning its tying and bundling theories but elaborating on its massive price-fixing conspiracy theory, the new centerpiece of BanxCorp's lawsuit. (3AC ¶¶ 15, 116-149). It alleged a conspiracy between Bankrate and more than 100 co-branding partners that also allegedly entered into improper exclusive dealing relationships with Bankrate. (*Id.* ¶ 280-287).

Discovery commenced in 2009 and is ongoing. (*See* Sept. 1, 2011 Letter Order re: Pretrial Scheduling, D.E. 280). During discovery, "thousands" of documents have changed hands. (Def. Moving. Br. at 9). On July 13, 2010, Judge Wigenton denied Bankrate's motion to dismiss the 3AC. *See BanxCorp v. Bankrate, Inc*. ("July 13, 2010 Order") (D.N.J. Sept. 14, 2009) (D.E. 121).

On April 1, 2011, BanxCorp filed its 4AC (D.E. 204)—the complaint at issue in the instant motion—in which BanxCorp alleges that Bankrate consciously engaged **[*9]** in (1) illegal restraint of trade in violation of *§§ 1* and *2* of the Sherman Act, *15 U.S.C. § 1*; (2) illegal mergers and acquisitions in violation of *§ 7 of the Clayton Act*; and (3) conspiracy in restraint of trade in violation of *§ 56:9-3* of the New Jersey Antitrust Act, *N.J. Stat. Ann. § 56:9-1 et seq.* (4AC ¶¶ 279-313). In the 4AC, BanxCorp offers two theories of liability: (1) a predatory price-fixing conspiracy between Bankrate and its competitors, pursuant to which the parties allegedly conspired to set prices charged to financial institutions for rate table listings *below* Bankrate's average variable cost; and (2) exclusionary conduct based on Bankrate's contractual exclusive right to sell rate table listings for inclusion on rate tables that appear on co-branded web pages of online media outlets. (4AC ¶ 280).

Subsequently, on April 11, 2011, Defendant Bankrate filed this motion pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted. (D.E. 210). Specifically, Bankrate seeks an order dismissing: the First Claim for Relief (*§ 1 of the Sherman Act*), except as it pertains to alleged agreements with LendingTree LLC; the Second and Third Claims **[*10]** for Relief (*§ 2 of the Sherman Act*) except as they pertain to alleged predatory pricing based on Bankrate's switch to cost-per-click pricing; and the Fifth Claim for Relief (the New Jersey Antitrust Act) consistent with Claims 1 through 3. [5] (Def. Moving Br. at 1).

For the following reasons, Defendant's motion to dismiss is granted as to the First Claim and denied as to the Second, Third, and Fifth claims.

C. Arguments

Bankrate argues that BanxCorp's predatory price-fixing conspiracy and exclusive dealing claims are new claims never raised before and must therefore be dismissed because **[*11]** they violate Judge Wigenton's September 14, 2009 opinion and order in this case. These claims, Defendant argues, are not based on newly discovered evidence or facts learned during the course of discovery. (*Id.* at 3-4).

Bankrate also argues that the predatory price-fixing claim is legally defective. First, BanxCorp fails to allege that any of Bankrate's co-conspirators agreed with Bankrate to set prices below cost in order to drive out competition. Second, BanxCorp fails to provide any evidence that Bankrate priced its product below average variable cost or even market value. Third, the claim is based on contradictory and conclusory allegations. Fourth, the predatory pricing theory is economically implausible, or makes no economic sense, and should therefore be dismissed on that basis alone. (*Id.* at 13-20).

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[5] Bankrate's only reference to the New Jersey antitrust claims is the following: "Bankrate respectfully seeks an Order, pursuant to *Fed. R. Civ. P. 12(b)(6)*, dismissing . . . the Fifth Claim for Relief (the New Jersey Antitrust Act) consistent with Counts One through Three." (Def. Moving Br. at 1). Bankrate never revisits the New Jersey claims in its moving papers, and does not provide any guidance on whether analysis under the New Jersey statutes would be the same as under the federal statutes. In light of the foregoing, the Court will not address the sufficiency of the pleading as to the New Jersey claims.

Next, Bankrate argues that the exclusionary conduct claim is equally legally defective. First, BanxCorp seemingly makes two contradictory statements. For purposes of the price-fixing claim, it alleges that the co-conspirators are also competitors; for purposes of the exclusionary dealing claim, it alleges that they are "distribution channels" for the product. These two distinct characterizations **[*12]** are, according to Bankrate, mutually exclusive. Further, even if the two characterizations could be harmonized, BanxCorp fails to provide proof of market foreclosure—a necessary element of the claim. (*Id.* at 20-25).

Finally, Bankrate argues that the "new" predatory price-fixing conspiracy and exclusionary conduct theories were brought in bad faith and with undue delay and the claims should therefore be dismissed on that basis alone. (*Id.* at 25-31).

In response, Plaintiff BanxCorp asserts that the predatory price-fixing and exclusionary dealing claims are not new and were in fact raised in the 3AC. The claims are simply pled here with more particularity based on facts recently discerned through discovery, from documents that were secretly withheld by Defendant. (Pl. Opp. Br., D.E. 214 at 2-3, 29). Therefore, its claims were not brought in bad faith or with undue delay. (*Id.* at 32).

Further, BanxCorp argues that inquiries into purpose, power, and effects are unnecessary once a particular restraint has been found to be a *per se* violation of *§ 1*. BanxCorp asks this Court to find that the price-fixing and exclusionary dealing claims are *per se* violations of *§ 1*. (*Id.* at 7, 10-13).

Further, **[*13]** BanxCorp asks this Court to bifurcate the *per se* issues presented here because bifurcation will "greatly narrow the scope of discovery," "streamline the issues to be decided at trial," and "serve the interests of judicial economy. (*Id.* at 8). It also asks this Court for leave to file a motion for summary judgment as an alternative to converting Defendant's Motion to Dismiss to a summary judgment motion. (*Id.* at 9). Finally, it asks this Court to consolidate this action with *BanxCorp v. LendingTree LLC*, No. 10-2467 (D.N.J. June 2, 2005). (*Id.* at 32-34). Importantly, Plaintiff does not directly address any of Defendant's others arguments. The Court more specifically outlines and addresses the parties' arguments below.

II. LEGAL STANDARD

HN2[] On a motion to dismiss pursuant to *Rule 12(b)(6)*, "courts are required to accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party." *Phillips v. Cnty. of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008)*; *Burrell v. DFS Servs., LLC, 753 F. Supp. 2d 438, 440 n.1 (D.N.J. Dec. 6, 2010)* (holding that contradictory factual assertions on the part of defendants must be ignored). Courts must "determine **[*14]** whether, under any reasonable reading of the complaint, the Plaintiff may be entitled to relief." *Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)*. But, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Determining whether the allegations in a complaint are "plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*. "Courts are not required to credit bald assertions or legal conclusions draped in the guise of factual allegations." *McCargo v. Hall, No. 11-553, 2011 U.S. Dist. LEXIS 146449, 2011 WL 6725613, *1 (D.N.J. 2011)* (citing *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997))*. And ***HN3***[] while antitrust complaints are to be liberally construed, they are not altogether exempt from the federal rules. *See Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir. 1988)* (citations omitted). A pleading that offers "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not **[*15]** do." *Iqbal, 129 S. Ct. at 1949* (citations omitted). Additionally, in evaluating a plaintiff's claims, generally "a court looks only to the facts alleged in the complaint and its attachments without reference to other parts of the record." *Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994)*.

HN4[] In *Twombly*, the Supreme Court set forth the "plausibility" standard for overcoming a motion to dismiss. It refined this approach in *Iqbal.* A complaint satisfies the plausibility standard when the factual pleadings "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at*

1949 (citing Twombly, 550 U.S. at 556). This standard requires showing "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint that pleads facts "'merely consistent with a defendant's liability, stops short of the line between possibility and plausibility of entitlement of relief.'" *Id.* (quoting Twombly, 550 U.S. at 557).

HN5[] To determine the sufficiency of a complaint under *Twombly* and *Iqbal*, the Court must take the following three steps:

> First, the court must "tak[e] note of the elements a plaintiff must **[*16]** plead to state a claim." Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011) (citations omitted).

The Court now proceeds with its analysis claim-by-claim, element-by-element under the three-step method set forth by the Third Circuit, granting the motion to dismiss as to the First Count based on Plaintiff's failure to plausibly allege the "object" of the conspiracy, and denying the motion to dismiss as to the Second, Third, and Fifth claims for relief.

With this standard in mind, the Court analyzes the parties' arguments on dismissal.

III. DISCUSSION

A. Threshold/Preliminary Matters

As a **[*17]** preliminary matter, Bankrate argues that BanxCorp's predatory pricing conspiracy and exclusive dealing claims are new claims, and therefore must be dismissed. BanxCorp responds that these claims were in fact discussed in the 3AC and are now being fleshed out based on new documents—some of them secretly withheld by Defendant—acquired through discovery after the filing of the 3AC. Notably, BanxCorp does not indicate which documents, when these documents were obtained, or what specific factual allegations they support in the 4AC. Under the following analysis, the Court finds that Plaintiff offers only a self-serving statement with nothing to support it.

Specifically, Bankrate argues that in the 3AC, BanxCorp alleged "that Bankrate and more than 100 online media outlets conspired to fix prices charged to financial institutions for hyperlinked interest rate table listings at above market levels." Now, according to Bankrate, Plaintiff abandons that theory and alleges "that Bankrate and more than 100 online media outlets conspired to charge *below-cost* prices for the advertising product at issue . . . for some (unidentified) period of time in order to drive competitors out of the market, then **[*18]** agreed to raise prices in order to recoup unidentified losses." (Def. Moving. Br. at 1-2). In other words, Bankrate argues that BanxCorp changed its theory from price-fixing to predatory pricing. This is simply not so.

The 3AC contains numerous paragraphs where its claim of predatory pricing, or pricing below average variable cost, is discussed in some detail. For example, BanxCorp alleges:

> Then, [Bankrate] secured CPC rate listing contracts with hundreds of financial service providers, most of them listing their rates exclusively on Bankrate.com and its network of Mirror Sites, by offering them predatory prices and free rate listings. It retained their loyalty and de-facto exclusivity by switching from a flat fee to a CPC system, and *continued to price below its average variable cost—and at a significantly lower price than what any remaining competitor could afford to charge*, because the volume of traffic on Bankrate-dot-com and its Mirror Sites was large enough that it generated significant long-term profits, allowing Defendant to quickly start recouping its earlier losses in excess of $53 million. (3AC ¶ 91) (emphasis added).

> A key to the development of its alleged monopoly was Bankrate's **[*19]** predatory pricing scheme. In order to survive, Plaintiff BanxQuote and any other remaining struggling competitors were left with only two undesirable options: *either charge the same CPC as Bankrate—below any reasonably expected average variable or other measure of cost*—while having less traffic to offer to potential advertisers, or charge a lower CPC than Bankrate and lose even more money on each transaction.

(*Id.* ¶ 102 (emphasis added); *see also id.* ¶¶ 19(e), 19(g), 223-230, 240, 246). Because the 3AC explicitly contains allegations of below-cost pricing, it cannot be said that claims in the 4AC allege below-cost pricing for the first time. [6]

Bankrate further argues that the exclusive dealing claim in the 4AC is new. According to Bankrate, in its 3AC, BanxCorp alleged that Defendant "entered into 'exclusive dealing' arrangements with those same online media outlets." (Def. Moving Br. at 1-2). In the 4AC, Plaintiff alleges that "Bankrate's contracts with the online media outlets resulted in exclusion of BanxCorp from necessary distribution outlets, and are thus violative of antitrust laws prohibiting exclusionary conduct." (*Id.* at 2). Below, in Part III.C, the Court more fully discusses the exclusionary conduct allegations in the 4AC; however, the Court briefly notes that it finds that the allegations made in the 4AC are similar to the ones made in the 3AC. (*Compare* 3AC ¶ 280 ("Bankrate has established de-facto exclusive dealing partnerships with approximately 100 co-branded Mirror Sites, thus foreclosing competition in the relevant market."), *with* 4AC ¶ 164 ("Defendant's 130 co-branding partnership agreements granted Bankrate the exclusive right to sell Internet rate table listings to financial service providers nationally[.] . . . Subsequently . . . independent competitors were driven **[*21]** out of the market . . . ."). On July 13, 2010, Judge Wigenton denied Bankrate's motion to dismiss, and therefore the claim survived. *See BanxCorp v. Bankrate, Inc.* ("July 13, 2010 Order") (D.N.J. Sept. 14, 2009) (D.E. 121).

Finally, Bankrate alleges that the claims in the 4AC are "new," and therefore violate Judge Wigenton's September 14, 2009 opinion and order prohibiting new claims and setting forth which claims could be amended and which could not. Based on its review of Judge Wigenton's opinion, the Court is satisfied that the claims at issue in this motion are not barred by that ruling, in which amendments were permitted to the "definition of the relevant market and related sub-markets, [as well as claims related to] tying, bundling, and vendor lock-in." *Id.* n.1. Judge Wigenton also found that the exclusive dealing claims were adequately pled. Additionally, Judge Wigenton found that predatory price-fixing *was* a theory BanxCorp raised in the 3AC, and she did not determine the sufficiency of these related claims. Therefore, as long as the predatory price-fixing and exclusionary conduct claims in the 4AC are not facially different from the claims in the 3AC, Judge Wigenton's order **[*22]** would not have precluded claims in the 4AC. Based on this Court's review, the predatory price-fixing and exclusionary conduct theories raised in the 3AC do not appear to be facially different from the theories raised in the 4AC, and therefore the Court finds that the claims raised in the 4AC do not violate the September 14, 2009 order. [7] The Court now proceeds to its primary analysis.

B. Sherman Act § 1: Contract or Conspiracy in Restraint of Trade

1. Legal Standard: Sherman Act, 15 U.S.C. § 1

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[6] Alternatively, Bankrate also argues—for the first time in its reply brief—that BanxCorp changed its theory from unilateral predatory pricing-fixing in the 3AC to a predatory price-fixing conspiracy in the 4AC. (*See* Def. Reply Br. at 5). Because Bankrate raises this argument on reply, the Court declines to address it here. *See* [Dana Transp., Inc. v. Ableco Fin., LLC, No. 04-2781, 2005 U.S. Dist. LEXIS 18086, at *16 (D.N.J. Aug. 17, 2005)] (**HN6**[]) "The purpose of the reply brief is to respond to the opposition brief or explain a position that the respondent **[*20]** has refuted.") (citations omitted).

[7] The Court also notes that on April 5, 2011, Judge Arleo granted BanxCorp's motion to amend the 3AC. That order did not limit BanxCorp's ability to modify the claims in its 3AC or bring new claims. (*See* Order Granting Motion for Leave to File an Amended Complaint, D.E. 209).

BanxCorp brings its predatory price-fixing claim under *§ 1* of the Sherman Act. *Section 1* provides: ***HN7***[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. Thus, ***HN8***[] plaintiffs asserting a *§ 1* claim "must allege four elements: '(1) concerted action by the defendants; (2) that produced **[*23]** anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action.'" *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir. 2010)*. Existence of a "contract, combination . . . or conspiracy" is the hallmark of a *§ 1* claim. *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010)* (citations omitted). Over the years, courts have limited their attention to two essential elements: (1) that the defendant was a party to a "contract, combination . . . or conspiracy" and (2) that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade. *See* *Burtch, 662 F.3d at 221* (citing *In re Ins. Brokerage, 618 F.3d at 315*).

HN9[] As to the first element, plaintiffs must establish the existence of an agreement or "concerted action," and therefore, in order to state a claim for conspiracy to engage in predatory pricing, BanxCorp must plead that the defendant and co-conspirators "conspired" to "price below some measure of cost." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. "Unilateral **[*24]** activity by a defendant, no matter the motivation, cannot give rise to a *section 1* violation." *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003)*. "An agreement exists when there is a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme." *West Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010)* (citing *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*; *Howard Hess Dental Labs. Inc., 602 F.3d at 254*).

HN10[] A plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the two. Direct evidence of a conspiracy is "evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Ins. Brokerage, 618 F.3d at 324 n.23* (citations omitted). "[D]irect evidence of conspiracy, if credited, removes any ambiguities that might otherwise exist with respect to whether the parallel conduct in question is the result of independent or concerted action." *Id. at 324*. "If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question of whether **[*25]** an agreement has been adequately pled." *West Penn, 627 F.3d at 99* (citing *In re Ins. Brokerage, 618 F.3d at 323*).

Examples of direct proof of conspiracies that the Third Circuit has found sufficient include:

> (1) a direct threat to the plaintiff from a competitor that if he went into business his competitors would do anything they could to stop him, including cutting prices or supplies;
> (2) advising distributors that a supplier would cut off access if the distributor failed to maintain a certain price level;
> (3) a memorandum produced by a defendant conspirator detailing the discussions from a meeting of a group of alleged conspirators; and
> (4) a public resolution by a professional association recommending that its members withdraw their affiliation with an insurer.

InterVest, 340 F.3d at 162-63 (citations omitted).

HN11[] In its evaluation of circumstantial evidence in an antitrust case, the Court must apply special considerations so that only reasonable inferences are drawn from the evidence. *InterVest, 340 F.3d at 160*. The reason is that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita, 475 U.S. at 588*. ***HN12***[] Certainly, "an actionable horizontal **[*26]** conspiracy does not require direct communication among the competitors." *In re Ins. Brokerage, 618 F.3d at 331*. But a *§ 1* claim of conspiracy "predicated on parallel conduct should be dismissed if 'common economic experience,' or facts alleged in a complaint itself, show that independent self-interest is an 'obvious alternative explanation' for defendants' common behavior." *Id. at 326*. Thus some courts have denominated certain factors which, if present, may indicate the existence of a conspiratorial agreement. *See* *id. at 321*. These factors include: "(1) evidence that the defendant had a motive to enter into a [conspiracy]; (2) evidence that the defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy." *Id.* Courts have cautioned that the first two factors may indicate that "defendants operate in an oligopolistic market," and because such a market contains very few sellers, each defendant would be aware of each other's actions. *In re Baby Food Antitrust Litig., 166 F.3d 112, 121, 135 (1999)* ("[E]vidence of action that is against self-interest or motivated by profit must go beyond mere interdependence."). Evidence of the third factor is "non-economic **[*27]** evidence that there was an actual, manifest agreement not to compete, which may include proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." *In re Ins. Brokerage, 618 F.3d at 322* (citations and quotations omitted).

HN13[] The second element of a *§ 1* claim, an unreasonable restraint on trade, is analyzed under either the *per se* standard or the rule of reason standard. The *per se* illegality rule applies when a business practice "on its face, has no purpose except stifling competition." *Eichorn v. AT & T Corp., 248 F.3d 131, 143 (3d Cir. 2001)*; *In re Ins. Brokerage, 618 F.3d at 316* (citations omitted) ("A *per se* rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."). Agreements that fall under established *per se* illegality categories are "conclusively presumed to unreasonably restrain competition." *In re Ins. Brokerage, 618 F.3d at 316* (citation and quotations omitted). "Paradigmatic examples are 'horizontal agreements among competitors to fix prices or to divide markets.'" **[*28]** *Id.* (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007))*. *Per se* illegality "is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010)* (citations and internal quotation marks omitted).

But ***HN14***[] plaintiffs pleading exclusively *per se* violations?as opposed to pleading rule of reason violations in the alternative [8] —must be careful. "If the court determines that the restraint at issue is sufficiently different from the *per se* archetypes to require application of the rule of reason, the plaintiff's claims will be dismissed." *In re Ins. Brokerage, 618 F.3d at 317*; *see also* *Texaco Inc. v. Dagher, 547 U.S. 1, 7 n.2, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (rejecting *per se* analysis and declining to conduct a rule of reason analysis where plaintiffs "ha[d] not put forth a rule of reason claim"). This is particularly true with certain restraints of trade that are "highly suspicious yet sufficiently idiosyncratic that judicial experience with them is limited." *In re Ins. Brokerage, 618 F.3d at 317* (quotations omitted). In those cases, **[*29]** *per se* "condemnation is inappropriate, but at the same time, the 'inherently suspect' nature of the restraint obviates the sort of 'elaborate industry analysis' required by the traditional rule-of-reason standard." *Id.*

2. Plaintiff's Failure to Sufficiently Plead [*30] the Conspiracy Element of Its Predatory Price-Fixing Theory

HN16[] Under the Third Circuit's three-step analysis, the Court begins by taking note of the elements of a conspiracy claim under *§ 1*, which are (1) the existence of an agreement to engage in the alleged scheme, here, predatory (*i.e.*, below-rate) price fixing and (2) that the conspiracy imposed an unreasonable restraint on trade. *See* *Burtch, 662 F.3d at 221*. Because the Court finds that Plaintiff has insufficiently pled element one, the Court does

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[8] The Supreme Court has explained the rule of reason as follows:

> ***HN15***[] The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of *§ 1*. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885-86, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (citations and internal quotations omitted).

not analyze the second element. Before moving to step two of the Third Circuit's three-step analysis, the Court briefly sets forth the standard for Plaintiff's required showing and the parties' arguments as to that showing.

HN17[] To sufficiently plead the conspiracy element of its claim, Plaintiff must show the existence of an agreement among members of the conspiracy demonstrating "a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme." *West Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010)* (citing *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*; *Howard Hess Dental Labs. Inc., 602 F.3d at 254*). **[*31]** The "unity of purpose" must point to the "common scheme" alleged in the complaint. *See id.* In this case, Plaintiff's 4AC alleges that the common scheme was predatory pricing. In the antitrust context, "predatory" means pricing below some measure of cost. *Matsushita, 475 U.S. at 574*; *Pac. Bell Tel. Co. v. Linkline Commc'n, Inc., 555 U.S. 438, 451, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)* ("[T]o prevail on a predatory pricing claim, a plaintiff must demonstrate that . . . 'the prices complained of are below an appropriate measure of its rival's costs'") (citation omitted); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 318, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* ("In a typical predatory-pricing scheme, the predator reduces the sale price of its product (its output) to below cost, hoping to drive competitors out of business."); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("The mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because cutting prices in order to increase business often is the very essence of competition[,] mistaken inferences are especially costly, because they chill the very conduct the antitrust **[*32]** laws are designed to protect.") (internal quotations and citation omitted).

Therefore, ***HN18***[] to sufficiently plead a conspiracy among Bankrate and its co-branding partners, BanxCorp must plausibly allege that the conspirators agreed to enter a price fixing agreement for the purpose of "pricing below a measure of cost." *Id.* A party's failure to allege specifics as to the entrance and object of the agreement will lead to the dismissal of a conspiracy claim. *See* *Matsushita, 475 U.S. at 595-96* (evidence that defendants agreed to fix minimum prices did not suggest predatory pricing conspiracy because such agreement indicated that defendants were seeking to place a floor under prices rather than to lower them, and evidence that tended to support the conspiracy "[said] little, if anything, about the existence of a conspiracy to charge below-market prices"); *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 340, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)* (affirming dismissal of a complaint where evidence indicated that defendants had abolished the featherbedding practice that was the "object of [the] conspiracy"); *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 535, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978)* ("The object of the conspiracy was to restrict St. Paul's **[*33]** policyholders to 'claims made' coverage by compelling them to 'purchase medical malpractice insurance from one insurer only, to wit defendant, St. Paul, and that [such] purchase must be made on terms dictated by the defendant, St. Paul.'"); *In re Ins. Brokerage, 618 F.3d at 321* ("[I]n many cases where an agreement exists, parallel conduct—such as setting prices at the same level—is precisely the concerted action that is the conspiracy's object. Accordingly, we must define the object of the horizontal agreement alleged in the complaint.") (citation omitted); *Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 179 (3d Cir. 2010)* ("Specifically, Great Western has failed to allege except in general terms the approximate time when the agreement was made, the specific parties to the agreement . . . the period of the conspiracy, or the object of the conspiracy."); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 226 (3d Cir. 2008)* ("Toledo also presented sufficient evidence that "the objects of and the conduct pursuant to th[e] contract or conspiracy were illegal."); *United States v. Sargent Elec. Co., 785 F.2d 1123, 1127 (3d Cir. 1986)* ("The illegal object **[*34]** of a Sherman Act conspiracy must be identified in terms of an intended or achieved effect upon commerce in a relevant market.").

Under this standard, BanxCorp argues that it has adequately alleged that Bankrate engaged in predatory price-fixing—that is, pricing below some measure of cost—with its partner-competitors, a *per se* violation of *§ 1*. (Pl. Opp. Br. at 10-14). [9] At its core, BanxCorp's theory rests on agreements between Bankrate and its co-branding partners

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[9] Although it briefly mentions rule of reason analysis in the alternative in the 4AC, BanxCorp argues exclusively under the *per se* rule **[*35]** in its opposition brief. (*See* Pl. Opp. Br. at 1, 10-14) (4AC ¶ 281) ("Defendant's horizontal market allocation and predatory price-fixing conduct constitutes a *per se* violation of the Sherman Act, since the restraints are presumptively

to switch pricing methods for the purpose of creating below-market rates that made it impossible for competitors to sustain their business. After clearing competitors from the field, Bankrate could, and did, increase its prices at will, thereby harming consumers. (*Id.* at 14-16). Bankrate argues that BanxCorp has failed to sufficiently plead that Bankrate and its co-branding partners shared a "unity of purpose" to price *below* any measure of cost, *i.e.*, to enter into a *predatory* price-fixing conspiracy. (Def. Moving Br. at 14-15). The Court finds that Defendant has the better of this argument.

HN19[] At step two of the Third Circuit's three-step analysis, the Court identifies allegations that—without factual support—would not be entitled to the assumption of truth because they would be no more than mere conclusions. *See* Burtch, 662 F.3d at 221. The following is a list of predatory price-fixing allegations from the First Claim in the 4AC:

> Defendant has illegally restrained trade in **[*36]** the market for Bank Rate Websites in violation of Section 1 of the Sherman Act as follows:
> a. by engaging in predatory pricing;
> b. by entering into approximately 130 exclusionary agreements with partners and competitors that granted Defendant the sole authority and/or exclusive right to sell rate table listings on the Internet at a fixed price on behalf of Defendant's cartel, also referred to as a "network";
> c. by forming a predatory Price-Fixing Cartel with more than 100 partners and competitors that together control more than 300 websites;
> d. by colluding and entering into agreements to divide markets, and allocate revenues, customers, products and Internet traffic with approximately 130 partners and competitors that together control more than 300 websites, including promotional, placement and/or minimum payment guarantees;
>
> Defendant's horizontal market allocation and predatory price-fixing conduct constitutes a *per se* violation of the Sherman Act, since the restraints are presumptively anticompetitive due to their predictable and pernicious anticompetitive effect, and limited potential for procompetitive benefit. (4AC ¶¶ 280-281).

These allegations are conclusory with respect to the alleged **[*37]** predatory price-fixing conspiracy. They merely allege that Bankrate engaged in predatory pricing, formed a predatory price-fixing cartel, and colluded with partners to enter into agreements to divide the market. Without more, these allegations evince no "unity of purpose" among Bankrate and its co-branding partners to depress prices. Such conclusory allegations are not entitled to the presumption of truth. *See* Burtch, 662 F.3d at 221. Therefore, the Court proceeds to **HN20**[] step three of the Third Circuit's analysis to determine whether these bare allegations are echoed elsewhere in the 4AC by well-pled allegations, and whether those allegations "plausibly give rise to an entitlement for relief." *Id.* In its analysis below, the Court finds that although BanxCorp includes numerous allegations related to a conspiracy to fix prices, Plaintiff fails to adequately plead that the purported conspirators agreed to join a predatory price-fixing conspiracy for the purpose of forcing prices below a measure of cost, the key requirement under Plaintff's chosen theory.

The following is a list of allegations in the 4AC related to the nature of the conspirators' agreements from which the Court must determine **[*38]** whether Bankrate and its co-branding partners shared the requisite "unity of purpose":

> [C]o-branding partnership agreements granted Defendant the sole authority and/or exclusive right to sell rate table listings on the Internet at the same price on behalf of Defendant's cartel or "network," first on a flat fee basis (from the late 1990s until October 1, 2005), and after October 1, 2005 on a cost-per-click ("CPC"). . . . This enabled Defendant to essentially charge any fixed price across its "network" at will, either through predatory fixed pricing below cost until any remaining independent competitor was (a) forced to join Defendant's cartel; (b) forced to exit the relevant market; or (c) driven out of business; or by charging supra-competitive fixed prices, as Defendant subsequently did after 2006. (4AC ¶¶ 21-22).

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anticompetitive due to their predictable and pernicious anticompetitive effect, and limited potential for procompetitive benefit. In the alternative, these claims would require an analysis under the quick look approach, or at a minimum, under the rule of reason."). This is a risky strategy. *In re Ins. Brokerage, 618 F.3d at 319 n. 16* (acknowledging that plaintiff permanently abandoned its rule of reason analysis argument where it pled rule of reason in its first amended complaint but argued exclusively for *per se* analysis in the second amended complaint and moving papers).

> In order to create a monopoly, Defendant's Hyperlink CPC ("Hyperlink CPC") rate listing prices were fixed in lockstep throughout its network and initially set below Defendant's average variable cost. Then, after Defendant found itself secure in its monopoly, it started to ratchet up its prices. (*Id.* ¶ 23).
>
> Defendant started providing its rate tables to The Wall Street Journal's **[*39]** print edition and the WSJ.com co-branded website enabled Defendant's Central Sales Force to control and subsequently fix the CPC prices charged to financial service providers, in parallel with its network of Partner Sites. (*Id.* ¶ 142).
>
> In addition to its own organic traffic websites Bankrate.com, Interest.com and Bankaholic.com, Defendant has assembled an Online Network of more than 300 Partner Sites through partnership agreements with approximately 130 competing counterparties. (*Id.* ¶ 155).
>
> These approximately 130 co-branding agreements granted Defendant the sole authority and/or exclusive right to sell rate table listings on the Internet at a fixed price and collect and allocate CPC revenues on behalf of Defendant's cartel or "network" consisting of more than 300 websites. (*Id.* ¶ 156).
>
> The purpose of the contracts, combination and conspiracy between Bankrate.com and the approximately 130 members of Defendant's cartel or "network," was to coordinate pricing for the mutual benefit of the members of the cartel, at the expense of independent competitors or potential competitors, buyers and sellers, and other market participants. (*Id.* ¶¶ 175).

In each of these paragraphs, BanxCorp fails to **[*40]** adequately allege the conspirators' intention to join a below-rate, predatory price-fixing scheme. For example, although BanxCorp alleges that Bankrate developed a co-branded website with WSJ.com that "enabled Defendant's Central Sales Force to control and subsequently fix the CPC prices charged to financial service providers," the allegation fails to explain how Defendant used its "control" to push down the CPC prices it charged to financial providers. Additionally, the allegation fails to evince an intention by WSJ.com to enter into the agreement *so that* Bankrate could push down pricing in a predatory manner. (*See id.* ¶ 142). Although Plaintiff alleges that Bankrate entered into co-branding agreements with 130 partners that "granted Defendant the sole authority and/or exclusive right to sell rate table listings on the Internet at a fixed price," the allegation fails to explain how Defendant used its exclusive authority to drive prices below some measure of cost. The allegation also fails to show how providing Bankrate with exclusive discretion over sales and pricing could mean that the purported co-conspirators had any intention of signing the contract *for the purpose* of having Bankrate **[*41]** push prices down. (*See id.* ¶ 156). Similarly, Plaintiff's allegation that Bankrate set prices "for the mutual benefit of the members of the cartel," does not evince an intention on the part of the co-conspirators to have Bankrate set prices in a predatory, below-cost manner. (*See id.* ¶ 175).

In an effort to support its allegations with direct evidence, BanxCorp further alleges that Bankrate and its purported co-conspirators planned and carried out its anticompetitive conduct by:

> a. Participating in meetings, conversations and communications with competitors to discuss the CPC prices to be charged to financial service providers for listing their rates on a Bank Rate Website;
> b. Agreeing with competitors at the same level of market structure to charge Bank Rate Website Hyperlink CPC prices at certain levels to be sold to certain financial service providers;
> c. Issuing CPC price quotations in accordance with the agreements reached;
>
> d. Agreeing to let Bankrate sell Bank Rate Website Hyperlinks on behalf of each partner in the Price-Fixing Cartel at CPC prices *they knew to be fixed* pursuant to the conspiracy described above . . . . (*Id.* ¶ 161) (emphasis added).
>
> [F]acilitat[ing] explicit or tacit **[*42]** collusion through practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration. (*Id.* ¶ 177(k)).

In further support of these allegations, BanxCorp cites to a series of contracts and meetings that supposedly demonstrate the requisite "unity of purpose" among Bankrate and its co-branding partners. The Court first evaluates the contracts, and then the meetings.

As to the contracts, BanxCorp cites language like the following, which appears in numerous co-branding contracts:

> Bankrate shall have the exclusive right to sell and collect fees for advertisements, including Hyperlink Advertisements within Rate Tables and Display Advertisements on the Rate Query Pages, the Rate Results Pages, the Linked Bankrate Site, and, with the exception of the Leaderboard, the Bankrate Content Pages (collectively, the "Bankrate Advertisements"). MSI shall not interfere with Bankrate Advertisements in any manner. (4AC Ex. A, D.E. 169-1, at *1, 33) (Contracts between Move Sales, Inc. and Bankrate dated July 24, 2007 and August 1, 2008).

For two reasons, the Court finds that the exclusivity provisions of these contracts—the only provisions that arguably **[*43]** evince direct evidence of the co-conspirators' intent—fall short of providing adequate support that the purported co-conspirators entered into the agreements for the purpose of pricing below-market. First, the exclusivity provision—"Bankrate shall have the exclusive right to sell and collect fees"—gives discretion to Bankrate, but does not explain whether Bankrate is to increase prices, decrease prices, or keep them the same. This provision, therefore, shows no intention on the part of the co-branding partner to enter an agreement so that Bankrate would push prices in any particular direction. Additionally, the agreement does not demonstrate an intention to give Bankrate pricing discretion so that they would alter pricing for purposes of driving competitors out of business. Second, the provision explicitly states that the purported co-conspirator "shall not interfere with Bankrate Advertisements in any manner." Based on this language, even if Bankrate alone had the intention to use its discretion to price below a particular measure of cost to drive competitors from the marketplace, the agreement explicitly demonstrates how such a choice would be Bankrate's alone, and nothing in the **[*44]** complaint demonstrates that Bankrate's co-branding partners had any knowledge of this hypothetical intention. The exclusivity provision of the contracts—providing discretion to Bankrate to set prices in no particular direction, and explicitly forbidding the co-branding partner from interfering at all with the prices—clearly falls short of the types of direct evidence set forth in *Intervest. See* *340 F.3d at 162-63* (listing threats to cut prices or cut off supply as examples of direct evidence that demonstrate a predatory price-fixing conspiracy). Here, the exclusivity provisions demonstrate only an intention by co-branding partners to give discretion to Bankrate.

As to meetings, *Intervest* explains that ***HN21***[] "a memorandum produced by a defendant conspirator detailing the discussions from a meeting of a group of alleged conspirators" would be sufficient direct evidence of a predatory price fixing conspiracy. *Id. at 163*. Here, the meetings discussed in the complaint fall short of that standard:

> There is enough factual matter . . . to prove that Defendant Bankrate and approximately 130 horizontal competitors and partners [have engaged in anticompetitive conduct by] [p]articipating in meetings, **[*45]** conversations and communications with competitors to discuss the CPC prices to be charged to financial service providers for listing their rates on a Bank Rate Website. (4AC ¶ 161);

> This plan was summarized by [Bankrate's CEO, Tom] Evans, during its Q3 2006 Earnings Conference Call, as follows: "Our plan is to grow our paid search budget in a methodical and thoughtful way so that the money is spent in concert with ad sales demand so as to generate high rates of return. We expect to grow that spending, quarter by quarter, until we reach the point where we see returns diminishing below a targeted level. The benefits of doing so are pretty obvious. It drives additional traffic to the site that we are working concurrently to monetize. As we grow this capability, it should increase both our traffic and our revenue." (*Id.* ¶ 194) (Statement by CEO Evans during Q3 2006 Earnings Conference Call).

These two allegations are the closest BanxCorp comes to providing evidence of meetings where discussions about anticompetitive activity may have been held between Bankrate and the co-conspirators. Any other mentions of meetings in the 4AC concern Board meetings or merger discussions between Bankrate **[*46]** and BanxCorp, (*id.* ¶¶ 30 n.9, 125-28, 146 n.34, 269 n.47). The allegations above, reviewed in connection with BanxCorp's other allegations, fall short of providing adequate support that the purported co-conspirators met, conversed, or communicated for the purpose of pricing below-market. First, BanxCorp offers no evidence that the object of the conspiracy was discussed at these meetings. Second, they offer no evidence that would tend to prove that co-branding partners were even present at these meetings. Indeed, the allegation relating to Mr. Evans's statement during the Q3 Earnings Conference Call demonstrates, at most, an intent on *Bankrate's* part to price below cost.

There is no mention in either of these paragraphs of any role played by co-branding partners in Bankrate's pricing determinations. BanxCorp's allegation of "meetings, conversations, and communications" is entirely conclusory and is not the type of direct evidence of a predatory price-fixing conspiracy that the Third Circuit has found sufficient. *See* InterVest, 340 F.3d at 162-63 (citations omitted) (listing "a memorandum produced by a defendant conspirator detailing the discussions from a meeting of a group of alleged **[*47]** conspirators" and "a public resolution by a professional association recommending that its members withdraw their affiliation with an insurer" as sufficient to prove this element).

In an effort to support its allegations of a predatory agreement with circumstantial evidence, BanxCorp generally alleges that before the execution of co-branding agreements, prices were higher, but after executing the co-branding agreements, prices decreased, and therefore the agreements must have been executed with the intention of predatory pricing:

> Prior to October 1, 2005 Defendant as well as Plaintiff and other Bank Rate Websites charged financial service providers a flat monthly fee to list their rates. (4AC ¶ 178).
>
> On October 1, 2005, exercising Defendant's sole authority and exclusive right to sell rate table listings on the Internet at a fixed price on behalf of its entire cartel or "network" of Partner Sites, Bankrate introduced a predatory CPC pricing structure, thus taking unfair advantage of its dominant position in the relevant market and suppressing competition even further. . . . After October 1, 2005 participating financial service providers now pay Bankrate each time a consumer clicks on **[*48]** its Bank Rate Websites' rate listings or telephone number icons. (*Id.* ¶ 179-180).
>
> Based on the foregoing, the structure of the relevant market at the time and other related cost factors, Bankrate's CPC price starting on October 1, 2005 was set below its average variable cost. (*Id.* ¶ 182).

The Court finds that the allegations fall short of adequately showing an intention on the part of the co-branding partners to join a conspiracy for the purpose of pushing prices down, because the mere existence of similar contracts signed by numerous parties during the same time frame does not on its own demonstrate intent. *See* In re Ins. Brokerage, 618 F.3d at 322 (citing Elevator Antitrust Litig., 502 F.3d 47, 51 (2d Cir. 2007) ("finding that allegations that the defendants used similar contractual language did not plausibly imply conspiracy because 'similar contract language can reflect the copying of documents that may not be secret'"). Additionally, because BanxCorp does not allege that the co-conspirators set prices themselves, or played a role in setting prices, there is no circumstantial evidence suggesting parallel conduct from which the Court can discern a possible price-*reduction* agreement. **[*49]** *See* In re Ins. Brokerage, 618 F.3d at 322 (discussing parallel conduct as circumstantial evidence of conspiracy).

Plaintiff fails to provide any evidence—direct or circumstantial—plausibly suggesting a unity of purpose, a common design and understanding, or a meeting of the minds among Bankrate's partner-competitors to engage in predatory pricing, *i.e.*, pricing below cost. Accordingly, because the Plaintiff has failed to adequately allege the first element of its § 1 claim, the Court will not address the second element.

Although the Court has found that Plaintiff's § 1 claims based on its predatory price-fixing theory should be dismissed, it will briefly address Bankrate's remaining arguments.

3. Contradictory Statements

Bankrate argues that the predatory price-fixing claim is premised on contradictory allegations, because the 4AC alleges, on the one hand, that Bankrate's pre-2002 pricing scheme was predatory and, on the other hand, the market remained competitive at the same time. Specifically, Bankrate argues:

> Bankrate began pricing below average variable cost in 2005. Notwithstanding that allegation, BanxCorp also pleads that Bankrate began providing "free Internet rate listings . . **[*50]** . to financial service providers since 1996" as well as "below-cost rate listing fees." BanxCorp further alleges that before 2002 the relevant market

> was competitive; no single market participant had a greater than 25% market share; and "participating financial service providers were charged competitive flat monthly fees to list their rates on a Bank Rate Website.

(Def. Moving Br. at 16) (citations omitted). Bankrate argues that these seemingly contradictory factual allegations "make it impossible to understand the basis for the predatory price-fixing claim and thus render the claim meaningless." *Id.* Bankrate cites to Ninth and Eleventh Circuit cases to support its argument. BanxCorp does not address the argument in its brief.

The quoted paragraphs, read alone and in the context of the Complaint and the conspiracy alleged, indicate that these paragraphs and allegations do not contradict each other. It appears that BanxCorp is alleging that Bankrate initially charged below variable cost beginning in the mid-1990s with its monthly flat fee model. The market remained healthy as Bankrate attempted to set up its field-clearing predatory pricing scheme until at least 2002, when the market **[*51]** became anti-competitive. Then by 2005, when Bankrate had successfully cleared competitors from the field, they began pushing up rates. This story, when accepted as true, would not be contradictory on its face, and would be supported by the evidence alleged by BanxCorp: that Bankrate entered its first anticompetitive contract with The Wall Street Journal in 2002 (4AC ¶¶ 26, 137, 139, 140, 141) (the Wall Street Journal contract); that Bankrate became profitable thereafter (4AC ¶ 131) (profitability in 2002); and that rate increases followed. (4AC ¶ 71) (rate increases).

4. Economic Implausibility

Bankrate argues that even if BanxCorp's predatory price-fixing theory was adequately pled, the claim is still subject to dismissal because it would make no economic sense for Bankrate's partner-competitors to join in a predatory price-fixing scheme where they share 50% of profits made from charging incredibly low rates. (Def. Moving Br. at 17).

The Court need not address the merits of Bankrate's economic motive argument. It is well settled that ***HN22***[] at the summary judgment stage a court may dispose of an antitrust conspiracy claim in "the **[*52]** absence of any plausible motive to engage in the conduct charged[.]" *Matsushita, 475 U.S. at 596 (1986)*. *Matsushita and Regency Oldsmobile, Inc. v. General Motors Corp., 723 F. Supp. 250 (D.N.J. 1989)*, on which Bankrate relies, were both postured at summary judgment. *See* *Matsushita, 475 U.S. at 576*; *Regency, 723 F. Supp. at 252*. The Court is unaware of any case in this Circuit that allows for dismissal of a claim based on implausible economic theories *at the pleading stage.* In any case, the facts pled here are not so implausible as to affect the sufficiency of the pleading. (*See* 4AC ¶ 109) ("Therefore, these independent website operators no longer had any incentive or a need to handle their own redundant back-office services."); Neither party has offered any cases to the contrary, or even addressed this issue in its brief. The Court sees no reason to address the issue now. Similar to the Third Circuit's approach in *Howard Hess*, the Court sees no reason to decide which line of cases—those addressing economic implausibility at the pleading stage, versus those addressing it at the summary judgment stage—is correct. *See* *Howard Hess, 602 F.3d at 257 n. 9*) ("We need not decide here which **[*53]** line of cases has it right.") (emphasis added).

C. Sherman *§ 2*: Monopolization or Attempt to Monopolize

1. Legal Standard: Sherman Act, *15 U.S.C. § 2*

BanxCorp brings its monopolization claim under *§ 2* of the Sherman Act, which provides: ***HN23***[] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony." *15 U.S.C. § 2 (2006)*. ***HN24***[] The offense of monopoly has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966).

HN25[] As to the first element, the Supreme Court has defined monopoly power as "the power to control prices or exclude competition." United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). "The existence of such power ordinarily may be inferred from the predominant share of the market." Grinnell Corp., 384 U.S. at 571 ("87% of the accredited central station service **[*54]** business leaves no doubt that the congeries of these defendants have monopoly power"); *see, e.g.*, Am. Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946) ("over two-thirds of the entire domestic field of cigarettes" and "over 80% of the field of comparable cigarettes" constituted "a substantial monopoly").

HN26[] Monopoly power may be proven by direct or indirect evidence. "'The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output.'" Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007) (citations omitted). "To support an inference of monopoly power, a plaintiff typically must plead and prove that a firm has a dominant share in a relevant market, and that significant 'entry barriers' protect that market." *Id.* (citations omitted). "Barriers to entry are factors, such as regulatory requirements, high capital costs, or technological obstacles, [which] prevent new competition from entering a market in response to a monopolist's supracompetitive prices." *Id.* (citing Matsushita, 475 U.S. at 591 n.15 ("[W]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.")).

HN27[] "Proving **[*55]** the existence of monopoly power through indirect evidence requires a definition of the relevant market." *Id.* "The scope of the market is a question of fact as to which the plaintiff bears the burden of proof." *Id.* (citations omitted). "Competing products are in the same market if they are readily substitutable for one another; a market's outer boundaries are determined by the reasonable interchangeability of use between a product and its substitute, or by their cross-elasticity of demand." *Id.* (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)). Failure to define the proposed relevant market in these terms may result in dismissal of the complaint (or claim). *See* Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 436. (3d Cir. 1997).

HN28[] As to the second element, "the acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor." Broadcom, 501 F.3d at 308 (citing Verizon Communs., Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)). "Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some **[*56]** basis other than the merits." *Id.* (citation omitted). "Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive." *Id.* (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604-05, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)). "Conduct that merely harms competitors, however, while not harming the competitive process itself, is not anticompetitive." *Id.* (citing Brooke Grp., 509 U.S. at 224 (1993) ("It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'") (citations omitted)).

2. Sufficiency of Plaintiff's § 2 Monopoly Claim

BanxCorp alleges that Bankrate has obtained a monopoly in the relevant market. [10] Specifically, it alleges:

> Bankrate has monopoly power in the market for Bank Rate Websites, having since 2003 captured and maintained a market share of approximately 95%. (4AC ¶ 287).
>
> Bankrate is maintaining and extending its monopoly power through the predatory and exclusionary conduct described above, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. (*Id.* ¶ 288).

[10] Based on this Court's review of the moving papers, Bankrate does not appear to be challenging the definition of the relevant market. Therefore, the Court accepts BanxCorp's definition of the relevant market for purposes of deciding this motion.

> Substantial barriers to entry exist in the relevant market. (*Id.* **[*57]** ¶ 289).
>
> There is no legitimate business justification for Bankrate's monopolization conduct. (*Id.* ¶ 290).
>
> Defendant's anticompetitive conduct has had a significant adverse effect on competition in the market for Bank Rate Websites, causing direct and proximate harm to financial service providers—the customers—and to consumers—the end users. (*Id.* ¶ 291).
>
> The anticompetitive actions of Defendant have directly injured BanxQuote in its business and property and its injuries and damages are ongoing. (*Id.* ¶ 292).

Bankrate challenges this monopolization claim "except as [it] pertain[s] to alleged predatory pricing based on Bankrate's switch to cost-per-click ("CPC") pricing." However, it makes the Court's job in evaluating the challenge particularly difficult by not discussing the specific elements of a monopoly claim. Instead, it attacks the theories underpinning the claims themselves. Bankrate does not direct any arguments at the monopoly claims specifically. **[*58]** Raising such global pleading arguments makes it unclear to the Court which arguments relate to which claims, and therefore, the specific basis on which Bankrate believes that BanxCorp has failed to plead particular elements of either the *§ 1* or *§ 2* claims. *See* *In re Hypodermic Prods. Antitrust Litig., No. 05-1602, 2007 U.S. Dist. LEXIS 47437, 2007 WL 1959224, *9 (D.N.J. June 29, 2007)*. Discussing the specific elements of a *§ 2* monopoly claim is particularly important because ***HN29***[] it is possible for a plaintiff to unsuccessfully plead a *§ 1* conspiracy claim but sufficiently plead a *§ 2* unilateral action claim in the same complaint. *See, e.g.,* *Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98, 110-12 (3d Cir. 1992)* (considering *§ 2* of the Sherman Act claims after rejecting claims based on the same evidence under *§ 1* of the Sherman Act). Nevertheless, the Court attempts to evaluate BanxCorp's claims in light of Bankrate's arguments. Importantly, in its opposition brief, BanxCorp responds to Bankrate's challenge by discussing a supposed distinction between monopoly and monopoly power and reiterating evidence presented in the 4AC. (Pl. Opp. Br. at 26-28).

BanxCorp offers statistics to support the first element, possession of **[*59]** monopoly power. Specifically, BanxCorp alleges:

> BanxQuote's market share and consequential revenues have declined at a rate of approximately 25% annually, year after year, for at least four years, while its costs of capital increased and its access to the capital markets was foreclosed. Furthermore, Defendant drove Plaintiff out of business, as well as any other independent competitors, who did not either agree to be acquired or join its "network" or cartel, such as for example Bankaholic, MMIS/Interest.com, LendingTree, Move.com, Realtor.com, Ratecatcher.com and BankCD.com. (4AC ¶ 258).
>
> Bankrate controls over 95% of the relevant market share. (*Id.* ¶ 91(a)).
>
> In January 1999, approximately 44% of the total traffic to Bankrate.com originated from its co-branding partners. (*Id.* ¶ 135).

One of BanxCorp's exhibits also indicates that by 2002, only 30% of Bankrate's total traffic originated from its co-brand sites. (*Id.* Ex. B at 1). Finally, it describes the current market after monopolization to be:

> a. Market Concentration: Bankrate controls over 95% of the relevant market share.
> b. Price-Fixing Cartel: more than 300 competing Partner Sites joined Bankrate's Price-Fixing Cartel.
>
> c. Lack of Competitive **[*60]** Pricing: Prices charged to customers became inelastic.
> d. Independent Competitors Pushed Out or Acquired: Independent Bank Rate Websites were forced to join Bankrate's Price-Fixing Cartel or exit the market, or were bought out by Bankrate, as in the case of MMIS/Interest.com and more recently Bankaholic. (4AC ¶ 91).

The allegations above, when accepted as true, are sufficient to plead the first element of this claim. The level of market share, 95%, is higher than what the Supreme Court has found sufficient to establish monopoly power. [11] The fact that less and less of Bankrate's traffic comes from its partners—and more and more results come from its own conduct—also supports the idea that Bankrate is dominant in the market.

BanxCorp's allegations also sufficiently answer each of Bankrate's arguments relating to exclusionary conduct. The first argument—that BanxCorp has failed to sufficiently plead that it was foreclosed from selling its products in the relevant market—is adequately rebutted by the following statements by BanxCorp: its statement of market share and revenue loss (*id.* ¶ 258); Mr. Evans's statement that "Bankrate does not have direct competitors" **[*61]** (*id.* ¶ 146); and Mr. Evans's statement that "one of the things that is a tremendous gating item for [Bankrate], we believe is in terms of competition, and barriers for competition, is how does anybody else break into this, if we have tied up all the best newspaper relations, the best co-brand relationships." (*Id.* ¶ 87).

Bankrate's second argument is that there was no market foreclosure. The plausibility of market foreclosure is supported by the inelasticity in the market described by Mr. Evans when he states that, despite a number of rate increases within three years, lenders "don't vote with their feet. They don't leave. They are not canceling. They are not finding alternatives." (*Id.* ¶¶ 69). *See* *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc., 159 F.3d 129, 141 (3d Cir. 1998)* (***HN30***[] "A sufficient pleading 'requires something more, which may include . . . the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand.'") (citation omitted). Market foreclosure is further supported by Mr. Evans's statements implying market foreclosure, such as: "How does anybody else get into this business and compete with Bankrate? I look at it **[*62]** as both an offensive marketing opportunity, as well as a defensive opportunity." (4AC ¶ 87).

Bankrate's final argument—that a one-year contract is not restrictive to the effect condemned by the antitrust laws—is correct, but that fact alone is insufficient to negate the second element of a *§ 2* antitrust claim. As Bankrate argues, ***HN31***[] it is true that a one-year contract, taken alone, does not violate the antitrust laws. *See* *LePage's Inc. v. 3M, 324 F.3d 141, 180 (3d Cir. 2003)* ("Even assuming, however, that 3M did have exclusive contracts with some of the customers, LePage's has not demonstrated that 3M acted illegally, as one-year exclusive contracts have been held to be reasonable and not unduly restrictive.") (citation omitted). However, the mere fact that the one-year exclusivity provision in the co-branding agreement does not violate the antitrust laws does not mean that BanxCorp's allegations do not demonstrate that Bankrate unreasonably restrained competition, when viewed in totality. *See* *id. at 162* (holding that a court should consider a defendant's anticompetitive conduct "as a whole rather than considering each aspect in isolation"); *Fed. Trade Comm'n v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 395-96, 73 S. Ct. 361, 97 L. Ed. 426, 49 F.T.C. 1730 (1953)* **[*63]** (stating that the FTC had found that the term of one-year exclusive contracts had become a standard practice and would not be an undue restraint on competition, but holding that evidence sustained the Commission's finding that the distributor's exclusive screening agreements with theater operators unreasonably restrained competition). As in *Federal Trade Commission*, allegations in the 4AC, taken together, when accepted as true, plausibly support a showing of the first element, monopoly power. *See* *id. at 396-97*.

HN32[] The second element requires a showing of maintenance of the monopoly power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell, 384 U.S. at 570-71*. Conduct that would satisfy this element includes conduct that would foreclose competition, allow Bankrate to gain a competitive advantage, or destroy a competitor. BanxCorp's allegations of price-fixing and exclusionary conduct, as discussed above, clearly support this element enough to present a claim that is plausible on its face, because "conduct that impairs the opportunities of rivals and either does not further competition on the merits or does **[*64]** so in an unnecessarily restrictive way may be deemed anticompetitive." *Broadcom, 501 F.3d at 308* (citation omitted). For example, Plaintiff alleges:

> During the summer of 2002, Bankrate offered WSJ to enter into a revenue-sharing agreement, waiving the annual license fees that WSJ had been paying BanxQuote, in order to break up and take over the WSJ-

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[11] *See* Part III.C.1 above.

> BanxQuote contracts, by persuading WSJ to join Defendant's "network." This agreement essentially granted Defendant the exclusive right to sell rate table listings on the Internet on behalf of WSJ.com on a "network" basis. Defendant's conduct did not make any economic sense but for the harm it caused to Plaintiff and other competitors. (4AC ¶ 137).

This allegation mentions conduct—an agreement that allowed Bankrate to set rates in exchange for waiving annual license fees—that would certainly impair the opportunities of rivals for whom waiving license fees was not feasible and who were, as a consequence, excluded from doing business with the Wall Street Journal. Taken as true, this practice would either foster anticompetitive behavior or not further competition because it would force competitors to suffer losses until either Bankrate or its **[*65]** competitor was driven out of the market.

The closest Bankrate comes to challenging this element is its argument that the exclusionary conduct theory is legally defective because the factual allegations underlying the theory "are at odds with the facts alleged in the balance of the 4AC, and with the facts alleged in this case in every version of the complaint filed since 2008." (Def. Moving Br. at 20). Bankrate argues that in its conspiracy claim, BanxCorp alleges that Bankrate and its media co-branding partners are competitors who entered into *per se* illegal horizontal price fixing agreements through the co-brand contracts. In the exclusionary conduct claim, however, BanxCorp alleges that it was denied access to an essential distribution channel—the media outlets—as a result of Bankrate's agreements with those media outlets. Bankrate argues that these allegations are mutually exclusive. *Id.* It is not possible, Bankrate argues, for the media outlets to be horizontal competitors of Bankrate and BanxCorp in the relevant market, but at the same time to be the "key internet traffic pipeline" needed to "permit Plaintiff and other independent firms to compete in the relevant market." *Id.* (citation **[*66]** omitted). "Stated another way, co-brand contracts that provided Bankrate with the 'sole authority and/or exclusive right to sell rate table listings on the Internet at a fixed price . . .' cannot be a *per se* illegal price-fixing agreements between [horizontal] competitors and also be the very same [vertical] gating item that prevents BanxCorp from distributing its product." (Def. Moving Br. at 20) (citing 4AC ¶ 280(b)). Plaintiff does not address this argument in its opposition brief.

It is true that ***HN33***[] pleading contradictory facts to support different claims is grounds for dismissal of those claims. *See Bailey-El v. Fed. Bureau of Prisons, 246 F. App'x 105, 109 (3d Cir. 2007)*; *Georges v. Ricci, No. 07-5579, 2008 U.S. Dist. LEXIS 38315, 2008 WL 2036799, at *3 (D.N.J. May 9, 2008)*. But BanxCorp does not appear to be advancing completely contradictory theories. BanxCorp appears to be arguing that Bankrate engaged in both horizontal and vertical exclusionary conduct with a whole host of entities. Horizontally, it engaged in anticompetitive conduct with its competitors—*i.e.*, other businesses, such as LendingTree—that aggregated rate tables and offered the same services to their customers as Bankrate. (*See, e.g.*, 4AC Ex. **[*67]** A at 1, Contracts between Move Sales, Inc. and Bankrate dated July 24, 2007 and August 1, 2008). Vertically, it allegedly engaged in exclusionary conduct through exclusive dealing contracts with media outlets such as the New York Times. (*See* 4AC ¶ 159 ("Bankrate has locked up the largest and most important newspapers for print distribution of its rate tables, consisting of 500+ newspapers nationwide, which are linked through credit captions to its website Bankrate.com, thus providing significant brand value, publicity and promotional support for its Bank Rate Website."); ¶ 160 (alleging that BanxCorp also provides a geographic breakdown of the media outlets)). Although BanxCorp's horizontal/vertical distinction is not a model of clarity, the allegations do not appear to be contradictory in the way Bankrate describes. Therefore, the Court finds that BanxCorp has sufficiently pled its monopoly claim under *§ 2*.

3. Sufficiency of Plaintiff's *§ 2* Attempted Monopoly Claim

HN34[] To state a claim for attempted monopolization, a plaintiff must establish "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability **[*68]** of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

HN35[] As to the first element, "a firm engages in anticompetitive conduct when it attempts to exclude rivals on some basis other than efficiency" or when it competes "on some basis other than the merits." *West Penn, 627 F.3d* at 108-09 (citing Aspen Skiing, 472 U.S. at 605). "Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive." Id. at 108 (citing Broadcom, 501 F.3d at 308). "'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." LePage's, 324 F.3d at 152 (citation omitted). Allegations raised under § 1 may be a proper basis on which to predicate a § 2 claim. *See, e.g.,* Matsushita, 475 U.S. at 590 ("These observations apply even to predatory pricing by a single firm seeking monopoly power."); Advo, Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1198-99 (3d Cir. 1995) (determining whether plaintiff satisfied this element by analyzing only plaintiff's allegation **[*69]** of § 1 predatory pricing conspiracy).

HN36[] As to the second element—specific intent to monopolize?"a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were not 'predominantly motivated by legitimate business aims.'" Penn. Dental Ass'n v. Med. Serv. Ass'n of Penn., 745 F.2d 248, 260-61 (3d Cir. 1984) (quoting Times Picayune Publ'g Co. v. United States, 345 U.S. 594, 627, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)). "Direct evidence of specific intent need not be shown; it may be inferred from predatory or exclusionary conduct." Penn. Dental Ass'n, 745 F.2d at 261 (citing Interstate Circuit, 306 U.S. at 208, 59 S. Ct. 467, 83 L. Ed. 610).

HN37[] As to the third element, "'[a] dangerous probability of monopoly may exist where the defendant firm possesses a significant market share when it undertakes the challenged anticompetitive conduct.'" Barr Labs., 978 F.2d at 112 (quotation and citation omitted). However, alleging market share alone is insufficient to properly plead attempted monopolization. Crossroads Cogeneration, 159 F.3d at 141. A sufficient pleading "requires **[*70]** something more, which may include 'the strength of competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand.'" *Id.* (citation omitted). The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output. Broadcom, 501 F.3d at 307.

The allegations discussed under the Court's § 1 analysis sufficiently support the first element of this claim. BanxCorp alleges that Bankrate purposefully predatorily priced its rate listings below cost—and sometimes for free—in order to acquire customers from competitors and drive competitors out of the market. It further alleges that Bankrate entered into agreements with its distributors who gave Bankrate the exclusive right to advertise its tables throughout the United States. This predatory pricing theory is the type of conduct that the Third Circuit has found sufficient to satisfy this element. *See, e.g.,* Advo, 51 F.3d at 1198-99 (determining whether plaintiff satisfied this element by analyzing only plaintiff's allegation of § 1 predatory pricing conspiracy). Mr. Evans's statements—"[w]e think we are in **[*71]** some cases under priced relative to the value. And we think that we will try to reconcile that and rectify that over time" (4AC ¶ 69), and "[s]ome of the guys that are our partners, they're also competitors" (*id.* ¶ 169)—support a unilateral predatory pricing theory under this element because they serve as acknowledgement on Bankrate's part that its prices were below what is needed to attract customers; Bankrate intended to increase its prices after reaching a certain threshold; and it was doing business with competitors in the same market. [12]

The second element—specific intent to obtain a monopoly—is equally satisfied. BanxCorp offers several statements by Bankrate's CEO, Tom Evans, which would indicate a specific intent on the part of Bankrate to obtain a monopoly. The statements include:

> And some people have better business models and obviously better at converting than others, but because of that, we are pretty confident about our ability to push rates. And again, nobody calls us and goes, hey, thanks for the rate increase, can I have another? **[*72]** But the fact is that they don't vote with their feet. They don't leave. They are not canceling. They are not finding alternatives. We think we are a fair value. (4AC ¶ 69).

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[12] Defendant's attacks on the predatory pricing and exclusionary conduct theories are dealt with throughout this opinion and are not addressed here.

> [T]he fact is we really haven't seen any exodus of advertisers. In fact, it's been just the opposite. We continue to grow our rate table-advertising base and have more lenders on the table than we did last quarter, and more than we had last year. . . . As of yesterday, August 1, we had 811 advertisers on our rate tables. Given that strength, given that demand, you are aware that we previously announced a 15% price increase for mortgage and home equity hyperlink clicks effective July 1. As Ed said, there's more news on the pricing front. This last week we announced to deposit advertisers a price increase effective August 15 of 25% per CD click, and 20% per money market click. . . . And you should know that neither increase has resulted in a decline in the number of advertisers."

(*Id.* ¶ 76; *see also id.* ¶ 87 ("One of the things that is a tremendous gating item for us, we believe is in terms of competition, and barriers for competition, is how does anybody else break into this, if we have tied up all the best newspaper **[*73]** relations, the best co-brand relationship[.]"); *id.* ¶ 146 ("Defendant's CEO Tom Evans acknowledged at a board meeting that Bankrate does not have direct competitors."); *id.* ¶ 81 (reporting more than a thousand advertisers in the first quarter of 2008)). Defendant does not raise any argument tailored to attacking this element.

The last element—that there is a dangerous probability of success—has also been sufficiently pled. The allegations found sufficient to satisfy the first element of the monopoly claim apply here with equal force. They include BanxCorp's allegation of Bankrate's 95% market share, Bankrate's ability to drive independent, non-compliant competitors—such as Bankaholic, MMIS/Interest.com, LendingTree, Move.com, Realtor.com, Ratecatcher.com and BankCD.com—out of the market, and the increase in traffic from 1999 to 2002 to Bankrate.com from sources other than Bankrate's co-branding partners. Mr. Evans's statements, referenced above for the propositions that the market is inelastic and that Bankrate has no direct competitors as a result of Bankrate's conduct also support this claim. The same is true for Mr. Evans's statements tracking an increase of advertisers from 811 **[*74]** in 2007 to more than 1,000 in 2008. (4AC ¶¶ 76-81). Defendant's argument that Plaintiff has failed to sufficiently plead market foreclosure, and that there was no market foreclosure, are unpersuasive for the same reasons as explained earlier in this opinion in Part III.C.2, where the Court discussed the sufficiency of BanxCorp's *§ 2* monopoly claim.

IV. DISMISSAL WITHOUT PREJUDICE

HN38[] *Fed. R. Civ. P. 15(a)(2)* allows a party to amend its pleading by leave of court when justice so requires. Leave to amend pleadings is to be freely given. *Fed. R. Civ. P. 15(a)(2)*; *see also* *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. The decision to grant leave to amend rests within the discretion of the court. *Id.* Leave to amend may be denied on the basis of undue delay or bad faith. *Id.* "Only when these factors suggest that amendment would be 'unjust' should the court deny leave." *Arthur v. Maersk, Inc., 434 F.3d 196, 203 (3d Cir. 2006)* (internal citations omitted).

HN39[] In determining whether an amendment should be denied for undue delay, the Court must "focus on the plaintiffs' motives for not amending their complaint to assert [the proposed] claim earlier[.]" *Adams v. Gould, 739 F.2d 858, 868 (3d Cir.1984)*. "There **[*75]** is no presumptive period in which a motion for leave to amend is deemed 'timely' or in which delay becomes 'undue.'" *Coulson v. Town of Kearny, No. 07-5893, 2010 U.S. Dist. LEXIS 3711, 2010 WL 331347, *3 (D.N.J. Jan. 19, 2010)*. "The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point, the delay will become 'undue,' placing an unwarranted burden on the court[.]" *Adams, 739 F.2d at 868*. "Delay may become undue when a movant has had previous opportunities to amend the complaint." *Cureton v. NCAA, 252 F.3d 267, 273 (3d Cir.2001)*. In other words, the Court should also consider whether "new information came to light or was available earlier to the moving party." *In re Adams Golf, Inc. Secs. Litig., 381 F.3d 267, 280 (3d Cir. 2004)*.

HN40[] Allegations of bad faith must pertain to Plaintiff's motives for not amending sooner, not to Plaintiff's alleged litigation strategy. *See* *Adams, 739 F.2d at 868* ("The question of undue delay, as well as the question of bad faith, requires that we focus on the plaintiffs' motives for not amending their complaint to assert this claim earlier; the issue of prejudice requires that we focus on the effect **[*76]** on the defendants.").

Bankrate argues that Plaintiff's new claims should be dismissed because of BanxCorp's undue delay and bad faith in bringing its current claims, and that "BanxCorp has not added claims it inadvertently omitted, of which it was unaware, or which it only learned of through discovery." (Def. Moving Br. at 27). Rather, it has attempted "to reformulate theories of liability that it has admitted are unsupportable (namely, price-fixing and exclusive dealing), and to change the elements of another claim (predatory pricing) that is implausible as pled. *Id.* Bankrate also argues that BanxCorp's bad faith is reflected in its pleading the exclusionary conduct claim in a conclusory manner. *Id.* at 29. "No specific facts are alleged in support of the claim because BanxCorp knows it cannot do so in good faith." *Id.* BanxCorp does not offer any factual allegations that "explain in any way how Bankrate's agreements with its co-brand[ing] partners prevented BanxCorp and competitors from selling their product to financial service providers." *Id.* at 30.

BanxCorp responds that there was no undue delay or bad faith on its part in bringing these claims because it could not have raised them **[*77]** earlier. It argues that the very documents on which its claims in this complaint were based were "secretly kept in the exclusive possession of Defendant and its partners." Further, the passage of time alone did not unfairly disadvantage or deprive Bankrate of the opportunity to present facts or evidence that it would have offered had the claims been raised earlier. (Pl. Opp. Br. at 28-30).

As explained in its discussion of previous decisions in this action, BanxCorp's claims do not appear to be new or different. In this complaint, BanxCorp alleges that Bankrate conspired with its partner-competitors, under *§ 1*, to engage in predatory pricing. Under *§ 2*, BanxCorp alleges that Bankrate unilaterally obtained a monopoly or attempted to obtain a monopoly through predatory pricing and exclusionary conduct. Based on the Court's review of the 3AC, it appears that these claims were also raised in the previous pleading. In that pleading, for example, BanxCorp alleged:

> The centerpiece of this action is a massive predatory pricing and price-fixing conspiracy between Bankrate and 100 of America's leading websites. More specifically, Bankrate has engaged in predatory pricing and price-fixing agreements **[*78]** with competitors, entered into a market division agreement, and engaged in mergers and acquisitions with other competitors that have helped create and enhance its monopoly power in the relevant market. (3AC ¶ 15).
>
> Bankrate's exclusionary conduct has effectively boxed BanxQuote and other competitors out of the market for Bank Rate Websites. The few remaining competitors in the relevant market at the moment are weak and increasingly starved of opportunities to attract meaningful traffic, transaction volume, and revenues. (*Id.* ¶ 100).
>
> Bankrate's exclusionary practices, combined with its monopoly power, have been used by Defendant as leverage to gain market share, foreclose competition, and potentially extend its dominance beyond the relevant market. (*Id.* ¶ 107(p)).

The sufficiency of that pleading is not for this Court to determine. The Court is satisfied that these claims and theories were raised before and were not dismissed by Judge Wigenton. *See* *"BanxCorp II", 2009 U.S. Dist. LEXIS 84151 at *2* (holding that predatory price-fixing conspiracy and exclusive dealing theory were adequately pled).

As to Bankrate's argument that BanxCorp has acted in bad faith by pleading the exclusionary conduct theory in a **[*79]** conclusory manner, the Court has already determined that this theory, as it relates to the *§ 2* claims, has been adequately pled and therefore the bad faith issue is moot.

Finally, the Court notes Bankrate's frustration with BanxCorp's pleading strategy:

> Given that this is BanxCorp's fifth attempt to plead the complaint, what was once deemed as sloppy pleading can now be seen for the strategic ploy that it is. BanxCorp uses imprecision and vagueness in order to intentionally muddle its pleadings to make the motion to challenge the pleading more complex, and as an excuse to expand the scope of discovery beyond the relevant market identified in interrogatories. Underlying all else, BanxCorp uses imprecision to keep an avenue open, so that when BanxCorp later decides on a new permutation of a theory of liability, it will point to a stray allegation in the complaint as a purported basis for the new theory. It should not be allowed to continue that game. (Def. Moving Br. at 31).

BanxCorp should take heed that the Court will not be amenable to any attempts by BanxCorp to shift its theories of liability this late in the game. But, for the foregoing reasons, the Court finds that Plaintiff has **[*80]** not unduly delayed in bringing the claims.

V. CONCLUSION

For the foregoing reasons, Defendant's motion is GRANTED as to the First Claim and DENIED as to the Second, Third, and Fifth claims. Plaintiff's *§ 1* predatory pricing conspiracy claim is dismissed without prejudice. The Court grants BanxCorp fifteen days to amend its First Claim, and only its first claim. An appropriate Order will follow.

/s/ Esther Salas

Esther Salas, U.S.D.J.

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Deborah Heart & Lung Ctr. v. Penn Presbypyterian Med. Ctr.

United States District Court for the District of New Jersey

December 30, 2011, Decided; December 30, 2011, Filed

Civil No. 11-1290 (RMB)(KMW)

Reporter

2011 U.S. Dist. LEXIS 149664 *; 2012-1 Trade Cas. (CCH) P77,760; 2011 WL 6935276

DEBORAH HEART AND LUNG CENTER, Plaintiff, v. PENN PRESBYPYTERIAN MEDICAL CENTER, et al., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Reconsideration denied by *Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr., 2012 U.S. Dist. LEXIS 55654 (D.N.J., Apr. 19, 2012)*

Summary judgment granted by *Deborah Heart & Lung Ctr. v. Virtua Health, Inc., 2015 U.S. Dist. LEXIS 36588 (D.N.J., Mar. 24, 2015)*

Core Terms

patients, anticompetitive, conspiracy, monopolize, antitrust, allegations, transferred, consumers, concerted action, specific intent, anti trust law, cardiac, effects, motion to dismiss, relevant market, geographic, quotation, transport, reasons, antitrust violation, alleged conspiracy, conspired, Elective, merits, prices, high prices, cardiology, assessing, provider, factors

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Judges: RENÉE MARIE BUMB, United States District Judge.

Opinion by: RENÉE MARIE BUMB

Opinion

BUMB, United States District Judge:

Plaintiff Deborah Heart and Lung Center ("Plaintiff"), a not-for-profit charity hospital, alleges two claims against the Defendants - Virtua Health, Inc. and Virtua Memorial Hospital Burlington County (the **[*2]** "Virtua Defendants"), Presbyterian Medical Center of the University of Pennsylvania Health System, University of Pennsylvania Health System, Penn Cardiac Care at Cherry Hill, and Clinical Health Care Associates of New Jersey, P.C. (the "Penn Defendants"), and The Cardiology Group, P.A. ("Defendant CGPA").

First, Plaintiff claims that the Defendants conspired with one another, in violation of *Section 1* of the Sherman Act, to exclude Plaintiff from the market for certain critical, advanced cardiac interventional procedures, thereby restricting consumers' choice of providers for these procedures, and forcing consumers to pay higher prices.

Second, Plaintiff claims that these efforts were part of an overlapping conspiracy by the Defendants, in violation of *Section 2* of the Sherman Act, for the Virtua Defendants to monopolize the market for emergent/primary angioplasties - a submarket of the larger market for advanced cardiac interventional procedures that is the subject of the first alleged conspiracy. Defendants have moved to dismiss on a number of grounds. [1]

For the reasons that follow, Defendants' motion to dismiss is DENIED with respect to Plaintiff's Section 1 claim and GRANTED with respect to Plaintiff's Section 2 Claim.

I. Background

A. The Plaintiff

Plaintiff is a 139-bed hospital located in Burlington County, New Jersey and is nationally renowned for the quality of its cardiology and pulmonary services, as well as its high scores for patient satisfaction. [2] Uniquely, Plaintiff is one of only three hospitals in the United States that are legally exempt from collecting insurance co-pays and deductibles from patients. Prior to 2010, Plaintiff lacked an emergency **[*4]** room and Defendant Virtua Memorial Hospital was the primary and, at times, only emergency room in what Plaintiff contends is the relevant geographic market for emergency care.

B. The Competitive Landscape

Plaintiff competes with the much larger Virtua Defendants, who operate three hospitals in the area with nearly 900 beds. Since 2005, the Virtua Defendants have made Defendant CGPA the exclusive provider of cardiology services at Defendant Virtua Memorial Hospital, one of the three hospitals the Virtua Defendants operate.

Until 2007, the Virtua Defendants were unable, under New Jersey law, which regulates what procedures hospitals may perform based on area need by issuing Certificates of Need, to provide any of the advanced cardiac interventional procedures that are at issue in this litigation. Those procedures fall in to two broad categories: (1) elective - non-emergent angioplasty, electrophysiology, and cardiac surgery (the "Elective Procedures"); and (2) emergency - emergent/primary angioplasty (the "Emergency Procedures"). Plaintiff contends that the relevant geographic **[*5]** market for the Elective Procedures consists of Burlington County, New Jersey, as well as parts of Atlantic, Camden, Mercer, and Ocean Counties, also in New Jersey, and the Philadelphia area. As for the relevant geographic market for Emergency Procedures, Plaintiff claims that the market is slightly smaller and consists of Burlington County, as well as portions of Camden, Mercer, and Ocean Counties, but not Atlantic County or the Philadelphia area.

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[1] In briefing on the motions to dismiss, Plaintiff moved for leave to file a sur-reply in further opposition to the motions, attaching **[*3]** the sur-reply brief. Plaintiff's attachment of the brief was improper and Plaintiff is cautioned that, going forward, it is to obtain this Court's permission before filing any supplemental briefing. As such, this Court has not considered the improperly filed sur-reply brief. The Court previously exercised its discretion to deny the motion to file the sur-reply brief. See Docket No. 48; *Fenza's Auto, Inc. v. Montagnaro's Inc., No. 10-3336, 2011 U.S. Dist. LEXIS 29696, 2011 WL 1098993, at *4 (D.N.J. Mar. 21, 2011)*("[T]he court has broad discretion to consider supplemental briefing as appropriate and fair.").

[2] The allegations contained in Plaintiff's Amended Complaint are accepted as true for purposes of the motion to dismiss.

Historically, because the Virtua Defendants were largely unable to perform the procedures at issue [3], Virtua transferred patients requiring these procedures to other area hospitals. These hospitals included New Jersey hospitals who had obtained a Certificate of Need, like Plaintiff and two other hospitals who also compete with Plaintiff - Cooper Hospital University Medical Center ("Cooper") and Our Lady of Lourdes Medical Center ("Lourdes"). They also included, for Elective Procedures, Defendant Presbyterian Medical Center of the University of Pennsylvania Health System ("Penn Presbyterian"), a Philadelphia-based hospital, which was entitled to perform the procedures under Pennsylvania law. According to Plaintiff, patients requiring Emergency **[*6]** Procedures were generally not transferred to Penn Presbyterian because the transit time would have been considered unacceptable due to the need for these patients to receive more immediate care. Most patients, for both Elective and Emergency Procedures, however, were simply transferred to Plaintiff.

All this changed when, according to Plaintiff, the Defendants conspired to exclude Plaintiff and, ultimately, drive it out of business and allow Defendant Virtua Memorial Hospital to monopolize the market for Emergency Procedures.

C. The Alleged Conspiracies

According to Plaintiff, Defendants entered into an anticompetitive conspiracy in 2007 premised on two interlocking written agreements: first, between the Virtua Defendants and Defendant CGPA, making CPGA the exclusive provider of cardiology services at Virtua; and second, between CGPA and the Penn Defendants, making the Penn Defendants the exclusive recommended referral of CGPA. These agreements, Plaintiff contends, form the building blocks **[*7]** of the larger conspiracies to exclude Plaintiff from receiving transfers from the Virtua Defendants, drive it out of the market, and allow the Virtua Defendants to monopolize the Emergency Procedures market. Plaintiff claims that, as a result of these conspiracies, the Virtua Defendants transferred almost all patients requiring advanced cardiac care to the Penn Defendants. Plaintiff claims that, to enforce this larger agreement, the Virtua Defendants monitored, and reported to the other Defendants, instances of "leakage" - occasions when Virtua Defendants' patients were transferred to other hospitals besides those of the Penn Defendants. [4]

Plaintiff alleges that, in many instances, in contravention of patients' rights under the New Jersey Patients' *Bill of Rights*, patients of the Virtua Defendants had their requests to transfer to Plaintiff denied, or were coerced not to transfer through the use of false and malicious statements. According to Plaintiff, the Virtua Defendants attempted to compensate for the greater distance to Penn Presbyterian, which previously made Penn an unattractive choice for patients requiring Emergency Procedures, by utilizing helicopter transfers. However, Plaintiff alleges that the helicopter transfers still regularly exceeded medically recommended transfer time limits.

Plaintiff claims that these actions resulted in harm to both Plaintiff and consumers: Plaintiff lost business to the Penn Defendants and consumers faced higher costs, **[*9]** less choice, and greater medical risk. In particular, according to Plaintiff, patients transferred to the Penn Defendants faced higher fees in the form of: "out of pocket expenses related to insurance co-pays and deductibles and balance billing" which do not occur at Deborah. Medicare, Medicaid, and third party insurers also faced increased costs from lengthier ambulance transportation to Penn Presbyterian and helicopter transport. Patients and insurers were both harmed because, according to Plaintiff, the conspiracy enabled the Penn Defendants to charge supracompetitive prices for the procedures at issue. Finally,

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[3] In 2007, the Virtua Defendants, who previously lacked a Certificate of Need to perform any of the procedures at issue, were authorized to perform a limited number of procedures on an emergency basis.

[4] Plaintiff submitted an email discussing a "leakage report" in an exhibit attached to its opposition to the motions to dismiss. Because the exhibit, and Plaintiff's other attachments submitted in opposition to the motion to dismiss, are consistent with the facts plead in the Amended Complaint, this Court may exercise its discretion to consider them without converting the motions to dismiss into motions for summary judgment. *Help at Home, Inc. v. Medical Capital, L.L.C., 260 F.3d 748, 752-53 (7th Cir. 2001)*("A plaintiff need not put all of the essential **[*8]** facts in the complaint; he may add them by affidavit or brief in order to defeat a motion to dismiss if the facts are consistent with the allegations of the complaint."(quotation and citation omitted); *Kulwicki v. Dawson, 969 F.2d 1454, 1462 (3d Cir. 1992)*("A trial judge has the discretion to consider evidence outside the complaint in ruling on motions to dismiss.").

Patients were deprived of their choice in hospital and, in the case of Emergency Procedures, subjected to unnecessary medical risk because of the lengthier transport time.

II. Standard

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Sheridan v. NGK Metals Corp., 609 F.3d 239, 262 n.27 (3d Cir. 2010)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (internal quotations omitted)). "A claim has facial plausibility when the plaintiff pleads factual **[*10]** content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting *Iqbal, 129 S.Ct. at 1949*).

The Court conducts a three-part analysis when reviewing a claim:

> First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010)(quotations and citations omitted); see also *Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009)*(" . . . [A] complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts.").

III. Analysis

Plaintiff makes two claims: (1) that Defendants have violated *Section 1* of the Sherman Act (conspiracy to restrain trade); and (2) that Defendants have violated *Section 2* of the Sherman Act (conspiracy to monopolize the Emergency Procedures market). **[*11]** [5] Defendants have moved for dismissal of both claims based on lack of antitrust standing and failure to meet the elements of Section 1 and 2 claims. The Court first turns to the standing issue.

A. Plaintiff Has Antitrust Standing To Maintain Its Claims.

Defendants argue that Plaintiff lacks antitrust standing to pursue its claims. The Third Circuit applies a 5-factor test to assess antitrust standing. The factors are:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing;
> (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress;
>
> (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce **[*12]** speculative claims;
>
> (4) the existence of more direct victims of the alleged antitrust violations; and
>
> (5) the potential for duplicative recovery or complex apportionment of damages. *Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 274 (3d Cir. 1999)*(citation omitted).

The first two factors relate to whether Plaintiff has suffered an "antitrust injury." See *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 443 (2d Cir. 2005)*. The final three factors relate to whether Plaintiff would be an "efficient enforcer" of the antitrust laws whose interest would be "aligned with those of consumers generally." Id.; *Reddy v. Puma, No. 1:06CV1283, 2006 U.S. Dist. LEXIS 67848, 2006 WL 2711535, at *5 (E.D.N.Y. Sept. 21, 2006)*.

[5] The Amended Complaint's pleads a Section 2 claim with respect to both the Elective and Emergency Procedures markets. However, in Plaintiff's motion to dismiss opposition briefing, Plaintiff solely addressed the Emergency Procedures market and, at oral argument, Plaintiff confirmed that its Section 2 claim was limited to the Emergency Procedures market.

Importantly, in assessing these factors, this Court assumes the alleged conduct would constitute an antitrust violation. *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 926 n.7(3d Cir. 1999)*("assum[ing] for the sake of assessing plaintiffs' antitrust standing that the conduct in which defendants allegedly engaged would constitute such a violation."); *Daniel, 428 F.3d at 437* (assuming that alleged conduct was antitrust violation in assessing antitrust violation to avoid **[*13]** blurring antitrust standing and merits); *Glaberson v. Comcast Corp., No. 03-6604, 2006 U.S. Dist. LEXIS 62672, 2006 WL 2559479, at *4-5 (E.D.Pa. Aug. 31, 2006)*(citing ***Antitrust Law*** by Phillip E. Areeda and Herbet Hovenkamp for the proposition that "[t]o test standing in a private suit . . . the court should assume the existence of a violation and then ask whether the [standing elements] are shown"). In light of this principle, the "antitrust injury" analysis does not depend on whether Plaintiff has plausibly alleged anticompetitive harm to the market. *St. Clair v. Citizens Financial Group, No. 08-1257, 2008 U.S. Dist. LEXIS 92135, 2008 WL 4911870, at *5 (D.N.J. Nov. 12, 2008)*(holding that harm to the market "is not required for antitrust standing, but instead is relevant to show restraint of trade when proving the merits of an antitrust claim."). That factor goes to the merits and whether a violation occurred, not a plaintiff's standing. Id. Applying these factors, Plaintiff has suffered an antitrust injury and would be an efficient enforcer of the antitrust laws. Plaintiff therefore has antitrust standing.

First, Plaintiff has plausibly alleged that Defendants' conspired to harm Plaintiff and that that conspiracy caused Plaintiff harm in **[*14]** the form of lost patient revenues. Second, Plaintiff's loss of revenues from its exclusion is among the types of harm the antitrust laws were designed to prevent. *Angelico, 184 F.3d at 274* ("Turning to the second element, whether Angelico's alleged injury is of the type the antitrust laws were meant to redress, we conclude that the injury he suffered, when shut out of competition for anticompetitive reasons, is indeed among those the antitrust laws were designed to prevent."). Third, Plaintiff's injuries are "clearly [a] direct (and substantial) . . . result of the alleged conspiracy" as patients that likely would have transferred to Plaintiff were instead sent to the Penn Defendants. *Id. at 275*. Fourth, there are no more direct victims of the alleged conspiracy. Other excluded hospitals are in the same position as Plaintiff. Insurers and individual consumers harmed by the alleged antitrust violations are no more direct and the latter are less likely to sue for this type of violation, absent a class action, given the small amount of damages each would have sustained on an individual basis. Fifth, and finally, there is no potential for duplicative recovery or complex apportionment of **[*15]** damages since the other hospitals and consumers would have wholly separate and independent damages. Id. More generally, Plaintiff's interest is aligned with consumers because both are interested in protecting consumer choice and access to a lower cost and, in the case of Emergency Procedures, medically superior hospital.

Therefore, Plaintiff has antitrust standing to maintain its claims and this Court must turn to whether Plaintiff has plausibly alleged the elements of its antitrust claims.

B. Plaintiff Has Plausibly Alleged A Section 1 Claim.

"To establish a violation of *Section 1*, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." *Black Box Corp. v. Avaya, Inc., No. 07-6161, 2008 U.S. Dist. LEXIS 72821, 2008 WL 4117844, at *7 (D.N.J. Aug. 29, 2008)*(quotation and citation omitted). Defendants have vigorously challenged Plaintiff's allegations with respect to each of these elements. However, because Plaintiff has satisfied each of these elements, Defendants' motions will be denied.

1. Plaintiff **[*16]** Has Plausibly Alleged Concerted Action By The Defendants.

"Concerted action is established where two or more distinct entities have agreed to take action against the plaintiff." *Gordon v. Lewistown Hosp., 423 F.3d 184, 204 (3d Cir. 2005)*. Entities agree where they share "a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme." *West Penn Allegheny Health System, Inc. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010)*. Agreement may be plead through "direct or circumstantial evidence, or a combination of the two." Id.

Plaintiff has adequately plead, through both direct and circumstantial evidence, that Defendants are engaging in concerted action to exclude Plaintiff from receiving patient transfer from the Virtua Defendants. Directly, Plaintiff has demonstrated that there are two interlocking written agreements: first, between the Virtua Defendants and

Defendant CGPA, making CPGA the exclusive provider of cardiology services at Virtua; and second, between CGPA and the Penn Defendants, making the Penn Defendants the exclusive recommended referral of CGPA. According to Plaintiff, these interlocking agreements, in practice, make the **[*17]** Penn Defendants the exclusive advanced cardiac procedural referral of the Virtua Defendants. This direct evidence of agreement is supported by four strong pieces of circumstantially pled evidence: (1) the powerful shift in the Virtua Defendants' transfer pattern (Am. Compl. ¶¶ 75, 77); (2) that the shift in patients needing Emergency Procedures was made despite increased medical risks and costs (Am. Compl. ¶¶ 181-185, 208); (3) coercive conduct by the Virtua Defendants and CGPA to prevent patients from exercising their choice of hospital, in the face of a statutory obligation to allow that very choice (Am. Compl. ¶¶ 78-174) [6]; and (4) the Defendants' dissemination and discussion of leakage reports. (See Certification of Thomas Kane in Support of Plaintiff's Opposition to Motions to Dismiss, Ex. D).

The Virtua Defendants and CGPA argue that Plaintiff has failed to establish concerted action because Plaintiff failed to show that the events at issue are more plausibly the result of concerted action than of parallel conduct because they lacked an economic motive to engage in the alleged concerted action. The Court rejects that argument for three reasons.

First, Defendants overstate the Plaintiff's burden on a motion to dismiss. To survive a motion to dismiss, a plaintiff's "allegations need not rule out all potential alternative explanations" and instead must only adduce enough factual material taken as true to plausibly suggest an agreement was made. See *In re Magnesium Oxide Antitrust Litig., No. 10-54983, 2011 U.S. Dist. LEXIS 121373, 2011 WL 5008090, at *15 (D.N.J. Oct. 20, 2011)*. As described above, Plaintiff has plainly met this burden.

Second, Plaintiff has, in fact, plausibly and specifically alleged economic incentive from these Defendants. The Virtua Defendants and CGPA both stood to gain from the potential elimination of a rival. In an e-mail, CGPA's President contemplated the possibility of Plaintiff being driven out of business and hypothesized that that process could be **[*19]** accelerated by no longer transferring certain cardiac patients there. Plaintiff's exit from the market would result in new patients and an enhanced possibility of the Virtua Defendants being awarded a Certificate of Need to perform additional cardiac interventional procedures - a possibility the Virtua Defendants are alleged to have considered and studied.

Third, these Defendants have failed to offer a plausible explanation that the events at issue were the result of independent conduct, rather than the result of an agreement.

Finally, the Penn Defendants argue that a Section 1 claim requires, and they lacked, a unity of purpose with the other Defendants, since the alleged goal of their co-defendants was to shutdown Deborah, and their economic motivation was not predicated on Deborah's shutdown, but on a the "influx of new patients" as a result of the transfers - a legitimate business interest. But the complaint need not have alleged "that the parties to an agreement had identical motives" or that a party's motive was anti-competitive - only that they "had a plausible reason to participate in the conspiracy." *Trans World Techs., Inc. v. Raytheon Co., No. 06-5012, 2007 U.S. Dist. LEXIS 82118, 2007 WL 3243941, at *4 (D.N.J. Nov. 1, 2007)*; **[*20]** *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1153-54 (9th Cir. 2003)*(holding that the plaintiff "need not prove intent to control prices or destroy competition to demonstrate the element of an agreement . . . among two or more entities.")(quotation and citation omitted). [7] Therefore, even if the Penn Defendants had no desire to eliminate Plaintiff and were merely motivated

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[6] The Penn Defendants contend that the alleged coercive conduct amounts to no more than "garden-variety business torts" that do not rise to the level of antitrust claims. That some of the conduct allegedly employed by Defendants in furtherance of the alleged antitrust conspiracy was also tortious is immaterial to the viability of Plaintiff's antitrust claims. Tortious and anticompetitive conduct **[*18]** are not mutually exclusive.

[7] See also *Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F.2d 1224, 1243 (3d Cir. 1993)*("However, we have made it clear that the defendants need not share the same motive. Rather, all that is required is they each have a motive to conspire."); *Acme Markets, Inc. v. Wharton Hardware and Supply Corp., 890 F. Supp. 1230, 1239 (D.N.J. 1995)*(holding **[*21]** that alleged co-conspirators may have "independent motivations" so long as they "acted in concert to restrain competition through their

by economic self-interest, Plaintiff has sufficiently alleged that the Penn Defendants participated in the alleged conspiracy and their reason for participation: the large influx of new patients. *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 212-14 (3d Cir. 1992)*(explaining that a conspirator in a scheme to eliminate plaintiff did not need to share a commitment to the elimination of the rival and could instead simply be motivated by its own financial incentives).

Accordingly, Plaintiff has plausibly alleged the first element of a Section 1 claim.

2. Plaintiff Has Plausibly Alleged Anticompetitive Effects Within The Relevant Product And Geographic Markets.

A plaintiff may demonstrate that concerted action produced adverse, anticompetitive effects within the relevant product and geographic markets in two ways: (1) through direct evidence of actual anticompetitive effects; or (2) through proof of the defendant's market power, which acts as a proxy for anticompetitive effect. *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010)*. [8]

While, in both cases, a plaintiff must make some showing of a relevant market, where a plaintiff demonstrates direct evidence of actual anticompetitive effects, the plaintiff's burden is diminished and it must only demonstrate "the rough contours of a relevant market." *In re Compensation of Managerial Professional and Technical Employees Antitrust Litig., No. 02-CV-2924, 2008 U.S. Dist. LEXIS 63633, 2008 WL 3887619, at *7 (D.N.J. Aug. 20, 2008)*(quotation omitted). Actual anticompetitive effects can be shown through reduced output, increased prices, decreased quality, and loss of consumer choice. [9] *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 728 (3d Cir. 1991)*("An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services.)(quotation and citation omitted); *Acme Markets, 890 F. Supp. at 1240* (same); **[*24]** United States v. Brown Univ. in Providence in State of Rhode Island, 5. F.3d 658, 675 (3d Cir. 1993)(noting that "[e]nhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit."); *Rome Ambulatory Surgical Center LLC v. Rome Memorial Hosp., Inc., 349 F. Supp. 2d 389, 410 (N.D.N.Y. 2004)*(recognizing loss of consumer choice as a significant injury to competition).

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common objective of enforcing the restrictive covenant."); *In re Processed Egg Prods. Antitrust Litig., No. 08-md-02002, 821 F. Supp. 2d 709, 2011 U.S. Dist. LEXIS 109641, 2011 WL 4465355, at *7* (E.D.Pa. Sept. 26, 2011(holding that even reluctant co-conspirators may be held liable and that "the issue is whether the pleading delineates to some sufficiently specific degree that a defendant purposefully joined and participated in the conspiracy.").

[8] Defendants argue that, in order to demonstrate competitive harm, Plaintiff **[*22]** was required, and failed, to demonstrate that the alleged exclusionary conduct resulted in a significant market foreclosure. But market foreclosure analysis, like market power analysis, is merely a surrogate for a demonstration of actual anticompetitive effect. Jonathan M. Jacobson, Exclusive Dealing, "Foreclosure," And Consumer Harm, 70 ANTITRUST L.J. 311, 362 (2002). As Jonathan Jacobson, former member of the Congressional Antitrust Modernization Commission, persuasively writes:

> But just as foreclosure is no more a magic wand for plaintiffs, neither does the absence of "substantial foreclosure" provide a defense for firms whose exclusive dealing practices in fact threaten significant harm. The foreclosure concept was developed as a useful proxy for analyzing harm to competition. If "substantial foreclosure" was shown, the courts presumed that the competitive process had been damaged and the restraint was condemned accordingly. As the sophistication of antitrust analysis has increased, however, the foreclosure proxy has been found inadequate. A large amount of percentage foreclosure, without more, proves nothing, but the absence of percentage foreclosure is equally unilluminating. **[*23]** In all cases, the relevant question is instead whether there has been an adverse effect on price, output, quality, choice, or innovation in the market as a whole. Id.

As described below, Plaintiff has adequately alleged actual anticompetitive effect, obviating any need for a demonstration of market foreclosure.

[9] Defendants argue that Plaintiff cannot demonstrate anticompetitive effects because Plaintiff cannot show reduced output. However, reduced output is just one method of demonstrating anticompetitive harm. *New York Medscan LLC v. New York University School of Medicine, 430 F. Supp. 2d 140, 146 (S.D.N.Y. 2006)*("A plaintiff asserts harm to competition by alleging adverse effects on the price, quality, or output of the relevant good or service.")(emphasis added); *Angelico, 184 F.3d at 276 (3d Cir. 1999)*(same).

Because the Court concludes that Plaintiff has plausibly alleged direct anticompetitive effects, there is no need to, and the Court will not, separately assess whether Plaintiff adequately alleged market power.

a. Plaintiff Plausibly Alleged Competitive Harm

While Plaintiff's allegations of supracompetitive **[*25]** pricing for the procedures at issue are too conclusory to be credited [10], Plaintiff has sufficiently alleged competitive harm in the form of: (1) higher prices through co-pays and related expenses and increased transportation costs, particularly helicopter transport costs; (2) reduced quality of care in Emergency Procedures, where Plaintiff has plausibly alleged that the increased transport time may cause adverse medical outcomes [11]; and (3) loss of consumer choice as Plaintiff is removed as an option for Virtua patients, even in cases where they request to be transferred there but are denied. *Farina v. United Parcel Service, MDL-1339, 2002 U.S. Dist. LEXIS 14049, 2002 WL 1766554, at *10 (S.D.N.Y. July 31, 2002)*(holding that denial of ability to purchase from lower-priced competitor was anticompetitive harm); *Bearing Distributors, Inc. v. Rockwell Automation, Inc., No. 06-CV-831, 2006 U.S. Dist. LEXIS 67327, 2006 WL 2709779, at *7 (N.D.Oh. Sept. 20, 2006)*(holding that removal of lower-priced, superior service product from market was antitrust harm). These are real competitive harms to a significant population.

They do not reflect, **[*27]** as Defendants alternately contend: (1) a *de minimis*, non-cognizable harm to competition; (2) a harmless substitution of one provider of the procedures at issue - Plaintiff - for another - the Penn Defendants; or (3) "increased competition" from the Penn Defendants. Those conclusions do not follow. Prior to the alleged conspiracy, the Penn Defendants competed freely with Plaintiff and other hospitals in the area. Once the conspiracy began, however, Plaintiff alleges that it was largely excluded from competition. Thus, the diversion of patients at issue was not the product of increased competition from the Penn Defendants, who were already competitors, but the exclusion of Plaintiff. That exclusion was harmful, not harmless, to consumers for the reasons detailed above and affected a significant harm on the market. Plaintiff has therefore, contrary to Defendants' arguments otherwise, satisfied its burden to show anticompetitive harm that was more than a *de minimis* restraint of trade. *Tunis, 952 F.2d at 728*.

Defendants also argue that the higher prices patients transferred to the Penn Defendants pay, through co-pays and other payments that they do not need to pay at Plaintiff, cannot constitute **[*28]** a competitive harm because: (1) they are the product of a regulatory anomaly rather than Plaintiff's competitive merits; (2) the regulatory exemption is itself anti-competitive; and (3) holding otherwise would mean that any transfer, other than to Plaintiff, could constitute a competitive harm. On the first issue, Defendants have cited no authority, and this Court can find none, suggesting that it would be improper to find anticompetitive harm because of Plaintiff's admitted regulatory advantage. [12] Defendants' argument wrongly places the focus on whether Plaintiff is competing on the merits, when

[10] See *Burns v. Lavender Hill Herb Farm, Inc., No. Civ.A 01-7019, 2005 U.S. Dist. LEXIS 7559, 2005 WL 1006321, at *3 (E.D.Pa. Apr. 28, 2005)*(rejecting conclusory **[*26]** allegations of higher prices); *Process Controls Int'l, Inc. v. Emerson Process Mgmt., No: 4:10CV645, 2011 U.S. Dist. LEXIS 9405, 2011 WL 403121, at *4 (E.D.Mo. Feb. 1, 2011)*(same).

[11] At oral argument, the Virtua Defendants contended that there are two time-based components to ensuring proper medical care for these procedures: the transport time to the hospital and the time, once at the hospital, before a patient receives the proper treatment. They argued that the Amended Complaint alleges only that the transport time is shorter for transfer to Deborah and, without allegations as to wait time at Deborah, does not plausibly establish that transfer to Penn subject patients to unnecessary medical risks. This is an overly technical reading of the Amended Complaint. Plaintiff has, particularly in light of the historic practice of transferring patients to it, plausibly alleged that there are no medical issues that prevent transport to it from Virtua. It is a fair inference from these allegations, and the allegations that Defendants' practice subjects patients to unnecessary medical risk, that there is no issue with hospital waiting time at Deborah that would negate its transportation time advantage.

[12] The Court ordered supplemental briefing on this issue. Defendants' authority submitted in response is inapposite. In *Schuylkill Energy Resources v. Pa. Power & Light Co., 113 F.3d 405 (3d Cir. 1997)*, the Court rejected an energy supplier's contention that a utility company's failure to purchase energy from it resulted in a higher rates to consumers on two grounds. *Id. at 414-15*. First, the court found that the utility's rates were determined by regulators, not the marketplace, and therefore any complaints were properly directed to regulatory authorities. Id. Defendants have not identified any corresponding authority here that would make

antitrust law is concerned, as evidenced by the required elements of a Section 1 claim, with Defendants' conduct and its effect on competition. Given these facts and ***antitrust law***'s strong emphasis on promoting lower prices for consumers [13], this Court finds that the higher prices patients pay can constitute an anticompetitive harm. On the second issue, similar logic applies: Defendants' conduct and its effect on competition is at issue in this litigation, not the merits of the exemption. On the third issue, competitive harm would not arise, based on the Court's interpretation, in every transfer. **[*29]** It is only implicated where, as here, it is the product of an exclusionary transfer policy. In any event, even if these higher prices were not credited as antitrust injuries, Plaintiff has plausibly alleged meaningful competitive harms to consumer choice and, with respect to Emergency Procedures, loss in quality.

Finally, Defendants argue that the alleged agreement is not anticompetitive, and therefore there is no anticompetitive harm, because there is no duty to cooperate. But the anticompetitive harm alleged is the exclusion of Plaintiff as a choice for patients, not that Defendants have an affirmative **[*31]** obligation to direct patients to Plaintiff, or give Plaintiff access to Defendants' patients.

b. Plaintiff Has Met Its Burden To Allege Relevant Markets.

Plaintiff has also sufficiently alleged, at a minimum, the rough contours of the marketplace for both the Elective and Emergency Procedures. For the former, Plaintiff has adequately alleged a marketplace in Southern New Jersey and Philadelphia. For the latter, Plaintiff has adequately alleged a more restricted geographic market, which excludes Philadelphia, in light of the need for patients needing emergency treatment to receive more rapid care and the alleged greater transport time in transit to Philadelphia. That the Virtua Defendants are, in fact, transferring patients to the Penn Defendants in Philadelphia for Emergency Procedures does not disturb this analysis. Plaintiff has plausibly alleged that Philadelphia hospitals are not a suitable medical alternative and that patients are only being transferred there as a result of the conspiracy. It is therefore plausible that Philadelphia is not part of the relevant market. In any event, regardless of whether Philadelphia is part of the market for Emergency Procedures, Plaintiff's allegations **[*32]** certainly allege the "rough" market contours required in a direct evidence case.

3. Plaintiff Has Plausibly Alleged That The Concerted Action Was Illegal.

Concerted action that unreasonably restrains trade is illegal. *American Needle, Inc. v. Nat'l Football League, 130 S.Ct. 2201, 2212, 176 L. Ed. 2d 947 (2010)*. "At the pleading stage, a plaintiff may satisfy the unreasonable-restraint element by alleging that the conspiracy produced anticompetitive effects in the relevant markets." *West Penn, 627 F.3d at 100*. As discussed above, Plaintiff has plausibly alleged competitive harm. Therefore, Plaintiff has plausibly alleged that Defendants' concerted actions were illegal.

4. Plaintiff Has Plausibly Alleged That It Was Injured As A Proximate Result Of The Concerted Action.

Plaintiff has alleged that it has lost revenues because patients who would have sought treatment at its hospital are instead diverted to the Penn Defendants as the result of Defendants' conspiracy. Therefore, Plaintiff has plausibly alleged that it was injured, in the form of lost patients and revenues, as a proximate result of Defendant's concerted actions.

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antitrust review inappropriate Second, the plaintiff there was found to be only a supplier to the utility, not its competitor, so could not participate in the market for consumers. *Id. at 415*. Plaintiff here, in contrast, is in direct competition **[*30]** with Defendants. In *In re Canadian Imp. Antitrust Litig., 470 F.3d 785 (8th Cir. 2006)*, the court found that prescription drug purchasers failed to allege anti-competitive conduct where they alleged that drug companies acted to prevent the importation of cheaper brand name drugs from Canada. *Id. at 791* There, unlike here, the inability to access a cheaper alternative was caused, at the start, by government regulations, not the Defendants' exclusionary conduct. *Id. at 791-92*. The plaintiffs there could not allege, as Plaintiff can here, "that prior to the alleged anti-competitive conduct of the defendants" consumers had access to the cheaper alternative. *Id. at 792*.

[13] See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*(holding, in the predatory pricing context, that "[l]ow prices benefit consumer regardless of how those prices are set")(quotation and citation omitted).

C. Plaintiff Has Failed To Plausibly Allege A Section 2 Claim.

The elements of a conspiracy **[*33]** to monopolize include at least three elements: "(1) a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize." *Black Box, 2008 U.S. Dist. LEXIS 72821, 2008 WL 4117844, at *8*. Courts are divided on whether a fourth element - a dangerous probability of successful monopolization - is required to establish the claim. Id. This Court agrees with those courts that have concluded that a dangerous probability of success is not required. [14] As the Second Circuit has held:

> Congress outlawed the conspiracy itself. Once a plaintiff establishes a conspiracy with a specific intent to monopolize, proof of success or impending success is irrelevant.

Int'l Distribution Centers, Inc. v. Walsh Trucking Co., Inc., 812 F.2d 786, 796 n. 8 (2d Cir. 1987)(citations omitted).

However, while a dangerous probability of success is not a required element, the likelihood of success may be highly significant to whether the defendants could plausibly have had the specific intent to monopolize the market at issue. *Emigra Group v. Fragomen, Del Rey, Bernsen & Loewy, 612 F. Supp. 2d 330, 363 (S.D.N.Y. 2009)*("And while rigorous proof of a relevant market and the likelihood of monopolization is not required in this Circuit on a conspiracy to monopolize claim, the relevant market and the likelihood of its monopolization may have a significant bearing on whether the requisite specific intent to monopolize is present."); *Virginia Vermiculite Ltd. V. W.R. Grace & Co., 144 F. Supp. 2d 558, 592 (W.D.Va. 2001)*("But where actions are ambiguous the existence and extent of market power may make the inference of specific intent from conduct more or less plausible.")(quotation and citation omitted). That specific intent to monopolize must be more than knowing and must be shared by all the conspirators. *ID Security Systems Canada, Inc. v. Checkpoint Systems, Inc., 249 F. Supp. 2d 622, 660 (E.D.Pa. 2003)*(holding **[*35]** that the alleged co-conspirators must share the intent that would-be-monopolist obtain a monopoly); *Int'l Distribution, 812 F.2d at 796* (same); *In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 728, 731 (D.Md. 2001)*("[Specific intent] signifies something more than willing, voluntary, and knowing participation in the illegal course of conduct . . . . It means participating in that course of conduct for the specific, shared purpose of [monopolization].").

Plaintiff alleges that Defendants conspired with the intent that the Virtua Defendants monopolize the market for Emergency Procedures. At the time Defendants allegedly entered into the conspiracy (Plaintiff alleges it began sometime in 2007), the Virtua Defendants had either no ability, or very limited ability, to perform any of the Emergency Procedures at issue. And any future ability to perform these procedures depended on Virtua obtaining a Certificate of Need from the state. Virtua also faced robust competition from at least Plaintiff, Cooper, and Lourdes.

Against this backdrop, Defendants argue that successful monopolization of the Emergency Procedures market is, and was, implausible and, with respect to the Penn Defendants **[*36]** and CGPA, there is no reason why they these entities would support a monopoly by Virtua. Therefore, Defendants argue, it is implausible that they would have had the intent that the Virtua Defendants monopolize the relevant Emergency Procedures market. Plaintiff counters that there are plausible economic reasons why Defendants could have shared such intent. Plaintiff misapprehends its burden. It is not sufficient that there may be some plausible reasons that Defendants could have shared the requisite intent. Plaintiff must instead advance factual allegations to render it plausible that Defendants did share the requisite intent.

Plaintiff has failed to meet this burden. On the allegations before the Court in Plaintiff's Amended Complaint, successful monopolization of the Emergency Procedures market was implausible given the competitive landscape and that the Virtua Defendants were not even approved for such Procedures, let alone participants in the market. In the face of these allegations, which are highly suggestive of a lack of specific intent, Plaintiff has failed to offer more

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[14] At oral argument, Plaintiff articulated its belief that it was, in fact, obligated to demonstrate a dangerous probability of successful monopolization. While the Court does not adopt this standard because it believes that standard is incorrect, the differing standards are immaterial here. The same facts, discussed below, that demonstrate the implausibility of Defendants having the intent to successfully monopolize, **[*34]** would also render implausible Plaintiff's claim that Defendants had a dangerous probability of success.

than conclusory allegations of specific intent and argument why the Defendants rationally could have possessed **[*37]** such intent. Plaintiff has not offered non-conclusory allegations suggesting that Defendants did have such intent. Plaintiff has thus failed to plausibly allege that Defendants shared a specific intent for the Virtua Defendants to monopolize the Emergency Procedures market. Therefore, Plaintiff has failed to plausibly allege a Section 2 claim.

IV. Conclusion

For all these reasons, Defendants' motions to dismiss Plaintiff's Section 1 claim is DENIED and Defendant's motion to dismiss Plaintiff's Section 2 claim is GRANTED. Plaintiff's Section 2 Claim is dismissed without prejudice.

Dated: December 30, 2011

/s/ Renée Marie Bumb

RENÉE MARIE BUMB

United States District Judge

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Smith v. Ebay Corp.

United States District Court for the Northern District of California

January 5, 2012, Decided; January 5, 2012, Filed

No. C 10-03825 JSW

Reporter
2012 U.S. Dist. LEXIS 1211 *; 2012-1 Trade Cas. (CCH) P77,908; 2012 WL 27718

CHARLOTTE SMITH, et al., Plaintiffs, v. EBAY CORPORATION, ET AL., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion to strike denied by, Motion denied by *Smith v. Ebay Corp., 2012 U.S. Dist. LEXIS 74121 (N.D. Cal., May 29, 2012)*

Core Terms

eBay, online, sellers, monopolization, auction, Plaintiffs', antitrust, alleged facts, motion to dismiss, relevant market, Defendants', limitations period, allegations, payment system, buyer, statute of limitations, unjust enrichment, shipping, DENIES, tying arrangement, cause of action, products, form of payment, tied product, acquisition, conversion, monopoly, listing, amended complaint, leave to amend

Counsel: [*1] For Charlotte Smith, Plaintiff: Peter W. Macuga, II, Macuga and Liddle, Detroit, MI.

For eBay Corporation, Paypal Corporation, Defendants: Thomas Patrick Brown, LEAD ATTORNEY, O'Melveny & Myers LLP, San Francisco, CA; Howard B. Iwrey, Dykema Gossett, Bloomfield Hills, MI; Kyle R. Dufrane, Timothy Kuhn, Dykema Gossett, Detroit, MI.

Judges: JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

Opinion by: JEFFREY S. WHITE

Opinion

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; GRANTING LEAVE TO AMEND; CONTINUING CASE MANAGEMENT CONFERENCE

INTRODUCTION

This matter comes before the Court upon consideration of the Motion to Dismiss Plaintiffs' First Amended Complaint filed by Defendants eBay Corporation ("eBay") and PayPal, Inc. ("PayPall") (collectively "Defendants") The Court has considered the parties' papers, relevant legal authority, and the record in this case, and it previously found the matter suitable for disposition without oral argument and vacated the hearing on the motion. *See N.D. Civ. L.R. 7-1(b)*. The Court HEREBY GRANTS IN PART AND DENIES, IN PART, Defendants' motion.

BACKGROUND

On April 12, 2010, Plaintiffs, Charlotte Smith, Art and Lee Beltrone, Paul Jackson, James **[*2]** and Jean Mountain, and Rex and Patti Stark (collectively "Plaintiffs") filed their original class action complaint against eBay and PayPal. On September 28, 2011, Plaintiffs filed the First Amended Class Action Complaint ("FAC"), in which they allege Defendants violated *Sections 1* and *2* of the Sherman Act. Plaintiffs assert five claims for relief against the Defendants: (1) abuse of monopoly power and monopoly maintenance in the market for online payment systems for use in online auctions; (2) attempted monopolization of the market for online payment systems for use in online auctions; (3) unlawful tying under *Section 2* of the Sherman Act; (4) unlawful tying under *Section 1* of the Sherman Act; and (5) "improper collection of shipping fees as part of final value fee."

Plaintiffs allege that eBay is "the largest online auction/sales service in ... the United States, controlling in excess of an estimated 90% of the national online auction market." (FAC ¶ 23.) On October 3, 2002, eBay acquired PayPal, which is the largest online payment system. Plaintiffs allege that this acquisition "eliminated competition and expanded [eBay's] own market dominance," such that eBay "possesses effective **[*3]** monopoly power in online auction markets." (*Id.* ¶ 24; *see also id.* ¶ 34 (alleging that acquisition "had the effect of eliminating competition in the market for online payment systems").) Plaintiffs also allege that eBay has acted through PayPal to monopolize the forms of payments that sellers can use on eBay and has "limited and banned competitors in an attempt to maintain its dominance in the online auction market." (*Id.* ¶ 25.)

Each of the Plaintiffs allege that they are "'seller[s]' utilizing Defendant's [*sic*] online auction/sales services and [are] forced to pay fees both to eBay for listing and selling items, and to eBay through the use of PayPal." (*Id.* ¶¶ 5-14.) According to Plaintiffs, in order to maximize bids on a product sold in an online auction, it is in the seller's interest to provide as many payment means as possible. Plaintiffs allege that eBay's Accepted Payment Policy prohibits sellers, *inter alia,* from asking buyers to contact them for additional payment methods, or asking buyers to use a method a seller has not included in her or her listing. (*Id.* ¶¶ 44-45.) Plaintiffs allege that if eBay believes a seller has violated the Accepted Payment Policy, eBay will remove **[*4]** the seller's listing and may restrict his or her selling privileges. (*Id.* ¶ 47.) However, none of the Plaintiffs allege that eBay has taken such action against them.

Plaintiffs also allege that, although eBay purports to offer payments methods that are alternatives to PayPal, eBay has made PayPal the only viable payment option for sellers. (*Id.* ¶¶ 48-50.) Thus, according to Plaintiffs, in addition to paying eBay for listing and sales fees, sellers are forced to pay eBay additional fees when they use PayPal. (*Id.* ¶ 51.) "eBay's dominant position in the market for online payment systems for use with online auctions, and use of affirmative anticompetitive activity, has ensured, however, that there are functionally no other real choices for online payment on eBay besides PayPal." (*Id.* ¶ 30; *see also id.* ¶¶ 36-43.) Plaintiffs claim that these actions and eBay's Accepted Payment Policies "effectively limit" sellers to accepting payments only through eBay owned PayPal, which creates an improper tying arrangement between eBay's on-line auction services and PayPal's on-line payment services. (*See id.* ¶¶ 26, 81-106.) Plaintiffs also allege that as a result of eBay's conduct they "have paid or **[*5]** are likely to pay artificially inflated and supra competitive [*sic*] fees to eBay by paying for both listing, selling and PayPal charges." (*Id.* ¶ 74.b, 85, 88.b.)

Finally, Plaintiffs allege that in April 2011, eBay changed the structure of its "final value fee," and it calculated that fee using both the dollar value of the item sold and the shipping fees incurred, even though eBay does not provide shipping services, the costs of which are born either by the buyer or the seller. (*Id.* ¶¶ 52-58.)

ANALYSIS

A. Applicable Legal Standard.

A motion to dismiss is proper under *Federal Rule of Civil Procedure 12(b)(6)* where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986). However, even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) **[*6]** (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). A statute of limitations defense may be raised by a motion to dismiss where the running of the applicable limitations period is apparent on the face of the complaint. Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).

Pursuant to *Twombly,* a plaintiff must not merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." Id. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing Twombly, 550 U.S. at 556). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.... When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting Twombly, 550 U.S. at 556-57) (internal quotation marks omitted). If the allegations are insufficient **[*7]** to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g.,* Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990); Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246-47 (9th Cir. 1990).

B. Plaintiffs' Claims Are Not Barred by the Statute of Limitations.

Defendants move to dismiss each of Plaintiffs' claims on the basis that they are barred by the statute of limitations. Under the Clayton Act, 15 U.S.C.§ 15b, private antitrust claims are subject to a four-year statute of limitations. *See* Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1300 (9th Cir. 1986). "A civil cause of action under the [antitrust laws] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time." AMF, Inc. v. General Motors Corp., 591 F.2d 68, 70 (9th Cir. 1979) (quoting Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1270 (9th Cir. 1975)). Plaintiffs filed their original complaint on April 12, 2010, so any antitrust claim that is based on conduct that occurred prior to April 12, 2006 would be barred. Defendants argue that Plaintiffs **[*8]** claims are based upon eBay's acquisition of PayPal in October 2002 and, thus, are barred. Plaintiffs argue, in turn, that they have alleged conduct that falls within the "continuing violations" theory and, thus, the claims are timely.[1]

In ***antitrust law***, "[a] continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured." Pace Industries, Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987) (citation omitted); *see also* AMF, 591 F.2d at 71. It is clear, however, that "a continuation of harm to plaintiffs alone will not keep the cause of action alive without some overt act or continuing conduct of defendants during the limitations period." Electroglas, Inc. v. Dynatex Corp., 497 F. Supp. 97, 105 (N.D. Cal. 1980).[2] "When a continuing violation exists, the limitations period runs from the 'last overt act' by the defendant, which must be (1) a new and independent act that is not merely a reaffirmation of a previous decision that (2) inflicts a 'new and accumulating' injury on the plaintiff." **[*9]** Red Lion Medical Safety Inc. v. Ohmeda, Inc., 63 F. Supp. 2d 1218, 1223 (E.D. Cal. 1999) (citing Pace Industries, 813 F.2d at 238). "'New and independent acts' may include active

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[1] Plaintiffs do not rely on any other legal theory to argue that the statute of limitations should be tolled.

[2] Any harm that accrues after the tolling of the statute of limitations periods but that is associated with an overt act that occurred prior to the limitations period is not remediable. However, "each separate cause of action that so accrues [during the statute of limitations period] entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-39, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971).

enforcement of policies first put into place outside the limitations period." *Red Lion, 63 F. Supp. 2d at 1223* (citing *Columbia Steel Casting Co. v. Portland General Elec. Co., 111 F.3d 1427, 1444-45 (9th Cir. 1996))*.

1. The Tying Claims.

Plaintiffs' tying claims are based on the theory that they have been injured by eBay's alleged attempts to tie use of its online auction services to PayPal's online **[*10]** payment services. "To restart the statute of limitations in a tying situation, [a plaintiff] must show that [a defendant] 'had the ability [to] and actually did enforce the tie' during the limitations period." *Eichman v. Fotomat, 880 F.2d 149, 160 (9th Cir. 1989)* (quoting *Airweld, Inc. v. Arco, Inc., 742 F.2d 1184, 1190 (9th Cir. 1984)*." However, the continued purchase of a defendants' product or services does not constitute a "new and independent" act that would restart the statute of limitations. *See, e.g., Stanislaus Food Products Co. v. USS-POSCO Indus., 2010 U.S. Dist. LEXIS 92236, 2010 WL 3521979, at *16 (E.D. Cal. Sept. 3, 2010)* (citing *Aurora Enters. v. NBC, 688 F.2d 689, 694 (9th Cir. 1982)* ("Continual purchasing of the products is merely an affirmation of defendants' prior conduct and does not inflict a 'new and accumulating' injury on plaintiff.'"); *see also Rite Aid Corp. v. American Express Travel Related Servs. Co., 708 F. Supp. 2d 257, 270 (E.D.N.Y. 2010)* ("Collecting a contract fee is not a new and independent act.").

Although it is not binding, the Court finds the *Rite Aid* case to be instructive. The plaintiffs in *Rite Aid* were a group of retail merchants who accepted American Express cards as **[*11]** payment from customers, pursuant to merchant agreements with the defendants. One feature of these agreements was that defendants would collect a percentage of each transaction as a service fee. Pursuant to the terms of the merchant agreements, on written notice, defendants were permitted to unilaterally change the fee they initially charged the plaintiffs. According to the plaintiffs, in all instances, the fee was supracompetitive. The plaintiffs also alleged that the defendant imposed "anti-steering" rules that prevented plaintiffs from urging customers to use forms of payment that were cheaper than American Express cards. *Id. at 260-61*. Based on these allegations, the plaintiffs brought claims against the defendants under *Sections 1* and *2* of the Sherman Act. *Id. at 262*.

The defendants moved to dismiss each of plaintiffs on the basis that the plaintiffs' claims were barred by the statute of limitations. The court analyzed plaintiff's *Section 1claim* under a tying theory, and it found that although collecting a contract fee was not a "new and independent act," the defendants' "unilateral increases to its merchant discount fee [did] constitute over acts," which "did not merely reaffirm **[*12]** a contractual duty memorialized in a prelimitations agreement." *Id. at 270-71*. The court therefore found that the plaintiffs' *Section 1* claims were "not barred to the extent that they see damages based on fee adjustments that [defendants] implemented within four years before" they filed suit. *Id. at 272*.

It is undisputed that eBay acquired PayPal in 2002. If Plaintiffs premised their claims solely on the acquisition of PayPal, their claims would be barred. Plaintiffs, however, allege that eBay has continued to refine its Accepted Payment Policy to restrict acceptable forms of payment. For example, Plaintiffs allege that in July 2006, within the limitations period, eBay announced that it would not permit payment through Google Checkout and updated its payment policies to reflect that decision. (FAC ¶ 37.) In addition, Plaintiffs allege that in January 2007, again within the limitations period, eBay "doubled the PayPal Buyer Protection on its website, and in doing so effectively eliminated buyer protection for non-PayPal transactions." (*Id.* ¶ 38.) Similarly, Plaintiffs allege that in 2008, eBay announced a policy by which it required sellers to accept electronic payments, which Plaintiffs **[*13]** allege "effectively eliminat[ed] payments by cash, cashiers or personal check, or money order." (*Id.* ¶ 39; *see also id.* ¶¶ 42-46.) Plaintiffs further allege that since 2008, eBay has "further modified and restricted its Accepted Payments Policy to limit sellers to only accept PayPal," and other forms of electronic payments that Plaintiffs contend are not viable alternatives to PayPal. (*Id.* ¶¶ 41, 48-51.)

Thus, much like the plaintiffs in the *Rite Aid* case, Plaintiffs here premise their tying claims on eBay's continued modification of the Accepted Payment Policy. As in the *Rite Aid* case, the Court concludes that those changes do constitute overt acts, and it finds that Plaintiffs have alleged sufficient facts to show that those changes inflicted new and accumulating harm on them. In addition, Plaintiffs have alleged that eBay had the ability to and did enforce the purported tying arrangement within the limitations period.

Accordingly, the Court DENIES, IN PART, Defendant's motion to dismiss on this basis.

2. The Monopolization and Attempted Monopolization Claims.

Plaintiffs' claims of monopolization and attempted monopolization are premised on the same conduct that supports their tying **[*14]** claims. In brief, Plaintiffs allege that eBay has used its monopoly power to: prohibit many forms of payment; require sellers to accept payment forms that carry additional fees; intimidate sellers to accept those forms of payments; exclude new payment services by the "destruction or acquisition of competitors;" and steer buyers to PayPal. (FAC ¶ 73).

Defendants rely on the *USS-Posco* case, *supra,* to argue that these claims are barred by the statute of limitations. In that case, the plaintiff, a tomato canner, alleged that the defendants had conspired to monopolize the market for the products used to make tin cans used by the plaintiff and to fix prices in that market. The plaintiff alleged that two defendants had achieved this monopoly by creating a joint venture to manufacture the products for the purpose of avoiding competition with one another in that market. *2010 U.S. Dist. LEXIS 92236, 2010 WL 3521979, at *2-3*. Although the defendants created the joint venture outside the limitations period, the plaintiff argued that its cause of action did not accrue until the joint venture raised its prices to supracompetitive levels. *2010 U.S. Dist. LEXIS 92236, [WL] at *13-14*. The court disagreed and concluded that the plaintiff's claim for conspiracy **[*15]** to monopolize injured the market, and it concluded that the market had been harmed when the joint venture was formed. Although plaintiff continued to purchase defendant's products during that time, the court noted that such conduct "is merely an affirmation of defendants' prior conduct and does not inflict a 'new and accumulating injury' on plaintiff." *2010 U.S. Dist. LEXIS 92236, [WL] at *16*. Because the allegedly illegal act, the formation of the joint venture, "occurred but one, single time," outside the limitations period, the court concluded that plaintiff's claims challenging that conduct were barred. *2010 U.S. Dist. LEXIS 92236, [WL] at *17*.

This case is distinguishable from *Stanislaus* in that, unlike the plaintiff in the *Stanislaus,* Plaintiffs do allege claims for attempted monopolization and monopolization. *See, e.g., 2010 U.S. Dist. LEXIS 92236, [WL] *16 n.9*. In addition, Plaintiffs' claims of monopolization and attempted monopolization are not based *solely* on the fact that eBay acquired PayPal. As discussed above, Plaintiffs allege that eBay has, for example, banned Google Checkout as an acceptable form of payment and has doubled the PayPal Buyer Protection in order to continue its alleged efforts to monopolize the market for online payment services for **[*16]** use in online auctions. Plaintiffs also allege that in October 6, 2008, eBay acquired Bill Me Later and merged its services with PayPal "in an effort to further extend its leadership in online payments." (FAC ¶ 40.) Each of these actions occurred within the limitations period, and Plaintiffs allege that they were harmed by these actions.

Accordingly, the Court DENIES, IN PART, Defendants' motion on this basis as well.

C. The Court Dismisses the Tying Claims, With Leave to Amend.

Defendants also move to dismiss Plaintiffs' tying claims on the basis that Plaintiffs fail: (1) to allege facts to show that a tying arrangement exists; (2) to allege facts that show an actual adverse effect on competition; (3) to allege facts supporting the relevant markets; and (4) to allege facts showing antitrust injury. Although the Court agrees that Plaintiffs have failed to allege facts showing an adverse effect on competition, it shall address each of Defendants' arguments.

Tying arrangements are traditionally defined as "'an agreement by a party [the buyer] to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase **[*17]** that product from any other supplier.'" *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461-462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. In order to prevail on a traditional tying claim, a must establish:

"(1) that there exist two distinct product or services in different markets whose sales are tied together; (2) that the seller possesses appreciable economic power in the tying product market sufficient to coerce acceptance of the tied product; and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market." *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1159 (9th Cir. 2003)* (citing *Eastman Kodak, 504 U.S. at 461-462* (quoting *Northern Pacific R. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*.[3] In addition, Plaintiffs must allege that the tying arrangement has a "'pernicious effect on competition and lack ... of any redeeming virtue." *In re eBay Sellers Antitrust Litig., 545 F. Supp. 2d 1027, 1034 (N.D. Cal. 2008)* (quoting *Northern Pac Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*; *see also* *Siegel v. Chicken Delight, 448 F.2d 43, 47 (9th Cir. 1971)* ("[T]he hallmark of a tie-in is that it denies competitors free access to the tied product **[*18]** market.").

1. Tying Arrangement.

Plaintiffs allege that the two distinct products or services are on-line auction services provided by eBay (the "tying" service) and the on-line payment services provided by PayPal (the "tied" service). Plaintiffs concede that eBay does not require sellers to use PayPal as the sole method of payment, but they argue that eBay's policies have "effectively" created such a requirement. In such a case, Plaintiffs must be able to allege that using PayPal is "the only viable economic option." *See, e.g.,* *Ways and Means, Inc. v. IVAC Corp., 506 F. Supp. 697, 701 (N.D. Cal. 1979)*. Plaintiffs have alleged facts showing why the alternative forms of payment permitted by eBay are not viable alternatives. (*See, e.g.,* FAC ¶ 50.) Whether or not this is in fact true is a matter best addressed by way of summary judgment.

2. [*19] Adverse Effect on Competition.

With respect to their *Section 2* tying claim, Plaintiffs allege that eBay's tying conduct

> has had and/or is likely to have, among other things, the following effects: a. actual and potential competition *in the online payment systems markets for online auctions* has been injured, limited, reduced, restrained, suppressed, and effectively foreclosed; and b. *eBay sellers* are effectively forced to accept payment via PaPal and thus have paid or are likely to pay artificially inflated prices to eBay as a whole caused by reduced competition.

(FAC ¶ 88 (emphasis added).) These allegations mirror the allegations in the *In re eBay Seller Antitrust Litig.* case, which the court determined failed to adequately allege that competition in the *tied* product market was harmed. *See In re eBay* *Seller Antitrust Litig., 545 F. Supp. 2d at 1034*.

With respect to their *Section 1* tying claim, Plaintiffs allege that "Defendant's improper tying and bundling harms competition. Since the Class can effectively only accept payment via PaPal, there is little motivation for other online payment systems to enter the market, and those that do are foreclosed from offering their services directly **[*20]** to members of the Class at a lower, market-driven cost." (FAC ¶ 98.) However, these conclusory allegations are not supported by facts alleged elsewhere in the FAC.

Accordingly, the Court concludes that Plaintiffs have failed to allege facts showing that the alleged tie caused harm to competitors in the tied product market. Because Plaintiffs may be able to allege such facts, the Court shall grant them one final opportunity to amend.

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[3] Plaintiffs assert tying claims under *Sections 1* and *2* of the Sherman Act. Courts have permitted plaintiffs to proceed on tying claims under *Section 2* "at least where there is monopolization or attempted monopolization," as is alleged in this case. *See* *Apple Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1195 n.2 (N.D. Cal. 2008)*.

3. Relevant Market.

In order to maintain a tying claim, a plaintiff allege facts showing that a defendant possesses market power in the tying product, and a plaintiff must properly allege that market. *See, e.g., Rick-Mik Enters., Inc. v. Equilon Enters., LLC, 532 F.3d 963, 971-72 (9th Cir. 2008)*. A relevant product market usually is defined as "the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka v. University of So. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)*; *see also W. Parcel Exp. v. United Parcel Serv. of America, Inc., 65 F. Supp. 2d 1052, 1058 (N.D. Cal. 1998)*. A court may grant a motion to dismiss if a "'plaintiff fails to define [the] proposed relevant market with reference to the rule **[*21]** of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products....'" *In re eBay Seller Antitrust Litig., 545 F. Supp. 2d at 1031* (quoting *Queen City Pizza, Inc. v. Domino's Pizza Inc., 124 F.3d 430, 436 (3rd Cir. 1997)*; *see also Newcal Indus. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)* (citing *Queen City Pizza, 124 F.3d at 436-37*) (court may dismiss where relevant market is "facially unsustainable").

Plaintiffs allege that the tying product is online auctions and the tied product is online payment services.[4] Defendants argue that Plaintiffs definition of the relevant market is impermissbly narrow and fails to "show how this purported market is any different from the larger market for online payment systems for use on other sales formats, both on eBay and other online platforms." (Mot. at 10:13-17.)

In essence, Defendants take issue with the possibility that Plaintiffs may attempt to rely on the theory **[*22]** that their relevant market is a submarket of a broader product market. *See, e.g., Brown Shoe, Inc. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* ("within [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes").[5] Plaintiffs have not, however, defined the relevant market solely by reference to consumers of the proposed products. For this reason, the Court finds Defendants' reliance on *Colonial Med. Group., Inc. v. Catholic Healthcare W., No. C-09-2192-MMC, 2010 U.S. Dist. LEXIS 51350, 2010 WL 2108123 (N.D. Cal. May 25, 2010)*, to be misplaced. The Court also concludes that Plaintiffs' allegations are not so conclusory that dismissal is warranted and, thus, also finds that this case is distinguishable on its facts from *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc., No. C-09-3854-MMC, 2010 U.S. Dist. LEXIS 47896, 2010 WL 1541257 (N.D. Cal. Apr. 16, 2010)*.

At this stage of the litigation, the Court cannot say that Plaintiffs' proposed relevant product market is not sustainable on its face. *See In re eBay Seller Antitrust Litig., 545 F. Supp. 2d at 1033* (noting that the Plaintiff did not claim that eBay's product alone constituted a market, and concluding that Plaintiff's allegations of online auctions market and person-to-person payment systems markets were sufficient to state a claim); *In re eBay Seller Antitrust Litig., 2010 U.S. Dist. LEXIS 19480, 2010 WL 760433, at *6-*9 (N.D. Cal. Mar. 4, 2010)* (finding triable issues of fact on whether plaintiff established "online auctions market" was an economically distinct submarket within broader category of online marketplaces), *aff'd 433 Fed. Appx. 504, 2011 WL 1749206 (9th Cir. May 9, 2011)*.

Accordingly, the Court DENIES, IN PART, Defendants' motion on this basis.

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[4] Plaintiffs define the relevant market for the monopolization claims as the "market for online payment systems for use in online auctions." (FAC ¶ 72.)

[5] Neither Plaintiffs nor Defendants have addressed the factors identified in *Brown Shoe* relevant to a submarket. *See 370 U.S. at 325* ("The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar **[*23]** characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."). Because this issue is not adequately briefed, Defendants may renew this argument in connection with a motion for summary judgment summary judgment.

4. Antitrust Injury.

Defendants also move to dismiss Plaintiffs' **[*24]** tying claims on the basis that Plaintiffs fail to allege facts showing antitrust injury. The Ninth Circuit has identified "four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *American Ad. Mgmt., Inc. v. General Tel. Co., 190 F.3d 1051, 1055 (9th Cir. 1999)*.

Defendants argue that Plaintiffs allegations fail to satisfy the requirements of *Rule 8*, because they do not specify the amount of the fees at issue or show a link to the allegedly anticompetitive actions and those fees. However, Plaintiffs identify the specific fees at issue, *i.e.* listing fees, selling fees and fees for using PayPal. Plaintiffs also allege that by excluding other, cheaper forms of online payment systems, the prices that eBay and PayPal charge are artificially high. The Court finds that Plaintiffs have alleged sufficient facts to show they suffered antitrust injury. *Cf.* *Garon v. eBay Inc., No. 10-cv-5737-JW, Order Granting Motion to Dismiss at 6-7, 2011 U.S. Dist. LEXIS 148621 (N.D. Cal. Nov. 30, 2011)* (noting that if plaintiffs had relied on allegations that they **[*25]** paid monopolistic fees in relevant market as a result of eBay's decision to implement challenged policy, plaintiffs could have stated a claim for relief).

Defendant also argues that Plaintiffs must be able to prove net economic harm, and that because eBay and PayPal compete in "two-sided" industries, the conduct about which Plaintiffs complain may actually be beneficial to sellers. The Court finds these arguments are better addressed in the context of a motion for summary judgment.[6]

Accordingly, the Court DENIES, IN PART, Defendants' motion on this basis.

C. The Monopolization Claims.

Defendants also move to dismiss Plaintiffs' claims for monopolization and attempted monopolization on the basis that Plaintiffs fail to allege facts to support the relevant markets and on the basis that they fail to allege facts showing an antitrust injury. "A claim of monopolization **[*26]** under *[Section] 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *In re eBay Seller Antitrust Litig., 545 F. Supp. 2d 1027, 1031 (N.D. Cal. 2008)* (citing, *inter alia,* *U.S. v. Grinnell Corp., 384 U.S. 563, 570, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*.[7] In addition, a plaintiff must allege facts to show "an injury caused by the violation." *Id.* (citing *Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 855 (9th Cir. 1995)*; *P. Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir. 1992)*. In order to state a claim for attempted monopolization, "a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury." *Forsyth v. Humana, Inc., 114 F.3d 1467, 1477 (9th Cir. 1997)*.

For the reasons set forth above, in connection with Plaintiffs' tying claims, the Court concludes that Plaintiffs have sufficiently alleged the relevant market and have sufficiently alleged facts to show antitrust injury.

Accordingly, the Court DENIES, IN PART, Defendants' motion to dismiss on this basis.

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[6] Defendants rely, in part, on *Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir. 1982)* in support of their argument that Plaintiffs' allegations of injury are not sufficient. However, the court in *Kypta* addressed whether the plaintiffs had proved antitrust injury on a motion for summary judgment, rather than a motion to dismiss.

[7] The relevant market includes both a product market and a geographic market. *See* *Newcal Indus. v. Ikon Office Solution, 513 F.3d 1038, 1045 n.4 (9th Cir. 2008)*. **[*27]** Defendants do not argue that Plaintiffs fail to allege sufficient facts to define the relevant geographic market.

D. The Shipping Fee Claim is Dismissed, With Leave to Amend.

Plaintiffs assert a claim for relief entitled "Improper Collection of Shipping Fees as Part of Final Value Fee." (FAC ¶¶ 107-117.) Defendants moved to dismiss on the basis that Plaintiffs failed to articulate a legal basis for this claim. In their opposition, Plaintiffs argue that the facts alleged support a claim for unjust enrichment or for conversion.

Under California law, unjust enrichment is a theory of recovery, not an independent legal claim. *Melchior v. New Line Productions, Inc., 106 Cal. App. 4th 779, 793, 131 Cal. Rptr. 2d 347 (2003)* ("[T]here is no cause of action in California for unjust enrichment."); *see also* *McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 1490, 49 Cal. Rptr. 3d 227 (2006)* ("There is no cause of action for unjust enrichment. **[*28]** Rather, unjust enrichment is a basis for obtaining restitution based on quasi-contract or imposition of a constructive trust."). Therefore, although Plaintiffs may be entitled to recovery for unjust enrichment under other theories of liability, a claim for unjust enrichment does not constitute a stand-alone cause of action.[8]

> Conversion occurs where the defendant wrongfully exercises dominion over the property of another. ... To establish conversion, a plaintiff must show (1) his ownership of or right to possess the property at the time of the conversion, (2) that the defendant disposed of the plaintiff's property rights or converted the property by a wrongful act, and (3) damages. ... A plaintiff in a conversion action must also prove that it did not consent to the defendant's exercise of dominion.

Bank of N.Y. v. Fremont Gen. Corp., 523 F.3d 902, 914 (9th Cir. 2008) (citations omitted). In addition, Plaintiffs must allege a specific, identifiable sum of money involved. *See* *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal. App. 4th 384, 395, 58 Cal. Rptr. 3d 516 (2007)*.

Plaintiffs have not alleged that Defendants converted a specific, identifiable sum that is involved. In addition, Plaintiffs allege that eBay includes the shipping fee in its final value fee. Although Plaintiffs allege that Defendants do not provide shipping service or charge for shipping, Plaintiffs do not allege that they did not consent to pay eBay a final value fee. Although leave to amend should be freely granted, in light of the facts of this case, the Court concludes that Plaintiffs would not be able to state a claim for conversion.

Accordingly, the Court dismisses the fifth claim for relief, with one final opportunity to amend. If Plaintiffs believe there is some other legal basis on which to recover for this alleged conduct, they may include such a claim in the amended complaint permitted by this Order. Similarly, although the Court has concluded that Plaintiffs cannot assert **[*30]** a claim for unjust enrichment, the Court makes no finding as to whether Plaintiffs may be entitled to such damages as a matter of law.

CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART Defendants' motion to dismiss. Plaintiffs shall file and serve their Second Amended Complaint by no later than January 27, 2012. Defendants shall answer or otherwise respond within twenty days after service of the Second Amended Complaint. The Court HEREBY CONTINUES the case management conference scheduled for February 10, 2012 to April 6, 2012 at 1:30 p.m. The parties' Joint Case Management Conference statement shall be due by no later than March 30, 2012.

IT IS SO ORDERED.

Dated: January 5, 2012

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[8] Some courts have found that it is unclear whether California law recognizes a claim for "unjust enrichment" **[*29]** as a separate claim and have chosen to allow a claim for unjust enrichment. *See, e.g.,* *Nordberg v. Trilegiant Corp., 445 F. Supp. 2d 1082, 1100 (N.D. Cal. 2006)*. However, this Court believes the better course is to allow Plaintiffs to pursue recovery for unjust enrichment under other theories of liability.

/s/ Jeffrey S. White

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE

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Johns v. Visa U.S.A., Inc. (In re Credit/Debit Card Tying Cases)

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

January 9, 2012, Filed

A129672, JCCP No. 4335

Reporter
2012 Cal. App. Unpub. LEXIS 147 *; 2012-1 Trade Cas. (CCH) P77,765

CREDIT/DEBIT CARD TYING CASES.RICHARD JOHNS et al., Plaintiffs and Respondents, v. VISA U.S.A., INC. et al., Defendants and Respondents; JAMES ATTRIDGE et al., Objectors and Appellants.

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

Subsequent History: Decision reached on appeal by *Credit/Debit Card Tying Cases v. Visa U.S.A., Inc., 2014 Cal. App. Unpub. LEXIS 7814 (Cal. App. 1st Dist., Oct. 30, 2014)*

Costs and fees proceeding at *Credit/Debit Card Tying Cases v. Visa U.S.A., Inc., 2017 Cal. App. Unpub. LEXIS 263 (Cal. App. 1st Dist., Jan. 12, 2017)*

Prior History: **[*1]** San Francisco City & County Super. Ct. No. CGC04-436920.

Core Terms

settlement, debit card, debit, network, policies, Cases, card, merchants, credit card, trial court, class action, class member, banks, revolving, acquirer, damages, parties, unfair competition, cause of action, retail, settlement agreement, approving, federal credit, trial judge, card-issuer, charges, Cartwright Act, consumers, customers, inflated

Judges: RUVOLO, P. J.; REARDON, J., SEPULVEDA, J. concurred.

Opinion by: RUVOLO

Opinion

I. INTRODUCTION

This appeal arises from the settlement of a consolidated unfair competition class action (the Credit/Debit Card Tying Cases) brought on behalf of California residents who purchased retail goods or services using a credit or debit card affiliated with either the Visa or MasterCard system. The Credit/Debit Card Tying Cases are premised on policies (the credit/debit acceptance policies) adopted by respondents Visa and MasterCard that require merchants who accept their credit cards to accept their debit cards as well. The plaintiffs in the Credit/Debit Card Tying Cases (Class Plaintiffs) characterize the credit/debit acceptance policies as an unlawful tying arrangement. Class Plaintiffs allege that the credit/debit acceptance policies permitted Visa and MasterCard to charge inflated fees to merchants in connection with debit transactions, and that this damaged Class Plaintiffs because the merchants passed along the cost of these inflated fees in the form of higher retail prices. The trial court certified a settlement class in the Credit/Debit Card Tying Cases, **[*2]** and approved the settlement over the objections of appellants, who are members of the settlement class.

Appellants object to the settlement principally on the ground that the release of class members' claims included in the settlement agreement is overbroad. Specifically, appellants' concern is that the release covers not only all claims arising from the credit/debit acceptance policies, but also the claims (the Attridge claims) asserted in a separate action brought by objector and appellant James Attridge (the Attridge action).

The Attridge action is based on a different set of policies adopted by Visa and MasterCard. These policies (the exclusion policies) prohibit banks that issue credit cards affiliated with the Visa or MasterCard systems from issuing credit cards affiliated with other systems, such as American Express or Discover. The Attridge action asserts that the exclusion policies diminish competition in the consumer credit card market, thereby permitting banks that issue Visa or MasterCard credit cards (card-issuer banks) to charge inflated interest rates and fees to consumers who maintain revolving balances on their credit card accounts.

We agree with appellants that the release **[*3]** approved by the trial court as part of the settlement agreement in the Credit/Debit Card Tying Cases includes a release of the Attridge claims, and that the trial court erred in approving the settlement without considering whether it included adequate compensation for the release of the Attridge claims. Therefore, we must vacate the order approving the settlement, and remand the matter to permit the trial court to reconsider the fairness and adequacy of the settlement in light of the inclusion of the Attridge claims in the release.

II. FACTS AND PROCEDURAL BACKGROUND

A. Visa and MasterCard Systems and Relevant Policies

The basic structure of the Visa and MasterCard systems is not a matter of dispute on appeal. Accordingly, for background purposes, we adopt the cogent and concise description of the two systems' operations set forth in the opinion of the Second Circuit Court of Appeals in *U.S. v. Visa U.S.A., Inc. (2d Cir. 2003) 344 F.3d 229*.

"Visa U.S.A.[1] and MasterCard are two of the United States's four major network systems in the payment card industry, the other two being Amex and Discover. Visa U.S.A. and MasterCard are organized as open joint ventures, owned by the numerous banking **[*4]** institutions that are members of the networks. . . . Because MasterCard allows its member banks to issue Visa cards, and Visa U.S.A. likewise allows its members to issue MasterCard cards, many of Visa U.S.A.'s 14,000 members are also members of the MasterCard network. The networks' operations are conducted primarily by their member banks. While the member banks engage in the card business for profit, MasterCard and Visa U.S.A. themselves operate as non-profit organizations and are largely funded through service and transaction fees paid by their members. Both make a 'profit' on these fees, but their business model is not one that strives to maximize earnings at the 'network' level. Rather, the two organizations' capital surpluses are held basically as security accounts, to pay merchants in the event a member bank defaults on a payment obligation.

"The member banks of the MasterCard and Visa U.S.A. card networks may function either as 'issuers' or 'acquirers' **[*5]** or both. A member bank serving as an 'issuer' issues cards to cardholders; it serves as the liaison between the network and the individual cardholder. A member bank serving as an 'acquirer' acquires the card-paid transactions

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[1] For the sake of simplicity, our opinion refers to Visa U.S.A. and its affiliated parties collectively as Visa. Nonetheless, we have retained the Second Circuit's references to Visa U.S.A. in the portions of its opinion quoted here.

of a merchant; a particular acquiring bank acts as liaison between the network and those merchants accepting the network's payment cards with whom it has contracted.

"When a consumer uses a Visa card or a MasterCard card to pay for goods or services, the accepting merchant relays the transaction information to the acquiring bank with whom it has contracted. The acquirer processes and packages that information and transmits it to the network (Visa U.S.A. or MasterCard). The network then relays the transaction information to the cardholder's issuing bank, which approves the transaction if the cardholder has a sufficient credit line. Approval is sent by the issuer to the acquirer, which relays it to the merchant.

"Payment requests are sent by the merchant to the acquirer, which forwards the requests to the issuer. The issuer then pays the acquiring bank the amount requested, less what is called an 'interchange fee'—typically 1.4%. The acquirer retains an additional **[*6]** fee—approximately .6%. Thus, the issuing bank and the acquirer withold an aggregate of approximately 2% of the amount of the transaction from the merchant. This is known as the 'merchant discount.' For a $100 sale, the merchant typically will receive $98, the issuing bank retaining $1.40, while the acquiring bank retains 60 cents.

"Both MasterCard and Visa are open joint ventures, meaning that there is no limit to the number of banks that may become members, either as issuers or as acquirers. Any member may serve as both an issuer and as an acquirer. Members agree to abide by their association's by-laws and other regulations.

"A member of either the Visa U.S.A. or MasterCard network may also be a member of the other network. Thus a bank that is a member of Visa U.S.A.'s network and issues Visa cards may also be a member of the MasterCard network and issue MasterCard cards. On the other hand, both MasterCard and Visa U.S.A. have promulgated rules that prohibit their members from issuing American Express or Discover cards." (*U.S. v. Visa U.S.A., Inc., supra, 344 F.3d at pp. 234-236*, fns. & italics omitted.)[2]

Both Visa and MasterCard permit their member card-issuer banks to issue two types of cards that function within the network: credit cards and debit cards. "A credit card, such as a Visa or MasterCard credit card, allows a cardholder to make a purchase and pay off his card-issuing institution off over time. . . . A debit card allows a holder to access his bank account directly. . . . A debit card might be an ATM card, which enables the holder to withdraw cash from an ATM, or a 'POS debit card,' which can be used to make a purchase at the 'point of sale,' or both. [Citation.]" (*In re Visa Check/Mastermoney Antitrust Litigation (E.D.N.Y. 2000) 192 F.R.D. 68, 72*.) As already noted, both Visa and MasterCard adopted policies requiring merchants who accepted credit cards affiliated with their respective networks also to accept those networks' debit cards as well (the credit/debit acceptance policies).

B. The Federal Antitrust Litigation

1. The Federal Credit/Debit Tying Case

In 1996, a group of retail stores, headed by Walmart, sued Visa and MasterCard in federal district **[*8]** court (the federal credit/debit tying case). In the federal credit/debit tying case, the retail stores alleged that the credit/debit acceptance policies constituted illegal tying arrangements in violation of federal ***antitrust law***, and that Visa and MasterCard were using these policies, in conjunction with other anti-competitive conduct, to monopolize the debit card market. As a consequence, the stores claimed that they had incurred supra-competitive interchange fees in connection with transactions charged to Visa or MasterCard debit or credit cards. (See *In re Visa Check/Mastermoney Antitrust Litigation, supra, 192 F.R.D. at p. 73*.)

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[2] The rules described in the quoted text, precluding members of the Visa and MasterCard **[*7]** networks from issuing cards affiliated with other networks, are those referred to in this opinion as the exclusion policies.

The federal credit/debit tying case was certified as a class action, and the case ultimately settled. In December 2003, the district court approved the settlement (*In re Visa Check/Mastermoney Antitrust Litigation (E.D.N.Y. 2003) 297 F.Supp.2d 503*), and in January 2005, the Second Circuit affirmed. (*Wal-Mart Stores, Inc. v. Visa U.S.A., Inc. (2d Cir. 2005) 396 F.3d 96*.)

2. The Federal Exclusion Case

In 1998, while the federal credit/debit tying case was pending, the United States Department of Justice brought a civil enforcement action (the federal exclusion **[*9]** case) in federal district court charging that Visa and MasterCard's exclusion policies violated the Sherman Antitrust Act. (See *U.S. v. Visa U.S.A., Inc. (S.D.N.Y 2001) 163 F.Supp.2d 322*.) In October 2001, the trial court in the federal exclusion case entered a judgment against Visa and MasterCard, holding that the exclusion policies operated as a horizontal restraint on trade. (*Ibid.*)

As the Second Circuit later explained, the exclusion policies were "anticompetitive because they restrict the ability of American Express and Discover to compete with Visa and MasterCard in marketing their 'network services' to banks. As a result of [the exclusion policies], American Express and Discover have been effectively foreclosed from the business of issuing cards through banks. . . . No United States bank has been willing to give up its membership in the Visa U.S.A. and MasterCard networks in order to issue Amex or Discover cards." (*U.S. v. Visa U.S.A., Inc., supra, 344 F.3d at p. 237*.) The Second Circuit affirmed the judgment in the federal exclusion case in 2003. (*Id. at p. 244*.)

C. The California State Court Litigation

1. The Credit/Debit Card Tying Cases

On January 26, 2000, while the federal **[*10]** credit/debit tying case was still pending, Richard Johns filed a consumer class action in California state court challenging the credit/debit acceptance policies. The action was stayed, by mutual consent of the parties, pending the resolution of the federal credit/debit tying case.

After the federal credit/debit tying case settled, additional similar cases were filed in California state court. Ultimately, the cases were coordinated under the rubric of the Credit/Debit Card Tying Cases, and in February 2004, San Francisco Superior Court Judge Richard A. Kramer was assigned as the coordination trial judge.

On July 12, 2004, Class Plaintiffs filed a consolidated amended complaint (the Complaint), which remained the operative complaint at the time the case settled. The Complaint alleged that Visa and MasterCard illegally tied the acceptance of Visa and MasterCard debit cards by retailers (referred to in the Complaint as "Vendors" or "merchants") to the merchants' acceptance of Visa and MasterCard credit cards, thus "forcing merchants to accept [the debit cards] as a condition to being able to continue accepting the foremost and indispensable Visa and/or MasterCard credit cards." It further **[*11]** alleged that Visa and MasterCard "charged merchants the same fees for their [respective] debit cards as for their respective credit cards, despite the fact that the expenditures and risks associated with credit cards are far greater than for debit cards, which do not involve an extension of credit."

The Complaint defined the plaintiff class as all California purchasers of products or services from Vendors that accepted Visa and MasterCard credit cards, and that "have therefore been forced to accept Visa and MasterCard debit cards . . . , and to pay unreasonably high charges for acceptance of [those debit] cards." The Complaint alleged that the questions of law and fact common to the members of the class included: "(a) Whether defendants and their co-conspirators tie the acceptance of [Visa and MasterCard debit cards] to the Vendors' acceptance of Visa and MasterCard credit cards; [¶] (b) Whether defendants' tying arrangements are unlawful; and [¶] (c) The amount of supra-competitive fees paid by the Vendors with respect to [Visa and MasterCard debit cards], and passed on by the Vendors to class members in the form of higher prices for the Vendors' [p]roducts and [s]ervices."

The Complaint **[*12]** went on to describe the nature and operations of Visa and MasterCard, and their allegedly anticompetitive conduct. As part of that description, the Complaint mentioned the exclusion policies, citing *U.S. v. Visa U.S.A., Inc., supra, 344 F.3d 229*. It also briefly discussed other actions allegedly taken by Visa and MasterCard to hinder competitors from gaining market share in the general purpose credit card market, including charging higher fees to merchants for processing credit card purchases using card acceptance terminals associated with American Express. This section of the Complaint ended by alleging that "[a]fter Visa and MasterCard . . . assured their control of the credit card market, they began to pursue other payment systems," which "included POS [point of sale] debit cards."

The bulk of the factual allegations in the Complaint consisted of a description of the operations of Visa and MasterCard's debit card systems, and how the credit/debit acceptance policies, together with other policies and practices, enabled Visa and MasterCard to charge assertedly excessive, supra-competitive fees to merchants for processing payments tendered via Visa or MasterCard debit cards. Finally, **[*13]** the Complaint alleged that "[m]erchants pass on to consumers the higher costs associated with their losses, including forced payment of [Visa and MasterCard debit card] interchange fees, and the higher costs associated with the much slower transfer of consumers' funds into the merchants' bank accounts" when those debit cards are used in lieu of on-line debit cards (i.e., those tied directly to customers' bank accounts, rather than processed through the Visa or MasterCard "off-line" debit card system).

The Complaint alleged six causes of action: (1) violation of the Cartwright Act (*Bus. & Prof. Code, § 16720 et seq.*) by Visa, based on the credit/debit acceptance policies, resulting in artificially high fees to Vendors, and damaging plaintiffs because those fees were passed on to them in the form of higher prices charged the Vendors; (2) violation of the Cartwright Act by MasterCard, based on the same allegations made with respect to Visa, and resulting in the same damages; (3) conspiracy by Visa and MasterCard to violate the Cartwright Act in the manner alleged in the first two causes of action, and resulting in the same damages; (4) violation of the Unfair Competition Act (*Bus. & Prof. Code, § 17200*) **[*14]** by means of the antitrust violations alleged in the first three causes of action, resulting in unjust enrichment of the defendants; (5) violation of the Unfair Competition Act by means of the business acts or practices alleged in the first four causes of action, which were alleged to be in violation of public policy, immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers, resulting in unjust enrichment of the defendants; and (6) violation of the Unfair Competition Act by means of fraudulent business acts, including the "adoption of elaborate measures to deceive merchants into believing they were receiving Visa and MasterCard credit cards, when in fact they were receiving . . . debit cards . . . ." The complaint requested that the court certify the action as a class action; find that the defendants' conduct amounted to a violation of the Cartwright Act and the Unfair Competition Act; and award injunctive relief; treble damages for the Cartwright Act violation; restitution; other equitable relief; and attorney fees. Nowhere in the Complaint's description of the damages to consumers caused by the defendants' conduct is there any mention of inflated fees **[*15]** paid to card-issuer banks by credit card holders who maintain revolving balances on their accounts, which is the type of damages sought in the Attridge action.

On October 14, 2004, the trial court sustained Visa and MasterCard's joint demurrer to the first, second, and third causes of action for violation of the Cartwright Act, but overruled their demurrer to the fourth, fifth, and sixth causes of action for violations of the Unfair Competition Act, and denied their motion to strike portions of the complaint relating to those causes of action. On December 6, 2007, the trial court ruled that the findings recited in a partial summary judgment order issued by the federal district court in the federal credit/debit tying case would not be given collateral estoppel effect, because the federal court's order was interlocutory, and the case was ultimately settled before the order became final.

2. The Attridge Action

In December 2004, after the Second Circuit's affirmance of the judgment against Visa and MasterCard in the federal exclusion case, appellant James Attridge filed a class action in the San Francisco Superior Court alleging that the exclusion policies violated the Cartwright Act and **[*16]** the Unfair Competition Law. As of August 2009, the operative complaint in the Attridge action (the Attridge complaint) was the third amended complaint, filed on

December 2, 2005, as amended by an amendment naming a Doe defendant, which was filed on December 14, 2007.

The Attridge complaint described the exclusion policies, and alleged (citing the trial court's findings in the federal exclusion case) that they had reduced competition in the "general purpose card network services market," which permitted Visa and MasterCard, in combination with their member card-issuer banks, to charge supra-competitive prices for network services. The complaint sought certification of a class defined to include California Visa and MasterCard holders with revolving balances ("revolver cardholders"). The Attridge complaint further alleged that the exclusion policies damaged revolver cardholders, because the affected banks had passed on the cost of the inflated network service fees to their customers in the form of higher prices for "general purpose card network services." On the basis of these allegations, the Attridge complaint pleaded one cause of action for violation of the Cartwright Act and three **[*17]** causes of action for violation of the Unfair Competition Act.

After the Attridge action was filed, it was designated as complex, and assigned to Judge Kramer. Attridge timely disqualified Judge Kramer under *Code of Civil Procedure section 170.6*, however, so the case was redesignated as a single-assignment case. The Attridge action was not included among the cases coordinated as the Credit/Debit Card Tying Cases.

In the Attridge action, as in the Credit/Debit Card Tying Cases, the defendants' demurrer to the Cartwright Act causes of action was sustained, but their demurrer to the Unfair Competition Law causes of action was overruled. During the hearing on the demurrer, counsel for Attridge confirmed that the court was correct in describing the claims asserted in the Attridge action as follows: "The wrong that is alleged is the alleged conspiracy among the Visa members, among the MasterCard members, and between Visa and MasterCard to shut out competition at the network service level, thereby driving up network service costs beyond what they would have been had Discover and American Express or others been permitted to enter the market, thereby increasing . . . the finance charge that banks **[*18]** are able to charge their customers . . . ."

As of the fall of 2009, the defendants in the Attridge action had filed a motion for summary judgment or summary adjudication. The motion for summary judgment was denied, but the motion for summary adjudication had not yet been ruled upon. No class certification motion had been filed.

D. The Settlement and the Settlement Approval Proceedings

By August 2009, the Class Plaintiffs in the Credit/Debit Card Tying Cases had settled with both Visa and MasterCard. The parties then requested the trial court to grant preliminary approval of the settlement. Attridge objected to the settlement, and was permitted to participate as an amicus curiae in the preliminary approval proceedings.

On January 5, 2010, the trial court entered an order preliminarily approving the settlement, provisionally certifying the settlement class, ordering that notice to the class members be published and posted on the Internet, and providing an opportunity for class members to object, or to opt out. Prior to final approval, the settlement agreement was amended several times. In its final form, the settlement agreement provided that Visa and MasterCard would pay a total of $31 **[*19]** million into an escrow fund, from which attorney fees, litigation costs, class representative incentive awards, and administration costs would be paid. The amount remaining was to be distributed to nonprofit organizations selected by the parties and approved by the court, to be used by those organizations for financial literacy education, or other purposes relating to advocacy for children, or the indigent.

On August 6, 2010, the trial court held a hearing on final approval of the settlement. In addition to Attridge, appellants Marilene Selvaggio, John Metzger, and Melvin Salveson, all of whom stated that they were members of the settlement class, filed objections.[3]

At the settlement approval hearing on August 6, 2010, counsel for appellant Salveson argued that the amount of the settlement was inadequate in light of the scope of the release, and that Class Plaintiffs' counsel "should get a **[*20]** much, much better deal from these [d]efendants who have already been found to have violated the antitrust laws . . . because of their agreements to exclude competing cards and competitors, which . . . will be released by [Class] Plaintiffs for no money at all." Counsel went on to point out that Visa and MasterCard had been found to have "by agreement . . . prevented . . . their [card-issuer] bank members from participating with American Express, Discover and other competing cards," and noted that claims based on this conduct were being released as part of the settlement. As the trial judge paraphrased it, Salveson's position was that the settlement would "releas[e] all antitrust claims no matter how they would come about, and other anticompetitive claims arising out of the existence of the Visa and the MasterCard interchange system."

The trial judge then invited counsel for the settling parties to inform the court whether Salveson's counsel's interpretation of the scope of the settlement agreement was correct. He noted that at the preliminary approval stage, he had "raised the point on the record that this release should only cover claims that would arise out of what this lawsuit's **[*21]** about," and that this was the way he had interpreted the release. In response, Visa's counsel and counsel for the Class Plaintiffs represented that the "standard release language" in the settlement agreement was not intended to be "any broader than claims based on conduct which was alleged . . . or claims which could have been brought based on the conduct which was alleged in this case."

Later during the hearing on August 6, 2010, counsel for plaintiffs in the Attridge action stressed that two different injuries were involved in the two cases. As counsel explained, the Credit/Debit tying cases involved "merchants who have charges imposed on them for debit [cards], passing them on to all purchasers" in the form of higher retail prices paid by everyone who bought retail products and services, regardless of the form of payment they used. The Attridge case, in contrast, involved the "network service fee injury" which "involves Visa and MasterCard imposing charges on the [card] issuing banks which then pass them on to revolver credit card holders in their credit card statements." Counsel for the Class Plaintiffs responded that the harm alleged in the Attridge action was "part of this case," **[*22]** noting that members of the putative class in the Attridge action would, of necessity, also be members of the settlement class in the Credit/Debit Tying Cases, and pointing out that he had submitted declarations from class representatives averring that they had paid finance charges on their credit cards.

The trial judge then commented that in his view, the problem had been taken care of by notifying the class members in the Credit/Debit Tying Cases that the settlement could affect their rights in the Attridge action, advising them to seek the advice of counsel, and offering them the opportunity to opt out. He declined to "make an express interpretation of the release in this context, because [he did not] have facts in front of [him]." Instead, he was "just going to leave it for any situation that might arise and may not arise in the future," even though he understood the Attridge plaintiffs' contention that, as their counsel put it, "the reference that's in the release is specific enough to give us a lot of trouble" due to the reference to the federal exclusion litigation on which the Attridge action is based.

At the end of the hearing on August 6, 2010, the trial judge directed the parties **[*23]** to revise the settlement so as to distribute the entire settlement amount (net of attorney fees and costs) to charitable organizations, rather than using a portion of it to develop a "financial literacy toolkit." Once the parties had done so, on August 23, 2010, the judge signed an order finally approving the settlement, over the objections of appellants. Judgment was entered on the same day. Appellants each filed timely notices of appeal.

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[3] Except where it is necessary to distinguish among objectors Attridge, Selvaggio, Metzger, and Salveson, we will refer to them collectively as appellants. In this court, Selvaggio and Metzger have filed joint appellants' briefs, and Attridge and Salveson have each filed their own appellant's briefs.

III. Discussion

A. Judicial Review of Class Action Settlements

When a class action is settled, trial court approval of the settlement is required, because the court has a fiduciary responsibility as guardian of the rights of the absentee class members. (*Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 129, 85 Cal. Rptr. 3d 20* (*Kullar*).) "[I]n the final analysis it is the court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation." (*Ibid.*)

"The well-recognized factors that the trial court should consider in evaluating the reasonableness **[*24]** of a class action settlement agreement include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.' [Citations.] This list 'is not exhaustive and should be tailored to each case.' [Citation.]" (*Kullar, supra, 168 Cal.App.4th at p. 128*.)

A "presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. [Citation.]" (*Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1802, 56 Cal. Rptr. 2d 483*.) Even when these factors are present, a court cannot "determine the adequacy of a class action settlement without independently satisfying itself that the consideration being received for the release of the class members' claims **[*25]** is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra, 168 Cal.App.4th at p. 129*.) In particular, "[a]ny attempt to include in a class settlement terms which are outside the scope of the operative complaint should be closely scrutinized by the trial court to determine if the plaintiff genuinely contests those issues and adequately represents the class. [Citation.]" (*Trotsky v. Los Angeles Fed. Sav. & Loan Assn. (1975) 48 Cal.App.3d 134, 148, 121 Cal. Rptr. 637* (*Trotsky*).) Moreover, if an objector questions the fairness of the settlement based on a difference of opinion with class counsel regarding a "legal point [which] significantly affects the valuation of the case for settlement purposes," then "the trial court is obliged, at a minimum, to determine whether a legitimate controversy exists on [that] legal point." (*Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 803, 96 Cal. Rptr. 3d 441* (*Clark*); see also *id. at pp. 801-804*.)

The scope of this court's review of the trial court's approval of a class action settlement is limited. "Our task is not to make an independent determination whether the terms of the settlement are fair, **[*26]** adequate and reasonable, but to determine 'only whether the trial court acted within its discretion.' [Citation.]" (*Kullar, supra, 168 Cal.App.4th at pp. 127-128*.) In making this determination, "[g]reat weight is accorded the trial judge's views." (*7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1145, 102 Cal. Rptr. 2d 777*.) "[G]iven that 'so many imponderables enter into the evaluation of a settlement' [citation], an abuse of discretion standard of appellate review is singularly appropriate." (*Id. at pp. 1166-1167*.)

This does not mean, however, that we are obligated to rubber stamp the trial court's judgment. "'The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.] Moreover, '"[t]he discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject **[*27]** of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]"' [Citations.]" (*Cellphone Termination Fee Cases (2009) 180 Cal.App.4th 1110, 1118, 104 Cal. Rptr. 3d 275*.)

B. Analysis

In the present case, all appellants argue, in essence, that the trial court abused its discretion by approving the settlement, because including the Attridge claims within the scope of the release rendered the settlement unfair. Attridge claims, in addition, that a subclass should have been certified, and separate class representatives and counsel appointed, because there was a conflict between the settlement class and those of its members who also were putative class members in the Attridge action. Selvaggio and Metzger additionally argue that even as to the core claim asserted in the Credit/Debit Tying Cases, the settling parties did not submit sufficient evidence to support the finding that the settlement was adequate.

1. The Attridge Claims Are Not Subsumed Within the Credit/Debit Tying Cases

Respondents contend that the Attridge claims are subsumed within the claims of the Plaintiff Class in the Credit/Debit Tying Cases, because both cases plead unfair competition claims based on many **[*28]** of the same facts regarding Visa and MasterCard's duopolistic market power. We agree that both the Credit/Debit Card Tying Cases and the Attridge action are based on the same general background allegations that Visa and MasterCard possessed and abused duopolistic economic power. They also both plead causes of action based on the unfair competition law, and there is considerable overlap among the putative class members. Nonetheless, contrary to the position of the plaintiffs in the Credit/Debit Card Tying Cases, the Attridge action is not a mere "copycat" action. The two actions involve different instrumentalities of harm—i.e., the credit/debit acceptance policies versus the exclusion policies—and different types of damage—i.e., inflated retail prices charged by merchants to those who purchase goods or services using credit or debit cards, versus inflated fees charged by card-issuer banks to their customers who carry outstanding credit card balances.

Class Plaintiffs stress that their Complaint is based in part on the exclusion policies, which are the instrumentalities of harm relied on in the Attridge action. This is so, however, only insofar as the Complaint alleges that the exclusion **[*29]** policies contributed to placing Visa and MasterCard in the dominant market position that enabled them to impose the credit/debit acceptance policies on merchants. Class Plaintiffs also point to their evidence that some class members paid interest on revolving credit card balances. We do not doubt that there is considerable overlap between the settlement class in the Credit/Debit Card Tying Cases and the putative class in the Attridge action. This fact in and of itself, however, does not justify requiring the release of the Attridge claims.

This principle is illustrated by *Trotsky, supra, 48 Cal.App.3d 134*. *Trotsky* was a class action that originally challenged three provisions of a specific form of trust deed used to secure mortgage loans made by the defendant. Later, the plaintiffs filed an amended complaint that withdrew any challenge to one of the three challenged provisions. Meanwhile, another borrower, Barwig, filed a class action involving the same deed of trust. Barwig's action challenged *only* the provision that the *Trotsky* plaintiffs had deleted from their amended complaint. When the *Trotsky* parties then settled the class action in an agreement that released the defendant from **[*30]** liability relating to all three provisions, including the one that been abandoned by the *Trotsky* plaintiffs, Barwig objected to the settlement, arguing that it might be given collateral estoppel effect and bar Barwig's own class action. Despite the obvious overlap among the class members in the two cases, the Court of Appeal in *Trotsky* reversed the trial court's approval of the settlement on various grounds, including that the *Trotsky* plaintiffs could not settle the claims of a class of plaintiffs they did not represent. (*Id. at pp. 146-152*.)

Similarly, in the present case, even though the Class Plaintiffs may also be members of the purported class in the Attridge action, this is not sufficient to establish that the trial court acted within its discretion in approving a settlement that releases the Attridge claims. Admittedly, in *Trotsky, supra, 48 Cal.App.3d 134*, the Court of Appeal relied in part on the fact that the named plaintiffs did not allege that they themselves had incurred damages based on the provision at issue in Barwig's action (see *id. at p. 147*), whereas here, Class Plaintiffs have provided evidence that they are indeed members of the putative Attridge class. However, **[*31]** this is a distinction without a difference. "It is the fact that the class plaintiff's claims are typical *and his representation of the class adequate* which gives legitimacy to permitting him to bind class members who have notice of the action. [Citations.]" (*Id. at p. 146*, italics added.)

Thus, the issue is not just whether the class membership overlaps, but in addition, whether Class Plaintiffs have adequately represented not only the interests they assert in the Credit/Debit Tying Cases, but also the separate interests asserted in the Attridge action. (See *Trotsky, supra, 48 Cal.App.3d at pp. 146-147*.) Otherwise, the settlement "carries with it substantial dangers of injustice to [the Attridge] class members who may be deprived of their rights by the actions of the class plaintiff[s]" in the present case. (*Id. at p. 149*, citing *City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 458-459, 115 Cal. Rptr. 797, 525 P.2d 701*.)[4] Therefore, if the settlement includes a release of the Attridge claims, the trial court was obligated to consider whether Class Plaintiffs had adequately represented the interests of Visa and MasterCard customers in their capacity as members of the putative class in the Attridge action before **[*32]** approving the settlement.

2. The Attridge Claims Fall Within the Scope of the Release

In the course of the proceedings regarding the settlement, in response to the **[*33]** objections posed by counsel for Attridge, the trial judge suggested that the settling parties remove from the agreement a provision *expressly* releasing the claims asserted in the Attridge action. The release provision was revised accordingly. However, as already noted, the trial judge declined to make a ruling, both at the class notice stage and at the final settlement approval hearing, as to whether the release provision ultimately included in the settlement agreement did or did not extinguish the claims asserted in the Attridge action.

The release included in the final settlement agreement ultimately approved by the trial court provides that class members who do not opt out agree to release Visa and MasterCard (referred to as Released Parties) from all liability "arising out of or relating in any way to any conduct or failure to act of any Released Party alleged or which could have been alleged in the Consolidated Amended Complaint . . . , including any claims based on rules, by-laws, regulations, policies, practices, network service fees, interchange fees, merchant discount fees, *finance charges,* or *charges of any kind* of any Released Party, and including any claims based on theories **[*34]** of tying, attempted monopolization, monopolization, *exclusionary conduct,* price-fixing, or any other restraint of trade, or of any unfair, deceptive, or fraudulent practice or failure to disclose, and including any claims that arise under or relate to California's Unfair Competition Law . . . , and including *any claims based in any way upon* the tying *or other* conduct alleged in [the federal credit/debit tying case] or upon the Visa By-law 2.10(e) or MasterCard Competitive Programs Policy or other conduct alleged in *United States v. Visa U.S.A., Inc., et al.,* . . . [i.e., the federal *exclusion* case] (including any impact that such conduct had on retail product or service prices)." (Italics added, except as to case title.)

Because the trial court did not resolve any conflicts in the evidence regarding the parties' intent in drafting this release provision, we interpret it de novo based upon the contractual language. (*Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 865, 44 Cal. Rptr. 767, 402 P.2d 839*; *Nelson v. County of Kern (2010) 190 Cal.App.4th 252, 276, 118 Cal. Rptr. 3d 736*.) The language italicized in the quotation in the preceding paragraph includes within the ambit of the release all claims that are based on "finance charges, **[*35]** or charges of any kind," and that involve "theories of . . . attempted monopolization [and] exclusionary conduct." Coupled with the explicit reference

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[4] As the Second Circuit recently pointed out in reversing an order approving a class action settlement, the fact that some class representatives have the same claims as those belonging to the objecting plaintiff class does not necessarily mean that the representatives will fairly and adequately represent the interest of all class members. (*Literary Works in Elec. Databases Copyright Litig. (2d Cir. 2011) 654 F.3d 242, 251-255*.) The court reasoned that when a class action covering more than one type of claim is settled, the "named plaintiffs . . . [are] obligated to advance the collective interests of the class, rather than those of the subset of class members whose claims mirror[] their own." (*Id. at p. 252*.) Thus, the court held that even where "class members can and do hold claims in [multiple] categories" (*id. at p. 251*), subclasses for each type of claim should be created, in order to ensure adequate representation in the settlement negotiations of those class members who hold only one type of claim. (*Id. at pp. 251-257*.)

to claims based on the conduct alleged in the federal exclusion case, the wording of the release leaves no room for doubt that it encompasses the claims asserted in the Attridge action. Tellingly, respondents' briefs on appeal implicitly adopt this interpretation of the scope of the release.[5] Thus, contrary to respondents' assertions, appellants' challenges to the release provision in the settlement agreement cannot be dismissed on the basis that the release provision is nothing more than the standard broad release language commonly used in class action settlement agreements.[6]

Moreover, the release goes on expressly to exempt from its scope all claims that are (1) based on the releasing party's acceptance, as a merchant, of Visa or MasterCard credit or debit cards; (2) based on an entitlement to settlement funds in specified litigation relating to currency conversion fees; or (3) "based upon a routine individual dispute with the financial institution that issued [the claimant] a Visa- or MasterCard-branded payment card regarding payment of [the claimant's] personal account statement." The inclusion of these explicit exceptions to the scope of the release demonstrates that if the parties to the Credit/Debit Tying Cases had wished to exempt the claims asserted in the Attridge **[*37]** action from the ambit of their settlement, they could and would have done so. Conversely, the omission of such an exception from the release makes it even clearer that, if allowed to stand, the release would operate as a bar to the further prosecution of the Attridge action, or to the assertion of the same claims in any other litigation. (See *Villacres v. ABM Industries Inc. (2010) 189 Cal.App.4th 562, 585-590, 117 Cal. Rptr. 3d 398* [holding individual plaintiff's claims barred by release provision in prior class action settlement agreement which included all claims that could have been asserted in that action, based in part on fact that agreement included exceptions to scope of release, and plaintiff's claims were not listed as exception]; *Stephenson v. Drever (1997) 16 Cal.4th 1167, 1175, 69 Cal. Rptr. 2d 764, 947 P.2d 1301* [under maxim *expressio unius est exclusio alterius,* where parties' contract expressly provided that certain consequences would flow from termination of plaintiff's employment, this tended to negate inference that parties also intended another consequence to flow from same event].)

3. The Release of the Attridge Claims Renders the Settlement Unfair

Because we conclude the Attridge claims are included within the scope of the **[*38]** release, the overall fairness of the settlement of the Credit/Debit Tying Cases depends in part on a "ballpark" estimate of the value of the Attridge claims. (See, e.g., *Kullar, supra, 168 Cal.App.4th at p. 133* [trial court approving class action settlement "must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness"].) In other words, the parties seeking approval of the settlement were obligated to present the trial court with evidence that the relief provided was adequate to compensate not only for the inflated retail prices allegedly paid to merchants as a result of the credit/debit acceptance policies, but also the inflated interest and fees allegedly paid to card-issuer banks by those credit card holders with revolving balances, as a result of the exclusion policies.

In an effort to demonstrate that the settlement did *not* include fair compensation for the Attridge claims, Attridge submitted a declaration by an expert economist, Dr. Andrew Safir, regarding the amount of damages suffered by the putative class in the Attridge action. Safir explained that he had been asked to calculate the damages caused by the "former Visa and MasterCard loyalty **[*39]** rules in place from 1991 through October 2004," which "enabled these companies to set, fix and establish supra-competitive prices for network service fees charged to banking

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[5] Respondents argue that it was proper for the release to include the Attridge claims, and they do not contend that those claims fall outside its intended scope. At oral argument in this court, counsel for Visa confirmed Visa's position that the release includes the Attridge claims.

[6] On June 10, 2011, class counsel requested that this court take judicial notice of four class action settlements approved by other courts, in cases not substantively related to this one, **[*36]** after the judgment was entered in the trial court in the present case. Class counsel has not established that any of these other settlements implicate the issue that appellants raise here, i.e., that the settlements included a release of claims asserted in a different, concurrently pending case, and were approved over the objections of persons representing putative class members in that other case. For that reason, the request for judicial notice is denied, on the ground of lack of relevance.

institutions issuing Visa and Master[Card] [c]ards to the general public"—fees which Safir asserted "were, in turn, passed on to specific bank card customers, who incurred greater costs in obtaining revolving credit."

Safir opined that "over the period from 1991 until the unfair competitive practices were terminated in October of 2004, Visa revolving charge card holders suffered approximately $177 million in damages" (not including interest) and that "[o]ver this same period, revolving credit customers holding MasterCards were damaged by $80 million" (again, not including interest). Safir opined that the retail charge market was sufficiently competitive that "any reduction in network fees charged by Visa and MasterCard to their banking clients would have been rapidly passed on to end use customers." Safir explained that he was still awaiting additional discovery material that would enable him "to calculate the specific extent of the 'pass-on' of network fee value from the bank to the retail card level, and specifically **[*40]** that amount which should be appropriately allocated to revolving charge customers." Safir estimated that if the members of the putative class in the Attridge action received their damages in full, "each class member would receive more than $36." (Fn. omitted.)

In response to Safir's declaration, counsel for the Class Plaintiffs submitted the declaration of a rival expert economist, Dr. Gustavo Bamberger. While conceding that it was "not possible to fully evaluate [Safir's] damage estimate" due to the lack of supporting detail, Bamberger opined that it did "not appear to be consistent with the available evidence." Specifically, Bamberger indicated that contrary to Safir's analysis, publicly available data did not show a fall in network service fees after Visa and MasterCard revoked their anticompetitive policies in October 2004. Bamberger also explained that even if the "challenged conduct" substantially raised the fees charged by Visa and MasterCard to their member card-issuer banks, Safir had not demonstrated that "those higher fees had a substantial effect on the cost to consumers who used credit cards as a source of revolving credit." Bamberger noted that card-issuer banks that are **[*41]** members of the Visa and/or MasterCard networks could have passed on higher network service fees in other ways than via increased interest on revolving balances. He also noted that such banks set their own fees and interest rates, which "could vary substantially across issuing banks." (Fn. omitted.)

The dueling expert declarations of Safir and Bamberger created a significant conflict in the evidence as to the value of the claims asserted by the putative class in the Attridge action. Moreover, Safir's and Bamberger's declarations each indicated that the respective declarants had reached their conclusions based on a limited amount of available information. Yet in discussing the reasons that he found the amount of the settlement to be fair and reasonable, the trial judge did not resolve—or even mention—the conflict between the two declarations. Nor did he address the question whether counsel for the Class Plaintiffs, before agreeing to the settlement, had adequately investigated and assessed the factual and legal strengths and weaknesses of the Attridge claims. Under *Kullar, supra, 168 Cal.App.4th 116*, and *Clark, supra, 175 Cal.App.4th 785*, it was an abuse of discretion to approve the settlement **[*42]** without determining whether the evidence in the record justified a finding that the settlement's terms were fair notwithstanding the inclusion of the Attridge claims in the release.

Based on his comments at the settlement approval hearing on August 6, 2010, the trial judge appears to have believed that Attridge's objections were adequately resolved by the fact that the class members, including the Attridge plaintiffs, had been notified of the pending settlement, and given the opportunity to opt out. However, opting out would have preserved only the Attridge plaintiffs' right to pursue their *individual* claims. It would not have permitted them to maintain the Attridge action as a class action, because the members of the putative Attridge class generally were also members of the class in the Credit/Debit Tying Cases, and therefore would be barred from pursuing their claims if they had not opted out of the present settlement. (Cf. *Villacres v. ABM Industries Inc., supra, 189 Cal.App.4th at pp. 581-590* [plaintiff who was member of class in prior action and did not opt out of settlement was barred by res judicata from bringing subsequent action raising claims that fell within scope of release **[*43]** given in prior action].)

Moreover, the opportunity to opt out merely put the absent class members to a Hobson's choice: participate in the settlement in the Credit/Debit Tying Cases, and give up their claims in the Attridge action; or opt out of the settlement, and litigate their Attridge claims separately. A settlement that requires absent class members to give up one set of claims in order to retain other, independent claims should not be approved as fair and equitable unless and until the value of the latter claims has been assessed by the trial court, at least within a "ballpark" for settlement purposes. (See generally *Clark, supra, 175 Cal.App.4th 785*; *Kullar, supra, 168 Cal.App.4th 116*; *Trotsky, supra, 48 Cal.App.3d 134*.) Thus, the fact that the notice to the absent class advised them of the potential effect of the settlement on the Attridge claims and allowed them to opt out does not resolve the problems with the settlement that appellants have identified.[7]

IV. DISPOSITION

The judgment approving the settlement agreement is REVERSED, and the matter is remanded for further proceedings consistent with the views expressed in this opinion, including but not limited to reconsideration of the fairness and adequacy of the settlement in light of the inclusion of the Attridge claims in the scope of the release. Appellants are awarded their costs on appeal, as a joint and several obligation of respondents.

RUVOLO, P. J.

We concur:

REARDON, J.

SEPULVEDA, J.

End of Document

[7] Because we are reversing the judgment approving the settlement, this case will proceed to trial unless the parties agree to revise the settlement agreement and resubmit it for court approval. Thus, we need not address appellants' **[*44]** other challenges to the fairness of the existing settlement agreement. To the extent appellants may have similar objections to the terms of any future settlement agreement that are similar to the ones raised here and not addressed in this opinion, they remain free to assert those objections in the course of the proceedings for court approval.

Marchese v. Cablevision Sys. Corp.

United States District Court for the District of New Jersey

January 9, 2012, Decided; January 9, 2012, Filed

Civil Action No.: 10-2190 (JLL)

Reporter

2012 U.S. Dist. LEXIS 2799 *; 2012-1 Trade Cas. (CCH) P77,778; 2012 WL 78205

GARY MARCHESE, individually and on behalf of all others similarly situated, Plaintiff, v. CABLEVISION SYSTEMS CORPORATION, and CSC HOLDINGS, INC., Defendants.

Notice: NOT FOR PUBLICATION

Prior History: *Marchese v. Cablevision Sys. Corp., 2011 U.S. Dist. LEXIS 80117 (D.N.J., July 21, 2011)*

Core Terms

two way, boxes, Plaintiffs', cable, tying product, set-top, geographic, subscribers, cluster, relevant market, consumers, technological, coercion, market power, products, interactive, package, tied product, customers, providers, prices, satellite, video, interchangeable, programming, allegations, rental, monopoly power, distributed, markets

LexisNexis® Headnotes

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

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

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

In reviewing a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, a district court is required to accept as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable to the plaintiff. However, a court need not credit either bald assertions or legal conclusions in a complaint when deciding a motion to dismiss. A complaint survives a *Rule 12(b)(6)* motion to dismiss if it states a claim to relief that is plausible on its face regarding the plaintiff's entitlement to the relief sought. This standard is satisfied only when a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Antitrust & Trade Law > Sherman Act > Claims

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

HN2[] Sherman Act, Claims

A tying arrangement is an arrangement in which the seller sells one item, known as the tying product, on the condition that the buyer also purchases another item, known as the tied product. In order to make out a *15 U.S.C.S. § 1* per se tying claim, a plaintiff must appropriately allege facts indicating: (1) a defendant seller tied two distinct products, conditioning sale of one product on the purchase of a different tied product; (2) the seller possesses market power in the tying product market; and (3) a substantial amount of interstate commerce is affected.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

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

HN3[] Sherman Act, Claims

The first inquiry in any *15 U.S.C.S. § 1* tying case is whether the defendant has sufficient market power over the tying product, which requires a finding that two separate product markets exist and a determination precisely what the tying and tied products markets are. In order to state a Sherman Act claim under *§ 1*, a plaintiff must identify the relevant product and geographic markets.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

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

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

HN4[] Relevant Market, Geographic Market Definition

The geographic market selected by plaintiffs must correspond to the commercial realities of the industry and be economically significant. The United States Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. Courts generally measure a market's geographic scope, the area of effective competition, by determining the areas in which the seller operates and where consumers can turn, as a practical matter, for supply of the relevant product. This approach evaluates the geographic aspect of the elasticity of a specified market-that is, how far consumers will go to obtain the product or its substitute in response to a given price increase and how likely it is that a price increase for the product in a particular location will induce outside suppliers to enter that market and increase supply-side competition in that location. Courts have also held that the market for certain entertainment services is local or regional. For per se claims, plaintiffs need not establish a geographic market. Some prohibited practices can be conclusively presumed to unreasonably restrain competition. Further, defining the relevant geographic market is an issue of the merits.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN5[] Relevant Market, Geographic Market Definition

The relevant geographic market is the market area in which the seller operates, and to which the purchaser can practicably turn for supplies, in other words, the area in which suppliers effectively compete. In view of the realities of the multichannel video programming distributor industry, defining the relevant geographic market as the clustered service area in which an individual distributor operates accords with reports issued by the Federal Communications Commission and other district courts' consideration of the issue.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

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

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN6[] Tying Arrangements, Per Se Rule

In antitrust claims reviewed under *Fed. R. Civ. P. 12(b)(6)*, a plaintiff has the burden of defining the relevant market. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted. However, antitrust claims do not have a heightened pleading standard: definition of the relevant product market often requires a deeply fact-intensive inquiry, and courts are hesitant to grant motions to dismiss for failure to plead a relevant market definition. Also, plaintiffs are required to state facts sufficiently alleging coercion: to prove a per se illegal tie-in, a plaintiff must establish an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. In the absence of a formal agreement, a plaintiff must establish in some other way that a tie-in was involved and not merely the sale of two products by a single seller. This can be done by proof that purchase of one product, the tied product, was not voluntary, i.e., by proof of coercion.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN7[] Relevant Market, Product Market Definition

Cluster markets should arguably be found invalid unless: 1) most customers would be willing to pay monopoly prices for the convenience of receiving a defendant's grouping of products; or 2) economies of joint provision make distribution of the cluster cheaper per good than distribution of each separately, and firms supplying one of the products in the cluster could not easily add the others as well. If aggregation reveals an important relationship between the defendants' course of conduct and their overall monopoly power, it is indeed a useful and, hence, appropriate methodology. It, however, aggregation obscures, rather than reveals, it cannot be justified.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

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

HN8[] Tying Arrangements, Per Se Rule

A significant element of an illegal tying arrangement is coercion of the consumer by the seller in the form of conditioning the sale of the tying product on the consumer's purchase of the tied product. Where the buyer is free to take either product by itself, there is no tying problem. The United States Supreme Court has focused on the danger of tying when a seller leverages economic power from one market to another. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such forcing is present, competition on the merits for the tied item is restrained and the Sherman Act is violated.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

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

HN9[] Tying Arrangements, Per Se Rule

The United States Supreme Court has required that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product. The first inquiry into any *15 U.S.C.S. § 1* tying case is whether the defendant has sufficient market power over the tying product. If the defendant is found to have sufficient market power in the tying product market, then the tie may be a per se violation of the Sherman Act. Market power is the power to force a purchaser to do something that he would not do in a competitive market. The focus of the court should be whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Evidence > Burdens of Proof > Allocation

HN10[] Price Fixing & Restraints of Trade, Tying Arrangements

To sufficiently assert a tying claim under a rule of reason theory of liability, plaintiffs need not prove that the seller has power in the tying product market, but must set forth: 1) a viable theory of causation of antitrust injury in that a defendant's alleged tying resulted in anticompetitive effects (e.g., through the forced purchase of inferior goods, consumer surprise, difficulty in consumer ability to make proper price comparisons, or foreclosure of the tied product market); and 2) a rebuttal at trial of defendant's procompetitive justifications, if any. Rule of reason claims are still available to plaintiffs who do not succeed in their per se tying claims.

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

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN11[] Scope, Monopolization Offenses

Section 2 of the Sherman Act, *15 U.S.C.S. § 2*, sanctions those who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. Monopolization under *§ 2* consists in: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Plaintiffs have the burden of defining the relevant *§ 2* product market. To have standing to seek a *§ 2* claim, plaintiffs must show that they have suffered an antitrust injury as a result of the defendant's misconduct so as to possess the standing necessary to seek relief. The injury prong requires a showing of: (1) harm of the type the antitrust laws were intended to prevent; and (2) an injury to the plaintiff which flows from that which makes defendant's acts unlawful.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN12[] **Actual Monopolization, Monopoly Power**

Monopoly power has been defined as the power to charge a price higher than the competitive price without inducing so rapid and great an expansion of output from competing firms as to make the supracompetitive price untenable. Such power can be demonstrated by direct evidence of supracompetitive pricing and high barriers to entry or with structural evidence of a monopolized market. Structural indicators of a monopolized market include a firm's possession of a dominant share of a relevant market that is protected by entry barriers. In determining a valid relevant market in which monopoly power is alleged, a court looks to reasonable interchangeability of use of the relevant product. The test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but commodities reasonably interchangeable by consumers for the same purposes.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN13[] **Market Definition, Relevant Market**

A single brand of a product of service may constitute a relevant market only where the commodity is unique, and therefore not interchangeable with other products.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN14[] **Market Definition, Relevant Market**

Potential participants in a market may be included in the relevant market since, absent the exclusionary conduct of the alleged monopolist, such participants could have offered interchangeable products. Defining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

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Judges: Jose L. Linares, United States District Judge.

Opinion by: Jose L. Linares

Opinion

This matter comes before this Court by way of Defendant Cablevision Systems Corporation ("Defendant" or "Cablevision")'s Motion to Dismiss Plaintiffs' Third Amended Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. [Docket Entry No. 63]. The matter arises out of allegations that Cablevision employs an illegal tying arrangement in which it uses its market power to require its subscribers to rent cable boxes as a condition of subscribing to Cablevision's "Two Way Services," as defined herein, in violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, and various state common law prohibitions of unjust enrichment. The Court **[*2]** has considered the submissions made in support of and in opposition to the instant motion. No oral argument was heard. *Fed. R. Civ. P. 78*. Based on the reasons that follow, Defendant's motion to dismiss is GRANTED in part and DENIED in part.

I. BACKGROUND

This case arises out of Plaintiffs' allegations that Cablevision engaged in an illegal restraint on trade in violation of the Sherman Antitrust Act, *15 U.S.C. § 1*, by forcing customers to rent a set-top cable box in order to receive Cablevision's Two Way Services. Cablevision's Two Way Services allow two-way communication between a subscriber and accessible services through a remote control, said services including: (1) interactive services (including the interactive program guide); (2) pay-per-view ("Pay TV"); (3) Video on Demand ("on Demand"); and (4) iO Games. (Third Am. Compl., ¶¶ 2, 41). Plaintiffs argue that consumers are unable to purchase alternative access to said Two Way Services in the relevant geographic market of the New York, New Jersey and Connecticut from either Cablevision or on the open market and thus claim that Cablevision has impermissibly tied its Two Way Services to its own proprietary cable box. Plaintiffs also **[*3]** allege that Cablevision unlawfully monopolized the market for the distribution of set-top boxes providing access to Two Way Services in the relevant geographic market in violation of *§ 2* of the Sherman Act. (Id., ¶ 19). A complete recitation of the facts of the case can be found in this Court's three opinions dismissing Plaintiffs' Original and two Amended Complaints, entered respectively on August 18, 2010 [Docket Entry No. 31], January 14, 2011 [Docket Entry No. 45] and July 21, 2011 [Docket Entry No. 57], and are incorporated herein by reference.

II. LEGAL STANDARD

HN1[] In reviewing a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, a district court is "required to accept as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable" to the plaintiff. *Phillips v. County of Allegheny, 515 F.3d 224, 228 (3d Cir. 2008)*; see also *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)*. "However, a court need not credit either 'bald assertions' or 'legal conclusions' in a complaint when deciding a motion to dismiss." *Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005)*. A complaint survives a *Rule 12(b)(6)* motion to dismiss **[*4]** if it states a claim to relief that is "plausible on its face" regarding plaintiff's entitlement to the relief sought. *Twombly, 127 S.Ct. at 1965-66*. This standard is satisfied only when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*.

III. DISCUSSION

Plaintiffs allege that Defendant Cablevision's policy requiring subscribers to Two Way Services to rent cable boxes from Cablevision in order to receive said services constitutes an illegal tying scheme in violation of *§ 1* of the Sherman Act, and, further, that Cablevision unlawfully monopolized the market of set-top box distribution in violation of *§ 2* of the Sherman Act. The Court will address each of Plaintiffs' claims in turn.

1) Plaintiffs' § 1 Tying Claim — *Per Se* Analysis

HN2[] A tying arrangement is an arrangement in which "the seller sells one item, known as the tying product, on the condition that the buyer also purchases anther item, known as the tied product." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1997)*(citing *Allen-Myland, Inc. v. International Business Machines Corp. 33 F.3d 194, 200 (3d Cir. 1994))*. **[*5]** In order to make out a *§ 1* per se tying claim, a plaintiff must appropriately allege facts indicating: (1) a defendant seller tied two distinct products, conditioning sale of one product on the purchase of a different tied product; (2) the seller possesses market power in the tying product market; and (3) a substantial amount of interstate commerce is affected. *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 477 (3d Cir. 1992)*; see also *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1062 n.3 (3d Cir. 1978)*; *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 9-10, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*("Jefferson Parish"). For the following reasons, the Court finds that Plaintiffs have sufficiently alleged facts stating a *§ 1* per se tying claim. Defendant's Motion to Dismiss Plaintiffs' said claim is therefore denied.

A. Separate Tying and Tied Products

HN3[] "The first inquiry in any *§ 1* tying case is whether the defendant has sufficient market power over the tying product, which requires a finding that two separate product markets exist and a determination precisely what the tying and tied products markets are." *Queen City Pizza, 124 F.3d at 443* (citing *Allen-Myland, 33 F.3d at 200-201*). **[*6]** In order to state a Sherman Act claim under *§ 1*, a plaintiff "must identify the relevant product and geographic markets." *Id., at 435*. The Court finds that Plaintiffs have alleged sufficient facts regarding valid distinct products markets within the designated geographic market to support this first element of a per se tying claim.

i. Relevant Geographic Market of the Tying and Tied Products.

Plaintiffs' Third Amended Complaint limits the relevant geographic market to the area in New York, New Jersey and Connecticut in which Cablevision operates, designating said area as the "New York designated market area ('DMA')." (Third Am. Compl., ¶¶ 4, 118). Defendant makes three arguments against the validity of Plaintiffs' alleged geographic market. (Def. Br., at 16). First, Defendant argues that the proposed geographic market is too vague in that it neither delineates a specific geographic area nor identifies which areas within the tri-state area were inside or outside the relevant Two Way Services market during the class period. (Def. Br., at 16-17). Second, Defendant claims that the New York DMA violates the principle articulated in Third Circuit law which circumscribes the relevant geographic **[*7]** market to "the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 745 F.2d 248, 260 (3d Cir. 1984)*. Specifically, Defendant asserts, Plaintiffs concede that competitive conditions varied within the New York DMA in that Verizon in New Jersey and New York and AT&T in Connecticut offered two-way services in certain areas in which Cablevision operated, but the Third Amended Complaint does not narrow the geographic market to take into account such variations. (Def. Br., at 17-19). Third, Defendant contends that Plaintiffs have it backwards in attempting to define Cablevision's geographic market based on its market share dominance in a particular area rather than defining the market first, based on where consumers may turn for the relevant product. (Def. Br., at 19-20).

HN4[] The geographic market selected by a Plaintiffs must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe v. United States, 370 U.S. 294, 336-37, 82 S. Ct. 1502, 8 L. Ed. 2d*

510 (1962). "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." Id., at 336. **[*8]** Courts generally measure

> a market's geographic scope, the 'area of effective competition,' by determining the areas in which the seller operates and where consumers can turn, as a practical matter, for supply of the relevant product. This approach evaluates the geographic aspect of the elasticity of a specified market-that is, how far consumers will go to obtain the product or its substitute in response to a given price increase and how likely it is that a price increase for the product in a particular location will induce outside suppliers to enter that market and increase supply-side competition in that location.

Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 227 (2d Cir. 2006)(citations omitted); see also Atl. Exposition Servs. v. SMG, 262 Fed. Appx. 449, 452 (3d Cir. 2008). Courts have also held that "the market for certain entertainment services ... is local or regional." Heerwagen, 435 F.3d at 228 (collecting cases); see also Houser v. Fox Theatres Management, Corp., 845 F.2d 1225, 1230 & n. 10 (determining the movie ticket market based on how far theatergoers travel to see movies). For per se claims, "plaintiffs need not establish a geographic market." Behrend v. Comcast Corp., 655 F.3d 182, 192 (3d Cir. 2011); **[*9]** see also In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 316-317 (3d Cir. 2010)(explaining that some prohibited practices can be conclusively presumed to unreasonably restrain competition). Further, "[d]efining the relevant geographic market . . . is an issue of the merits." Behrend, 655 F.3d at 192; see also Borough of Lansdale v. Phila. Elec. Co., 692 F.2d 307 (3d Cir. 1982)(addressing on appeal whether a jury verdict should be set aside because of allegedly erroneous definition of the relevant geographic market and finding that the relevant geographic market was a jury question).

Defendant's arguments regarding Plaintiffs' definition of the relevant geographic market are unpersuasive at this stage of the pleadings. Most importantly, since the relevant geographic market "is a component of substantive ***antitrust law***" to be determined on the merits as a jury question, the Court finds that the New York DMA is a relevant geographic market susceptible to proof at trial through available evidence common to the class. See Behrend, 655 F.3d at 192.

To the extent that Defendant seeks to dismiss Plaintiffs' tying claim under a rule of reason analysis, the Court is still not convinced of **[*10]** the invalidity of the relevant geographic market at this stage. Defendant's first argument regarding the vagueness of the New York DMA is not supported by the case law. Defendant cites Mathias v. Daily News, L.P., to support its assertion that the "tri-state area" is too vague of a geographic market to survive a motion to dismiss. (Def. Br., at 17). In Mathias, delivery firms claimed, inter alia, that a newspaper publisher, the Daily News, conspired with others to force the delivery firms to purchase the News from the defendant publisher at unreasonably high prices, amounting to a "systematic exclusion" of the delivery firms from the home delivery business. 152 F. Supp. 2d 465, 477-83 (S.D.N.Y. 2001). However, the Mathias court located the vagueness of plaintiffs' definition of the relevant geographic market not in the breadth of the "tri-state area" market, but rather in the contradictory and imprecise nature of the plaintiffs' shifting definition of the relevant market between the broader national market and the narrower "tri-state area" market. Plaintiffs assert no such contradictory or vague market here, narrowing the scope of the market to those areas of the New York DMA in which **[*11]** Cablevision operates.

Further, ***HN5***[] the relevant geographic market is "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies," in other words, the area in which suppliers "effectively compete." Behrend, 655 F.3d at 193. In view of the realities of the multichannel video programming distributor ("MVPD") industry, defining the relevant geographic market as the clustered service area in which an individual distributor operates accords with reports issued by the Federal Communications Commission ("FCC") and other district courts' consideration of the issue. First, in its examination of the commercial realities of the industry of MVPDs, of which Cablevision is a participant, the FCC aggregated relevant geographic markets in which customers face similar competitive choices, noting in its 2009 Annual Report that "[c]able operators continue to pursue a regional strategy of 'clustering' their systems." (Def. Mot. to Dismiss, Decl. of Jakob B. Halpern ("Halpern Decl."), Ex. 6, "FCC Thirteenth Annual Report of 2009" ("FCC 2009 Report"), at ¶ 180). Further, at least five federal district courts that have considered antitrust claims against MVPDs for **[*12]** alleged tying with set-top boxes have determined that the relevant geographic market consists in the service area of the cable companies. See In re Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation, 2010 U.S. Dist. LEXIS 58417, at * 20-21 (W.D. Okla. Jan. 19, 2010); Parsons v. Bright House Networks, 2010 U.S. Dist. LEXIS 55277, at * 20-21 (N.D. Ala. Feb. 23, 2010); Bodet, Jr. v. Charter Communications, Inc., 2010 U.S. Dist. LEXIS 87088, at *8, 17-18 (E.D. La. July 26, 2010); Downs v. Insight Communications Company, 2011 U.S. Dist. LEXIS 29616, at * 10-11 (W.D. Ky. Mar. 22, 2011); In re Time Warner Set-Top Cable Television Box Antitrust Litigation, 2011 U.S. Dist. LEXIS 39001, at * 20-26 (S.D.N.Y. April 8, 2011). Taking the facts of Plaintiffs' Complaint to be true and considering the commercial realities of the relevant industry at issue in this matter, it is plausible that the New York DMA is the relevant geographic market in which Cablevision operates and effectively competes for Two-Way Services with other providers of said services.

Defendant's second argument regarding variations within the New York DMA is also unconvincing insofar as Plaintiffs contend that, **[*13]** even in areas where overbuilders (such as Verizon and AT&T) and satellite providers competed with Cablevision's provision of Two-Way Services during the class period, Cablevision still had an overwhelming market share of, at minimum, 90% of said services in the relevant geographic market. (Third Am. Compl., at ¶ 6, 120). Therefore, accepting Plaintiffs' factual allegations as true, those variations in local or rural markets do not sufficiently impact a determination of shifts in or adjustments to consumer choices within submarkets of the New York DMA. While the Complaint concedes to competitive variations between the conditions of specific geographic markets in which overbuilders and satellite operators have limited incursions in the relevant product market, those variations at the pleading stage are consistent with alleging a plausible geographic market based on a pragmatic, factual approach under *Brown Shoe*, and do not produce contradictory results as would, for example, the oscillation between the national and tri-state area markets in Mathias.

Finally, the Court finds that Defendant's third argument incorrectly characterizes Plaintiffs' approach to the relevant geographic market **[*14]** definition. Plaintiffs' geographic market definition is not circumscribed after the fact of Plaintiffs' assertion of Defendant Cablevision's dominance; rather, Plaintiffs' definition limits itself to Defendant's areas of operation within the sole designated market area in which it operates in the United States, an area in which Plaintiffs allege Cablevision also dominates in the relevant product market of Two Way Services. (Pls. Opp'n Br., at 26). The Court agrees with Defendant that Plaintiffs may not allege a "very high market share in a geographic market," but rather must allege power "in the *relevant* geographic market" (Def. Br., at 20), but given that the New York DMA is the only geographic market in which Cablevision operates to offer Two Way Services, the Court does not find that Plaintiffs are boot-strapping their geographic market definition only to areas in which it happens to be dominant. Therefore, for the above-cited reasons, Plaintiffs have sufficiently alleged facts demonstrating the existence of a relevant geographic market.

ii. Relevant Product Markets: Tying Product Market of Two-Way Services, Tied Product Market of Cable Set-Top Boxes, and Coercion.

HN6[] In antitrust claims **[*15]** reviewed under *Rule 12(b)(6)*, a plaintiff has "the burden of defining the relevant market. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*(citations omitted). However, antitrust claims do not have a heightened pleading standard: "[d]efinition of the relevant product market often requires 'a deeply fact-intensive inquiry,' and courts are hesitant to grant motions to dismiss for failure to plead a relevant market definition." *In re Time Warner, 2011 U.S. Dist. LEXIS 39001, at * 27* (quoting *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001))*. Also, plaintiffs are required to state facts sufficiently alleging coercion: "[t]o prove a per se illegal tie-in, a plaintiff must establish... an agreement by a party to sell one product but only **[*16]** on the condition that the buyer also purchases a different (or tied) product. . . [I]n the absence of a formal agreement, a plaintiff must establish in some other way that a tie-in was involved and not merely the sale of two products by a single seller. This can be done by proof that purchase of one product, the tied product, was not voluntary, i.e., by proof of coercion." *SmithKline, 575 F.2d at 1062 n. 3*.

Throughout their Amended Complaints, Plaintiffs have with increasing precision defined the tied product market as the cable set-top box that provides access to Defendant Cablevision's Two Way Services. (Compl., at ¶ 29; Am. Compl., at ¶ 39; Sec. Am. Compl., at ¶ 33; Third Am. Compl., at ¶ 42). However, Plaintiffs have consistently narrowed their definition of the tying product market in their respective Amended Complaints from a broad definition of Cablevision's iO TV Package to only a limited set of interactive services Cablevision provides which are accessible via a cable set-top box. Specifically, Plaintiffs' Original Complaint defined the tying product market as Cablevision's sale of subscriptions to its iO TV Packages. (Compl., at ¶¶ 22-23). This Court found that market definition **[*17]** to be too broad since iO TV Packages allowed access to certain interactive services through both set-top boxes and CableCARDs. (Aug. 18, 2010 Op., at 10-11). As a result, the Court held that while Plaintiffs failed to adequately allege the requisite coercion for a tying claim as defined against those services, actual coercion was found to be alleged with respect to digital services "not currently available through use of a CableCARD device: (1) Video On Demand, (2) iO interactive program guide; (3) iO games, and (4) the ability to order Pay Per View events using a remote control." (Id.). The Court allowed Plaintiffs to amend their original complaint, and in their First Amended Complaint, Plaintiffs redefined the tying product market as "iO TV Package with two way communications so as to permit Two Way Services." (Sec. Am. Compl., at ¶ 32). In its January 14, 2011 Opinion, the Court found that that Amended Complaint did not "limit the tying product to Two Way Services," so "the tying product remains an iO TV Package (which is comprised of both one-way and two-way services)." (Jan. 14, 2011 Op., at 5). Since the Court found that Plaintiffs failed to allege a plausible claim for coercion **[*18]** between the whole of the designated tying product and the tied product of the cable box due to only part of the tying product, the Two Way Services, being allegedly tied to the rental of the tied product, the Court again dismissed Plaintiffs' Complaint without prejudice to its refiling. Plaintiffs' Second Amended Complaint defined the tying product as "Two Way Services" to which consumers subscribe through one of Cablevision's iO TV Packages. (Sec. Am. Compl., at ¶ 27). However, the Court found a discrepancy between Plaintiffs' definition of Two Way Services and the contents of an exhibit attached to Plaintiffs' Complaint. That exhibit indicated that "Switched Digital Video Services," which seemed to include the "digital channels and international programming" referenced in Plaintiffs' tying product definition, were potentially accessible through a TiVo/Moxi HD DVR equipped with a CableCARD and Tuning Adapter, and thus did not appear to be exclusively accessible through a cable set-top box. (July 21, 2011 Op., at 6). Since Plaintiffs "attached a document to their Complaint which states that a portion of the tying product (i.e., the 'digital channels and international programming' portion **[*19]** of Two Way Services) can be accessed by Cablevision subscribers without the rental of the tied product (the cable box)," the Court agreed with Defendant that Plaintiffs had again failed to state a claim of coercion that was plausible on its face. (Id.).

In Plaintiffs' Third Amended Complaint, they continue to allege that Defendant has inappropriately tied two distinct products, Two Way Services and set-top cable boxes, to one another. Two Way Services are now defined to include "both the package of interactive services offered by Cablevision . . . and similar packages of interactive services offered by overbuilders such as AT&T and Verizon," but "Two Way Services offered by other major incumbent cable companies such as Cox and Time Warner" are not included "because no major incumbent cable company operates in the geographic areas in which Cablevision operates." (Third Am. Compl., at ¶ 3). Critically, the newest iteration of the Complaint excludes the digital channels and international programming portion of Two Way Services accessible by CableCARD in its "Two Way Services" definition of the tying product market. (Id., at ¶¶ 37-40). However, Plaintiff asserts that an ambiguity exists **[*20]** on Defendant Cablevision's website regarding "the full scope of premium cable services that have not been available to subscribers without a set-top box (i.e., with only a CableCARD) at various times during the Class Period." (Id., at ¶ 40 & 40 n. 2). The Third Amended Complaint alleges that Defendant's current website states that "Switched Digital Video Services" are accessible via CableCARD, but Defendant's website in 2004 did not mention these services as accessible via CableCARD (simply stating to website visitors at that time that "[y]ou will need a Digital set-top box - different than the one you may currently have to receive analog premium channels - to receive the digital channels, order video on demand services or listen to digital music channels"). (Id.). Plaintiffs assert that discovery will be necessary to determine exactly which Two Way Services were available to subscribers without a set-top box during the Class Period. (Id.). Therefore, while the Third Amended Complaint defines the tying product market as "Two Way Services" which "include the interactive program guide, interactive games, Pay TV and On Demand," it also defines the tying product market in the alternative **[*21]** as "the Two Way Services *plus* any additional premium cable services which are (or were) not available with a CableCARD during the Class Period." (Id., at ¶¶ 38, 40 n. 2).

Defendant argues that Plaintiffs' Third Amended Complaint should be dismissed because Plaintiffs fail to sufficiently allege a valid tying product market and because it fails to sufficiently allege coercion. First, Defendant claims that Plaintiffs have failed to sufficiently allege a valid tying product market since they allege no facts that justify Plaintiffs' exclusion from the market of obvious substitutes for Cablevision's Two-Way Services. (Def. Br., at 12). Specifically, Defendant construes Plaintiffs' tying product market as an invalid "cluster market" that brings together distinct services which, if differentiated, would include reasonable substitutes arbitrarily excised by Plaintiffs from the relevant product market. (Id., at 12-16). For example, Defendant alleges that the Video on Demand service ("On Demand") included in Plaintiffs' Two Way Services market faces competition from direct-broadcast satellite ("DBS") providers, which make digital video recorded movies and programs available for home rental or **[*22]** sale; internet providers that provide on-demand digital videos; and movie channels such as HBO or other programming for movies provided through one-way services. (Id., at 13-14). Defendant also contends that the iO Games service provided through its Two Way Services have reasonable substitutes through other gaming systems, such as Xbox, and that Pay TV has the reasonable substitutes of ordinary TV or televised events that can be ordered through a CableCARD over the phone. (Id., at 14).

Second, Defendant argues that Plaintiffs' definition of their tying product is identical to their definition articulated in their Second Amended Complaint which was dismissed by this Court, and for that reason Plaintiffs again fail to allege the requisite coercion for a tying claim since some of Cablevision's Two Way Services, namely Pay TV, are accessible to subscribers of Cablevision's iO TV Packages via CableCARD. (Id., at 27-28). Defendant does not state whether Pay TV was accessible to subscribers of Cablevision's Two Way Services throughout the relevant class period alongside Pay TV's accessibility via a cable set-top box.

The Court will first address the validity of Plaintiffs' relevant tying product **[*23]** market as it complies with the rule of reasonable interchangeability and cross-elasticity of demand, considering next whether Plaintiffs sufficiently addressed the pleading deficiencies in the Second Amended Complaint regarding coercion.

a. Validity of Plaintiffs' Tying Product Market

As stated infra, Defendant contends that Plaintiffs' tying product market of Two Way Services must fail as a matter of law because it excludes reasonable substitutes and their "cluster market" concept neither alleges sufficient market power over each clustered service nor is sufficient on the grounds of the existence of "one-stop shopping." (Def. Br., at 12-15). Plaintiffs assert that Two Way Services is a valid tying product market at this stage for three reasons: 1) the "clustered product" is a legally valid market definition under ***antitrust law*** and Supreme Court precedent; 2) Defendant failed to state reasonably interchangeable substitutes for the individual services packaged with Cablevision's broader interactive services; and 3) hotly contested factual issues regarding market definition are not appropriately addressed at the motion to dismiss stage. (Pls. Opp'n Br., at 15-23). For the reasons set forth **[*24]** below, the Court finds Plaintiffs' tying product market valid at this juncture.

The Supreme Court has generally considered "cluster" markets in contexts in which, as a matter of trade or commercial reality, a cluster of products create a distinct line of commerce. For example, in a line of cases beginning in 1963, the Supreme Court considered whether clusters of products and services provided by financial institutions could constitute a cluster market of commercial banking with economic significance beyond the various products and services involved, and the Supreme Court found that commercial banking could in fact constitute such a market. See, e.g. *U.S. v. Philadelphia Natl. Bank, 374 U.S. 321, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*; *U.S. v. Phillipsburg Nat'l Bank and Trust Co., 399 U.S. 350, 379-83, 90 S. Ct. 2035, 26 L. Ed. 2d 658 (1970)*; *U.S. v. Connecticut Nat'l Bank, 418 U.S. 656, 660-66, 94 S. Ct. 2788, 41 L. Ed. 2d 1016 (1974)*.

In U.S. v. Grinnell Corp., the Supreme Court found a valid "cluster" market of central station property protective services (central fire alarm and burglary systems) which were not interchangeable or economic substitutes for an end user, affirming that the Court "see[s] no barrier in combining in a single market a number of different products or services **[*25]** where that combination reflects commercial realities." *384 U.S. 563, 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. In that case, Justice Douglas suggested that distinct, non-interchangeable services could be grouped together into one market if "companies recognize that to compete effectively, they must offer all or nearly all types of service." Id. Grinnell has been interpreted as a valid example in which nonsubstitutable goods could constitute a relevant "cluster" market based on the rationale of "economies of joint provision," or economies produced in a relevant market that would give a monopolist of the combination of separate goods a decisive cost advantage over those who offered the services separately:

> Under the technology of the day, central station services connected covered homes by a wire to a central station, and sensors for motion, window breakage, smoke, fire, and so on were connected together. This was almost certainly cheaper than it would be for different firms to duplicate the network, each of them offering a single type of protection. The relevant questions would then be whether the offeror of the combined services could profit by charging a price significantly above its costs, while preventing other **[*26]** firms from offering a similar set of combined services. If the answer to both questions is yes, then the grouping is a relevant market.

2B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, ¶ 565c, at 409 (3d Ed. 2007). The "cluster" market has also been taken to stand for the proposition that "courts should cluster a group of goods when competition causes that group to be supplied together." Ian Ayres, "Rationalizing Antitrust Cluster Markets," *95 Yale L. J. 109, 112 (1985)*. More specifically, antitrust scholars have suggested that courts should cluster goods which are "transactional complements," or goods that, if bought from a single firm, significantly reduce consumers' transaction costs, tying consumer purchases of those products to individual firms. *Id., at 110-11*. In sum, ***HN7***[] "cluster" markets should arguably be found invalid unless: 1) most customers would be willing to pay monopoly prices for the convenience of receiving a defendant's grouping of products; or 2) economies of joint provision make distribution of the cluster cheaper per good than distribution of each separately, and firms supplying one of the products in the cluster could not easily add the others as well. Areeda & Hovenkamp, at 408. **[*27]** "If aggregation reveals 'an important relationship between the defendants' course of conduct and their overall monopoly power,' it is indeed a useful and, hence, appropriate methodology. It, however, aggregation obscures, rather than reveals, it cannot be justified." *United States v. AT&T, 524 F. Supp. 1336, 1376 n. 165 (D.D.C. 1981)*(finding a cluster market on the grounds of "industry recognition, coincidence of supplying firms, and the integrated nature of the telecommunications system").

The Third Circuit Court of Appeals has affirmed a district court's determination that a cable company's "clustering" activity may establish a relevant market in the context of swaps and acquisitions made in a given geographic market where consumers face similar competitive choices since that determination considered both where a buyer may rationally look for goods and the commercial reality of the industry. *Behrend, 655 F.3d at 194*. While the Third Circuit reviewed clustering in the context of a geographic market, the Court finds that an analysis of a valid market from the perspective of consumer behavior, reviewing the competitive choices of end users based on the commercial reality of the industry, **[*28]** is equally applicable here where Plaintiffs' Complaint alleges geographic consolidation of Defendant Cablevision's Two Way Services market alongside the provision of a collection of nonsubstitutable services.

The facts alleged by Plaintiffs in support of finding a valid "cluster" market of Two Way Services are the following. Cablevision itself defined its Two Way Services as a package on its website: "iO TV interactive services are not available with a CableCARD. In order to receive interactive digital services such as iO Video on Demand, and the iO interactive program guide and to order pay per view events using your remote, you must have a digital cable box." (Third Am. Compl., at ¶¶ 8, 41, 98). Further, Plaintiffs' Complaint provides facts detailing the unique nature of Cablevision's product as a "bundled" product: its provision of a "multitude of services" to consumers "with the ability to select from and view a variety of programming"; allowing subscribers to "have control over these viewing options simply by using their television remote controls without having to even leave their couch"; and

> Allow[ing] consumers to navigate through a vast array of programming options and choose **[*29]** the options that suit them best in a given moment. Subscribers can choose from a live sporting event in high definition, a brand new television show, or specialized coverage of a breaking current event. Video rentals, whether from a brick and mortar store, a mail service, on an internet site, do not offer consumers any of those options. Moreover, consumers cannot access video rentals from brick and mortar stores or Netflix on a sudden whim, as they can with Two Way Services. In addition, brick and mortar rental stores like Blockbuster have been reducing staff, reducing hours and closing in recent years while the number of Two Way Services subscribers

> and the prices of subscriptions have increased consistently. These products are functionally and substantively different from Two Way Services and are not reasonably interchangeable with Two Way Services. Websites or internet vendors did not offer a comparable produc[t] to interactive Two Way Services during the Class Period.

(Id., at ¶¶ 114-116). Plaintiffs thus argue, "consumers view the Two Way Services provided by Cablevision as functionally superior, more readily available and easier to use than the individual one way services cited **[*30]** in Defendants' brief." (Pls. Opp'n Br., at 20).

Further, Plaintiffs' Complaint alleges that overbuilders such as AT&T and Verizon cannot compete with said packaged services readily because Cablevision has taken steps to frustrate their competitive entry. (Third Am. Compl., at ¶ 80). Specifically, Plaintiffs cite to the FCC's January 20, 2010 Report and Order, which states:

> Cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming in order to hinder competition in the video distribution market. A vertically integrated cable operator may raise tile costs of its MVPD competitors by increasing the price of its affiliated programming or may choose not to sell its affiliated programming to rival MVPDs. As the Commission noted in the Adelphia Order, "the integrated firm may be able to harm its rivals' competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete." Unfair acts involving cable-affiliated programming may harm the ability of MVPDs to compete with incumbent **[*31]** cable operators, thereby resulting in less competition in the marketplace to the detriment of consumers.

(Id., quoting FCC January 20, 2010 Report and Order, at ¶ 26). Barriers to entry to overbuilders alleged in this case include: "the enormous costs associated with building and maintaining a broadband network infrastructure; the cost and pricing advantages that incumbent cable providers like Cablevision have vis-à-vis overbuilders; and the significant time and expense associated with the franchising application process." (Id., at ¶ 111). Finally, Plaintiffs assert that "Cablevision has increased the number of its Two Way Services customers, despite increasing its prices, every year during the class period, despite the onset of supposed competition from individual services such as Xbox and Netflix, demonstrating that the market did not consider those individual components to be reasonable substitutes for Cablevision's package of Two Way Services." (Id., at 21; see also Third Am. Compl., at ¶¶ 59-65).

The Court finds these alleged facts to be sufficient for establishing a "cluster" product market of Two Way Services in that the combination of interactive services provided is a combination **[*32]** reflective of the commercial realities in the industry of MVPDs creating a distinct line of commerce. Specifically, the Plaintiffs' Third Amended Complaint pleads sufficient facts to establish that differences exist between the Defendant's provision of interactive services and non-cable and other entertainment providers that offer individual services or partial clusters that are not bundled together in a convenient, comprehensive format accessible through a remote from the interior of a home. See e.g., *Science Products Co. v. Chevron Chem. Co., 384 F. Supp. 793, 797 (N.D. Ill. 1974)*(finding that a "substantial overlap of locus of use for ... products generally" supports cluster definition); *In re The Grand Union Co., 102 F.T.C. 812, 1044 (1983)*(stronger case for clustering where services are involved, especially "where the services are complex, interrelated, and interdependent"). Similar to the facts alleged in *Grinnell*, Plaintiffs state facts regarding the provision of services connecting homes that have subscribed to Cablevision's Two Way Services to a central system through which said homes can access and control a range of entertainment options, the combination of which being difficult **[*33]** to duplicate by overbuilders, satellite providers, or individual firms providing only, for example, games or videos. It is plausible that the economies of joint provision of Two Way Services make distribution of interactive services cheaper per individual service than distribution of each service separately, and firms supplying one of the products in the cluster-for example, Netflix with videos or DBS providers with digital channels-cannot easily add other services such as Video on Demand or gaming services through instant and direct home delivery.

Defendant contends that "goods cannot be clustered unless there is sufficient basis for inferring that the defendant has the required degree of market power over each of the goods in the cluster." (See Def. Br., at 15; Areeda & Hovenkamp, at 408). Defendant cites to U.S. v. Phillipsburg Nat'l Bank & Trust Co. and Emigra Group, LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP to support their argument that clustering is a "severe exception" not to be found where either of the following exist on their own: 1) where packages make access possible to services that would otherwise be unavailable; or 2) where a plaintiff can show "[t]he existence **[*34]** of one-stop shopping, and a group of customers with a preference or even demand for it." (See Def. Br., at 15-16; *Phillipsburg, 399 U.S. at 360*; *Emigra Group, 612 F. Supp. 2d 330, 352-55 (S.D.N.Y. 2009)*. However, based on the facts alleged in Plaintiffs' Third Amended Complaint, neither of these conditions exist on their own in this case without additional facts alleged.

First, the facts alleged here are close to those in *Phillipsburg* in which the Court found that customers were likely to maintain certain accounts in the same local bank even when higher savings interest was available elsewhere due to the convenience of one-stop banking and the advantages of a consistent and continuous relationship with one banker. *399 U.S. at 361*. Likewise, here, it is plausible to infer that the separate services provided by Cablevision made possible access to services that may otherwise have been unavailable from a home through a remote control. Thus, unlike the facts in *Queen City Pizza* where the relevant market was found not to be Domino's-approved tomatoes or dough for franchisees, but rather the entire available markets for tomatoes and pizza dough, the interactive services at issue here are not **[*35]** interchangeable with submarket products purchasable in each wider submarket. Interactive Two-Way Services are a qualitatively different, unique product, more analogous to a set of facts in which Domino's were the only seller in a geographic market of green tomatoes and then required franchisees to only use green tomatoes in their franchise pizza production. More specifically in the context of tying jurisprudence, the separate relevant submarkets neither constitute reasonable substitutes for the package nor do the separate submarkets broken down into their separate elements-digital channels / one-way services, cable TV, on-demand video, interactive gaming-provide reasonable substitutes for those services as provided through Cablevision's Two Way Services.

For example, Defendant argues that satellite providers and one-way movie channels through normal or cable TV should be viewed as a reasonable substitute for the digital channels provided through Cablevision's Two Way Services. (Def. Br., at 13-14). However, neither satellite providers nor one-way services through movie channels like HBO offer interactive services in which a customer can select specific viewing events at the time of **[*36]** their choosing in their home through a remote control. One-way services as provided by satellite providers are equally distinguishable from the viewing services offered through an interactive communication system like Cablevision's Two Way Services. In Parsons v. Bright House Networks, the Northern District of Alabama found that plaintiffs' exclusion of satellite MVPDs from their definition of the relevant tying product market could survive a motion to dismiss since plaintiffs alleged sufficient facts that satellite providers did not constitute reasonable substitutes for premium cable services due to: 1) defendants' own representations that they provide superior services and reliability over satellite providers; 2) satellites may only be installed on an external surface with clear sky access, which may be unavailable in urban areas or banned by multi-family dwellings such as apartments; 3) cable MVPDs' ability to "bundle" cable services with phone and internet services where satellite providers could not created high entry barriers in the form of: costs for constructing a parallel cable system, obtaining licenses from local franchises authorities, accessing multi-family dwellings such **[*37]** as apartments and obtaining programming rights to popular channels; and 4) high switching costs from incumbent MVPDs to different providers in terms of time and money in set-up and new equipment. *2010 U.S. Dist. LEXIS, at * 7-9, 19-20*. In this case, Plaintiffs cite to Cablevision's explicit statement that, "We compete with . . . DBS [satellite] competitors by 'bundling' our service offerings with products that DBS companies cannot efficiently provide at this time, such as high-speed data service and voice service carried over the cable distribution plant, as well as by providing interactive services that are currently unavailable to a DBS subscriber." (Def. Mot. to Dismiss, Halpern Decl., Ex. 5, "Cablevision 2009 Form 10-K, filed February 25, 2010," at 48; Third Am. Compl., at ¶ 69). Further, Plaintiffs' Third Amended Complaint alleges facts pertaining to Cablevision's programmer-distributor contracts which were executed before satellite providers existed which gives Defendant more popular programming options than satellite providers and establishes barriers to their entry. (Third Am. Compl., ¶ 70). Finally, Plaintiffs allege that satellite and cable MVPDs are technologically distinct **[*38]** in that satellite technology uses a telephone line as an exchange, and the receiving unit does not have the ability to transfer information back to the satellite for use in interactive services. (Id., ¶ 71). Therefore, the Court finds that neither one-way movie channels nor satellite providers not constitute reasonable substitutes for the provision of digital channel or video programming through Two Way Services, and Plaintiffs have alleged sufficient facts distinguishing their interchangeability.

Further, Plaintiffs have alleged sufficient facts to infer that other submarkets which Defendant introduces as reasonable substitutes for individual services provided through its Two Way Services do not in fact constitute reasonable substitutes. Specifically, Plaintiffs have alleged sufficient facts to survive a motion to dismiss with respect to the reasonable comparability of entertainment services such as internet streaming, Netflix and gaming systems like Xbox and Playstation. Plaintiffs assert that these internet services are not interchangeable with the package of Two Way Services in that website and internet vendors: 1) do not offer a comparable selection of offerings as the cable MVPD **[*39]** companies in part due to content providers' concern about distributing copyright material; 2) have poorer quality of internet videos with longer download times and higher rates of interruptions in viewing; and 3) were nascent ventures during the Class Period and had an extremely limited customer base. (Id., ¶ 116). Gaming services is alleged not to provide comparable service as iO Games in that the interactive service provided through Cablevision allows subscribers to instantly choose, through a remote control in their home, a specific game amongst a vast array of options which would be best suited to their wishes in the moment. (Id., ¶ 115). Thus, the facts alleged by Plaintiffs plausibly state why subscribers may not find each individual submarket service interchangeable with those provided through Cablevision's Two Way Services. The many distinguishing features alleged by Plaintiffs within each submarket of goods are sufficient to plead a valid relevant product market of Two Way Services worthy of surviving a motion to dismiss.

Second, while Plaintiffs in part allege a one-stop shopping theory here as articulated infra, they also state facts alleging more than just consumer convenience. **[*40]** Defendants reject Plaintiffs' cluster product definition in part on the grounds that it is based on a one-stop shopping theory, and they cite to Areeda and Hovenkamp in their assertion that "courts typically and properly reject claims that customers find 'one-stop' shopping for noncompeting goods attractive, notwithstanding lower prices elsewhere. . . the courts properly focused on the facility providing the nonsubstitute goods, but they refused to find a relevant market because there was no evidence that the combination could not readily be duplicated by other sellers in response to supracompetitive prices." Areeda & Hovenkamp, at 410. However, in this case, Plaintiffs allege more than the benefits of a one-stop shopping service provided by Cablevision since they also allege facts about pricing and facts about the ability of other sellers to compete with the same bundle of services:

• "[E]ven after significantly increasing the price Cablevision charges for subscriptions to premium cable packages that include Two Way Services, Cablevision has not only retained a substantial number of such subscribers, but has regularly increased the number of subscribers to Two Way Services" (Third **[*41]** Am. Compl., ¶ 59);

• "Cablevision does not face any appreciable competition from major cable operators, as each of these major cable companies employ the same 'clustering' strategy, in which they concentrate their cable operations in geographic areas where only one incumbent has the infrastructure to operate" (Id., ¶ 106);

• "[T]he clustering and bundling strategies... as well as the long term contracts which enable cable operators to offer more popular programming options, were (and are) effective in enabling Cablevision — like other cable providers — to achieve and maintain market dominance in the areas in which it operates" (Id., ¶ 110);

• "Video game systems (such as X-box) and video rental services (such as Netflix and Blockbuster) are not reasonable substitutes for Two Way Services, which provide a combination of valuable services in a convenient comprehensive format." (Id., ¶ 115).

Based on facts alleged concerning interchangeability of the services product, consumer preference, pricing, and other sellers' ability to duplicate, Plaintiffs have sufficiently stated a relevant tying product market of Two Way Services beyond a mere cluster market definition resting in a one-stop shopping **[*42]** theory. Therefore, the Court finds at this stage that Plaintiffs have sufficiently alleged a valid tying product market. Defendant does not contest the validity of the tied product market in their Motion to Dismiss Plaintiffs' Third Amended Complaint.

b. Coercion Through Involuntary Purchase of Tied Product

Defendant contends that Plaintiffs have again failed to sufficiently allege coercion for two reasons: 1) Plaintiffs solely challenge technological incompatibility, so their Third Amended Complaint fails to allege coercion as a matter of law under *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 542 (9th Cir. 1983)*; and 2) Plaintiffs include in the purported tying product a service that can be accessed by Cablevision subscribers without the rental of the tied product, the set-top cable box. (Def. Br., at 25-29). Plaintiffs assert on the contrary that: 1) Plaintiffs Third Amended Complaint contains no allegations of technological incompatibility as a basis for their coercion claim and thus Defendants' argument goes beyond the pleadings; 2) to the extent that Plaintiffs' Complaint preserves allegations made in the Original Complaint regarding technological incompatibility, **[*43]** no binding legal authority prevents such an allegation as a basis for establishing coercion; 3) Plaintiffs removed "Switched Digital Video Services" from the primary market definition of the tying product market, a service which could be accessed without the rental of the cable box; and 4) the "Pay TV" services included in Plaintiffs' tying product market definition are limited to those accessible by remote control and exclude any services which allow Cablevision customers to purchase pay-per-view events by phone. (Pls. Opp'n Br., at 5-10).

This Court agrees with Plaintiff that the Third Amended Complaint sufficiently alleges coercion. Since the facts of this case are distinguishable from *Foremost*, the Court does not find any preserved claims regarding technological incompatibility to be deficient as a matter of law to allege coercion. To the extent that Plaintiff's Third Amended Complaint has excluded those services sold by Defendant Cablevision not conditioned on the lease of a cable box, Plaintiff's Complaint has sufficiently narrowed the tying product market at this stage of the pleadings. Therefore, Plaintiffs' complaint complies with the requirement cited by this Court from In **[*44]** re Time Warner., which stated that "[o]nly those services which were unavailable to consumers who opted to use the alternative CableCARD to access secured channels, despite paying an additional fee for the service, caused consumers to be actually coerced into renting a cable box." *In re Time Warner Inc. Set-Top Cable TV Box Antitrust Litigation, 2010 U.S. Dist. LEXIS 22369, at * 26 (S.D.N.Y. Mar. 5, 2010)*.

As stated above, ***HN8***[] a significant element of an illegal tying arrangement is coercion of the consumer by the seller in the form of conditioning the sale of the tying product on the consumer's purchase of the tied product. See *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 10, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*. "[W]here the buyer is free to take either product by itself, there is no tying problem. . . ." *Northern Pac. Ry. Co, 356 U.S. at 6 n. 4*. The Supreme Court has focused on the danger of tying when a seller leverages economic power from one market to another: "Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force **[*45]** the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits for the tied item is restrained and the Sherman Act is violated." *Jefferson Parish, 466 U.S. at 12*.

1) Technological Incompatibility

While Defendant contends that Plaintiffs' coercion challenge solely relies on technological incompatibility, a claim insufficient to establish an unlawful per se tying arrangement, the Court finds that any preserved claims regarding technological incompatibility alleged in Plaintiffs' Complaint are not deficient as a matter of law to allege the requisite element of coercion in this case.

In Foremost, plaintiff Foremost Pro Color, an authorized Kodak dealer and independent photofinisher brought, inter alia, a tying claim against Eastman Kodak Company alleging that, because Kodak's newly issued 110 cameras could only use new Kodacolor II film, and because this film could only be processed with Kodak's own new papers and chemicals, Kodak had unlawfully tied: the sale of cameras to film, film to chemicals, and chemicals to paper and film in violation **[*46]** of *§ 1* of the Sherman Act and *§ 3* of the Clayton Act. *Foremost, 703 F.2d at 537*. In upholding the district court's granting of defendant Kodak's *Rule 12(b)(6)* motion to dismiss for failure to state a tying claim, the Ninth Circuit held that the requisite element of coercion was absent from plaintiff's claim. Specifically, the court found that plaintiff had not sufficiently alleged "that the purchase of the alleged tied products was required as a condition of sale of the alleged tying products, rather than a prerequisite to practical and effective use of the tying products." *Id., at 542*. Elaborating on coercion in the context of "technological ties," the court found procompetitive aspects in said ties which protect product innovation "in such technologically advancing industries as the photographic industry The creation of technological incompatibilities . . . increases competition by providing consumers with a choice among differing technologies, advanced and standard, and by providing competing manufacturers the incentive to enter the new product market by developing similar products of advanced technology." Id. If a court were to find the development of new cameras which require **[*47]** new processing materials a per se unlawful tie, such technological innovations and procompetitive benefits would be thwarted since "[t]he essence of a per se unlawful tying arrangement... is that it forecloses competition in the market for the tied product or products." Id. Therefore, the court held that, "as a general rule ... the development and introduction of a system of technologically interrelated products is not sufficient alone to establish a per se unlawful tying arrangement even if the new products are incompatible with the products then offered by the competition and effective use of any one of the new products necessitates purchase of some or all of the others. Any other conclusion would unjustifiably deter the development and introduction of those new technologies so essential to the continued progress of our economy." *Id., at 542-43*.

Taking the facts alleged in Plaintiffs' Complaint to be true, this case is distinguishable from *Foremost* in at least two respects: 1) Defendant has not presented evidence that it is in the business of developing and introducing a "system of technologically interrelated products" similar to the camera, film, paper and chemicals system developed **[*48]** and introduced by Kodak; and 2) Plaintiffs did not claim that it was the technological tie, standing alone, which constituted the coercive element in the allegedly unlawful tying arrangement, but rather that third-party boxes were compatible with Defendant's Two Way Service and rental of set-top boxes from Defendant was nevertheless required despite that compatibility.

Regarding the first issue, Cablevision has presented no evidence of its development and introduction of a technologically innovative tying or tied product. Other cable MVPDs such as Comcast, Time Warner, and Cox offer Two Way Services virtually identical to the service provided by Defendant, and Defendant presented no distinguishing aspects to its service that indicate technological innovation in its provision. Further, the set-top boxes Defendant rents to consumers to whom it provides Two Way Services were not developed by them at all, but were rather developed by third parties such as Scientific Atlanta and Motorola who have contractual relationships with Defendant and other cable MVPDs in other geographic markets. In fact, Defendant Cablevision was not even in a position during the purported Class Period to make innovations **[*49]** in the cable set-top box market as it was not engaged in the manufacture and production of such boxes; it was not "a firm that pioneers new technology" that "introduce[d] the first of a new product type along with related, ancillary products that can only be utilized effectively with the newly developed technology" as in *Foremost. Id., at 542*. Therefore, neither the aspects of the technological tie found to be insufficient in *Foremost* nor the procompetitive benefits articulated there are applicable to the facts alleged in this case.

Second, Plaintiffs do not limit their allegations regarding coercion to a technological tie. The facts stated in Plaintiffs Third Amended Complaint are that "Cablevision . . . engaged in coercive anti-competitive practices by restricting the sources or outlets through which a usable cable set-top box can be acquired by Class members. Namely, Cablevision requires that Class members rent cable set-top boxes exclusively from Cablevision to access Two Way Services." (Third Am. Compl., at ¶ 44). Specifically, Plaintiffs allege,

> Cablevision has prevented and continues to prevent all other non-Cablevision rented set-top boxes from being viable alternatives to, and **[*50]** substitutable for, the set-top boxes distributed by Cablevision, **even though the set-top boxes distributed by Cablevision use the same technology as other set-top boxes available from other sources.** In fact, the set-top boxes that Cablevision requires class members to rent exclusively from Cablevision are of the same make and model as those manufactured by, inter alia, Cisco Corporation's Scientific Atlanta subsidiary, which models are also used by other major cable companies including Time-Warner, Comcast and Cox. Yet, because of Cablevision's conduct, these boxes are not usable by Class members if they are obtained from sources other than Cablevision.

(Id., at ¶ 48)(emphasis added). Plaintiffs thus assert additional facts beyond a technological tie regarding Defendant's coercion of the consumer by conditioning rental of the tied product with the purchase of the tying product. The facts alleged here in the world of Foremost would be more analogous to a situation in which other companies besides Kodak produced paper and chemicals capable of processing film from Kodak's new camera, but Kodak was nevertheless conditioning sale of the new camera on the concomitant purchase of paper and **[*51]** chemicals exclusively from Kodak.

To conclude, since *Foremost* is not governing law in this Circuit, and since, in any case, the facts alleged in Plaintiffs' Third Amended Complaint distinguish this case from those facts alleged in *Foremost,* the Court finds that, even if a component of Plaintiffs' claims regarding coercion incorporate an argument regarding technological incompatibility, Plaintiffs have pled sufficient facts to allege coercion.

2) Third Amended Complaint's Narrowing of the Tying Product Market

Defendant also argues that, because Plaintiffs include in their purported tying product a service that can be accessed by Cablevision subscribers without the rental of the set-top cable box, Plaintiffs have again failed to allege coercion. However, the Court finds that Plaintiffs removal of "Switched Digital Video Services" and limiting of "Pay TV" services to those accessible by remote control sufficiently narrows the tying product market to assert coercion over consumers in the tied product market.

In this Court's prior Opinions, insufficient coercion was found where portions of the tying product could be accessed by Cablevision subscribers without the rental if the tied product. **[*52]** (Aug. 18, 2010 Op., at 9; Jan. 14, 2011 Op., at 5; July 21, 2011 Op., at 6). In Plaintiffs' Third Amended Complaint, Plaintiffs excise "'Switched Digital Video Services' from the primary definition of the tying product market, and limits this market to those services that Defendants, themselves, acknowledge require rental of a Cablevision set-top box." (Pls. Opp'n Br., at 5). The Third Amended Complaint defines the tying product market as those Two Way Services which Cablevision's website explicitly stated were not available with a CableCARD: "Video on Demand, iO interactive program guide, iO Games, and the ability to order Pay Per View events using your remote. . . . A digital cable box is required to receive these features." (Third Am. Compl., at ¶¶ 41-42, 98). In a similar case before the Western District of Oklahoma, the court found that the plaintiffs in the multidistrict litigation alleging tying violations against Cox Enterprises and Cox Communications survived a motion to dismiss where it was

> clear from the allegations in the [complaint] that customers wishing to receive the full benefit of their premium cable subscription ha[d] no choice but to rent a set-top box from Cox. **[*53]** Indeed, as the [complaint] demonstrates, Cox's own advertising and consumer communications establishes this relationship. Moreover, the [complaint] alleges Defendants have engaged in conduct which minimizes the viability of the use of cable cards to receive the full panoply of premium cable services. Thus, the Court finds that Plaintiffs have alleged facts sufficient to demonstrate Cox has engaged in coercion, thereby satisfying the second element of a prima facie case.

*In re Cox, 2010 U.S. Dist. LEXIS 58417, at * 17-18*. Plaintiffs here also rely on advertising and consumer communications made to customers of Cablevision's Two Way Services regarding what services were and were not accessible through a cable set-top box, and Plaintiffs also clearly allege conduct which minimizes CableCARD access to Cablevision's full panoply of Two Way Services. The Complaint carves out "Pay TV" Pay-Per-View events ordered by phone, narrowing the tying product market only to those Pay-Per-View events accessible through remote control since "a customer's ability to access Pay Per View by using a remote control is what makes it a "two way" digital service." (Pls. Opp'n Br., at 6). Therefore, to the extent **[*54]** that Plaintiffs have limited their tying product market to interactive Two Way Services accessible only by remote control through a cable set-top box, Plaintiffs have sufficiently alleged the requisite element of coercion to survive Defendant's Motion to Dismiss.

iii. Market Power in the Tying Product Market Restraining Competition in the Tied Product Market

HN9[] The Supreme Court has required that, "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." Illinois Tool Works, Inc. v. Independent Ink, Inc.. 547 U.S. 28, 46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006); Allen-Myland, Inc. v. International Business Machines Corp., 33 F.3d 194, 200-201 (3d Cir. 1994)("The first inquiry into any § 1 tying case is whether the defendant has sufficient market power over the tying product . . . If the defendant is found to have sufficient market power in the tying product market, then the tie may be a 'per se' violation of the Sherman Act"). Market power "is the power to 'to force a purchaser to do something that he would not do in a competitive market.'" Eastman Kodak, 504 U.S. at 464 (quoting Jefferson Parish, 466 U.S. at 14). The focus of the Court should be "whether **[*55]** the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969).

In their Third Amended Complaint, Plaintiffs allege the following:

- "Cablevision's substantial monopoly power, market power and/or economic power in the tying product market is evidenced by, inter alia, the fact that approximately 2.9 million of Cablevision's 3.0 million customers subscribe to Two Way Services through an iO Package. This represents nearly 97% of Cablevision's customers" (Third Am. Compl., at ¶ 54);
- "Cablevision's dominant market share numbers for the overall cable market... together with the additional facts set forth below, demonstrate that Cablevision also possesses a dominant share in the market for Two Way Services. Specifically:

  - Cablevision possessed a 90% or greater share of the overall cable market in the area in which it operates within the New York DMA throughout the Class Period. Indeed, since Cablevision has repeatedly indicated that it has the highest penetration in the nation, its market share in the Two Way Services market **[*56]** likely exceeds that of the New York DMA, as a whole;
  - . . . [O]ver 97% of Cablevision's cable customers subscribe to Two Way Services as part of a premium cable package. Therefore, Cablevision's share of the overall cable market is also highly indicative of its share of the market for Two Way Services;
  - . . . [O]ver 99% of [Cablevision's premium cable] subscribers rent set-top boxes from Cablevision . . . ;

  - Only two competitors of Cablevision — AT&T and Verizon — operate in the geographic areas where Cablevision operates, and provide comparable packages of Two Way Services. . . . AT&T and Verizon have had no more than a combined 10% of the overall cable market in the New York DMA throughout the Class Period. . . . Cablevision necessarily possessed a dominant share of the market for Two Way Services in the areas in which it operated... throughout the Class Period — over 80% at a minimum. This share easily exceeds the 30% market share needed to establish market/monopoly power in this Circuit" (Id., at ¶ 55);

- "Cablevision's monopoly, market and/or economic power in the tying product market are further evidenced by the fact that, even after significantly increasing the price Cablevision **[*57]** charges for subscriptions to premium cable packages that include Two Way Services, Cablevision has not only retained a substantial number of such subscribers, but has regularly increased the number of subscribers with Two Way Services. This is direct evidence of Cablevision's substantial economic power, monopoly power and/or market power" (Id., at ¶ 59);

- "Cablevision instituted the following annual increases in its rates during the Class Period: 2010 + 3.7%, 2009 + 3.5%, 2008 + 4.7%, 2007 + 1.1%, 2006 + 2.3%, and 2004 + 3.2%. These rate increases include increases in the rates charged by Cablevision for the premium cable packages which provide Two Way Services. (As alleged above, premium cable packages which include Two Way Services constitute the vast majority of cable packages sold by Cablevision)" (Id., at ¶ 60);

- "Despite these significant annual price increases, Cablevision has been able to add subscribers with Two Way Services. For instance, from December 2006 through the end of the Fourth Quarter of 2007, the total number of subscribers with Two Way Services increased by approximately 181,000, or 7.4%. From December 2007 to the end of the Fourth Quarter of 2008, the total number **[*58]** of subscribers with Two Way Services increased by approximately 208,000, or 7.9%. Further, from December 2008 to the end of the Fourth Quarter of 2009, the total number of subscribers with Two Way Services increased by 56,000, or 2.0%" (Id.).

Defendant Cablevision claims that Plaintiffs have not cured the pleading deficiencies addressed in this Court's July 21, 2011 Opinion regarding Defendant's market power in the tying product market. In particular, Defendant argues: (1) Plaintiffs fail to provide "direct proof" that Defendant has been able to retain customers despite an increased price in Two Way Services; or, in the alternative, (2) Plaintiffs have failed to allege high market share in Two Way Services coupled with barriers to entry, or "structural evidence" of market power. In our July 21, 2011 Opinion, this Court found that Plaintiffs' Second Amended Complaint, "in attempting to allege market power, . . . conflates Cablevision's provision of Two Way Services with its provision of all cable programming." (July 21, 2011 Op., at 7). Further, the Court found that "Plaintiffs have alleged no specific facts to support the theory that dominance in a market that includes multiple products **[*59]** — both one way and Two Way Services — equates to dominance in the Two Way Services market. . . . Nor have Plaintiffs alleged any specific facts which would allow the Court to otherwise infer that Two Way Services — as opposed to one way services — drive the most demand within the relevant packages." (Id., at 8). The concern expressed in that Opinion was that the Two Way Services market was exclusively defined in relation to and as a subset of premium cable services as provided by Defendant Cablevision, which is an improper mechanism for determining market power because "[i]t would be as if a plaintiff had adequately alleged a product market consisting of orange juice, but relied on the defendant's position in the overall beverage industry as evidence of market power." *In re Set-Top Cable Television Box Antitrust Litig., 2011 U.S. Dist. LEXIS 39001, at * 39*.

The Court disagrees that Plaintiffs have not sufficiently alleged facts regarding Defendant's market power in the tying market of Two Way Services in their Third Amended Complaint. The Court has already found infra that Plaintiffs have sufficiently alleged valid tying and tied product markets. Plaintiffs thus must only show that **[*60]** Cablevision had sufficient market power in the relevant geographic market in which it operates to coerce customers for Two Way Services into renting set-top boxes as a condition of receiving said Two Way Services.

Plaintiffs' Third Amended Complaint alleges facts purporting to show "direct proof" of market power through alleging that Cablevision had a minimum of an 89% market share in the Two Way Services market. The Complaint alleges that, out of all cable service available to consumers in the New York DMA, Cablevision penetrates 90% of the cable market (compared to about 10% market share for overbuilders AT&T and Verizon). (Third Am. Compl., at ¶¶ 7, 52-58). Plaintiffs allege that, since 97% of Defendant's premium cable customers have purchased Two Way Services, and that the only other cable providers that provide such services are their competitors AT&T and Verizon (satellite providers not being technologically capable of providing said services), Cablevision has a minimum of 89% market share of the Two Way Services market. (Id.; Pls. Opp'n Br., at 11). Further, the Third Amended Complaint alleges that, despite Cablevision's continued and significant increase in its prices over a **[*61]** six-year period, it did not only not lose sales during that period but substantially increased revenues, a key indication of market power. (Third Am. Compl., at ¶¶ 58-65; see *Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 307 (3d Cir. 2007)*("[i]f a firm can profitably raise prices without causing competing firms to expand output and drive down prices, that firm has monopoly power")).

The Third Amended Complaint also alleges facts supporting indirect, or structural, proof of market power by alleging Cablevision's high market share in Two Way Services coupled with barriers to entry. As stated above, the Complaint states facts regarding Cablevision's market power in Two Way Services by simultaneously narrowing the tying product market and alleging a 89% share for Cablevision's provision of Two Way Services in that product market. Plaintiffs additionally cite to barriers of entry: Cablevision's "clustering" activities to consolidate its control of the geographic market; "bundling" its products by providing customers with broadband internet access and phone services over the same cable infrastructure that it uses to provide video cable service; offering superior programming through long-standing **[*62]** programmer-distributor contracts; and utilizing technological, structural, cost and pricing advantages to prevent overbuilders from threatening its dominance in the tying product market. (Third Am. Compl., at ¶¶ 66-80).

Although Plaintiffs may still be presented with difficulties and challenges proving that Cablevision has market power, the allegations in the Complaint are sufficient to make such a finding plausible at this stage in the proceedings. Plaintiffs have detailed facts suggesting both direct and indirect proof which, if taken to be true, indicate that Cablevision controls a large portion of the narrowly defined Two Way Services market in the New York DMA, and can therefore manipulate pricing without regard to competition in that area. Accordingly, the Court concludes that Plaintiffs have properly pled that Cablevision possesses the requisite market power to make out a tying claim.

iv. Effect on Interstate Commerce

Plaintiffs contend that Cablevision's actions have an effect on interstate commerce as required for a per se tying claim in that Cablevision operates in New York, New Jersey and Connecticut (the New York DMA). (Third Am. Compl., at ¶¶ 23, 52); see, e.g. *Northern Pacific, 356 U.S. at 5*; **[*63]** *Town Sound & Custom Tops, 959 F.2d at 477*. Specifically, the Complaint states that "Defendants' conduct substantially affects interstate commerce by foreclosing and eliminating competition in the market for the tied product in the areas where Cablevision operates. This lack of competition in this market has caused substantial anticompetitive effects, including higher prices for the tied product, lesser choice and dampened incentives to innovate. (Third Am. Compl., at ¶ 154). Defendant Cablevision does not contest Plaintiffs' allegations regarding its effect on interstate commerce in its submissions in support of its Motion to Dismiss. Thus, the Court, taking the facts alleged in Plaintiffs' Complaint to be true, finds it plausible that Cablevision's alleged conduct meets this third and final requirement for a per se tying claim.

2) Plaintiffs' § 1 Tying Claim — Rule of Reason Analysis

HN10[] To sufficiently assert a tying claim under a rule of reason theory of liability, plaintiffs need not prove that the seller has power in the tying product market, but must set forth: 1) a viable theory of causation of antitrust injury in that a defendant's alleged tying resulted in anticompetitive effects **[*64]** (e.g., through the forced purchase of inferior goods, consumer surprise, difficulty in consumer ability to make proper price comparisons, or foreclosure of the tied product market); and 2) a rebuttal at trial of defendant's procompetitive justifications, if any. *Town Sound, 959 F.2d at 482-94*. Rule of reason claims are still available to plaintiffs who do not succeed in their per se tying claims. Id.; see, e.g., *Jefferson Parish, 466 U.S. at 17-17*; *Fortner, 394 U.S. at 499-500*; *Times-Picayune, 345 U.S. at 614-15*; *Town Sound, 959 F.2d at 482*. Since this Court finds that Plaintiffs have sufficiently pled facts regarding a per se tying violation, the requisite elements generally required for proving a tying violation under a rule of reason analysis—causation of antitrust injury and rebutting procompetitive justifications for a tie-in—need not be assessed at this stage. See *Town Sound, 959 F.2d at 477*. However, the Court cautions that survival of a motion to dismiss is no guarantee of the ultimate success on the merits of any per se tying claim, and an assessment based upon a rule of reason theory of liability may be required at future stages of the proceedings in this matter based on **[*65]** the sufficiency of the evidence presented on the record.

3) Plaintiffs' *§ 2* Monopolization Claim

HN11[] *Section 2* of the Sherman Act sanctions those "who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations." *15 U.S.C. § 2*. Monopolization under *Section 2* consists in: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell, 384 U.S. at 570-71*; see also *Harrison Aire, Inc. v. Aerostar International, Inc., 423 F.3d 374, 380 (3d Cir. 2005)*. Plaintiffs have the burden of defining the relevant *§ 2* product market. See *Queen City Pizza, 124 F.3d at 436*. To have standing to seek a *§ 2* claim, Plaintiffs must show that they have suffered an "antitrust injury" as a result of Defendant's misconduct so as to possess the standing necessary to seek relief. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 75-76 (3d Cir. 2010)*. The injury prong requires a **[*66]** showing of: (1) harm of the type the antitrust laws were intended to prevent; and (2) an injury to the plaintiff which flows from that which makes defendant's acts unlawful. Id., at 76 (quoting Gulfstream III Assocs. Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3d Cir. 1993)(citation omitted)). Because the Court finds that Plaintiffs have failed to sufficiently allege Defendant's possession of monopoly power in the relevant market of set-top box distribution, Plaintiffs Section 2 monopolization claim is dismissed with prejudice and the Court need not address Defendant's alleged willful acquisition or maintenance of monopoly power or Plaintiffs' § 2 antitrust standing.

a. Possession of Monopoly Power in the Relevant Market

HN12[] Monopoly power has been defined as "the power to charge a price higher than the competitive price without inducing so rapid and great an expansion of output from competing firms as to make the supracompetitive price untenable." Harrison Aire, 423 F.3d at 380 (quoting Am. Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1319 (7th Cir. 1991)). Such power can be demonstrated by direct evidence of supracompetitive pricing and high barriers to entry **[*67]** or with structural evidence of a monopolized market. Id. Structural indicators of a monopolized market include a firm's possession of a dominant share of a relevant market that is protected by entry barriers. Id., at 381. In determining a valid relevant market in which monopoly power is alleged, a Court looks to reasonable interchangeability of use of the relevant product. See Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)(see also Queen City Pizza, 124 F.3d at 437-38 ("The test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes.'")(citation omitted).

Plaintiffs' Third Amended Complaint alleges that Defendant Cablevision willfully acquired and maintained a monopoly in the market for distribution of set-top boxes that provide access to Two Way Services. (Third Am. Compl., at ¶¶ 121-136). Specifically, Plaintiffs define the relevant product market of set-top boxes to include those boxes distributed by Cablevision to its subscribers and those boxes that would have been distributed to Cablevision subscribers by other suppliers absent Cablevision's **[*68]** exclusionary conduct. (Id., at ¶ 123). In this product market, the Complaint alleges, Cablevision has total control through willfully acquiring and maintaining exclusive power by imposing a tying arrangement requiring subscribers to rent set-top boxes from Cablevision (Id., at ¶ 122).

Defendant argues that the Third Amended Complaint's "Cablevision-compatible" market is deficient to establish a § 2 claim for two reasons: (1) the Court has already rejected identical market definitions for Plaintiffs' § 2 claim in its prior Opinions granting Defendant's motions to dismiss; and (2) the proposed market is an aftermarket that cannot be sustained as a matter of law. (Def. Br., at 33-36). The Court will address these arguments in turn.

i. Correction of Pleading Deficiencies from Prior Complaints

Plaintiffs' Original Complaint did not contain a § 2 claim, but in Plaintiffs' subsequent amendments to that Complaint, they have progressively defined the relevant product market for their monopolization claim as follows: 1) "the market for set-top boxes permitting two way communications between Cablevision and its iO TV subscribers" (First Am. Compl., at ¶ 150); 2) "the market for distribution of set-top **[*69]** boxes that can provide access to Two Way Services" (Sec. Am. Compl., at ¶ 147); 3) "the market for distribution of set-top boxes that can provide access to Two Way Services in the area in New York, New Jersey and Connecticut in which Cablevision operates (which falls entirely within the New York DMA)." (Third Am. Compl., ¶ 159). Plaintiffs' first market definition was rejected in this Court's January 14, 2011 Opinion because, inter alia, "the Amended Complaint limits the relevant product market to Cablevision-specific boxes but admits that Cablevision-specific boxes are, in fact, not unique and are interchangeable with other cable boxes available on the market." (Jan. 14, 2011 Op., at 9). **HN13**[] A single brand of a product of service may constitute a relevant market only where "the commodity is unique, and therefore not interchangeable with other products." Queen City Pizza, 124 F.3d at 439. When Plaintiffs redefined the relevant market to limit it to the distribution of set-top boxes that provide access to Two Way Services in its Second Amended Complaint, this Court found it could not "decipher whether such product market is, once again, limited to those boxes distributed exclusively by **[*70]** Cablevision (i.e., 'Cablevision-specific boxes')." (July 21, 2011 Op., at

12). The Court pointed to sections of Plaintiffs' Second Amended Complaint which suggested that their amended relevant market was limited to boxes distributed by Cablevision despite their maintenance in their opposition brief to Defendant's motion to dismiss that the amended relevant market was "not limited to boxes distributed by Cablevision." (Id., at 13). Thus, the Second Amended Complaint was found to "contain[] no facts which would allow the Court to reasonably infer that Cablevision posses[es] monopoly power in the relevant market of all two-way boxes -that is, all cable boxes that allow two way communications, not simply those cable boxes that allow Cablevision subscribers to access Two Way Services (i.e., Cablevision-specific boxes)." (Id.).

Defendant contends that Plaintiffs have again failed to allege a relevant market beyond the single product market of Cablevision-specific boxes. (Def. Br., at 33). Plaintiffs, however, argue that they have clarified the scope of the set-top box distribution market by including "the distribution of all set-top boxes that provided, or absent Cablevision's exclusionary **[*71]** conduct, potentially would have provided, access to Two Way Services in the geographic market (Cablevision's service area)." (Pls. Opp'n Br., at 33; citing Third Am. Compl., at ¶¶ 121-122, 129). Specifically, Plaintiffs claim that their amended market avoids the deficiencies of a "single product market" because it includes Verizon and AT&T's set-top boxes in the relevant market definition. (Id., at 34; Third Am. Compl., at ¶ 129). In fact, Plaintiffs' Third Amended Complaint "includes boxes that would have been distributed by other outlets, including retail outlets and secondary sources such as e-Bay, if not for Cablevision's tying conduct, which successfully prevented these other outlets from being able to distribute boxes to Cablevision's customers." (Third Am. Compl., at ¶ 123). Defendant Cablevision, Plaintiffs allege, have monopoly power in this larger market of set-top box distribution because "Verizon's and AT&T's combined share of the Two Way Services market in this geographic area is only 10% at most. ... Therefore, including boxes distributed by Verizon and AT&T in this geographic area in the *Section 2* Relevant Market does not change the fact that Cablevision clearly maintains **[*72]** a dominant share (at least 90%) of the market for boxes that provide access to Two Way Services in this area." (Pls. Opp'n Br., at 33).

Despite Plaintiffs' attempts to distinguish this third iteration of their *§ 2* relevant market from their prior Complaints, this Court finds that Plaintiffs' Third Amended Complaint maintains an incoherent market definition which simultaneously attempts to incorporate a broader market of set-top box distribution in a narrow geographic market while also insisting that "[s]et-top boxes obtained from a source other than Cablevision do not provide access to Two Way Services because these boxes are prevented from providing access to Two Way Services due to Cablevision's exclusionary conduct." (Third Am. Compl., at ¶ 127). As stated in this Court's January 14, 2011 Opinion, Cablevision-specific boxes are not unique and are interchangeable with other cable boxes; like Domino's-approved supplies and ingredients (tomatoes, dough, etc.), they cannot constitute their own, exclusive relevant market, but must include all interchangeable products not approved by a single brand. (Jan. 14, 2011, at 9-10; citing *Queen City Pizza, 124 F.3d at 440* ("Domino's does not sell **[*73]** a unique product or service. Franchisees must buy Domino' s-approved supplies and ingredients not because they are unique but because they are obligated by contract to do so.")). Aside from the contractual link limiting Cablevision's subscribers to the rental of the Cablevision-distributed boxes, Plaintiffs set-top box market, as Plaintiffs themselves concede, could include not only those boxes distributed by Verizon and AT&T, but all boxes distributed by Scientific Atlanta and other companies, including those boxes resold online. Plaintiffs are correct in citing to Third Circuit law which establishes that ***HN14***[] potential participants in a market may be included in the relevant market since, absent the exclusionary conduct of the alleged monopolist, such participants could have offered interchangeable products. See *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3d Cir. 1978)*("[D]efining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, **[*74]** either actual rivals or eager potential entrants to the market."). However, Plaintiffs only define their market share of 90% with respect to those participants that *actually* distribute set-top boxes in the relevant geographic market?namely, Verizon and AT&T—stating no facts which would allow the Court to plausibly determine Defendant's monopoly power in the larger market of potential distributors of cable set-top boxes, from manufacturers to retailers and online resellers, which could dramatically diminish Cablevision's monopoly power. For these reasons, this Court cannot find that Plaintiffs have sufficiently pled a relevant product market beyond a "single product market," and at best, a Cablevision- and overbuilder-limited set-top box market, so as to survive dismissal under current Third Circuit law.

ii. Aftermarket Analysis

In Eastman Kodak Co. v. Image Technical Services, Inc., the Supreme Court considered the question of whether a defendant's lack of market power in a primary market precludes as a matter of law the possibility of market power in derivative aftermarkets. *504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. In finding that it does not, the Court pointed to information costs, switching costs and **[*75]** discriminatory pricing which could "lock in" customers who purchase an item within a competitive primary market but face predetermined choices in an aftermarket. *Id., at 477*. In Queen City Pizza, the Third Circuit clarified Kodak's holding as follows: "Kodak does not hold that the existence of information and switching costs alone, such as those faced by the Domino's franchisees, renders an otherwise invalid relevant market valid." *124 F.3d at 439*. Specifically, Kodak could be distinguished in cases in which lifecycle pricing assessments are not ruptured or distorted by new and unpredictable policies unforeseen at the time of sale such that a lifecycle price calculations could in fact be incorporated into a purchase decision: "Unlike the plaintiffs in Kodak, the Domino's franchisees could assess the potential costs and economic risks at the time they signed the franchise agreement. The franchise transaction between Domino's Pizza, Inc. and plaintiffs was subjected to competition at the pre-contract stage." *Id., at 440*.

Defendant Cablevision likens its Two Way Services subscribers to Domino's franchisees in contending that Cablevision instituted no policy change to rupture the lifecycle **[*76]** pricing assessments of its subscribers with respect to their rental of the set-top box nor did it fail to disclose any information regarding rates and fees at the time Plaintiffs chose to subscribe to Cablevision. For those reasons, Defendant contends, Plaintiffs' *§ 2* relevant market is an "aftermarket" which must fail as a matter of law. (Def. Br., at 34). Plaintiffs argue that "the market for set-top boxes is not an 'aftermarket' that is dependent on choosing Cablevision Two-Way Services. To the contrary, boxes Cablevision distributes are commodity products that are widely deployed by many cable operates including Cox, Comcast and Time Warner. Therefore, Cablevision's monopoly over the complimentary product exists only because it had the power and ability to artificially exclude competitive sources of distribution of these commodity boxes." (Pls. Opp'n Br., at 34-35). Further, Plaintiffs distinguish this case from Kodak in that here, Cablevision is alleged to have monopoly power in the primary market of Two Way Services, unlike Kodak which lacked market power in the primary equipment market but was nevertheless found to have possible market power in derivative markets. (Id., at 35).

In **[*77]** our January 14, 2011 opinion, this Court cited to Queen City Pizza in holding that, to the extent that the Amended Complaint could be construed as stating a claim that an "aftermarket" for Cablevision-compatible cable boxes was the relevant *§ 2* market, Plaintiffs' *§ 2* claim "fails as a matter of law inasmuch as the Amended Complaint does not allege that the conduct challenged was not authorized or otherwise disclosed at the time Plaintiff chose to subscribe to Cablevision. . . . Absent a change in [an internal Cablevision] policy [or practice dating back to 2001] (or other circumstances not alleged here), the Court has no basis on which to find plausible a relevant market limited to Cablevision-compatible boxes." (Jan. 14, 2011 Op., at 10). Plaintiffs have made no change in their Third Amended Complaint alleging facts or circumstances which point to a change in policy or other indicators of consumer surprise placing upon them obligations to which they were not previously bound regarding charges or fees unforeseen at the time they signed the subscription agreement with Cablevision. To the extent that Plaintiffs reject an aftermarket definition in their Opposition Brief, or seek to distinguish **[*78]** their case from Kodak, the Court agrees that an "aftermarket" definition of set-top cable box distribution cannot succeed. That is because, while this case may be distinguishable from *Kodak* with respect to the defendant's alleged market power in the primary market, that cannot save Plaintiffs *§ 2* claim under Third Circuit law, which invalidates proposed aftermarkets as a matter of law which were the result of transactions "subjected to competition at the pre-contract stage" at which time a plaintiff "could assess the potential costs and economic risks at the time they signed the . . . agreement." *Queen City Pizza, 124 F.3d at 440*. If the contractual restrictions in the Two Way Services package were viewed by Plaintiffs as overly burdensome at the time said package was purchased based on the disclosed rental fee of the set-top box, Plaintiffs could have purchased a different package, or made some alternative entertainment-viewing decisions, for example, by signing on with overbuilders AT&T or Verizon, or even supplementing one-way services attainable through Cablevision or satellite providers with extra-contractual entertainment options in video and gaming. Further, if Cablevision acted **[*79]** unreasonably when, under the contractual agreement with its Two Way Services customers, it continuously raised its price for the set-top box required to utilize interactive features, Plaintiffs' remedy, if any, is in contract, not under antitrust laws, as Plaintiffs may have a right to sue for breach of the contract on originally agreed-upon terms. See, e.g. *Queen City Pizza, 124 F.23d at 441*.

To conclude, Plaintiffs fail to allege a valid relevant market under *§ 2* of the Sherman Act as required to establish a monopolization claim because Plaintiffs' market as defined is a "single product market" and cannot be properly construed as a valid "aftermarket." Since Plaintiffs have been afforded multiple opportunities to amend their *§ 2* claim in light of these deficiencies, the Court denies Plaintiffs' *§ 2* claim with prejudice.

4) Defendant's *Trinko* Argument

Defendant Cablevision revives an argument already rejected by this Court in the instant Motion to Dismiss, asserting that Plaintiffs' antitrust claims are precluded under *Verizon Commc's Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Specifically, Defendant claims that Plaintiffs are attempting to improperly convert **[*80]** a regulatory issue into an unlawful tying claim under ***antitrust law*** since the FCC was directed to adopt resolutions to promote nationwide availability of set-top boxes. The instant action, Defendant argues, is an attempted end run by Plaintiffs around the FCC's regulatory scheme, and since Plaintiffs allege no recognized antitrust claim, their Complaint should be dismissed on *Trinko* grounds. (Def. Br., at 38-39). However, since this Court finds that Plaintiffs have sufficiently stated a *§ 1* tying claim, and the Court has already rejected Defendant's Trinko-based argument on the grounds that "the circumstances at issue in Trinko [are] legally and factually distinguishable from the instant matter" in that "Plaintiff's § 1 claim would exist even in the absence of the FCC's regulation," the Court will not reconsider an argument it has already rejected. (Aug. 18, 2010 Op., at 3-4). Other courts have consistently rejected the application of Trinko to *§ 1* tying claims alleged in the context of cable MVPD providers and cable set-top boxes that they distribute. See, e.g., *In re Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litig., 2010 U.S. Dist. LEXIS 58417, *22-23 (W.D. Okla. Jan. 19, 2010)*; **[*81]** *Parsons v. Bright House Networks, L.L.C., 2010 U.S. Dist. LEXIS 55277, *26-27 (N.D. Ala. Feb. 23, 2010)*; *Downs v. Insight Communications Company, 2011 U.S. Dist. LEXIS 29616, * 15-16 (W.D. Ky. Mar. 22, 2011)*.

5) Plaintiffs' State Law Claims for Unjust Enrichment

Defendant Cablevision argues that the "[f]ailure of Plaintiffs' federal claims, as before (1/14 Op. 11), requires dismissal of Plaintiffs' state-law claims." (Def. Br. Supp. Mot. to Dismiss, at 39). However, since the Court has found that Plaintiffs have sufficiently alleged a *§ 1* tying claim, Defendant's motion to dismiss Plaintiff's unjust enrichment claims, which hinge on said tying claim, is denied.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss Plaintiffs' Complaint is **GRANTED** in part and **DENIED** in part. Defendant's Motion to Dismiss Plaintiffs' *§ 1* tying claim and state law unjust enrichment claims is DENIED. However, Defendant's Motion to Dismiss Plaintiffs' *§ 2* monopolization claim is GRANTED, and Plaintiffs' § 2 claim is dismissed with prejudice. An appropriate Order accompanies this Opinion.

DATED: January 9, 2012

/s/ Jose L. Linares

Jose L. Linares

United States District Judge

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Universal Grading Serv. v. eBay, Inc.

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

January 9, 2012, Decided; January 9, 2012, Filed

No. C-09-2755 RMW

Reporter
2012 U.S. Dist. LEXIS 2325 *; 2012 WL 70644

UNIVERSAL GRADING SERVICE, et al., Plaintiffs, v. EBAY, INC., et al., Defendants.

Subsequent History: Affirmed by Universal Grading Serv. v. eBay, Inc., 2014 U.S. App. LEXIS 4962 (9th Cir. Cal., Mar. 17, 2014)

Prior History: Universal Grading Serv. v. Ebay, Inc., 2011 U.S. Dist. LEXIS 25193 (N.D. Cal., Mar. 8, 2011)

Core Terms

coins, eBay, grading, plaintiffs', antitrust, Sherman Act, auction, online, commissions, sellers, motion to dismiss, relevant market, conspiracy, buyers, economic relations, competitors, listings, website, prices, amended complaint, grant a motion, allegations, markets, disruption, consumers, conspiracy claim, monopoly power, market power, Cartwright Act, Donnelly Act

Counsel: **[*1]** For Universal Grading Service, individually and on behalf of others similarly situated, Plaintiff: Marina Trubitsky, LEAD ATTORNEY, Law Office of Marina Trubitsky, New York, NY.

For John Callandrello, individually and on behalf of others similarly situated, Joseph Komito, individually and on behalf of others similarly situated, Vadim Kirichenko, individually and on behalf of others similarly situated, Plaintiffs: Marina Trubitsky, PRO HAC VICE, Law Office of Marina Trubitsky, New York, NY.

For eBay, Inc., a foreign corporation, Defendant: John C. Dwyer, LEAD ATTORNEY, Cooley LLP, Palo Alto, CA; Benjamin F Chapman, Cooley Godward, San Diego, CA; Michael Graham Rhodes, Cooley LLP, San Francisco, CA.

Judges: RONALD M. WHYTE, United States District Judge.

Opinion by: RONALD M. WHYTE

Opinion

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

[Re Docket No. 155]

This action arises out of a policy enacted by defendant eBay, Inc. ("eBay") regarding the labeling of certain coins sold on its online auction website. On March 28, 2011, plaintiffs Universal Grading Service ("UGS"), John Callandrello ("Callandrello"), Joseph Komito ("Komito"), and Vadim Kirichenko ("Kirichenko") (collectively "plaintiffs") filed a Fourth Amended Complaint **[*2]** ("FAC") attempting to state claims under Sections 1 and 2 of the Sherman

Act, state antitrust statutes, *Cal. Bus. & Prof. Code section 17200*, and the common law tort of interference with economic relations. eBay moves to dismiss under *Fed. R. Civ. P. 12(b)(6)*. For the reasons below, the court grants the motion to dismiss with prejudice.

I. BACKGROUND

A. Factual Background

eBay is the "world's largest provider of online auction services." FAC ¶ 19. eBay's website contains a forum for the purchase and sale of millions of items, including coins. *Id.* ¶ 6. According to the FAC, "on any given day, ... eBay has more than one hundred fifty thousand U.S., world, and ancient coins listed for online auction." *Id.* ¶ 21. Under eBay's Counterfeit Currency and Stamps Policy (the "Certification Policy"), only coins that have been "graded" by one of five authorized grading services may be listed as "certified coins." *Id.* ¶ 38. Coins that have not been graded, or have been graded by a non-authorized grading service, may be sold on eBay, but may not be labeled "certified coins." *Id.* ¶ 166. As of the filing of the FAC, only about 0.3% of coins available on eBay were listed as "certified." *Id.*

UGS is in the **[*3]** business of grading coins, but is not one of the five services authorized by eBay to "certify" coins for sale on its website. *Id.* ¶ 2, 39. Callandrello is the president of UGS, as well as a shareholder in the company. *Id.* ¶ 3. Komito and Kirichenko are individual coin dealers who buy and sell coins within an alleged "online auctions market for certified coins," including through eBay's website. FAC ¶¶ 4-5.

eBay's Certification Policy has a complicated history. In or about 2001, the Professional Numismatists Guild ("PNG"), an organization of coin dealers and collectors, formed a group known as the "Internet Rules Committee." FAC ¶¶ 7, 8, 27. The Internet Rules Committee consisted of various "coin industry insiders," including Barry Stuppler ("Stuppler") in his capacity as then-governor and chairman of a non-profit trade organization called the American Numismatic Association ("ANA") Consumer Protection Committee. *Id.* ¶ 27. Plaintiffs allege that the "sole purpose" of the Internet Rules Committee was to "interfere with and obstruct the ability of smaller coin grading services," including plaintiff UGS, to participate in the "then burgeoning online auctions market for certified coins" **[*4]** by accusing plaintiffs of selling counterfeit coins and engaging in other fraudulent conduct. *Id.*

In or about 2004, the ANA and eBay formed the Coins Community Watch Group ("CCW"). *Id.* ¶ 28. The CCW consisted of largely the same members as the Internet Rules Committee. *Id.* ¶ 30. The ANA described the CCW as "a collaborative effort among a team of lobby experts, the ANA, and eBay for the purpose of combating misrepresented or fraudulent listings involving coins and other numismatic items." *Id.* ¶ 28.

In August 2004, eBay conducted a workshop called the Coins Community Watch Program. *Id.* ¶ 29. The eBay forum announcing the program explained that it was "a cooperative effort between the CCW team of experts, the ANA, and eBay to combat misrepresented listings in the Coins category." *Id.* ¶ 29. Under the CCW program, purported experts: (1) selectively reviewed coin listings for violations and submitted claims; (2) the ANA corroborated claims and attempted to resolve them with sellers; (3) unresolved issues were escalated to eBay for the appropriate remedy. *Id.* According to the FAC, the CCW program, like the Internet Rules Committee, was intended to negatively affect competition in the online **[*5]** market for certified coins. *Id.* ¶ 30.

In 2006, the PNG commissioned a survey of rare coin authentication and grading services (the "Survey"). *Id.* ¶ 31. Respondents were asked to evaluate eleven grading services based on several criteria, including grading and authentication accuracy. *Id.* ¶ 31. UGS was not one of the grading services included in the Survey. Plaintiffs allege that "the false and damaging results of the Survey were manipulated by PNG and Stuppler" and that "smaller more economical coin grading services like plaintiff UGS were deliberately excluded ... from the survey." *Id.* ¶ 31.

In 2007, eBay implemented the Certification Policy, which allows only coins graded by one of five authorized grading services to be listed as "certified" in the auction forum. *Id.* ¶ 38. The selection of the authorized grading services was based on the results of the Survey. *Id.* Pursuant to the Certification Policy, coins graded by UGS and other non-authorized grading services may not be listed or sold on eBay as "certified" and are allegedly referred to by eBay as "counterfeit." *Id.* ¶ 39. In addition, eBay supposedly sent emails to dealers of coins graded by UGS with the subject line "eBay Listing **[*6]** Removed: Counterfeit Currency and Stamps." *Id.* ¶ 41.

Publicly, eBay announced that the Certification Policy was an effort to "combat misrepresented or fraudulent listings involving coins and other numismatic items." *Id.* ¶ 47. However, plaintiffs allege that the Certification Policy is in fact the result of a conspiracy between eBay, ANA, PNG and Stuppler to "raise the value of certified coins in the online auction market by restricting the online auction market to coins graded only by a handful of authorized graders." *Id.* ¶ 35. Plaintiffs further allege that coin buyers have been forced to pay "higher prices for certified coins than what they paid for identical coins prior to the enactment of the [Certification Policy]." *Id.* ¶ 43. Finally, plaintiffs allege that eBay "agreed to participate in this illegal scheme because it derives higher commissions from the sale of expensive coins." *Id.* ¶ 26.

B. Procedural Background

Plaintiffs originally filed a class action complaint in the United States District Court for the Eastern District of New York on August 29, 2008. The complaint alleged largely the same claims asserted in the FAC on behalf of a number of proposed classes. Then-defendants **[*7]** eBay, ANA, PNG and Stuppler moved to dismiss plaintiffs' First Amended and Second Amended complaints under *Rule 12(b)(6)*. On June 10, 2009, the District Court for the Eastern District of New York ordered the case transferred in its entirety to the Northern District of California. After the transfer, the parties stipulated to filing new motions to dismiss and to the filing of plaintiffs' Third Amended Complaint ("TAC"). eBay and PNG filed separate motions to dismiss the TAC. Stuppler and ANA were subsequently dismissed pursuant to a settlement agreement. *See* Dkt. No. 150.

On March 8, 2011, this court granted the motions to dismiss the TAC. Plaintiffs' antitrust claims were dismissed with prejudice to the extent they were based on alleged *per se* violations of the Sherman Act. The court also dismissed plaintiffs' trade libel claims with prejudice. However, the court granted plaintiffs leave to amend the complaint to plead facts supporting their Sherman Act § 1 claims under the rule of reason. *See* *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991)*. The court also allowed plaintiffs to amend the complaint to allege: (1) antitrust injury with respect to their Sherman Act § 2 claims, **[*8]** (2) derivative Donnelly Act, Cartwright Act, and Unfair Competition Law claims, and (3) facts showing the existence of specific economic relationships with identifiable third parties which defendants knew about and intentionally disrupted through a wrongful act, which would be necessary to support plaintiffs' tortious interference claims.

On March 28, 2011, plaintiffs filed their Fourth Amended Complaint ("FAC"). eBay moved to dismiss on May 6, 2011. On July 13, 2011, PNG reached a settlement agreement with plaintiffs, leaving eBay as the lone defendant in this action. *See* Dkt. No. 164.

C. The Fourth Amended Complaint

The FAC's nine causes of action can be divided into five categories: (1) *Section 1* Sherman Act claims, including conspiracy to restrain trade and unlawful tying; (2) *Section 2* Sherman Act claims, including abuse of monopoly power, maintenance of monopoly power, and attempted monopolization; (3) state law antitrust claims under the Donnelly Act (New York) and the Cartwright Act (California); (4) unfair competition under *Cal. Bus. & Prof. Code § 17200*; and (5) tortious interference with economic relations.

The claims of the FAC are brought on behalf of plaintiffs and various **[*9]** classes. These classes are: (1) coin grading companies not authorized under the Certification Policy; (2) companies and individuals who purchased "certified" coins after the implementation of the Certification Policy; (3) coin sellers who are in possession of coin inventories graded by companies other than the five authorized under the Certification Policy; (4) companies and individuals who attempted to list coins as "certified" which had been graded by non-authorized grading services and whose listings were removed by eBay for violating the Certification Policy; and (5) all companies and individuals who have bought and/or sold coins on eBay and have paid higher commissions to eBay as a result of the Certification Policy. FAC ¶¶ 98-147.

II. DISCUSSION

A. Standard of Review

A motion to dismiss for failure to state a claim pursuant to *Rule 12(b)(6)* tests the legal sufficiency of the complaint. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. A claim has facial plausibility when the plaintiff pleads factual content that allows the **[*10]** court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* In antitrust actions, "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Rick-Mik Enters. Inc. v. Equilon Enters., LLC, 532 F.3d 963, 970 (9th Cir. 2008)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)*. The Ninth Circuit has noted that "at least for the purposes of adequate pleading in anti-trust cases, the Court specifically abrogated the usual 'notice pleading' rule." *Rick-Mik Enters. Inc., 532 F.3d at 971*. Indeed, antitrust plaintiffs are specifically required to allege enough facts to "nudge claims across the line from conceivable to plausible." *Twombly, 550 U.S. at 570*.

B. Claim 1: Antitrust Conspiracy to Restrain Trade[1]

To **[*11]** prevail under Section 1 of the Sherman Act, *15 U.S.C. § 1*, a plaintiff must plead: "(1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., 'antitrust injury')." *McGlinchy v. Shell Chemical Co., 845 F.2d 802, 811 (9th Cir. 1988)*. Under the rule of reason, the court must "analyze the degree of harm to competition along with any justifications or pro-competitive effects to determine whether the practice is unreasonable on balance." *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991)* (quoting *Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988))*. Unlike a *per se* violation, "[t]he focus [under the rule of reason] is on the actual effects that the challenged restraint has had on competition in a relevant market." *Id.*

The essence of plaintiffs' conspiracy claim is that eBay agreed with the ANA, Stuppler and PNG to limit the number of authorized graders in order to artificially raise the prices of **[*12]** grading services, which were then passed on by coin sellers to coin buyers, resulting in higher commissions for eBay. While this is basically the same theory advanced in previous complaints, the FAC includes a number of allegations that were absent from the TAC. In particular, plaintiffs now allege that the five authorized coin graders charge more for their services than the non-authorized grading companies, and that the authorized coin graders raised their prices after the Certification Policy was adopted. FAC ¶¶ 167-69. Plaintiffs also allege that coin sellers pass the increased expense of grading services on to their customers and that the price of "certified coins" has increased since the implementation of the Certification Policy. FAC ¶¶ 171, 172.

While the court is conscious of its duty to accept plaintiffs' allegations as true at the pleading stage, it remains convinced that the FAC, like the iterations that preceded it, fails to state a conspiracy claim under the Sherman Act. First, the scheme described by plaintiffs simply does not make "economic sense." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *see also* *DM Research, Inc. v.*

[1] Claim 1 is brought on behalf of Class 1 (coin grading companies not authorized under the Certification Policy), Class 2 (companies and individuals who purchased coins graded by one of eBay's five authorized graders), and Class 3 (coin sellers who are in possession of coin inventories graded by companies other than one of the five authorized under the Certification Policy).

College of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999) **[*13]** (affirming Rule 12(b)(6) dismissal where complaint alleged "highly implausible" conspiracy); Brunson Communications., Inc. v. Arbitron, Inc., 239 F. Supp. 2d 550, 563-64 (E.D. Penn. 2002) (concluding that "the Amended Complaint fails to sufficiently allege concerted activity for the simple reason that the supposed conspiracy 'makes no economic sense.'"); United Magazine Co. v. Murdoch Mag. Distrib., 146 F. Supp. 2d 385, 402 (S.D.N.Y. 2001) (holding that because "plaintiffs' alleged conspiracy to engage in predatory pricing is entirely unnecessary and makes no economic sense, plaintiffs fail to state a claim under Section 1"). Plaintiffs acknowledge that eBay is "consistently able to raise its commissions without losing its users." FAC ¶ 200. Thus, even assuming the convoluted arrangement depicted in the FAC could result in increased commissions to eBay, it would be far easier and more efficient for eBay to simply raise its fees for the sale of coins than to conspire with unrelated non-profit trade groups to develop a policy that *might* result in higher commissions. *See, e.g.,* United Magazine Co. v. Murdoch Magazines Distribution, Inc., 146 F. Supp. 2d 385, 401-02 (S.D.N.Y. 2001) (dismissing **[*14]** Section 1 conspiracy claim as not making "economic sense" because the defendant could charge "supracompetitive prices" without engaging in the alleged conspiracy). Plaintiffs respond to this argument by contending that the adoption of the Certification Policy was the "easiest and most politically safe way" for eBay to accomplish its nefarious goal. Dkt. No. 159 at 6-7. The court is not persuaded. On top of the fact that the arrangement described by plaintiffs strikes the court as anything but "easy," the FAC contains no factual allegations supporting this assertion. Instead, plaintiffs consistently emphasize that eBay is "solely concerned with its own profits," not the "politics" of its relationships with coin sellers. Dkt. No. 159 at 7.

Furthermore, plaintiffs' theory is implausible because it is so highly unlikely to succeed. As the FAC notes, of the 378,902 "coin" listings on eBay as of March 16, 2011, only 1,113, or roughly 0.3%, were listed as "certified." FAC ¶ 166. Thus, according to plaintiffs' logic, eBay's commissions have declined on the 99.7% of coins whose sale prices have decreased under the Certification Policy. Plaintiffs in fact allege that the market for non-certified **[*15]** coins has been "permanently depressed," and that such coins now command only "a quarter of the price [of] graded coins." *Id.* ¶¶ 170, 207. An already improbable conspiracy to inflate commissions is not "nudged ... across the line from conceivable to plausible" where the complaint on its face suggests that the perpetrator has lost money as a result of the agreement. Twombly, 550 U.S. at 570.

In addition, the FAC itself demonstrates that the adoption of the Certification Policy was supported by pro-competitive justifications. Plaintiffs concede that the stated intent of the policy was "to combat misrepresented or fraudulent listing involving coins and other numismatic items." FAC ¶ 47. Further, the policy states on its face that "eBay wants to be a place that is safe for both buyers and sellers or stamps, coins, and paper money. We have worked with various outside experts to develop guidelines and policies designed to protect eBay members." Dkt. No. 155, Ex. 1 at 4. [2] As other courts have noted, standard-setting activity that "provides a better product carries with it an overriding justification." Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 487 (1st Cir. 1988) (Breyer, **[*16]** J.) (upholding defendant trade organization's promulgation of a standard for pipe-fittings that was adopted by various private standard-setting bodies, as well as state and local plumbing code authorities).

Plaintiffs allege, however, that any purported justifications are "misleading" because "no further surveys of coin grading services are taking place and thus coin grading companies which offer perfectly respectable and legitimate grading services are precluded from competing with ... eBay's chosen five." FAC ¶ 47. This statement suggests that plaintiffs' true grievance is not that eBay implemented a grading policy, but that certain grading services were excluded from the Survey upon which the policy was based. However, as **[*17]** the complaint makes clear, the Survey was commissioned and conducted PNG and Stuppler without the involvement of eBay. *See id.* ¶ 31. To the extent that UGS was wrongfully excluded from the Survey by its competitors, its gripe is with those parties, not with a website that appears to have simply relied on what it believed to be objective industry experts in attempting to reduce fraud. Furthermore, eBay has no obligation to deal with UGS or any other grading service, as long as it

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[2] The court takes notice of the Certification Policy, which was attached as an exhibit to a declaration accompanying the motion to dismiss, under the incorporation by reference doctrine. *See* United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) ("Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.").

possesses "good faith, sufficient pro-competitive or business justifications for [its] actions." *Race Tires Am., Inc. v. Hoosier Racing Tire Corp, 614 F.3d 57, 82 (3d Cir. 2010)* (upholding a rule imposed by a car racing sanctioning body requiring drivers to use a specific brand of tire because such a rule "creates more exciting races, ensures access to a uniform product, leads to increased safety, and lowers the costs of tires by eliminating the so-called 'tire wars.'"). Nor must eBay show that the Certification Policy is the *best* way to combat fraud, as long as it is reasonable. "Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them **[*18]** and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute." *7-UP Bottling Co. v. Archer Daniels Midland Co. (In re Citric Acid Litig.), 191 F.3d 1090, 1101 (9th Cir. 1999)*. With reasonable, pro-competitive justifications for the Certification Policy evident from the face of the complaint and judicially noticeable documents, plaintiffs' claim cannot withstand scrutiny even on a motion to dismiss.

Finally, the FAC fails to show that the alleged scheme "produces significant anticompetitive effects within a relevant market" in which eBay has market power. *Tanaka v. University of Southern California, 252 F.3d 1059, 1063-64 (9th Cir. 2001)* (internal citations and quotation marks omitted). Plaintiffs attempt to define the relevant market to include "any market which significantly depends on participation within online auctions, including the markets for coin grading and the market for certified coins." Dkt. No. 159 at 11. However, plaintiffs provide no authority supporting such an overbroad and amorphous market definition, which would theoretically encompass the market for **[*19]** every one of the millions of items sold through eBay. *See Tanaka, 252 F.3d at 1063-64* (affirming dismissal of antitrust claims where plaintiff identified product market as "UCLA women's soccer program" but failed to allege any facts to support "conclusory" assertion that such market existed). Furthermore, even if the Certification Policy had the indirect effect of raising the price of the minute percentage of coins listed as "certified" on eBay [3] or advantaging certain participants in the market for coin grading services, plaintiffs have not plausibly shown that eBay—which does not sell or grade coins—has "market power" in either market. *See Newcal Indus. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008)* ("In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.'"). Plaintiffs' failure to identify a cognizable market in which eBay has market power is fatal to its conspiracy claim. *See Tanaka, 252 F.3d at 1063* ("Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim."). Accordingly, the court GRANTS the motion to dismiss plaintiffs' *Section 1* conspiracy **[*20]** claim.

C. Claim 2: Unreasonable Tying[4]

Plaintiffs' second claim alleges that the Certification Policy "artificially and illegally tied the provision of a platform for online auction of certified coins . . . to the provision of coin grading services." FAC **[*21]** ¶¶ 174-185. In their opposition brief, plaintiffs modify their position to argue that eBay ties the sale of certified coins (rather than the provision of an online auction platform) to the sale of coin grading services. More specifically, plaintiffs contend that pursuant to eBay's unlawful conduct, purchasers of certified coins are "indirectly" forced to pay for the cost of coin grading services. Dkt. No. 159 at 12.

"A tying arrangement exists when a *seller* conditions the sale of one product or service (the tying product or service) on the buyer's purchase of another product or service." *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1158 (9th Cir. 2001)* (emphasis added). "The essential characteristic of an invalid tying arrangement lies in the

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[3] Plaintiffs attempt to exaggerate the impact of eBay's conduct by alleging that the "broad based" rare coin index demonstrated a "sharp increase" in rare coin prices around the time the Certification Policy was adopted. FAC ¶ 171. However, plaintiffs do not allege, nor does the court believe they could show, that any increase in the price of rare coins is the result of the Certification Policy rather than other factors. *See Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1413 (9th Cir. 1991)* (noting that the plaintiff must show "the restraint has actually produced significant anti-competitive effects").

[4] Claim 2 is brought on behalf of Class 1 (coin grading companies not authorized under the eBay Policy), Class 2 (companies and individuals who purchased coins graded by eBay's five authorized graders), and Class 3 (coin sellers who are in possession of coin inventories graded by companies other than the five authorized under the eBay Policy).

seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. Here, plaintiffs do not allege that eBay sells the tying product (certified coins) or the tied product (coin grading services). The FAC does not **[*22]** indicate that eBay exercise "control" over the price, marketing or distribution of certified coins or coin grading services. Nor does eBay "force" individuals to purchase coin grading services in order to participate in the online coin market; only the 0.3% of coin sellers and buyers who *choose* to deal in "certified coins" are required to abide by the Certification Policy. *See N. Pac. Ry. Co. v. United States, 356 U.S. 1, 7, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)* ("Where the buyer is free to take either product by itself there is no tying problem."). Such factors place plaintiffs' theory far outside the scope of a traditional tying claim.

Furthermore, plaintiffs have not shown that eBay obtained a "direct economic benefit" from the alleged tying arrangement. *See Tuolumne, 236 F.3d at 1158* ("If the tying entity receives no economic benefit from the tie, then we can safely presume that it is not attempting to spread its power into the tied-product market, and we need not strike the arrangements down as an illegal tie under the antitrust laws.") (quoting *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp., 880 F.2d 1514, 1517 (2d Cir. 1989))*. Plaintiffs do not allege that eBay receives a portion of the supracompetitive **[*23]** profits earned by the authorized grading services or any other sort of payment from the sale of the tied product. At best, plaintiffs show that eBay *could* benefit from the alleged tie because the Certification Policy *indirectly* leads to increased commissions on the sale of coins. The court is doubtful whether such an indirect and uncertain benefit could give rise to a tying claim. *See CTUnify, Inc. v. Nortel Networks, Inc., 115 Fed. Appx. 831, 834-35 (6th Cir. 2004)* (affirming dismissal of tying claim where plaintiff did not allege that defendant "received a portion of the profits" from sales of the tied product). Moreover, the Supreme Court has held that "indirect purchasers"—here, coin buyers indirectly "coerced" into buying coin grading services—cannot recover antitrust damages. *See Illinois Brick v. Illinois, 431 U.S. 720, 736, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Finally, under the rule of reason, the pro-competitive justifications for the adoption of the Certification Policy apply with equal force to counter plaintiffs' tying claim. *See Tuolumne, 236 F.3d at 1158*. The court therefore finds that plaintiffs have again failed to state a tying claim under the Sherman Act, and GRANTS the motion to dismiss plaintiffs' **[*24]** second cause of action.

D. Claims 3 and 4: Sherman Act § 2[5]

"To prevail on a claim of monopolization under *Section 2* of the Sherman Act, a plaintiff must demonstrate: '(1) [p]ossession of monopoly power in the relevant [market or] submarket; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury.'" *Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997)* (citing *Pac. Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir. 1992))*. Similarly, to prevail on a claim of attempted monopolization, a plaintiff must demonstrate: "(1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury." *Id. at 1477* (citing *Rebel Oil Co., v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995))*.

Both theories of liability require the plaintiff to show "antitrust injury." The Supreme Court **[*25]** has defined antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. More specifically, antitrust injury is harm to the "competitive process," rather than to individual competitors. *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 901 (9th Cir. 2008)*.

Here, the basis of plaintiffs' Section 2 claims is that eBay is a monopolist in the "market for the provision of online auction services." FAC ¶ 190. In its previous order, the court concluded that the complaint failed to demonstrate "that competition among online auction services has been harmed by the [Certification] Policy thus resulting in

[5] Plaintiffs' Section 2 claims are brought on behalf of Class 5 (all companies and individuals who have bought and/or sold coins on eBay and have paid higher commissions to eBay as a result of the Certification Policy).

antitrust injury." Dkt. No. 151 at 12. As the court noted, "plaintiffs do not explain how eBay's actions *on its own website* can reduce consumers' choices or diminish the quality of their experience on *other* auction websites." *Id.* at 13 (emphasis in original). That is, plaintiffs had failed to allege antitrust injury in the market in which eBay allegedly has monopoly power.

Plaintiffs now argue that eBay's conduct has not harmed competition **[*26]** in the market for online auction services, but rather in the markets for: (1) coin grading services; (2) non-certified coins; and (3) certified coins. Dkt. No. 159 at 15-17. Plaintiffs do not allege that eBay has monopoly power in any of the affected markets. As plaintiffs see it, because they are consumers of eBay's services rather than competitors, they need not establish harm to competition in the monopolized market, as long as they can show "detrimental effects to competition in three relevant antitrust markets which flow from [eBay's] anticompetitive abuse." *Id.* at 21.

The court finds that plaintiffs' novel theory stretches the concept of antitrust injury too far. Under *Section 2*, "the prohibited conduct must be directed toward *competitors* and must be intended to injure competition. Such conduct must affect the relevant product market, that is, the 'area of effective competition' between the defendant and plaintiff." *Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1353 (Fed. Cir. 1999)* (emphasis added). Simply put, in order to be liable for inflicting antitrust injury under *Section 2*, a defendant must compete in the affected market. *See Mercy-Peninsula Ambulance, Inc. v. County of San Mateo, 791 F.2d 755 (9th Cir. 1986)* **[*27]** (affirming dismissal of Section 2 claim against defendant who was not a competitor in the relevant market). Plaintiffs offer no authority for the proposition that alleged harm to competition in markets in which eBay is not a monopolist—indeed, markets in which eBay does not even compete—can give rise to liability under *Section 2*. Such a conclusion would subject eBay to Section 2 claims based on alleged competitive harms in the market for any of the "millions of items" sold through its website. FAC ¶ 19. Instead, plaintiffs cite only *J. Allen Ramey, M.D., Inc. v. Pacific Found. for Med. Care, 999 F. Supp. 1355, 1360 (S.D. Cal. 1998)*, which at best stands for the proposition that courts may view claims of antitrust injury brought by competitors with more skepticism than those brought by consumers. But even if the Certification Policy has indirectly resulted in increased prices for consumers of certified coins, such harm is not cognizable under *Section 2* because it does not stem from the type of activity that *Section 2* was enacted to prevent: exclusionary conduct directed towards eBay's competitors. *See Mercy-Peninsula Ambulance, Inc., 791 F.2d at 759* ("The gravamen of a section 2 claim **[*28]** is the deliberate use of market power by a competitor to control price or exclude competition."). Accordingly, the court finds that the FAC fails to allege antitrust injury cognizable under *Section 2 of the Sherman Act*, and GRANTS the motion to dismiss plaintiffs' third and fourth claims.

E. Claim 5: Donnelly Act[6]

Plaintiffs' claim under the Donnelly Act, *N.Y. Gen. Bus. Law § 340*, is derivative of plaintiffs' Sherman Act claims and therefore "succeed or fail with its Sherman Act claims." *Linzer Prods. Corp. v. Sekar, 499 F. Supp. 2d 540, 557 (S.D.N.Y. 2007)*. Because the Sherman Act claims **[*29]** are dismissed, claim 5 is also dismissed.

F. Claim 6: Cartwright Act

Plaintiffs' allegations under the Cartwright Act, *Cal. Bus. & Prof. Code § 16720*, are also derivative of plaintiffs' Sherman Act claims. As with the Donnelly Act, it is well established that "[i]nterpretation of federal ***antitrust law*** is . . . applicable to the Cartwright Act." *Davis v. Pacific Bell, 204 F. Supp. 2d 1236, 1243 (N.D. Cal. 2002)* (citing

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[6] Claims 5, 6 and 7 are brought on behalf of Class 1 (coin grading companies not authorized under the Certification Policy), Class 2 (companies and individuals who purchased coins graded by one of eBay's five authorized graders), Class 3 (coin sellers who are in possession of coin inventories graded by companies other than one of the five authorized under the Certification Policy), and Class 4 (; (4) companies and individuals who attempted to list coins as "certified" which had been graded by non-authorized grading services and whose listings were removed by eBay for violating the Certification Policy).

Chicago Title Insurance Co. v. Great Western Financial Corp., 69 Cal.2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481 (Cal. 1968). Accordingly, the sixth claim is dismissed.

G. Claim 7: Unfair Competition Law (UCL)

The cause of action for unfair competition under *Cal. Bus. & Prof. Code § 17200* is also dependent on plaintiffs' Sherman Act claims. Courts have noted that *Section 17200*'s "unlawful" prong "borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL. Thus, a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554, 62 Cal. Rptr. 3d 177 (Cal. Ct. App. 2007)* (quotation and citation omitted). As a result, "where a plaintiff cannot state a claim under the 'borrowed' law, it **[*30]** cannot state a UCL claim either." *Tuck Beckstoffer Wines LLC v. Ultimate Distribs., 682 F. Supp. 2d 1003, 1020 (N.D. Cal. 2010)*. Because plaintiffs have failed to state a claim under the Sherman Act, claim 7 is dismissed.

H. Claims 8 and 9: Tortious Interference Claims[7]

Plaintiffs' eighth claim asserts that by implementing the Certification Policy, eBay tortiously interfered with UGS' "prospective economic relationships with coin sellers trading certified coins in the relevant market." FAC ¶ 237. Similarly, plaintiffs ninth claim alleges that eBay interfered with Komito and Kirichenko's "prospective economic relationships with consumers interested in purchasing certified coins **[*31]** in the relevant market." *Id.* ¶ 248.

In order to state a claim for tortious interference with prospective economic advantage, plaintiffs must plead "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. The act causing disruption of the economic relationship must be "wrongful." *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1151 (9th Cir. 2008)*

The court previously dismissed these claims because plaintiffs failed to "plead facts showing the existence of a specific economic relationship with identifiable third parties, which defendants knew about and intentionally disrupted through a wrongful act." Dkt. No. 151 at 17. In the FAC, plaintiffs name a number of specific former clients of UGS, Komito and Kirichenko who "would have continued doing business with [plaintiffs] **[*32]** but for the implementation of [the Certification Policy." Dkt. No. 159 at 24. Nevertheless, plaintiffs' claims once again fail because they have not shown that any alleged disruption is the result of a "wrongful" act. An act is wrongful if it is "unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Google Inc. v. American Blind & Wallpaper Factory, Inc., No. 03-05340, 2005 U.S. Dist. LEXIS 6228, 2005 WL 832398, at *8 n.32 (N.D. Cal. March 30, 2005)* (citing *Korea Supply Co., 29 Cal. 4th 1134, 131 Cal.Rptr.2d 29, 63 P.3d 937*). Plaintiffs argue that the implementation of the Certification Policy is "wrongful" because it violates the Sherman Act. Dkt. No. 159 at 25. However, as discussed above, the court finds that eBay's conduct, as alleged in the FAC, does not run afoul of federal or state law. The implementation of the Certification Policy therefore cannot serve as the basis for plaintiffs' tort claims. Accordingly, the court GRANTS the motion to dismiss plaintiffs' eighth and ninth claims.

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[7] Claim 8 is brought on behalf of Class 1 (coin grading companies not authorized under the Certification Policy). Claim 9 is brought on behalf of Class 3 (coin sellers who are in possession of coin inventories graded by companies other than one of the five authorized under the Certification Policy), and Class 4 (companies and individuals who attempted to list coins as "certified" which had been graded by non-authorized grading services and whose listings were removed by eBay for violating the Certification Policy).

I. Leave to Amend

Dismissal with prejudice is appropriate where it is clear that the complaint could not be saved by amendment. *Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)*. **[*33]** Where the plaintiff has previously filed an amended complaint, "the district court's discretion to deny leave to amend is 'particularly broad.'" *Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir. 2004)* (citing *Chodos v. W. Publ'g Co., 292 F.3d 992, 1003 (9th Cir. 2002))*.

At this point, plaintiffs have had four opportunities to amend their complaint over the course of more than two years of litigation. This court has already considered their claims once, and continues to find each insufficient to survive a motion to dismiss. The court therefore concludes that the complaint cannot be saved by amendment, and grants eBay's motion to dismiss with prejudice.

III. ORDER

For the foregoing reasons, the court grants eBay's motion to dismiss all claims with prejudice.

DATED: January 9, 2012

/s/ Ronald M. Whyte

RONALD M. WHYTE

United States District Judge

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It's My Party, Inc. v. Live Nation, Inc.

United States District Court for the District of Maryland

January 10, 2012, Decided; January 10, 2012, Filed

Civil No. JFM-09-547

Reporter
2012 U.S. Dist. LEXIS 2728 *; 2012-1 Trade Cas. (CCH) P77,758; 87 Fed. R. Evid. Serv. (Callaghan) 481; 2012 WL 78795

IT'S MY PARTY, INC. and IT'S MY AMPHITHEATRE, INC., Plaintiffs, v. LIVE NATION, INC., Defendant.

Subsequent History: Summary judgment denied by, Motion to strike denied by, Motion to strike granted by, in part, Motion to strike denied by, in part, Objection overruled by, Objection sustained by *It's My Party, Inc. v. Live Nation, Inc., 2012 U.S. Dist. LEXIS 119625 (D. Md., Aug. 23, 2012)*

Summary judgment granted by, Summary judgment denied by, Motion to strike denied by, Motion granted by, in part, Motion denied by, in part *It's My Party, Inc. v. Live Nation, Inc., 2015 U.S. Dist. LEXIS 19762 (D. Md., Feb. 19, 2015)*

Core Terms

exhibits, judicial notice, adjudicative facts, antitrust, proceedings, disputes, concert, notice

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For Rams Head Group, Movant: Edwin (Ted) H Staples, II, Council Baradel Kosmerl and Nolan PA, Annapolis, MD.

Judges: J. Frederick Motz, United States District Judge.

Opinion by: J. Frederick Motz

Opinion

MEMORANDUM

Plaintiffs, It's My Party, Inc. ("IMP") and It's My Amphitheatre, Inc. ("IMA"), filed antitrust claims under Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1* and *2*, Section 4 of the Clayton Act, *15 U.S.C. § 15*, and under the Maryland Antitrust Act, as well as common law claims for tortious interference with contract and unfair competition. Plaintiffs allege that defendant, Live Nation, **[*2]** has deliberately and unlawfully acquired monopoly power in the concert promotion industry, thereby entitling plaintiffs to compensatory, treble, and punitive damages, attorneys' fees, and injunctive relief. Now pending before the court is defendant Live Nation's motion for judicial notice of Exhibits 9 and 11-13 of the Lucy Yen Declaration in support of Live Nation's motion for summary judgment. Live Nation's motion for judicial notice is denied.

BACKGROUND

It's My Party, Inc. ("IMP") is a concert promotion business, and It's My Amphitheatre, Inc. ("IMA") is a related venue management business, both of which are run by Seth Hurwitz, who operates in and around the Baltimore/Washington, D.C. area. (Def.'s Mot. Summ. J. at 2, ECF 74.) Live Nation is an international concert promoter. (*Id.* at 5.) IMP/IMA alleges that Live Nation is engaged in unlawful tying arrangements, has unlawfully gained a monopoly in the concert promotion business, and has tortiously interfered with contracts and engaged in unfair competition.

In conjunction with its motion for summary judgment (which is not yet ripe because IMP/IMA were recently granted an extension to file their opposition), defendant Live Nation **[*3]** seeks judicial notice of four exhibits: (1) Plaintiffs IMP/IMA's objections to a proposed merger between Live Nation and Ticketmaster, filed in the United States District Court for the District of Columbia; (2) the United States' response to IMP/IMA's objections; (3) IMP/IMA's verified complaint filed in the Circuit Court of Maryland for Anne Arundel County, seeking injunctive relief against Live Nation's plans to build a concert venue; and (4) the court order dismissing the Anne Arundel County Circuit Court complaint. Live Nation asserts that all four exhibits are public records, which may be judicially noticed according to *Federal Rule of Evidence 201*, and that the exhibits reflect IMP/IMA's history of failed legal challenges against Live Nation, thereby lending credibility to Live Nation's defense in this action. (Def.'s Reply in Support of Mot. for Jud. Notice at 1, ECF No. 92.)

ANALYSIS

A court may take judicial notice of adjudicative facts. Adjudicative facts, as opposed to legislative facts, "are simply the facts of the particular case." *Fed. R. Evid. 201(a)* advisory committee's note. Legislative facts "are those which have relevance to legal reasoning and the lawmaking process, **[*4]** whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id.* "[A]djudicative facts are facts about the parties and their activities, businesses, and properties; they usually answer the questions of who did what, where, when, how, why, and with what motive or intent . . . ." *Dashiell v. Meeks, 396 Md. 149, 913 A.2d 10, 26 n.6 (Md. 2006)*. Though a court may take judicial notice of adjudicative facts, the general rule "is that a court will not travel outside the record of the case before it in order to take notice of proceedings in another case, even between the same parties, and in the same court, unless the proceedings are put in evidence; and the rule is sometimes enforced with considerable strictness." *Id. at 26* (internal quotation marks omitted) (citing *Morse v. Lewis, 54 F.2d 1027, 1029 (4th Cir. 1932))*. In rare cases, however, the court may, in its discretion, judicially notice an adjudicative fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot **[*5]** reasonably be questioned." *Fed. R. Evid. 201(b)*.

Rule 201 limits judicial notice to adjudicative facts, which must be not only relevant but also not subject to reasonable dispute. Thus, for the court to judicially notice the four exhibits at issue, they must constitute or contain adjudicative facts. The exhibits reference prior antitrust objections made by IMP/IMA regarding a proposed merger between Live Nation and Ticketmaster, the Justice Department's response to those filings, and a prior state court proceeding between Live Nation and IMP/IMA. The DOJ's response to IMP/IMA's objections and the state court's order dismissing IMP/IMA's complaint are not adjudicative facts but rather opinions and legal conclusions. If Live Nation argues that the mere fact of prior objections, the DOJ's response, and dismissal of state court proceedings is relevant to its defense, that fact may be adjudicative, but the legal conclusions contained therein are not.

Moreover, Live Nation asserts that the four exhibits are relevant to establishing its defense in this action, but in its motion for summary judgment Live Nation does not offer any specific explanation as to how these exhibits are relevant to **[*6]** its defense. As IMP/IMA point out in their opposition to Live Nation's motion for judicial notice, Live Nation describes the facts underlying the four exhibits in detail in the undisputed facts section of its motion for summary judgment (Def.'s Mot. Summ. J. at 5), but Live Nation's legal argument does not reference the exhibits or the litigation and objections to which they pertain. In support of its motion for judicial notice, Live Nation suggests that the exhibits are relevant because IMP/IMA's objections to the proposed Ticketmaster merger and IMP/IMA's state court complaint contained allegations similar to those asserted here, which were rejected by both the DOJ and the Anne Arundel County Circuit Court. Live Nation contends that the DOJ and the Anne Arundel Circuit Court's finding that IMP/IMA overstated Live Nation's position in the market indicates that IMP/IMA cannot establish monopoly power and tying in this case either. While these prior allegations and decisions are loosely relevant to the instant case because they also involved Live Nation and ***antitrust law***, Live Nation cannot assert a defense to this new antitrust claim based on the fact that prior antitrust claims involving **[*7]** other activity were unsuccessful. It is therefore unclear exactly how the exhibits are relevant to Live Nation's defense. The only apparent use for introducing the exhibits into evidence (let alone judicially noticing them) is to establish that IMP/IMA has made unsuccessful objections and brought at least one failed legal challenge against Live Nation in the past for activity unrelated to the instant action. Other than serving as background to a characterization of IMP/IMA as litigious, it is unclear how else these exhibits are relevant.

Even if it is true that the four exhibits are relevant to Live Nation's defense, to be granted judicial notice, the exhibits must also be either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. While the fact of the filings and proceedings is capable of accurate determination by resort to the public record, the truth of the contents of the exhibits is open to reasonable dispute. Undoubtedly, Live Nation disputes IMP/IMA's objections to the proposed Ticketmaster merger, IMP/IMA disputes the DOJ's response **[*8]** to their objections, Live Nation disputes the allegations in IMP/IMA's state court complaint, and IMP/IMA disputes the decision to dismiss their state court action. Because the contents of the exhibits are reasonably disputed, they do not qualify for judicial notice.

Live Nation's motion must therefore be denied to the extent that Live Nation wants the facts of the exhibits to be judicially noticed for their truth; if any judicial notice is to be made of the exhibits, it must be limited to the fact that there were prior proceedings and prior filings. In other words, the exhibits may be judicially noticed not for the truth of the matters contained therein but merely to establish the fact of such prior proceedings if indeed that fact is relevant to establishing Live Nation's defense in this action. Denying the motion for judicial notice of the contents of the exhibits does not preclude Live Nation from trying to introduce the exhibits as evidence of a lack of tying, absence of monopoly power, or failure to show antitrust injury if the exhibits would indeed make that showing.

January 10, 2012

Date

/s/ J. Frederick Motz

United States District Judge

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Jeske v. Maxim Healthcare Servs.

United States District Court for the Eastern District of California

January 10, 2012, Decided; January 10, 2012, Filed

CASE NO. CV F 11-1838 LJO JLT

Reporter
2012 U.S. Dist. LEXIS 2963 *; 2012 WL 78242

JENNIFER JESKE, Plaintiff, vs. MAXIM HEALTHCARE SERVICES, INC, et al., Defendants.

Subsequent History: Dismissed by, Motion denied by, Transferred by *Jeske v. Cal. Dep't of Corr. & Rehab., 2012 U.S. Dist. LEXIS 45508 (E.D. Cal., Mar. 29, 2012)*

Core Terms

allegations, wages, aggrieved employee, rest period, meal, violations, employees, civil penalty, temperature, fault, seats, practices, defendants', unpaid wages, notice, leave to amend, premiums, alleged violation, fail to provide, class action, misrepresentation, parties, missed, fails, private right of action, waiting time, meal period, business practice, complaint alleges, cause of action

Counsel: **[*1]** For Jennifer Jeske, Plaintiff: Lonnie C. Blanchard, III, LEAD ATTORNEY, Blanchard Law Group, Apc, Los Angeles, CA; Peter R. Dion-Kindem, Dion-Kindem & Crockett, Woodland Hills, CA.

For Maxim Healthcare Services, Inc., a California Corporation, Ashley Blankenship, an individual, Alvin Tagayun, an individual, Defendants: Rebecca D. Eisen, LEAD ATTORNEY, Morgan, Lewis & Bockius LLP, San Francisco, CA; Jennifer Elizabeth White-Sperling, Morgan Lewis and Bockius, Irvine, CA; John Spivey Battenfeld, Kathryn T. McGuigan, Morgan, Lewis & Bockius LLP, Los Angeles, CA.

Judges: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

ORDER ON DEFENDANTS' *F.R.Civ.P. 12* MOTION TO DISMISS

(Doc. 9.)

INTRODUCTION

Defendants Maxim Healthcare Services, Inc. ("Maxim") and two of its supervisors seek to dismiss plaintiff Jennifer Jeske's ("Ms. Jeske's") wage and hour violation claims as inadequately pled and lacking necessary elements. Ms. Jeske counters that the claims alleged in her original complaint ("complaint") are pled adequately to defeat defendants' challenges. This Court considered defendants' *F.R.Civ.P. 12(b)(6)* motion to dismiss on the record and VACATES the January 13, 2012 hearing, pursuant **[*2]** to *Local Rule 230(g)*. For the reasons discussed above, this Court DISMISSES nearly all of Ms. Jeske's claims.

BACKGROUND[1]

Maxim provides medical staffing as an independent contractor to clients, including Wasco State Prison ("Wasco"). Wasco, an inmate reception center, processes new inmates with its 400-bed, medium custody facility. During April 2010 to October 2010, Maxim employed Ms. Jeske as a non-exempt, certified nursing assistant who was staffed at Wasco. Ms. Jeske generally worked from 10:30 p.m. to 6:30 a.m. five days per week. Her duties included watching suicidal inmates and providing inmate care at the Wasco clinic. Defendant Alvin Tagayun ("Mr. Tagayun") was an account manager/supervisor of Ms. Jeske. Defendant Ashley Blankenship ("Ms. Blankenship") was an manager/supervisor of Ms. Jeske. [2]

On behalf of Ms. Jeske, the complaint alleges seven California wage and hour violation, fraud and wrongful termination claims. [3] More specifically, the complaint alleges that defendants failed to provide Ms. Jeske proper meal and rest periods, **[*3]** failed to pay her timely premium wages, defrauded her into working for Maxim, and wrongfully terminated her in violation of public policy. On behalf of Ms. Jeske and other aggrieved Maxim employees, the complaint alleges 11 claims to pursue civil penalties pursuant to the California Private Attorneys General Act ("PAGA"), *Cal. Lab. Code, §§ 2698*, et al. More specifically, the complaint alleges that as to Ms. Jeske and other aggrieved employees, Maxim failed to provide accurate wage records, adequate seating and sanitary bathrooms, and to maintain adequate room temperatures.

The complaint seeks to recover unpaid wages, civil penalties, attorney fees, damages for Ms. Jeske's emotional distress, and punitive damages.

Defendants fault the complaint's failure to meet federal pleading standards and to establish that Mr. Tagayun and Ms. Blankenship are employers or corporate agents, officers or directors subject to the complaint's claims.

DISCUSSION

***F.R.Civ.P. 12(b)(6)* Motion To Dismiss Standards**

The primary thrust of defendants' challenges to the complaint's claims is that they are conclusory and lack supporting facts.

"When **[*4]** a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*; *Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997)*. A *F.R.Civ.P. 12(b)(6)* dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*; *Graehling v. Village of Lombard, Ill., 58 F.3d 295, 297 (7th Cir. 1995)*. A *F.R.Civ.P. 12(b)(6)* motion "tests the legal sufficiency of a claim." *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*.

In addressing dismissal, a court must: (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-338 (9th Cir. 1996)*. **[*5]** Nonetheless, a court is not required "to accept as true allegations that are merely conclusory, unwarranted

[1] The factual recitation is derived generally from the complaint.

[2] Maxim, Mr. Tagayun and Ms. Blankenship will be referred to collectively as "defendants."

[3] The complaint's 18 separate claims will be discussed in greater detail below.

deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citation omitted). A court "need not assume the truth of legal conclusions cast in the form of factual allegations," *U.S. ex rel. Chunie v. Ringrose, 788 F.2d 638, 643, n. 2 (9th Cir.1986)*, and must not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated . . . laws in ways that have not been alleged." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L. Ed. 2d 723 (1983)*. A court need not permit an attempt to amend if "it is clear that the complaint could not be saved by an amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*.

A "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544,127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)* **[*6]** (internal citations omitted). Moreover, a court "will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes, 181 F.R.D. 629, 634 (S.D. Cal. 1998)*. In practice, a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly, 550 U.S. at 562, 127 S.Ct. at 1969* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*.

In *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937,1949, 173 L. Ed. 2d 868 (2009)*, the U.S. Supreme Court explained:

> . . . a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a "probability requirement," **[*7]** but it asks for more than a sheer possibility that a defendant has acted unlawfully. (Citations omitted.)

After discussing *Iqbal*, the Ninth Circuit Court of Appeals summarized: "In sum, for a complaint to survive [dismissal], the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)* (quoting *Iqbal, 556 U.S. 662, 129 S.Ct. at 1949*).

The U.S. Supreme Court applies a "two-prong approach" to address dismissal:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more **[*8]** than the mere possibility of misconduct, the complaint has alleged - but it has not "show[n]"-"that the pleader is entitled to relief." *Fed. Rule Civ. Proc. 8(a)(2)*.
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. 662, 129 S.Ct. at 1949-1950.

Moreover, a plaintiff suing multiple defendants "must allege the basis of his claim against each defendant to satisfy *Federal Rule of Civil Procedure 8(a)(2)*, which requires a short and plain statement of the claim to put defendants on sufficient notice of the allegations against them." *Gauvin v. Trombatore, 682 F.Supp. 1067, 1071 (N.D. Cal.*

1988). "Specific **[*9]** identification of the parties to the activities alleged by the plaintiffs is required in this action to enable the defendant to plead intelligently." *Van Dyke Ford, Inc. v. Ford Motor Co., 399 F.Supp. 277, 284 (D. Wis. 1975)*.

With these standards in mind, this Court turns to defendants' challenges to the complaint's claims.

Ms. Jeske's Unpaid Wages

The complaint's first claim alleges that Maxim failed to pay all of Ms. Jeske's earned wages in that she was not paid her meal and rest period wages, waiting time penalties, and other due compensation to violate *California Labor Code section 204*. [4]

Defendants argue that no private right of action exists under *section 204* which provides for only civil penalties. *Section 204(a)* provides that wages "are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." Defendants argue that *section 204* "does not provide any right to wages" in that it addresses wage payments "at certain intervals." *See In re Moffet, 19 Cal. App. 2d 7, 13, 64 P.2d 1190 (1937)* ("sole purpose" of the statute "is **[*10]** to require an employer of labor who comes within its terms to maintain two regular pay days each month").

Defendants continue that a *section 204* violation remedy is limited to a civil penalty under *section 210(a)* which provides that "every person who fails to pay the wages of each employee as provided in *Sections . . . 204* . . . shall be subject to a civil penalty . . ." Under *section 210(b)*, the "penalty shall be recovered by the Labor Commissioner as part of a hearing held to recover unpaid wages and penalties pursuant to this chapter or in an independent civil action. The action shall be brought in the name of the people of the State of California and the Labor Commissioner and the attorneys thereof may proceed and act for and on behalf of the people in bringing these actions."

Defendants point to the absence in *sections 204* and *210* of "'clear, understandable, unmistakable terms" that a private right of action exists for violations of *section 204*. "If the Legislature had truly intended to create a private right to sue one would reasonably have expected that the Legislature simply would have directly imposed such liability in clear, understandable, unmistakable terms, as it has done **[*11]** in numerous other statutes." *Crusader Ins. Co. v. Scottsdale Ins. Co., 54 Cal.App.4th 121, 132, 62 Cal.Rptr.2d 620 (1997)* (internal quotations omitted). "Thus when neither the language nor the history of a statute indicates an intent to create a new private right to sue, a party contending for judicial recognition of such a right bears a heavy, perhaps insurmountable, burden of persuasion." *Crusader Ins., 54 Cal.App.4th at 133, 62 Cal.Rptr.2d 620*; *see Moradi-Shalal v. Fireman's Fund Ins. Companies, 46 Cal.3d 287, 300, 250 Cal.Rptr. 116, 758 P.2d 58 (1988)* (fact that creation of a private right of action is not observed "is a strong indication the Legislature never intended to create such a right of action").

In *Vikco Ins. Services, Inc. v. Ohio Indem. Co., 70 Cal.App.4th 55, 62-63, 82 Cal.Rptr.2d 442 (1999)*, the California Court of Appeal further explained:

> Adoption of a regulatory statute does not automatically create a private right to sue for damages resulting from violations of the statute. Such a private right of action exists only if the language of the statute or its legislative history clearly indicates the Legislature intended to create such a right to sue for damages. If the Legislature **[*12]** intends to create a private cause of action, we generally assume it will do so " 'directly[,] . . . in clear, understandable, unmistakable terms . . . .' [Citation.]" (*Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287, 294-295 [250 Cal.Rptr. 116, 758 P.2d 58]* (*Moradi-Shalal*); *see also Crusader Ins. Co. v. Scottsdale Ins. Co., supra, 54 Cal.App.4th at pp. 125-137* [because a judge may not insert what has been omitted from a statute, legislative intent alone determines whether a statute creates a new private right to sue]; *Schaefer v. Williams (1993) 15 Cal.App.4th 1243, 1248 [19 Cal.Rptr.2d 212]* [nothing in Elections Code creates a private cause of action to enforce a pledge to follow fair campaign practices; "Surely, if the Legislature had

[4] Unless otherwise noted, all further statutory "section" references will be to the California Labor Code.

intended to create such a private action, it would have done so by clear and direct language"]; *Nowlon v. Koram Ins. Center, Inc. (1991) 1 Cal.App.4th 1437, 1444-1445 [2 Cal.Rptr.2d 683]* [absent some express provision for civil liability, courts cannot assume a private cause of action for negligence may be brought any time a legislative enactment is violated].)

Moreover, "when legislation expressly provides a particular remedy or **[*13]** remedies, courts should not expand the coverage of the statute to subsume other remedies." *Passenger Corp. v. Passengers Assn., 414 U.S. 453, 458, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974)*.

Ms. Jeske offers no meaningful argument for survival of the complaint's (first) unpaid wages claim. Ms. Jeske merely recites the complaint's allegations that she was not paid her meal and rest period wages, waiting time penalties and other compensation due. Ms. Jeske offers that the claim's basis is "Defendant's failure to pay her wages that were owing to Plaintiff." Ms. Jeske fails to demonstrate that she is entitled to pursue a private right of action for a *section 204* violation and offers nothing to suggest that she can rehabilitate the claim. As such, the complaint's (first) unpaid wages claim is dismissed with prejudice.

Ms. Jeske's Missed Meal Periods

The complaint's second claim alleges that Maxim "failed to provide Plaintiff with the required meal periods for numerous days worked" in that Ms. Jeske "worked for more than 6 hours per day without a meal break" to entitle Ms. Jeske "to one additional hour of wage at the employee's regular rate of compensation for each workday that the meal periods were not provided."

Section 512 **[*14]** and related California labor laws require an employer to provide no less than a 30-minute meal period when the employee works more than five hours in a day.

Defendants challenge the claim as "conclusory" with "no factual basis . . . that Maxim failed to provide her with required meal periods." Defendants point to the absence of facts to support how Ms. Jeske was denied meal periods, who denied them, and when they were denied. Defendants continue that although meal and rest period premiums are mandated payments under *section 226.7*, they are not contractually agreed upon "wages" to which *section 204* applies.

Defendants are correct that the claim lacks facts to demonstrate that Maxim denied Ms. Jeske meal breaks. The claim merely alludes to "numerous days worked" without meal periods. Similar to the complaint's (first) unpaid wages claim, Ms. Jeske offers nothing meaningful to support survival of the (second) meal period premiums claim. Ms. Jeske merely reiterates the claim's allegations and provides no insight how to rehabilitate the claim. Despite Ms. Jeske's lack of meaningful support for the missed meal periods claim, she is granted leave to amend the claim.

Ms. [*15] Jeske's Missed Rest Periods

The complaint's third claim alleges that Maxim "failed to provide Plaintiff with the rest periods at the rate of ten minutes net rest per four hours of work or major fraction thereof" to entitle Ms. Jeske to one additional hour of wage at her regular compensation rate for each workday that rest periods were not provided.

California Industrial Welfare Commission Wage Order 4-2001, *Section 12* ("*Section 12*") requires rest periods "based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." *Section 226.7* prohibits an employer to require an employee to work during a mandated meal or rest period.

Defendants fault the claim as "devoid of facts" and characterize it as "a recitation of applicable law" and "legal conclusions referencing" Maxim. Defendants criticize the claim's failure to apprise "how rest periods were allegedly not made available."

Defendants are correct that the claim lacks facts as to when and how Maxim denied Ms. Jeske rest periods. The claim merely alleges denial of rest periods and nothing more. Ms. Jeske again points to the claim's skeletal allegations to claim they are sufficient. **[*16]** Ms. Jeske offers no meaningful resistance to dismissal of the claim and fails to challenge defendants' points. Despite Ms. Jeske's meaningless defense of the claim, this Court grants Ms. Jeske leave to amend her missed rest periods claim.

Ms. Jeske's Waiting Time Penalties

The complaint's fourth claim alleges that Maxim refused to pay Ms. Jeske her unpaid wages for meal and rest period premiums required by *section 203* to entitle her to waiting time penalties of 30 days' wages.

Section 201 requires within 72 hours, payment of employee wages when an employee quits. *Section 203* provides: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201 . . ., any wage of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days."

Defendants construe the claim to seek *section 203* penalties for willful failure to pay final wages timely on termination. Defendants fault the claim's failure to identify "what wages were earned and unpaid at the time of her termination" **[*17]** and "how and in what manner a final wage payment was untimely" under *Section 201* or *202*. Defendants point to uncertainty whether the complaint alleges that defendants paid Ms. Jeske untimely when she terminated or that the final timely pay check did not cover all wages owed. Defendants note that the complaint's limited reference to unpaid wages is allegedly unpaid meal and rest period premiums which are not wages under *section 203* and not subject to waiting time penalties. Defendants further fault the absence of allegations of Maxim's willfulness to fail to pay final wages.

Defendants raise valid points. The complaint fails to identify sufficiently wages at issue and to articulate Maxim's willful failure to pay such wages. Ms. Jeske offers that she "has alleged sufficient facts to apprise Defendant of its wrongful conduct." Based on a decision interpreting an applicable statute of limitations, Ms. Jeske characterizes payment of an additional hour as wages rather than a penalty. *See* *Murphy v. Kenneth Cole Productions, Inc., 40 Cal.4th 1094, 1102, 56 Cal. Rptr. 3d 880, 155 P.3d 284 (2007)*. Such characterization is unavailing in that the complaint fails to identify adequately untimely paid wages to warrant **[*18]** dismissal of the waiting time penalties claim with leave to amend.

Fraud

The complaint's (fifth) fraud - deceit and misrepresentation claim alleges that Maxim promised to pay Ms. Jeske $12 per hour but that she was paid $10 per hour with her first pay check. The fraud claim further alleges that Ms. Jeske complained "about the misrepresentation until eventually Defendants agreed to pay her $11 per hour" but never paid her "the $12 per hour that she had originally been promised."

Defendants attack the misrepresentation claim as lacking sufficient particularity to satisfy *F.R.Civ.P. 9(b)*.

Fraud Elements

The elements of a California fraud claim are: (1) misrepresentation (false representation, concealment or nondisclosure); (2) knowledge of the falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court, 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 (1996)*. The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance. Cadlo v. Owens-Illinois, Inc., 125 Cal. App. 4th 513, 519, 23 Cal. Rptr. 3d 1 (2004).

"[T]o establish a cause of action for **[*19]** fraud a plaintiff must plead and prove in full, factually and specifically, all of the elements of the cause of action." Conrad v. Bank of America, 45 Cal.App.4th 133, 156, 53 Cal.Rptr.2d 336 (1996). There must be a showing "that the defendant thereby intended to induce the plaintiff to act to his detriment in reliance upon the false representation" and "that the plaintiff actually and justifiably relied upon the defendant's misrepresentation in acting to his detriment." Conrad, 45 Cal.App.4th at 157, 53 Cal.Rptr.2d 336. "The absence of any one of these required elements will preclude recovery." Wilhelm v. Pray, Price, Williams & Russell, 186 Cal.App.3d 1324, 1332, 231 Cal.Rptr. 355 (1986).

Particularity Pleading Standard

F.R.Civ.P. 9(b) requires a party to "state with particularity the circumstances constituting fraud." [5] In the Ninth Circuit, "claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements." Neilson v. Union Bank of California, N.A., 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003). A court may dismiss a claim grounded in fraud when its allegations fail to satisfy F.R.Civ.P. 9(b)'s heightened pleading requirements. Vess, 317 F.3d at 1107. **[*20]** [6] A motion to dismiss a claim "grounded in fraud" under F.R.Civ.P. 9(b) for failure to plead with particularity is the "functional equivalent" of a F.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim. Vess, 317 F.3d at 1107. As a counter-balance, F.R.Civ.P. 8(a)(2) requires from a pleading "a short and plain statement of the claim showing that the pleader is entitled to relief."

F.R.Civ.P. 9(b)'s heightened pleading standard "is not an invitation to disregard Rule 8's requirement of simplicity, directness, and clarity" and "has among its purposes the avoidance of unnecessary discovery." McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996). F.R.Civ.P 9(b) requires "specific" allegations of fraud "to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985). "A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." Neubronner v. Milken, 6 F.3d 666, 671-672 (9th Cir. 1993) (internal quotations omitted; citing Gottreich v. San Francisco Investment Corp., 552 F.2d 866, 866 (9th Cir. 1997)). The Ninth Circuit has explained:

> Rule 9(b) requires particularized allegations of the circumstances *constituting* fraud. The time, place and content of an alleged misrepresentation may identify the statement or the omission **[*22]** complained of, but these circumstances do not "constitute" fraud. The statement in question must be false to be fraudulent. Accordingly, our cases have consistently required that circumstances indicating falseness be set forth. . . . [W]e [have] observed that plaintiff must include statements regarding the time, place, and *nature* of the alleged fraudulent activities, and that "mere conclusory allegations of fraud are insufficient." . . . The plaintiff must set forth what is false or misleading about a statement, and why it is false. In other words, the plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading. . . .
>
> In certain cases, to be sure, the requisite particularity might be supplied with great simplicity.

[5] F.R.Civ.P. 9(b)'s particularity requirement applies to state law causes of action: "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the *circumstances* of the fraud must be stated with particularity is a federally imposed rule." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003) (quoting Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1995)(italics in original)).

[6] "In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity **[*21]** requirement of Rule 9(b)." Vess, 317 F.3d at 1103-1104.

In Re Glenfed, Inc. Securities Litigation, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in original) *superseded by statute on other grounds as stated in* Marksman Partners, L.P. v. Chantal Pharm. Corp., 927 F.Supp. 1297 (C.D. Cal. 1996); *see* Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997) (fraud allegations must be accompanied by "the who, what, when, where, and how" of the misconduct charged); *see* Neubronner, 6 F.3d at 672 **[*23]** ("The complaint must specify facts as the times, dates, places, benefits received and other details of the alleged fraudulent activity."); Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 541 ("Rule 9(b) requires that the pleader state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation").

In a fraud action against a corporation, a plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal.App.4th 153, 157, 2 Cal.Rptr.2d 861 (1991).

Defendants challenge the complaint's failure to identify who made the allegedly false promise to pay $12 per hour and that person's authority to speak for Maxim. Defendants fault the absence of facts that "the promise of $12 per hour was made with knowledge of its falsity and an intent to defraud Plaintiff." Defendants point to the absence of allegations that Ms. Jeske relied "on a false promise or how that reliance damaged her." Defendants attribute the complaint to allege no more than **[*24]** a "breach of promise which is wholly inadequate." Mills v. Polar Molecular Corp., 12 F.3d 1170, 1176 (2nd Cir. 1993) (failure to carry out a promise "does not constitute fraud unless, when the promise was made, the defendant secretly intended not to perform or knew that he could not perform").

The complaint's conclusory allegations fail to meet Rule 9(b)'s strict standard. Ms. Jeske appears to concede as much as she merely offers that the complaint alleges "the requisite elements of a fraud claim." The complaint lacks precise allegations as to whom at Maxim specifically made a $12 per hour promise and when. The complaint lacks facts to support fraud elements let alone the who, what, when, when and how of alleged misconduct. Defendants correctly equate the fraud claim to no more than a contract breach, especially given the lack of facts to support fraud elements of scienter, intent to defraud, Ms. Jeske's justifiable reliance, and resulting damages. The complaint fails to plead in full, factually and specifically, all fraud elements to warrant dismissal with prejudice of the fraud claim.

Wrongful Termination In Violation Of Public Policy

The complaint's (seventh) wrongful termination in **[*25]** violation of public policy claim ("*Tameny* claim") alleges that Ms. Jeske complained about failure to provide meal and rest breaks, suitable seating, and functional, sanitary bathrooms, to maintain adequate temperature, and to pay a promised hourly rate. The claim further alleges that Maxim, in violation of California public policy, constructively discharged Ms. Jeske "in retaliation for asserting her statutory rights and resisting employer's violations of laws that secure important public policies." [7]

Defendants fault the complaint's failure to allege facts of a constructive discharge.

"Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working

[7] The complaint purports to allege a claim under Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 172, 164 Cal.Rptr. 839, 842, 610 P.2d 1330 (1980) ("an employer's traditional authority to discharge an at-will employee may be limited by statute . . . or by considerations of public policy"). There can be no right to terminate for an unlawful reason or purpose that contravenes fundamental public policy. Silo v. CHW Med. Found., 27 Cal. 4th 1097, 1104, 119 Cal. Rptr. 2d 698, 703, 45 P.3d 1162 (2002). "It is settled that an employer's discharge of an employee in violation of a fundamental public policy embodied in a constitutional or statutory provision gives rise to a tort action." Barton v. New United Motor Manufacturing, Inc., 43 Cal.App.4th 1200, 1205, 51 Cal.Rptr.2d 328 (1996); **[*26]** Cabesuela v. Browning-Ferris Industries of Cal., Inc., 68 Cal.App.4th 101, 107, 80 Cal.Rptr.2d 60 (1998). The plaintiff's remedy is a common law tort action: "A wrongful act committed in the course of a contractual relationship may afford both tort and contractual relief." Tameny, 27 Cal.3d at 174-175, 164 Cal.Rptr. at 843.

conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" Penn. State Police v. Suders, 542 U.S. 129, 141, 124 S.Ct. 2342, 159 L. Ed. 2d 204 (2004) (citation omitted).

An employee is constructively discharged when "a reasonable person in his position would have felt that he was forced to quit because of intolerable and discriminatory working conditions." Satterwhite v. Smith, 744 F.2d 1380, 1382 (9th Cir. 1984). Courts are reluctant to predicate constructive discharge "solely on the fact of employment discrimination" **[*27]** and look for "aggravating factors," such as a "continuous pattern of discriminatory treatment." Clark v. Marsh, 665 F.2d 1168, 1174, 214 U.S. App. D.C. 350 (9th Cir. 1984).

Defendants note the absence of allegations that Ms. Jeske "was forced to quit" and fault the complaint's conclusions that she was "constructively discharged" and labeled a troublemaker. Defendants argue that such allegations fail to establish protected activity, especially given the absence of facts to describe Ms. Jeske's complaints. Defendants further fault the complaint's failure to allege violation of a public policy to satisfy elements of a *Tameny* claim. For "a policy to support a wrongful discharge claim, it must be: (1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental." Stevenson v. Superior Court, 16 Cal.4th 880, 894, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 (1997). Defendants note that the *Tameny* claim fails to identify a "specific constitutional or statutory provision" which Maxim violated. Defendants fault the *Tameny* claim's **[*28]** mere reference to discharge "against the public policy of the State of California as evidenced by the enactment of the Labor Code provisions and Wage Orders referenced above."

Ms. Jeske responds that failure to pay wages "owed by law and promised her" is sufficient to establish necessary intolerable working conditions to compel her to resign. Ms. Jeske attributes the complaint to allege "the statutory provisions that Defendant has violated."

Defendants correctly note that lack of alleged facts to support objectively intolerable working conditions. The complaint points to no pattern of discriminatory treatment or similar employer conduct to support constructive discharge, especially given the limited six-month duration of Ms. Jeske's employment. Defendants are further correct to fault the lack of facts of a violation of a public policy to support a *Tameny* claim. As addressed above, the complaint fails to support wage and hour violations and in turn the necessary public policy violation for a *Tameny* claim to warrant dismissal with leave to amend the complaint's (seventh) wrongful termination in violation of public policy claim.

Unfair Competition Claim

The complaint's sixth claim proceeds **[*29]** under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code, §§ 17200, et seq. The claims alleges: "Defendants' violations of the Labor Code provisions set forth above constitute unlawful business acts or practices."

Defendants argue that a UCL claim fails with the failure of the complaint's "substantive claims" from which a UCL claim derives. Defendants fault the complaint's failure to "specify which alleged violations of law are the 'unlawful business acts or practices'" in that the claim merely references Labor Code violations which "constitute unlawful business acts or practices."

"Unfair competition is defined to include 'unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising.'" Blank v. Kirwan, 39 Cal.3d 311, 329, 216 Cal.Rptr. 718, 703 P.2d 58 (1985) (quoting Cal. Bus. & Prof. Code, § 17200). The UCL establishes three varieties of unfair competition - "acts or practices which are unlawful, or unfair, or fraudulent." Shvarts v. Budget Group, Inc., 81 Cal.App.4th 1153, 1157, 97 Cal.Rptr.2d 722 (2000). An "unlawful business activity" includes anything that can properly be called a business practice and that at the same time is forbidden **[*30]** by law. Blank, 39 Cal.3d at 329, 216 Cal.Rptr. 718 (citing People v. McKale, 25 Cal.3d 626, 631-632, 159 Cal.Rptr. 811, 602 P.2d 731 (1979)). "A business practice is 'unlawful' if it is 'forbidden by law.'" *Walker v. Countrywide Home Loans, Inc., 98 Cal.App.4th 1158, 1169, 121 Cal.Rptr.2d 79 (2002)* (quoting *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992))*.

The UCL prohibits "unlawful" practices "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1999)*. The UCL "thus creates an independent action when a business practice violates some other law." *Walker, 98 Cal.App.4th at 1169, 121 Cal.Rptr.2d 79*. According to the California Supreme Court, the UCL "borrows" violations of other laws and treats them as unlawful practices independently actionable under the UCL. *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992)*.

A fellow district court has explained the borrowing of a violation of law other than the UCL:

> To state a claim for an "unlawful" business practice under the UCL, a plaintiff must **[*31]** assert the violation of any other law. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)* (stating, "By proscribing 'any unlawful' business practice, *section 17200* 'borrows' violations of other law and treats them as unlawful practices that the unfair competition law makes independently actionable.") (citation omitted). Where a plaintiff cannot state a claim under the "borrowed" law, she cannot state a UCL claim either. *See, e.g., Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal.App.4th 700, 718, 113 Cal.Rptr.2d 399 (2001)*. Here, Plaintiff has predicated her "unlawful" business practices claim on her TILA claim. However, as discussed above, Plaintiff's attempt to state a claim under TILA has failed. Accordingly, Plaintiff has stated no "unlawful" UCL claim.

Rubio v. Capital One Bank, 572 F.Supp.2d 1157, 1168 (C.D. Cal. 2008).

"Unfair" under the UCL "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." **[*32]** *Cal-Tech Communications, 20 Cal.4th 163 at187, 83 Cal.Rptr.2d 548*. The "unfairness" prong of the UCL "does not give the courts a general license to review the fairness of contracts." *Samura v. Kaiser Found. Health Plan, 17 Cal.App.4th 1284, 1299, 22 Cal. Rptr. 2d 20* & n. 6, *17 Cal. App. 4th 1284, 22 Cal.Rptr.2d 20 (1993)*, *cert. denied*, *511 U.S. 1084, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994)*.

The "fraudulent" prong under the UCL requires a plaintiff to "show deception to some members of the public, or harm to the public interest," *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F.Supp.2d 1099, 1121 (C.D. Ca. 2001)*, or to allege that "members of the public are likely to be deceived." *Medical Instrument Development Laboratories v. Alcon Laboratories, 2005 U.S. Dist. LEXIS 41411, 2005 WL 1926673, at *5 (N.D. Cal. 2005)*.

"A plaintiff alleging unfair business practices under these statutes [UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc., 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708 (1993)*.

Defendants construe the complaint to merely allege that Ms. Jeske worked for Maxim as a certified nursing assistant and that her employment ended in October 2010 such that the complaint **[*33]** lacks facts that Ms. Jeske was improperly denied meal and rest periods and payments for denied meal and rest periods and other amounts. To attempt to support the UCL claim, Ms. Jeske notes allegations of "Defendant's violation of its statutory obligations. Such violations, because 'unlawful,' are sufficient . . ."

The complaint fails to establish that defendants engaged in unlawful, unfair or fraudulent business practices under the UCL. In the absence of violation of a borrowed law, a UCL claim fails, especially given the lack of reasonable particularity of facts to support a UCL claim. Reliance on other invalid claims alleged in the complaint fails to support a viable UCL claim. The UCL claim lacks particularity of fraudulent circumstances, such as a misrepresentation, for a UCL claim, especially given failure of fraud-sounding claims, as discussed above. The complaint lacks facts to hint at a wrong subject to the UCL to warrant the UCL claim's dismissal with leave to amend.

California Private Attorneys General Act

The complaint alleges 11 PAGA claims to pursue civil penalties for labor violations suffered by Ms. Jeske and "aggrieved employees." *Section 2699(a)* provides that a Labor **[*34]** Code civil penalty may "be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." *Section 2699(c)* defines an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." "Recovery of civil penalties under the act requires proof of a Labor Code violation . . ." *Arias v. Superior Court, 46 Cal.4th 969, 987, 95 Cal. Rptr. 3d 588, 209 P.3d 923 (2009)* (citing *Lab. Code, § 2699(a)*, *(f)*).

Defendants challenge Ms. Jeske's ability to prove that aggrieved employees have suffered a Labor Code violation.

PAGA Exhaustion

Defendants argue that Ms. Jeske "has not properly exhausted her administrative remedies" to warrant dismissal of the complaint's 11 PAGA claims.

Section 2699.3(a)(1) requires an aggrieved employee or representative to provide "written notice by certified mail to the Labor and Workforce Development Agency [("LWDA")]and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." *Section 2699.3(a)(2)(A)* requires up to 33 days notice to the LWDA prior **[*35]** to commencement of a civil action.

Defendants fault Ms. Jeske's LWDA notice's failure to "describe factually . . . the alleged practices and how they impacted the aggrieved employees or even who was responsible for the alleged practices - Maxim or its client Wasco State Prison. Defendants further fault the PAGA claims as "based only on bald allegations that fail to describe a common policy or practice" to satisfy *F.R.Civ.P. 8*. Defendants challenge as "evasive" Ms. Jeske's claims that she "cannot know but Defendants would know of their own violations" and that discovery will determine defendants' violations.

Ms. Jeske relies on the complaint's allegation that her counsel gave written notice to the LWDA and defendants "stating the code violations set forth below" and the August 16, 2011 letter of Ms. Jeske's counsel which Ms. Jeske characterizes as "sufficient notice of the facts and law upon which Defendants' violations are based." Ms. Jeske argues that her PAGA letter did not need to allege "who was responsible for the alleged practices."

Defendants offer broad challenges to Ms. Jeske's August 16, 2011 notice of Labor Code violations to the LWDA and defendants. Defendants do not explain **[*36]** how the notice fails to describe alleged practices. Defendants point to no particular portions of the 10-page notice, which outlines various alleged violations with statutory references. Defendants' imprecise attacks fail to substantiate a failure of PAGA exhaustion.

Scope Of Aggrieved Employees

Defendants challenge the complaint's scope and definition of aggrieved employees which Ms. Jeske seeks to represent in that "'aggrieved employees' have not been sufficiently identified." The complaint alleges that "aggrieved employees include all employees staffed by MHS [Maxim] at state and federal prisons and other facilities within the State of California." The complaint defines aggrieved employees as "[a]ll persons who were or are employed by Defendants in the State of California and against whom one or more of the alleged violations described below was committed."

Defendants argue that the complaint lacks "fair notice as to what the scope of the PAGA claims are" given the absence of "specificity as to who the persons are that the plaintiff seeks to represent." Defendants hold Ms. Jeske to "identify the 'aggrieved employees' beyond the statutory language," especially given that the complaint **[*37]** alleges that Ms. Jeske is an aggrieved employee as to only "some" of the labor violations.

Ms. Jeske responds that a PAGA plaintiff need not be an aggrieved employee for all alleged PAGA violations in that *section 2699(c)* uses the phrase "against whom one or more of the alleged violations was committed."

Ms. Jeske is correct that she need not have suffered all PAGA violations for which she seeks to pursue civil penalties. However, she ignores defendants' chief attack that the complaint fails to identify aggrieved employees beyond reference to their Maxim employment. The complaint is unclear as to whether it seeks to pursue PAGA claims for certified nursing assistants, such as Ms. Jeske, or other healthcare employees. The complaint fails to identify how particular aggrieved employees were subject to particular violations. Ms. Jeske fails to justify the complaint's overly broad scope of aggrieved employees. This Court is unable to sanction PAGA claims for imprecisely defined aggrieved employees but grants Ms. Jeske leave to amend to define precisely the aggrieved employees for whom she seeks to recover civil penalties.

PAGA Claim For Unpaid Wages

The complaint's eighth claim alleges that **[*38]** Maxim failed to pay "all wages" earned by Ms. Jeske and aggrieved employees since they "were not paid meal and rest period wages, waiting time penalties and other compensation."

Defendants fault the claim in that "neither meal or rest period premiums nor waiting time penalties are due at certain intervals during employment." As a reminder, *section 204(a)* provides that wages "are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." Defendants fault the claim's failure to allege a *section 204* violation.

Ms. Jeske argues that the (eighth) PAGA claim for unpaid wages sufficiently alleges a *section 204* violation in that meal and rest period premiums are wages which must be paid at least semi-monthly.

The PAGA unpaid wages claim fails to delineate how Ms. Jeske and aggrieved employees missed meal and rest periods and were entitled to waiting time penalties. The claim rests on mere conclusions to warrant its dismissal without prejudice.

PAGA Missed Meal And Rest Period Claims

The complaint's ninth and tenth claims allege that defendants committed labor violations by failing to provide Ms. Jeske and aggrieved employees with required **[*39]** meal and rest periods, by requiring Ms. Jeske and aggrieved employees to work during meal and rest periods, and by failing to pay the "premium" for failure to provide proper meal and rest periods. The claims allege that Ms. Jeske and aggrieved employees are entitled to one additional hour of wage at the employee's regular rate of compensation for each workday during which the meal or rest period was not provided.

Defendants characterize the claims as "conclusory" in the absence of facts to describe Maxim's meal and rest period practices and "how or why [Ms. Jeske] or any aggrieved employees were allegedly not provided meal and rest periods." Defendants point to the absence of "any actual illegal conduct."

Defendants are correct that the PAGA missed meal and rest period claims are predicated on general allegations of mere failure to provide meal and rest periods. The complaint neither describes Maxim's practices to deny meal and rest periods nor articulates precisely how and when Ms. Jeske and aggrieved employees were denied meal and rest periods. The (ninth and tenth) PAGA missed meal and rest period claims are subject to dismissal with leave to amend.

PAGA Inaccurate Records Claims

The **[*40]** complaint's eleventh through fifteenth claims allege that Maxim violated *section 226(a)* and failed to provide Ms. Jeske and aggrieved employees:

1. A "statement of wages that accurately reported gross wages earned in so far as it failed to reflect all wages due for meal and rest period premiums";
2. A "statement of wages that accurately reported the total hours worked";
3. An "accurate statement of wages reporting the net wages actually earned" in that Maxim failed "to pay all wages due for meal and rest period premiums";
4. An "accurate statement of wages showing the name and address of the legal entity that is the employer"; and
5. An "accurate statement of wages showing the applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate."

Section 226(a) requires pay stubs of non-exempt employees to include gross and net wages earned, total hours worked, the name and address of the legal entity that is the employer, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Defendants attribute the complaint to parse *section 226(a)* requirements **[*41]** into "five separate causes of action" although there is only one penalty for a *section 226* violation, not a penalty for each enumerated requirement for wage statements under *section 226(a)*. Defendants note that *section 226(e)* assesses penalties "for a pay period, not for each missing element on the pay stub" in that it provides: "An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with *subdivision (a)* is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees."

Defendants fault the inaccurate records claims' failure to allege basic supporting facts and to "show who experienced these violations, when, how, or why." Defendants criticize the failure to explain "why the name and address of the employer was incorrect on the wage statement."

Ms. Jeske argues that a violation of a *section 226(a)* subdivision gives rise to a separate penalty under **[*42]** *section 226.3*, which provides: "Any employer who violates *subdivision (a) of Section 226* shall be subject to a civil penalty in the amount of two hundred fifth dollars ($250) per employee per violation in an initial citation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation . . ." Ms. Jeske characterizes defendants' reference to *section 226(e)* as irrelevant in that Ms. Jeske does not assert a *section 226(e)* claim.

Defendants raise valid points as to the conclusory nature of the inaccurate records claims lacking supporting facts. The claims merely point to *section 226(a)* requirements and claim they were not satisfied with nothing more. The claims lack necessary facts to demonstrate defendants' failure to satisfy *section 226(a)* requirements. In addition, Ms. Jeske's rejection of *section 226(e)* in favor of *section 226.3* is curious since *section 226.3* provides for civil penalties subject to Labor Commissioner enforcement by stating that "the Labor Commissioner shall take into consideration whether the violation was inadvertent . . ." *Section 226(e)*, on the other hand, empowers an "employee suffering injury as a result of a knowing and intentional **[*43]** failure by the employer to comply with *subdivision (a)*" to seek recovery. Ms. Jeske fails to substantiate that *section 226.3* prevails in place of *section 226(e)* and that she, rather than the Labor Commissioner, is entitled to pursue *section 226.3* relief. The (eleventh through fifteenth) PAGA inaccurate records claims are subject to dismissal with leave to amend.

Suitable Seats

The complaint's sixteenth claim alleges that employees were required to unnecessarily stand in the absence of suitable chairs to violate California Industrial Welfare Commission Wage Order 4-2001, *Section 14* ("*section 14*"), which provides:

> (A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.
>
> (B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

The claim alleges that Maxim failed to provide proper seating to Ms. Jeske and aggrieved employees "when the nature of their **[*44]** work permitted and required the use of proper seats" in that Maxim required employees "to monitor the activities of inmates through a small rectangular window" and "employees were either provided with unsuitable chairs, broken chairs or not chairs at all" and "were required to unnecessarily stand during work hours."

Relying on an administrative advisory opinion, defendants challenge *section 14*'s application to Ms. Jeske's certified nursing assistant position in that *section 14* "was not intended to cover those positions where the duties require employees to be on their feet." Defendants fault the claim's absence of facts that the nature of Ms. Jeske's work "reasonably permitted the use of seats" or that Maxim failed to provide her a seat. Defendants further challenge the complaint's absence of facts that Ms. Jeske requested, wanted or was denied a seat. Defendants conclude that Maxim is required to provide seats "to the extent that employees want or request them; Maxim is not required to ensure that every employee is given a seat."

The complaint fails to allege sufficient facts that the nature of Ms. Jeske's or aggrieved employees' work reasonably permits seats. The complaint appears **[*45]** to base the suitable seats claim on the mere allegation that employees were required to monitor employees through a small window and "unnecessarily stand." The claim lacks sufficient facts to support a *section 14* claim to warrant its dismissal with leave to amend.

Adequate Temperature

The complaint's seventeenth claim alleges that Maxim failed to maintain an adequate working temperature to satisfy California Industrial Welfare Commission Wage Order 4-2001, *Section 15* ("*section 15*") which provides:

> (A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.
>
> (B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60F, a heated room shall be provided to which employees may retire for warmth, and such room shall be maintained at not less that 68F.
>
> (C) A temperature of not less than 68F shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of **[*46]** use.

The inadequate temperature claim alleges that the work environment temperature fell below "reasonable/acceptable standards" to require employees to wear heavy clothing and to bring in space heaters. The claim concludes that "nothing was done to remedy the problems with temperature."

Defendants fault the inadequate temperature claim's failure to allege facts that Maxim "had care, custody, or control of Wasco or could control the temperature." Defendants note the complaint's failure to explain "how or why the temperature was Wasco was not at reasonable/acceptable standards or was not consistent with industry-standards for the nature of the process and the work performed." Defendants criticize the absence of allegations as to inadequate temperatures at workplaces where other aggrieved employees were stationed.

The inadequate temperature claim generally alleges no more than a temperature to require heavy clothing and space heaters. The complaint lacks facts to demonstrate inadequate working temperatures, especially as to employees other than Ms. Jeske. Moreover, the complaint fails to explain how Maxim, as supplier of certified nursing assistants, had ability to control or address the **[*47]** temperature. The inadequate temperature claim is subject to dismissal with leave to amend.

Sanitary Restrooms

The complaint's eighteen claim alleges that Maxim violated *section 2350* "by failing to provide proper sanitary restrooms" to require Ms. Jeske and aggrieved employees "to work in unsanitary conditions because of, among other things, the unkempt and unclean condition of the bathrooms at Wasco."

Section 2350 provides:

> Every factory, workshop, mercantile or other establishment in which one or more persons are employed, shall be kept clean and free from the effluvia arising from any drain or other nuisance, and shall be provided, within reasonable access, with a sufficient number of toilet facilities for the use of the employees. When there are five or more employees who are not all of the same gender, a sufficient number of separate toilet facilities shall be provided for the use of each sex, which shall be plainly so designated.

Defendants argue that there is no private right of action under *section 2350* in that *section 2355* provides that the California Labor Commissioner shall enforce Article 3 of the California Labor Code, which includes *section 2350*. Defendants contend that *section 2350* **[*48]** fails to provide in "clear understandable, unmistakable terms" a private right of action. Defendants further note that *section 2699.5* enumerates California Labor Code sections which may predicate PAGA violations and that *section 2350* is missing. Defendants conclude "there can be no PAGA penalties for any alleged violation of *section 2350*."

Ms. Jeske does not dispute the absence of a private right of action under *section 2350*. This Court agrees with defendants that no private right of action exists under *section 2350* to limit exposure to a PAGA claim. Ms. Jeske relies on *section 2699.3(c)* to permit a *section 2350 PAGA* claim in that *section 2699.3(c)* references "violation of any provision other than those listed in *Section 2699.5*." Ms. Jeske points to a viable avenue for a *section 2350 PAGA* claim to limit viability of a *section 2350* claim under PAGA with no private right of action relief.

Class Action Prerequisites

Defendants contests the complaint's satisfaction of *F.R.Civ.P. 23* prerequisites of class actions. *F.R.Civ.P. 23(a)* provides:

> One or more members of a class may sue . . . as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all **[*49]** members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims . . . of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Defendants criticize the complaint's overbroad definition of "aggrieved employees" covering "every California employee employed by [Maxim] regardless of position, location, or duties." Defendants point to the absence of an "ascertainable class" bound by "common issues of fact and law" and the failure of Ms. Jeske's claims as "typical of those of the class." Defendants note that the complaint's "diverse claims will require individualized inquiries into specific facts pertaining to the employment of each of the allegedly aggrieved employees" to prevent "collective determination."

Ms. Jeske responds that her PAGA claims are "asserted on behalf of state law enforcement agencies, not individual employees" to avoid class action requirements. Ms. Jeske argues that as an employee bringing PAGA claims, she need not satisfy class action requirements. Ms. Jeske points to the California Supreme Court's holding in Arias, 46 Cal.4th at 975, 209 P.3d 923:

> We **[*50]** hold that an employee who, on behalf of himself and other employees, sues an employer under the unfair competition law (Bus. & Prof.Code, § 17200 et seq.) for Labor Code violations must satisfy class action requirements, but that those requirements need not be met when an employee's representative action against an employer is seeking civil penalties under the Labor Code Private Attorneys General Act of 2004 (Lab.Code, § 2698 et seq.).
>
> The California Supreme Court explained the rationale of its holding:
>
> An employee plaintiff suing, as here, under the Labor Code Private Attorneys General Act of 2004, does so as the proxy or agent of the state's labor law enforcement agencies. The act's declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves. (Stats.2003, ch. 906, § 1 [Legislature's findings and declarations].) In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. (Lab.Code, § 2699, subds. (a), **[*51]** (f); *see* 95 Cal.Rptr.3d p. 596, 209 P.3d p. 930, *ante.*) The employee plaintiff may bring the action only after giving written notice to both the employer and the Labor and Workforce Development Agency (Lab.Code, § 2699.3, subd. (a)(1)), and 75 percent of any civil penalties recovered must be distributed to the Labor and Workforce Development Agency (*id.*, § 2699, subd. (i)).
>
> . . . The act authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations (Lab.Code, § 2699, subds. (a), (g)), and an action to recover civil penalties "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties" (People v. Pacific Land Research Co. (1977) 20 Cal.3d 10, 17, 141 Cal.Rptr. 20, 569 P.2d 125).

Arias, 46 Cal. 4th 969, 986, 95 Cal. Rptr. 3d 588, 209 P.3d 923.

A fellow judge of this Court has noted the difference between a PAGA claim and a class action:

> A PAGA claim, therefore, is fundamentally different from a class action in terms of both the interests represented and the relief sought. In light of this essential disparity between the two types of claims, the California Supreme Court held that while actions under PAGA "may be **[*52]** brought as class actions," class certification is not mandatory. Id. at 981 n. 5, 95 Cal.Rptr.3d 588, 209 P.3d 923.

Mendez v. Tween Brands, Inc., 2010 U.S. Dist. LEXIS 66454, 2010 WL 2650571, at *2 (E.D. Cal. 2010); *see* Machado v. M.A.T. & Sons Landscape, Inc., Case No. CV F 2:09-0459 JAM JFM, 2009 U.S. Dist. LEXIS 63414, *8 (E.D.Cal. July 23, 2009) ("*Arias* controls in federal court and PAGA claims need not be brought as class actions"); *see also* Franco v. Athens Disposal Co., Inc., 171 Cal.App.4th 1277, 1300, 90 Cal.Rptr.3d 539 (2009) (a PAGA claim "is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions.")

Despite defendants' points to the contrary, the authorities are clear that PAGA claims are law enforcement actions, not class actions, to vitiate F.R.Civ.P. 23 adherence since a PAGA plaintiff brings claims as "the proxy or agent of the state's labor law enforcement agencies." Arias, 95 Cal.Rptr.3d 588, 209 P.3d at 933. The remedy sought in a PAGA suit consists of civil penalties, not individual or class damages. Cal. Lab.Code § 2699(a). This Court disagrees with defendants' notion that **[*53]** F.R.Civ.P. 23 trumps PAGA as a procedural statute. In effect, defendants ask this Court to ignore the California Supreme Court's holding in *Arias* as well as other courts' application of *Arias.* This Court will not hold Ms. Jeske to strict F.R.Civ.P. 23 prerequisites.

Relying on the general purposes of PAGA claims, Ms. Jeske argues that she "is not required to specifically allege the identity of the aggrieved employees who have been the subject of the unlawful employment practices." Ms.

Jeske points to *section 2699(a)* which permits recovery of civil penalties "through a civil action brought by an aggrieved employee on behalf of himself or herself and **other current or former employees** . . ." (Bold added.) Ms. Jeske argues that *section 2699(a)* "does not limit the employees on whose behalf a PAGA action may be brought to employees with the same job classification, or employees who were subject to the same violations." Ms. Jeske claims inability "to specifically allege each and every violation as to each and every group of employees at the pleading stage" without discovery.

Defendants respond that Ms. Jeske's "overbroad definition of 'aggrieved employees' essentially creates a class with no **[*54]** limits and threatens to give rise to costly and burdensome discovery as the parties dispute class boundaries."

Other than *section 2699(a)*, Ms. Jeske points to no precise authority to support her imprecise scope of aggrieved employees. As such, Ms. Jeske takes the legally unsupported position that she is entitled to pursue PAGA claims for the universe of Maxim employees. Such position contravenes federal pleading requirements to provide defendants sufficient notice of the claims against them. Ms. Jeske's entitlement to pursue claims for current and former employees must be balanced with an ascertainable scope of aggrieved employees, presumably Maxim healthcare workers employed at Wasco. The complaints lacks sufficient definition of the scope of aggrieved employees, and Ms. Jeske is granted leave to amend to do so.

Ms. Jeske's UCL Claim Against Individual Defendants

The complaint's (sixth) UCL claim is asserted against Mr. Tagayun and Ms. Blankenship for Ms. Jeske. Defendants fault the absence of underlying meal and rest period violation claims against Mr. Tagayun and Ms. Blankenship to support a UCL claim against them. Defendants further note that Mr. Tagayun and Ms. Blankenship are not **[*55]** subject to individual liability for Maxim's failure to pay wages. *See* *Jones v. Gregory, 137 Cal.App.4th 798, 800, 807, 40 Cal.Rptr.3d 581 (2006)* ("California law does not support imposing personal liability on corporate officers or agents as 'employers'" in that "a corporate officer or agent does not employ employees—the corporation does"); *Reynolds v. Bement,36 Cal.4th 1075, 1087,32 Cal. Rptr. 3d 483, 116 P.3d 1162 (2005)* ("corporate agents acting within the scope of their agency are not personally liable for the corporate employer's failure to pay its employees' wages"). Defendants continue that despite Mr. Tagayun's and Ms. Blankenship's alleged exercise over Ms. Jeske's wages, such control does not "convert" them into employers.

Defendants raise valid points. The complaint merely alleges that Mr. Tagayun and Ms. Blankenship are managers/supervisors. No facts are present to connect Mr. Tagayun and Ms. Blankenship to Maxim control over meal and rest break policies and practices. The complaint at most raises inferences that Mr. Tagayun and Ms. Blankenship carried out Maxim meal and rest break policies and practices. Ms. Jeske offers no meaningful opposition to dismissal of the UCL claims against Mr. Tagayun **[*56]** and Ms. Blankenship. The complaint lacks facts of Mr. Tagayun's and Ms. Blankenship's alleged wrongs to warrant dismissal of the UCL claim against Mr. Tagayun and Ms. Blankenship with prejudice.

PAGA Claims Against Individual Defendants

The complaint's (ninth and tenth) PAGA meal and rest period violations claims are asserted against Mr. Tagayun and Ms. Blankenship for the aggrieved employees to seek civil penalties. Defendants fault the complaint's absence of allegations that Mr. Tagayun or Ms. Blankenship had "control or responsibility for the aggrieved employees."

The complaint identifies Mr. Tagayun as "an account manager/supervisor of Jeske" and Ms. Blankenship as "the manager/supervisor of Jeske." The complaint's general allegations state that Mr. Tagayun and Ms. Blankenship:

1. Are Maxim "managing agents, employees, executives, officers and/or directors";
2. "[E]xercised control over the wages of employees"; and
3. "[D]esigned and implemented policies regarding meal and rest breaks, working hours an deductions."

The PAGA meal and rest period violations claims allege that Mr. Tagayun and Ms. Blankenship "controlled the working conditions of the aggrieved employees, including but not **[*57]** limited to meal and rest breaks."

Defendants criticize the complaint's failure to allege facts that Mr. Tagayun or Ms. Blankenship are owners, officers or corporate agents or "are responsible for the working conditions of all aggrieved employees." Defendants point to the lack of allegations of Mr. Tagayun's and Ms. Blankenship's direct causing of labor violations. Defendants hold Ms. Jeske to allege facts that Mr. Tagayun and Ms. Blankenship "held positions or committed acts that would render them personally liable for PAGA penalties and wage and hour violations."

Ms. Jeske points to *section 558*, which subjects to civil penalty an employer "or other person acting on behalf of an employer" who commits or causes wage and hour violations. However, without specific facts of Mr. Tagayun's and Ms. Blankenship's wrongful conduct, reliance on *section 558* is unavailing. The complaint lacks facts that Mr. Tagayun and Ms. Blankenship acted on Maxim's behalf to cause wage and hour violations. The complaint merely alleges that Mr. Tagayun and Ms. Blankenship are managers/supervisors. Nonetheless, Ms. Jeske is granted leave to amend to allege facts to satisfy *section 558* requirements as to Mr. Tagayun **[*58]** and Ms. Blankenship.

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. DISMISSES with prejudice the complaint's (first) unpaid wages claim;
2. DISMISSES without prejudice the complaint's (second) meal period premiums claim;
3. DISMISSES without prejudice the complaint's (third) rest period premiums claim;
4. DISMISSES without prejudice the complaint's (fourth) waiting time penalties claim;
5. DISMISSES with prejudice the complaint's (fifth) fraud - deceit and misrepresentation claim;
6. DISMISSES without prejudice the complaint's (sixth) UCL claim against Maxim;
7. DISMISSES without prejudice the complaint's (seventh) wrongful termination in violation of public policy claim;
8. DISMISSES without prejudice the complaint's (eighth) PAGA unpaid wages claim;
9. DISMISSES without prejudice the complaint's (ninth and tenth) PAGA missed meal and rest period claims;
10. DISMISSES without prejudice the complaint's (eleventh through fifteenth) PAGA inaccurate records claims;
11. DISMISSES without prejudice the complaint's (sixteenth) *section 14* suitable seats claim;
12. DISMISSES without prejudice the complaint's (seventeenth) *section 15* inadequate temperature claim;
13. DENIES dismissal **[*59]** of the complaint's (eighteenth) *section 2350* sanitary restrooms claim;
14. DISMISSES with prejudice the complaint's (sixth) UCL claim against Mr. Tagayun and Ms. Blankenship;
15. ORDERS Ms. Jeske, no later than January 31, 2012, to file and serve a first amended complaint to cure deficiencies identified in this order and to refrain from amending claims which are not viable and cannot be cured and ADMONISHES Ms. Jeske that she will be given no further opportunities to amend her complaint; and
16. ORDERS defendants, no later than February 22, 2012, to file and serve papers to respond to the first amended complaint and ADMONISHES defendants to seek *F.R.Civ.P. 12* relief based only on strong substantive grounds and to otherwise file and serve an answer to the first amended complaint.

This Court lacks the time and resources to re-do its work of educating the parties on pleadings and to address attacks on adequate, yet imperfect pleadings. The professionalism of the parties' respective counsel is expected.

Due to bearing the heaviest caseload in the nation with the recent retirement of former U.S. District Judge Oliver Wanger, limited resources, and the need to prioritize criminal and older civil **[*60]** matters over more recently filed actions, this Court ADMONISHES the parties that it is unable to commit to address this action to meet the parties' needs and expectations. As such, this Court urges the parties to consider the conduct of all further proceedings by a U.S. Magistrate Judge, whose caseload and availability is more accommodating to the parties. Forms to consent to a U.S. Magistrate Judge are available on this Court's website.

IT IS SO ORDERED.

Dated: January 10, 2012

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE

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Editorial Caballero, S.A. de C.V. v. Playboy Enters.

Court of Appeals of Texas, Thirteenth District, Corpus Christi - Edinburg

January 12, 2012, Delivered; January 12, 2012, Filed

NUMBER 13-10-00586-CV

Reporter

359 S.W.3d 318 *; 2012 Tex. App. LEXIS 298 **

EDITORIAL CABALLERO, S.A. DE C.V. AND GRUPO SIETE INTERNATIONAL, INC., Appellants, v. PLAYBOY ENTERPRISES, INC., Appellee.

Subsequent History: Released for Publication March 16, 2012.

Rehearing denied by *Edithial Carallero, S.A. De C.V. v. Playbary Enters., 2012 Tex. App. LEXIS 2188 (Tex. App. Corpus Christi, Feb. 9, 2012)*

Petition for review denied by *Editorial Caballero v. Playboy Enters., 2012 Tex. LEXIS 948 (Tex., Oct. 26, 2012)*

Prior History: [1]** On appeal from the 332nd District Court of Hidalgo County, Texas.

Playboy Enters. v. Editorial Caballero, S.A. de C.V., 202 S.W.3d 250, 2006 Tex. App. LEXIS 4498 (Tex. App. Corpus Christi, May 25, 2006)

Core Terms

juror, license agreement, trial court, outside influence, copies, attorney's fees, antitrust, jury misconduct, breached, internet, Edition, deliberations, conspiracy, theft, breach-of-contract, evidentiary hearing, burden of proof, jury's finding, jury finding, counterclaims, undisputed, monthly, motion for a new trial, juror's affidavit, segregate, pet, restraint of trade, jury question, good faith, new trial

LexisNexis® Headnotes

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

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN1[] **Standards of Review, Abuse of Discretion**

The court reviews a trial court's ruling on a motion for new trial based on jury misconduct for an abuse of discretion.

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

HN2[] **Standards of Review, Abuse of Discretion**

An abuse of discretion will be found when the trial court's ruling is arbitrary, unreasonable, or without reference to guiding principles.

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN3[] **Jurors, Misconduct**

Whether jury misconduct occurred and caused injury is a question of fact for the trial court. To obtain a new trial based on juror misconduct, an appellant must show (1) the misconduct occurred, (2) it was material, and (3) it probably caused injury. *Tex. R. Civ. P. 327*. A motion for new trial based upon jury misconduct must be supported by a juror's affidavit alleging that outside influences were brought to bear upon the jury. *Tex. R. Civ. P. 327(b)*.

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

HN4[] **Jurors, Misconduct**

An outside influence must emanate from outside the jury and its deliberations. An outside influence does not include information not in evidence, unknown to the jurors prior to trial, acquired by a juror and communicated to one or more other jurors between the time the jurors received their instructions from the court and the rendition of the verdict and does not include information gathered by a juror and introduced to the other jurors by that juror, even if the information were introduced specifically to prejudice the vote. In sum, under this rule, a juror may testify about improper contacts with individuals outside the jury or matters or statements not occurring during the course of the jury's deliberations. However, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, *Tex. R. Civ. P. 327(b)*.

Evidence > ... > Competency > Jurors > General Overview

HN5[] **Competency, Jurors**

See *Tex. R. Evid. 606(b)*.

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

HN6[] **Jurors, Misconduct**

Personal pressures felt by jurors to wrap up the deliberations do not constitute outside influences.

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

HN7[] **Jurors, Misconduct**

Holding that internet research does not constitute an outside influence is consistent with the general rule that information gathered by a juror and introduced to the other jurors by that juror, even if the information were introduced to prejudice the vote, does not add up to outside influence.

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

HN8[] **Jurors, Misconduct**

Where affidavits do not raise outside influence, the trial court is not required to receive the juror affidavits or testimony.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN9[] **Substantial Evidence, Sufficiency of Evidence**

When a party attacks the legal sufficiency of an adverse finding on an issue on which it has the burden of proof, that party must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. When an appellant attacks the legal sufficiency of an adverse finding on an issue for which it did not have the burden of proof, the appellant must demonstrate that there is no evidence to support the adverse finding. Such a no-evidence challenge will be sustained only if: (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. In conducting a legal sufficiency review, the court reviews the evidence presented at trial in the light most favorable to the jury's verdict and indulges every reasonable inference that would support it, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN10[] **Standards of Review, Clearly Erroneous Review**

In reviewing a factual-sufficiency challenge to a jury finding on an issue on which the appellant had the burden of proof, the appellant must show that the adverse finding is against the great weight and preponderance of the evidence. In reviewing a factual-sufficiency challenge to a jury finding on an issue on which the appellant did not have the burden of proof, the court considers and weighs all of the evidence and sets aside the verdict only if the evidence that supports the jury finding is so weak as to make the verdict clearly wrong and manifestly unjust. In either type of factual-sufficiency challenge, the court must examine both the evidence supporting and that contrary to the judgment. Additionally, the jury is the sole judge of witnesses credibility, and it may choose to believe one witness over another; a reviewing court may not impose its own opinion to the contrary.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Governments > Courts > Authority to Adjudicate

HN11[] **Reviewability of Lower Court Decisions, Preservation for Review**

Under *Tex. R. App. P. 47.1*, the court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. When reviewing a civil matter, an appellate court has no discretion to consider an issue not raised in the appellant's brief.

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN12[] **Breach, Breach of Contract Actions**

Under Illinois law, parties to a contract are entitled to enforce the terms of a contract to the letter and an implied covenant of good faith cannot overrule or modify the express terms of a contract.

Civil Procedure > Appeals > Standards of Review > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN13[] **Appeals, Standards of Review**

The court must affirm a take-nothing judgment on a common law fraud claim unless the evidence conclusively establishes all elements of the fraud claim.

Civil Procedure > Appeals > Standards of Review > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN14[] **Appeals, Standards of Review**

The court must affirm a take-nothing judgment on a statutory fraud claim unless the evidence conclusively establishes all elements of the claim.

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

HN15[] **Private Actions, State Regulation**

The Texas Free Enterprise and Antitrust Act (TFEAA) provides that every contract, combination, or conspiracy in restraint of trade is unlawful. In order to establish a violation of *Tex. Bus. & Com. Code Ann. § 15.05*, the party asserting the claim is required to prove a concerted action by two or more persons. To show a concerted action by two or more persons to illegally restrain trade, a plaintiff faces the threshold requirement of identifying a co-conspirator. Moreover, a company cannot conspire with its own employees as a matter of law. And one cannot sustain an action under *§ 15.05(a)* of the TFEAA regarding conspiracies or combinations in restraint of trade when he has not provided any evidence that the defendant engaged in any concerted action with any other independent entity. A violation of *§ 15.05(a)* cannot be based on concerted action between a corporation and its wholly-owned subsidiary.

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

HN16[] **Private Actions, State Regulation**

An internal plan is not a contract, combination, or conspiracy with a separate and independent business or person for purposes of *Tex. Bus. & Com. Code Ann. § 15.05(a)*.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Governments > Courts > Authority to Adjudicate

HN17[] **Reviewability of Lower Court Decisions, Preservation for Review**

Under *Tex. R. App. P. 47.1*, the court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. When reviewing a civil matter, an appellate court has no discretion to consider an issue not raised in the appellant's brief, even if the ends of justice so require.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN18[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Tex. R. Civ. P. 94 sets out that excuse is an affirmative defense upon which the defendant has the burden of proof.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN19[] **Reviewability of Lower Court Decisions, Preservation for Review**

See *Tex. R. Civ. P. 274*.

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN20[] **Jury Instructions, Objections**

To complain of the trial court's omission of a requested instruction on appeal, a party is obliged to make a written request to the trial court.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

HN21[] **Costs & Attorney Fees, Attorney Fees & Expenses**

Where no objection is made based on the failure to segregate, any error in failing to segregate fees is waived, and the trial court can only disregard a jury finding if it is unsupported by the evidence or is immaterial.

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Judges: Before Justices Rodriguez, Vela, and Perkes. Opinion by Justice Rodriguez.

Opinion by: NELDA V. RODRIGUEZ

Opinion

[*323] Opinion by Justice Rodriguez

This is a commercial dispute between appellants, Editorial Caballero, S.A. de C.V. (EC) and Grupo Siete International, Inc. (GSI), and appellee, Playboy Enterprises, Inc. (PEI). For over twenty years EC published and distributed a Spanish language version of *Playboy* magazine in Mexico and other Latin American countries. In October 1996, PEI and EC entered into a licensing agreement (License Agreement) that provided, in relevant part, that EC could publish a Spanish language version of *Playboy* for distribution in the United States. GSI was EC's assignee of the U.S. distribution rights to the Spanish language version of *Playboy*. In January 1998, PEI terminated the License Agreement because EC and GSI allegedly failed to pay certain monies due under the License Agreement and under a Renegotiated Payment Plan Agreement. EC and GSI claimed that PEI caused the failure of the project. Suit was filed. EC and GSI filed claims against PEI, and PEI filed counter-claims against EC and GSI. The case was tried twice **[**2]** to a jury.

Following the first trial, EC and GSI appealed. *See* Playboy Enter., Inc. v. Editorial Caballero, S.A. de C.V., 202 S.W.3d 250, 276 (Tex. App.—Corpus Christi 2006, pet. denied) (Playboy I). In *Playboy I*, this Court rendered judgment against EC and GSI on all claims except breach of contract and fraudulent concealment, remanding those claims for a new trial. *Id*. We also remanded all claims asserted by PEI against EC and GSI. *Id*.

The second trial, the judgment from which this appeal is taken, began on March 31, 2010. Rejecting PEI's argument that our 2006 decision and the law of the case doctrine precluded many of EC and GSI's claims, the trial court submitted EC and GSI's claims against PEI for breach of the License Agreement, common law fraud, statutory fraud, antitrust violations, and theft. In addition, the trial court submitted PEI's claims against EC and GSI for breach of the License Agreement, breach of the Renegotiated Payment Plan Agreement, and fraud. The jury found against EC and GSI on their claims and in favor of PEI on its claims. The trial court entered judgment in favor of PEI and awarded breach-of-contract damages in the amount of $410,000.[1] It also awarded $1,680,000 **[**3]** in attorneys' fees, $500,000 in conditional appellate attorneys' fees, and interest. Following the entry of judgment in PEI's **[*324]** favor and the denial of EC and GSI's post-judgment motions, EC and GSI appealed.

By three issues, with multiple sub-issues, EC and GSI contend that (1) they are entitled to a new trial based on jury misconduct; and (2-3) the evidence is insufficient to support the adverse jury findings. We affirm.

I. JURY MISCONDUCT

[1] The jury also awarded fraud damages against EC and GSI, but PEI elected to recover on its contract claims instead.

By their first issue, EC and GSI contend that the trial court abused its discretion when it denied their motion for new trial based, in part, on allegations of material jury misconduct that caused injury. The jury returned a 10-2 verdict. EC and GSI argue that the trial court abused its discretion in refusing to (1) admit and rely on affidavits from the two dissenting jurors; (2) hear live testimony from any of the jurors, especially the two juror affiants; and (3) grant a new trial based on juror misconduct. PEI responds that the juror affidavits did not contain competent, admissible evidence of jury misconduct, and its objections to those **[**4]** affidavits were properly sustained. We agree with PEI.

A. Standard of Review and Applicable Law

HN1[] We review a trial court's ruling on a motion for new trial based on jury misconduct for an abuse of discretion. *Vela v. Wagner & Brown, Ltd., 203 S.W.3d 37, 48 (Tex. App.—San Antonio 2006, no pet.)* (op. on reh'g). *HN2*[] An abuse of discretion will be found when the trial court's ruling is arbitrary, unreasonable, or without reference to guiding principles. *Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997)*.

HN3[] Whether jury misconduct occurred and caused injury is a question of fact for the trial court. *Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362, 372 (Tex. 2000)*. To obtain a new trial based on juror misconduct, an appellant must show (1) the misconduct occurred, (2) it was material, and (3) it probably caused injury. *Tex. R. Civ. P. 327*; *Golden Eagle Archery, 24 S.W.3d at 372*. A motion for new trial based upon jury misconduct must be supported by a juror's affidavit alleging that outside influences were brought to bear upon the jury. *Weaver v. Westchester Fire Ins. Co., 739 S.W.2d 23, 24 (Tex. 1987)* (per curiam); *see* *Tex. R. Civ. P. 327(b)*; *see also* *Tex. R. Evid. 606(b)*.

HN4[] An outside influence **[**5]** "must emanate from outside the jury and its deliberations." *Soliz v. Saenz, 779 S.W.2d 929, 931-32 (Tex. App.—Corpus Christi 1989, writ denied)*; *see* *Golden Eagle Archery, 24 S.W.3d at 370*; *King v. Bauer, 767 S.W.2d 197, 198 (Tex. App.—Corpus Christi 1989, writ denied)*. An outside influence does not include "information not in evidence, unknown to the jurors prior to trial, acquired by a juror and communicated to one or more other jurors between the time the jurors received their instructions from the court and the rendition of the verdict" and does not include "[i]nformation gathered by a juror and introduced to the other jurors by that juror, even if the information were introduced specifically to prejudice the vote . . . ." *Soliz, 779 S.W.2d at 932*; *see, e.g.,* *King, 767 S.W.2d at 198* (holding that "discussion of newspaper articles is not considered an outside influence"). In sum, under this rule, a juror may testify about "improper contacts with individuals outside the jury" or "matters or statements not occurring during the course of the jury's deliberations." *Golden Eagle Archery, 24 S.W.3d at 370*. However, "[a] juror may not testify as to any matter or statement occurring during **[**6]** the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in **[*325]** connection therewith, ..." *Tex. R. Civ. P. 327(b)*; *see* *Tex. R. Evid. 606(b)* (*HN5*[] "[A] juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict."); *Golden Eagle Archery, 24 S.W.3d at 370*.

B. Discussion

1. Affidavits

In support of their jury misconduct allegations in their motion for new trial, EC and GSI attached the affidavits of the two dissenting jurors. The affidavits set out the following three instances that allegedly occurred during jury deliberations:

$ One juror reported to other jurors that she had been informed of a death in her family, and she switched her vote in order to conclude the deliberations more quickly;

$ Another juror admitted that he read on the internet the appellate decision concerning the first trial of this case; and

$ **[**7]** A third juror stated that he knew that the Sanchez family[2] had a lot of money and that his (the juror's) sister was an attorney.

a. Death in Juror's Family

HN6[] Personal pressures felt by jurors to wrap up the deliberations do not constitute outside influences. *See, e.g., Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 660-61 (Tex. App.—Dallas 2002, pet. denied)* (explaining that a statement by the bailiff to jurors that they would have to deliberate another day if they told the court that they were deadlocked was not outside influence); *Perry v. Safeco Ins. Co., 821 S.W.2d 279, 281 (Tex. App.—Houston [1st Dist.] 1991, writ denied)* (concluding that family pressure to go on vacation was not outside influence); *Kirby Forest Indus., Inc. v. Kirkland, 772 S.W.2d 226, 234 (Tex. App.—Houston [14th Dist.] 1989, writ denied)* (holding that **[**8]** pressure from employers to return to work, and family, recreational, and personal pressures are not outside influences). The trial court could have reasonably determined that the portions of the jurors' affidavits discussing another juror's statements about a death in her family related to the effect of the death on the juror's mind or emotions or mental processes, as influencing her assent to or dissent from the verdict. *See Tex. R. Civ. P. 327(b)*; *Tex. R. Evid. 606(b)*; *Golden Eagle Archery, 24 S.W.3d at 370*; *Goode, 943 S.W.2d at 446*. Therefore, misconduct did not occur, and the trial court could have concluded that the affidavits were incompetent and inadmissible in this regard.

b. Appellate Decision Read on the Internet

The trial court could have made the same determination regarding the portion of one juror's affidavit explaining that another juror said, during deliberations, that he had read the appellate decision involving the first trial. The affidavit which stated that the juror read the decision on the internet, implies internet research. The affidavit did not state, however, that the juror said anything more about the opinion.

[*326] In a criminal context, this Court recently decided **[**9]** the issue of whether internet research constitutes an "outside influence." *See McQuarrie v. State, No. 13-09-00233-CR, 2011 Tex. App. LEXIS 2859, at *13-18* (Tex. App.—Corpus Christi Apr. 14, 2011, pet. granted) (mem. op., not designated for publication) (citing *Soliz, 779 S.W.2d at 931-32*).[3] In *McQuarrie*, we held that "independent research on the internet [conducted by a juror] during an overnight recess and conveyed . . . to the other jurors during deliberations the next morning" did not constitute an outside influence. *Id.*; *see Mathis v. State, No. 05-05-01119-CR, 2006 Tex. App. LEXIS 4645, at *24-27* (Tex. App.—Dallas May 31, 2006, no pet.) (not designated for publication) (holding internet research did not constitute an outside influence); *Johnson v. State, No. 08-05-00017-CR, 2006 Tex. App. LEXIS 8618, at *7-8* (Tex. App.—El Paso Oct. 5, 2006, no pet.) (not designated for publication) (concluding that information found on a computer system was not an outside influence); *see also Lucero v. State, 246 S.W.3d 86, 95 (Tex. Crim. App. 2008)* (noting that the State relied primarily on civil cases in support of its position "that the Bible reading [by the jury foreman during jury deliberations] **[**10]** was not an "outside influence" and that appellant was, therefore, improperly

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[2] At trial, Marco Antonio Sanchez described the Sanchez family business as a medium-size media company in Mexico. In late 1977, the Sanchez family acquired EC, known at that time as Caballero Con Le Mejor de Playboy. Marco's father, Javier Sanchez, was the president of EC who, on EC's behalf, executed the License Agreement that forms the basis of this lawsuit.

[3] The Texas Court of Criminal Appeals recently granted petition **[**11]** in *In re McQuarrie*, without oral argument, on the following issue: Did the court of appeals violate McQuarrie's federal and state constitutional right to confrontation and cross-examination by upholding the trial court's exclusion, pursuant to *Texas Rule of Evidence 606(b)*, of juror testimony and affidavits offered for purposes of his motion for new trial on the ground that a juror conveyed to other jurors harmful information obtained from her internet research during an overnight break in deliberations? *No. PD-0803-11, 2011 Tex. Crim. App. LEXIS 1517, at *1 (Tex. Crim. App. Nov. 16, 2011)*.

attempting to impeach the jury's verdict under *Rule 606(b)*") (citing *Golden Eagle Archery, 24 S.W.3d at 366-75* (rules contemplate that an "outside influence" originates from sources other than the jurors themselves); *Brandt v. Surber, 194 S.W. 3d 108, 134 (Tex. App.—Corpus Christi 2006, pet. denied)* (a jury's discussion of newspaper articles is not an "outside influence"); *Easly v. State, 163 S.W.3d 839, 842 (Tex. App.—Dallas 2005, no pet.)* (a chart brought into jury room with calculations of time appellant would serve in prison after application of the parole laws is not an "outside influence"); *Perry, 821 S.W.2d at 281* (juror using dictionary to share a definition with other jurors is not an "outside influence")). In *McQuarrie*, we also held that "the trial court properly excluded the affidavits and testimony" of the jurors because the affidavits did not contain any evidence of outside influence and that the trial court "did not abuse its discretion in denying [plaintiff's] motion for new trial on this basis." *2011 Tex. App. LEXIS 2859, at *17*.

HN7[] Holding that internet research does not constitute an outside influence is also consistent with the general rule that "[i]nformation gathered by a juror and introduced to the other jurors by that juror, even if the information were introduced to prejudice the vote, does not add up to outside influence." *Soliz, 779 S.W.2d at 932*; *see Brandt, 194 S.W.3d at 134* ("[One juror's] affidavit stating that other jurors discussed newspaper articles during deliberations was not evidence of any outside influence, but only described matters on the minds of other jurors during deliberations. The affidavit is, therefore, **[**12]** incompetent to serve as evidence of juror misconduct."). The trial court could have **[*327]** reasoned that evidence of a juror reviewing this Court's earlier opinion found on the internet, without more, described only matters on the mind of this juror during deliberations. Thus, it could have concluded that the affidavit was incompetent on this basis as well. *See Tex. R. Civ. P. 327(b)*; *Tex. R. Evid. 606(b)*.

c. Information Regarding the Sanchez Family and the Jury Foreman's Sister

The same analysis applies to EC and GSI's supporting affidavits setting out that "the jury foreman stated during jury deliberations that he knew the Sanchez family had a lot of money" and that "the jury foreman . . . sa[id] that his sister is an attorney and that he knew both the business and financial background of the Sanchez family." Once again, the trial court could have determined that these statements proffered by EC and GSI through the affidavits are incompetent and inadmissible because they occurred during deliberations and do "not add up to outside influence." *Soliz, 779 S.W.2d at 932*. The trial court could have, therefore, concluded that these statements from the affidavits describe only matters on the mind **[**13]** of another juror during deliberations. *See Tex. R. Civ. P. 327(b)*; *Tex. R. Evid. 606(b)*; *Brandt, 194 S.W.3d at 134*.

2. Evidentiary Hearing

EC and GSI also argue that when an affidavit avers misconduct, the language of *rule 327(a)* requires that the trial court grant an evidentiary hearing. *See Tex. R. Civ. P. 327(a)* ("When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury . . . the court shall hear evidence thereof from the jury or others in open court . . . ."). EC and GSI contend that, in this case, the trial court abused its discretion when it did not hold such a hearing.

In support of this argument, EC and GSI rely on *Sharpless v. Sim*. *See 209 S.W.3d 825, 828 (Tex. App.—Dallas 2006, pet. denied)*. In *Sharpless*, a verdict for the plaintiff was entered in a double fatality driving accident. *Id. at 827*. After the verdict, the parties learned that one of the jurors had conducted her own independent internet research of the defendant's driving record. *Id*. After conducting an evidentiary hearing, the trial court denied the defendant's motion for new trial based upon jury misconduct. *Id*. EC and GSI argue that *Sharpless* demonstrates the necessity of an **[**14]** evidentiary hearing when proof is adduced that a juror improperly conducted research on the internet.

However, the *Sharples* Court did not consider whether an evidentiary hearing on jury misconduct is mandatory or whether internet research constitutes an outside influence because neither party disputed these matters. *See id. at 827-28*. Rather, the *Sharpless* Court conducted an unchallenged hearing and considered only whether the internet research caused injury. *Id*. (citing *Tex. R. Civ. P. 327(a)*; *Golden Eagle Archery, 24 S.W.3d at 372*). Finding none, the court concluded that the trial court did not abuse its discretion when it determined that Sharpless and Southwestern failed to discharge their burden under *rule 327(a)*. *See* *id. at 829*. *Sharpless* is, thus, distinguishable from the present case and provides no support for EC and GSI's evidentiary hearing argument.

Moreover, while we agree with EC and GSI's basic contention that when an affidavit avers jury misconduct the trial court should grant an evidentiary hearing, in this case we have already concluded that the affidavits attached to EC and GSI's motion for new trial provided no evidence of an outside influence. *See* *Tex. R. Civ. P. 327(a)*; **[**15]** *King, 767 S.W.2d at 198-99* (concluding **[*328]** trial court did not err in refusing to consider the juror's testimony concerning jury misconduct which included reading outside newspaper accounts because her affidavit did not raise an outside-influence issue); *see also de* *Damian v. Bell Helicopter Textron, Inc., No. 02-08-00210-CV, 352 S.W.3d 124, 2011 Tex. App. LEXIS 7316, at *91-95* (Tex. App.—Fort Worth Aug. 31, 2011, pet. dism'd) (concluding that ***HN8***[] where affidavits did not raise outside influence, the trial court was not required to receive juror affidavits or testimony); *Davis v. BNSF Ry. Co., No. 10-09-00309-CV, 2010 Tex. App. LEXIS 8201, at *8* (Tex. App.—Waco Oct. 6, 2010, pet. denied) (mem. op.) (holding that affidavits filed in support of a motion for new trial were insufficient to require an evidentiary hearing because they raised "only speculation of possible outside influence"; therefore, the trial court did not err in quashing subpoenas of jurors); *WPS, Inc. v. Enervest Operating, L.L.C., No. 01-06-00759-CV, 2010 Tex. App. LEXIS 4233, at *51-53 (Tex. App.—Houston [1st Dist.] May 28, 2010, pet. denied)* (mem. op. on reh'g) (upholding the striking of juror affidavits regarding juror misconduct under *rule 327(b)* **[**16]** and *rule 606(b)* because the affidavits were "patently inadmissible" which was implicitly acknowledged by WPS in its brief); *Villegas v. State, No. 13-05-371-CR, 2008 Tex. App. LEXIS 1899, at *40-46* (Tex. App.—Corpus Christi Mar. 13, 2008, pet. denied) (mem. op., not designated for publication) (determining that when a juror affidavit failed to establish outside influence, a juror could not testify about what happened during deliberations, and the trial court did not err in striking juror affidavits). Because the affidavits did not aver jury misconduct, the trial court did not err in refusing to consider the affidavits or the testimony of the jurors at a hearing.

3. Summary

Based on the above, the matters set out in the affidavits did not constitute improper outside influences warranting a new trial under Texas law. Because EC and GSI submitted no evidence tending to show juror misconduct, the trial court properly sustained PEI's objections to the affidavits, properly struck the affidavits, and properly denied EC and GSI's request for an evidentiary hearing. The trial court did not abuse its discretion in so concluding and, further, did not abuse its discretion in denying EC and GSI's **[**17]** motion for new trial on that basis. We overrule EC and GSI's first issue.

II. EVIDENTIARY CHALLENGES TO ADVERSE FINDINGS

By their second and third issues, EC and GSI challenge every adverse jury finding, most of which are challenges to the sufficiency of the evidence.

A. Standard of Review for Sufficiency Challenges

HN9[] "When a party attacks the legal sufficiency of an adverse finding on an issue on which [it] has the burden of proof, [that party] must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue." *Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001)* (per curiam). When an appellant attacks the legal sufficiency of an adverse finding on an issue for which it did not have the burden of proof, the appellant must demonstrate that there is no evidence to support the adverse finding. *City of Keller v. Wilson, 168 S.W.3d 802, 810 (Tex. 2005)*; *Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983)*. Such a no-evidence challenge will be sustained only if: (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from **[*329]** giving weight to the only evidence offered to prove a vital **[**18]** fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *City of Keller, 168 S.W.3d at 810*; *King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003)* (quoting *Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997))*. In conducting a legal sufficiency review, we review the evidence presented at trial in the light most favorable to the jury's verdict and indulge every reasonable inference that would support it, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Del Lago Partners, Inc. v. Smith, 307 S.W.3d 762, 770 (Tex. 2010)*; *City of Keller, 168 S.W.3d at 822, 827*. "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller, 168 S.W.3d at 827*.

HN10[] In reviewing a factual-sufficiency challenge to a jury finding on an issue on which the appellant had the burden of proof, the appellant must show that "the adverse finding is against the great weight and preponderance of the evidence." **[**19]** *Dow Chem. Co., 46 S.W.3d at 242*. In reviewing a factual-sufficiency challenge to a jury finding on an issue on which the appellant did not have the burden of proof, we consider and weigh all of the evidence and set aside the verdict only if the evidence that supports the jury finding is so weak as to make the verdict clearly wrong and manifestly unjust. *Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)* (per curiam); *Ins. Network of Tex. v. Kloesel, 266 S.W.3d 456, 469-70 (Tex. App.—Corpus Christi 2008, pet. denied)*; *Bay, Inc. v. Ramos, 139 S.W.3d 322, 329 (Tex. App.—San Antonio 2004, pet. denied)* (en banc). In either type of factual-sufficiency challenge, we must examine both the evidence supporting and that contrary to the judgment. *See Dow Chem. Co., 46 S.W.3d at 242*; *Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989)*. Additionally, the jury is the sole judge of witnesses' credibility, and it may choose to believe one witness over another; a reviewing court may not impose its own opinion to the contrary. *See Golden Eagle Archery, 116 S.W.3d at 761*.

B. EC and GSI's Claims Against PEI

By their second issue, EC and GSI argue that the evidence is legally insufficient to support **[**20]** the jury's adverse findings on the following issues: (1) breach of the License Agreement; (2) common law fraud; (3) statutory fraud; (4) an antitrust violation; and (5) theft of property, a service, or trade secrets.[4] Because EC and **[*330]** GSI asserted these claims against PEI, they had the burden of proof on all related evidentiary issues.

1. Breach of the License Agreement

EC and GSI argue that the evidence is legally insufficient to support the jury's finding that PEI did not fail to comply with the License Agreement. They contend that there is undisputed and conclusive evidence that PEI breached the License Agreement in the following ways: (1) by failing to provide them with certain written information as required by Paragraph 8a of the Licensing Agreement; (2) by first agreeing to allow a monthly distribution of 225,000 copies

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[4] Although EC and GSI title their second issue a "factually insufficient and/or against the overwhelming weight of the evidence" issue, factual sufficiency is not raised in the body of their brief. Rather, the substance of this issue is based only on legal sufficiency principles, and we will review the second issue accordingly. *Compare* ***HN11***[] *Tex. R. App. P. 47.1* ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal."), *and Martinez v. El Paso County, 218 S.W.3d 841, 844 (Tex. App.—El Paso 2007, pet. dism'd)* ("When reviewing a civil matter, an appellate court has no discretion to consider an issue not raised in the appellant's brief."), *with Tex. R. App. P. 38.1(f)* ("The statement of an issue or point will be treated as covering every subsidiary **[**21]** question that is fairly included."), *and Hagberg v. City of Pasadena, 224 S.W.3d 477, 480 (Tex. App.—Houston [1st Dist.] 2007, no pet.)* (providing that even though a specific point may not be recited within a statement of issues presented, that point is not waived if raised within the body of the brief). Nonetheless, to the extent the second issue could be construed as a challenge to the factual sufficiency of the evidence, under the proper standard of review we would further conclude that the adverse findings were not against the great weight and preponderance of the evidence. *See Dow Chem. Co. v. Francis, 46 S.W.3d 237, 242 (Tex. 2001)* (per curiam).

into the U.S. and then unilaterally refusing **[**22]** to allow any more than 39,950 copies for monthly distribution; and (3) by not complying with its contractual obligation of good faith and fair dealing.

a. Internal Memoranda

EC and GSI assert that PEI breached the last sentence of Paragraph 8a of the License Agreement which states, "In the event Licensor does not approve any aspect of the Foreign Edition, Special Issues or Calendar, Licensor [PEI] will advise Licensee [ES and GSI] in what respect any such aspect is unacceptable." EC and GSI complain that PEI breached this provision because it did not provide them with certain written internal memoranda dated December 9, 1996, February 4, 1997, and February 7, 1997—memoranda from Hugh Hefner to *Playboy* executives expressing his general concerns about a Spanish edition of *Playboy* being distributed in the U.S.[5] We disagree.

Paragraph 8a, in its entirety, provides the following:

> Licensee acknowledges that Licensor has an interest in maintaining the worldwide goodwill and recognition of the Trademarks and in being assured that the Foreign Edition, Special Issues, and Calendars correspond as closely as possible in quality, format and content to their American counterparts; and Licensor acknowledges that Licensee has **[**24]** an interest in maintaining a quality that meets its standards and in producing a Foreign Edition, Special Issues and Calendars that meet the needs of the relevant market. For the foregoing reasons, it is agreed that both Licensor, or its authorized representative, and Licensee must approve in writing (by initialing where appropriate) in advance of publication, all aspects of each issue of **[*331]** the Foreign Edition, and each and every Special Issue and Calendar, including but not limited to, all aspects of advertising (including advertisers, products advertised, advertising copy, sales practices and terms), all editorial text (whether originating in the U.S.A., the Territory, or elsewhere, including translations), all photographs and cartoons, all aspects of editorial design and structure (including design, artwork, layout and design and copy lines of the front cover), all aspects of manufacturing and production (including paper, printing and binding), all advertisements, publicity and promotional material regarding the Foreign Edition, Special Issues and Calendars (including advance information to be given to news media) and all aspects of distribution (including the cover price and discount **[**25]** for newsstand sale and subscription prices). In the event Licensor does not approve any aspect of the Foreign Edition, Special Issues or Calendar, Licensor will advise Licensee in what respect any such aspect is unacceptable.

EC and GSI contend that, in addition to Paragraph 8a's required pre-publication, written *approval* of all aspects of each issue, through Paragraph 17 of the License Agreement, Licensor PEI was to provide written notice of its *disapproval* of any such aspect. Paragraph 17 provided that "[a]ll legal notices, consents, and other communications required by the terms of this agreement . . . shall be in writing."

It is undisputed that Paragraph 8a provided for pre-publication, written approval of aspects of each issue or edition. Pursuant to Paragraph 8a, the specific aspects of distribution that required such approval included the cover price, any discounts for newsstand sales, and the subscription price. And, assuming without deciding that the last sentence of Paragraph 8a through Paragraph 17 required PEI to advise EC and GSI, in writing, of any unacceptable aspects, the question becomes, did the evidence establish that the Hugh Hefner written memoranda

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[5] Hugh Hefner sent a December 9, 1996 memo to Christie Hefner, among others, reiterating that he did not want a second language version competing with *Playboy* in the United States and explaining that "[w]ith the acquisition of the Mexican Playboy by a U.S. firm, it is important to make clear that the editorial focus and distribution of this Spanish language version of **[**23]** the magazine remain essentially Mexican." In his February 4, 1997 memo to Henry Marks, after setting out that he had no problem with a direct Spanish translation if they owned the magazine, Heftner continued, "But I have already rejected the idea of a separate Spanish language edition of PLAYBOY in the U.S. as being too confusing. And I am even more opposed to allowing some outside company [to] own and distribute a Spanish edition (Mexican or other) here in the U.S." Finally, Hefner's February 7, 1997 memo sent to Christie Hefner expressed the following: "I think it is naive to assume that distributing 100,000 copies of a Mexican edition of PLAYBOY in the United States won't have some impact on the newsstand sales of the U.S. edition when our own single copy sales are often no more than 500,000."

expressed disapproval **[**26]** of an aspect of the magazine covered by Paragraph 8a, such that PEI was required to provide those memos to EC and GSI.

Although the evidence established that Hugh Hefner expressed his concern about the development of a Spanish language version of *Playboy* to be distributed in the U.S. and that PEI did not provide either EC or GSI with Hefner's written memoranda that addressed his concerns, a reasonable jury could have concluded that the Hefner memoranda did not address any aspect of any issue of the Foreign Edition, Special Issues, or Calendar that was identified in Paragraph 8a. The jury could have rationally concluded that, through these memos, PEI was not disapproving or refusing to approve any specific Paragraph 8a aspect. Thus, a reasonable jury could have concluded that PEI was not required to advise EC and GSI of Hefner's concern by providing them with his memoranda. Rather, the evidence establishes that three issues of the magazine, the October, November, and December 1997 issues, were distributed in the U.S. This evidence supports a determination that PEI approved, for U.S. distribution, all Paragraph 8a aspects of the three issues, including the cover price, the discount for **[**27]** newsstand sale, and the subscription price. After so concluding, the jury could have reasonably determined that PEI did not fail to comply with the License Agreement in this regard. *See* *City of Keller, 168 S.W.3d at 827*.

b. Number of Copies for Distribution in the U.S.

As a second breach-of-contract theory, EC and GSI argue that PEI **[*332]** breached the last sentence of Paragraph1.a(ii) of the License Agreement when it limited *distribution* of each of the three issues of the Foreign Edition to 39,950 copies. Paragraph 1.a.(ii) provides, in relevant part, the following:

> Licensor's approval of such distribution and sale in the United States, if at all, will not occur until at least six (6) months following the legal formation of the joint venture Grupo Siete International, Inc., and if such approval is granted, will not exceed one-hundred-fifty thousand (150,000) copies per issue.

EC and GSI assert that "[w]here, as here, a reasonable construction of this clause is that it allows the monthly distribution of a quantity higher than the actual sale[s] amount of 150,000 copies per month, this [t]rial [c]ourt should have declared that the contract was breached as a matter of law" because PEI approved **[**28]** only 39,950 copies per issue for distribution in the U.S. EC and GSI contend that although this provision may limit sales, it does not limit distribution and PEI should have allowed monthly *distribution* of more than 150,000 issues in order to accomplish an actual *sale* of 150,000 copies.

At EC and GSI's request, the trial court submitted the meaning of this provision to the jury through the following instruction in Question 1A: "The [c]ourt further instructs you that [this] term of the License Agreement is ambiguous, which means that it is susceptible to more than one meaning." It is clear, however, that the jury rejected EC and GSI's suggested construction and resolved ambiguity, if any, against EC and GSI when it found that PEI did not fail to comply with the License Agreement. By so finding, the jury impliedly concluded that this provision expressly allowed PEI to set U.S. sales *and* distribution figures at a number not to exceed 150,000 copies per month, and therefore, PEI did not breach that provision when it formally approved a monthly distribution in the U.S. of 39,950 copies. Thus, we are not persuaded by this argument, especially in light of the fact that the ambiguity instruction **[**29]** was submitted to the jury at EC and GSI's request. *See* *Tittizer v. Union Gas Corp., 171 S.W.3d 857, 862 (Tex. 2005)* (per curiam) (explaining that a party cannot complain on appeal that the trial court took a specific action that the complaining party requested).

EC and GSI also contend that, under this theory of recovery, the evidence is legally insufficient to support this adverse finding as a matter of law. They assert that there is undisputed and conclusive evidence that establishes PEI agreed to allow monthly distribution of 225,000 copies of the Spanish language version of *Playboy* in the U.S. and breached the License Agreement when it only allowed the monthly distribution of 39,950 copies. In support of this argument, EC and GSI point to PEI's approval of the use of a media kit which identified a monthly distribution objective of 225,000 copies.[6] However, we have already determined that the "media kit was not the formal written approval for U.S. distribution required by the License Agreement." *Playboy I, 202 S.W.3d at 259*. Thus, this argument fails under the law of the case doctrine. *See* *Hudson v. Wakefield, 711 S.W.2d 628, 630 (Tex. 1986)*.

In support of their contention that the evidence conclusively establishes that PEI approved a 225,000 distribution figure, EC and GSI also reference testimony provided by Marco Sanchez, Paul Siegel, Randy Hills, and Fernando Peramo, all executives **[*333]** or employees of either PEI or EC during the relevant time period. Our review of the evidence, however, reveals that this referenced testimony is based on PEI's asserted approval of the media kit; therefore, it provides no support. EC and GSI refer us to no evidence, and we find none, that PEI gave written approval for the distribution of 225,000 copies per issue. Rather, reviewing the evidence in the light most favorable to the verdict, the testimony of Marco Sanchez and Hills supports a determination that the only written approval given by PEI was for the distribution of 39,950 copies.

Finally, the jury could have credited favorable testimony provided by Javier Sanchez, an experienced businessman who signed the License Agreement on behalf of EC, and disregarded contrary evidence, if any, that PEI approved the distribution of 225,000 copies. **[**31]** *See* *Del Lago Partners, 307 S.W.3d at 770*; *City of Keller, 168 S.W.3d at 822, 827*. Javier Sanchez testified that he read and understood the agreement; his lawyers also read the agreement and advised him concerning it; and he discussed the meaning of the agreement with PEI representatives. In addition, Javier Sanchez agreed that, going into the agreement, he understood that the distribution and sale of the Spanish-language version of the magazine in any country other than Mexico would be subject to PEI's prior written approval that could be withdrawn once given on notice from PEI and that such approval, if any, would not exceed 150,000 copies per issue-in other words, the maximum amount of copies per issue would be 150,000. The jury could have reasonably concluded that Javier Sanchez understood that the License Agreement set out a maximum of 150,000 copies per issue for sale *and* for distribution in the U.S. and that the understanding or agreement did not set the lower or actual limit that PEI would approve. And after so concluding, the jury could have reasonably determined that PEI did not fail to comply with the License Agreement in this regard. *See* *City of Keller, 168 S.W.3d at 827*.

c. [**32] Good Faith and Fair Dealing

As a third theory of recovery on their breach-of-contract claim, EC and GSI argue that PEI did not act in good faith and failed to cooperate or to deal fairly with them.[7] EC and GSI contend that the following evidence conclusively established this breach: (1) certain internal memoranda were not turned over or discussed with EC and GSI; (2) PEI interfered with EC and GSI's attempt to distribute the magazines within the U.S.; and (3) after EC and GSI received a default letter and offered to pay PEI $50,000 in exchange for PEI's agreement to sit down in good faith and cooperate with them, PEI refused to do so, instead choosing to terminate the License Agreement. We disagree.

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[6] Fernando Peramo, EC and GSI's editor-in-chief **[**30]** for the Mexican *Playboy* magazine, described the media kit as a "presentation of what we send advertisers."

[7] As part of Question 1A, the failure-to-comply question, the trial court included the following instruction:

> The [c]ourt instructs you the License Agreement includes an implied duty of good faith and fair dealing. This ensures parties do not take advantage in a way that could not have been contemplated at the time the contract was drafted or do anything that would destroy the other party's right to receive the benefit of the contract. Accordingly, a party with absolute discretion under a contract **[**33]** must exercise such discretion in a manner consistent with the reasonable expectations of the other party. Whenever the cooperation of one party is necessary for the other party's performance, there is an implied condition that such cooperation will be given.

HN12[] Under Illinois law, parties to a contract "are entitled to enforce the terms of a **[*334]** contract to the letter and an implied covenant of good faith cannot overrule or modify the express terms of a contract."[8] *N. Trust Co. v. VIII S. Mich. Assocs., 276 Ill. App. 3d 355, 657 N.E.2d 1095, 1104, 212 Ill. Dec. 750 (Ill. App. Ct. 1995)*; *see* *St. Mary's Hosp. v. Health Pers. Options Corp., 309 Ill. App. 3d 464, 721 N.E.2d 1213, 1217, 242 Ill. Dec. 682 (Ill. App. Ct. 1999)*; *Harrison v. Sears, Roebuck & Co., 189 Ill. App. 3d 980, 546 N.E.2d 248, 256, 137 Ill. Dec. 494 (Ill. App. Ct. 1989)*; *see also* *Resolution Trust Corp. v. Holtzman, 248 Ill. App. 3d 105, 618 N.E.2d 418, 423-24, 187 Ill. Dec. 827 (Ill. App. Ct. 1993)* (explaining when a mortgage contract gave the lender a series of options to be exercised at its sole discretion, the duty of good faith and fair dealing could not negate the lender's right to choose and exercise those options). We have already concluded that PEI was exercising its rights under the terms of its contract with EC and GSI when it did not disclose its internal memoranda and when **[**34]** it limited the distribution of monthly copies of the magazine. In addition, the evidence establishes that EC and GSI's $50,000 offer to pay was approximately half of what EC and GSI were contractually required to pay, and the License Agreement expressly gave PEI the right to terminate for non-payment. Therefore, the jury could have reasonably concluded that PEI was exercising its contractual rights, which cannot be overruled or modified by an implied covenant of good faith, and, therefore, did not fail to comply with the License Agreement in this regard. *See* *N. Trust Co., 657 N.E.2d at 1104*; *see also* *City of Keller, 168 S.W.3d at 827*; *State Nat'l Bank v. Academia, Inc., 802 S.W.2d 282, 293 (Tex. App.—Corpus Christi 1990, writ denied)* (applying Illinois law).

d. Summary

Reviewing the evidence presented at trial in the light most favorable to the jury's verdict and indulging every reasonable inference that would support it, we conclude that the evidence is legally sufficient to support the jury's adverse finding on all three breach-of-contract theories of recovery set out above. *See* *Del Lago Partners, Inc., 307 S.W.3d at 770*; *City of Keller, 168 S.W.3d at 822, 827*. The evidence would enable reasonable and fair-minded people to reach the verdict under review. *See* *City of Keller, 168 S.W.3d at 827*.

2. Fraud

EC and GSI also contend that the evidence is legally insufficient to support the jury's adverse fraud findings. They argue that the undisputed evidence conclusively established that PEI committed common law fraud and statutory fraud against them.

a. Common Law Fraud

The jury answered "No" to Question 2A, "Did [PEI] commit fraud against [EC or GSI]?" For this question, the trial court instructed the jury that fraud occurs when,

> a. a party fails to disclose a material fact within the knowledge of that party,
> b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth,
>
> **[*335]** c. the party **[**36]** intends to induce the other party to take some action by failing to disclose the fact, and
> d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

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[8] The trial court applied Illinois law to the License Agreement based on a choice-of-law provision contained in that agreement. The trial court also ruled that a duty of good faith and fair dealing existed under Illinois law. Because PEI contends that the trial court improperly imposed a duty of good faith in this case, for the purposes of this analysis we will only assume, without deciding, that such a duty exists under Illinois **[**35]** law.

Based on this instruction, in order to recover on this common law fraud claim, EC and GSI had to establish not only failure to disclose, but also that they were ignorant of the undisclosed facts and did not have an equal opportunity to discover the truth, that PEI intended to induce them to take an action based on the non-disclosure, and that they suffered injury as a result of the non-disclosure. On appeal, EC and GSI have not challenged the jury finding with respect to all elements. Because ***HN13***[] we must affirm the take-nothing judgment on EC and GSI's common law fraud claim unless the evidence conclusively establishes all elements of the fraud claim and because EC and GSI, the parties that had the burden of proof, have not challenged the jury finding with respect to every element of that claim, their argument that the take-nothing judgment on their fraud claim must be reversed fails. *See* *Dow Chem. Co., 46 S.W.3d at 241*; *Rich v. Olah, 274 S.W.3d 878, 886-88 (Tex. App.—Dallas 2008, no pet.)*.

b. Statutory [37] Fraud**

The jury also answered, "No," to the statutory fraud Questions 3A, 4A, and 5A, "Did [PEI] commit statutory fraud as defined [in the respective questions] against [EC and GSI]?" On appeal, EC and GSI assert that PEI committed statutory fraud because,

> PEI never told [EC and GSI] about the true extent of [Hugh Hefner's] objections and concerns. The internal memos from Hugh Hefner, referred to above, make reference to the fact that such concerns were "previously expressed," within the PEI organization. In addition, multiple other memos, such as ones from Dick Rosenzweig, the Executive Assistant to Hugh Hefner and member of PEI's Board of Directors, reveal the true depth of Mr. Hefner's concerns.

EC and GSI argue that PEI had a legal duty to disclose this information.

However, none of the statutory fraud jury questions involve non-disclosure. Question 3A asked about false representations of a past or existing material fact that was made to and relied on by EC or GSI in entering into a contract; Question 4A asked about a false material promise to do an act with the intent of not relying on it that was made to relied on by EC or GSI in entering into a contract; and Question 5A asked about **[**38]** PEI's actual awareness of the falsity of a promise made by another person, its failure to disclose that false representation or promise, and a benefit received from it. Thus, all three questions required EC and GSI to prove a false representation or promise. On appeal, their statutory fraud arguments do not identify any false representations or promises that PEI allegedly made. Furthermore, as with the common law fraud analysis, because ***HN14***[] we must affirm the take-nothing judgment on this statutory fraud claim unless the evidence conclusively establishes all elements of the claim and because EC and GSI have not challenged the jury finding with respect to all elements of that claim, their argument fails. *See* *Dow Chem. Co., 46 S.W.3d at 241*, *Rich, 274 S.W.3d at 886-88*.

4. Antitrust Violation

EC and GSI challenge the legal sufficiency of the evidence to support the jury's adverse antitrust finding that PEI did not engage in a contract, combination, or conspiracy in restraint of trade or commerce that harmed EC or GSI. More specifically, EC and GSI assert the following:

> **[*336]** [T]he undisputed evidence conclusively established that PEI stole EC's and GSI's money, business, License Agreement, goodwill, **[**39]** customer lists, advertisers, distributors, customers, vendors, and subscribers by duping EC and GSI into believing that the export of the Foreign Edition was a genuine project, when in reality this project would and could not go forward unless and until PEI owned it for itself. In furtherance of this theft, PEI allowed three issues of the Foreign Export to enter the United States in the fall of 1997, at a substandard number of distributed copies, knowing full well that EC's and GSI's business would not be viable at these numbers, but in an effort to test the market for consumer interest and potential for cannibalization of U[.]S[.] Playboy so that PEI could then force EC and GSI out of business and steal this project for PEI. Additionally, the undisputed evidence conclusively established that PEI engaged in the following conduct: (1) Hugh Hefner's and/or PEI's actions to own this project; (2) Hugh Hefner's and/or PEI's attempts to monopolize the marketplace in the USA and prevent competition with U[.]S[.] Playboy by EC and

> GSI; (3) PEI's internal plan to force EC and GSI into a material default under the License Agreement; (4) PEI's internal plan to forcibly take over one or both of **[**40]** EC and GSI over their objection, so that PEI could own the project; (5) PEI's internal plan to sell Foreign Editions for direct PEI profit; and (6) PEI's internal plan to pursue this project as either a 100% PEI owned project or at least one in which PEI controlled the project and had a majority and/or substantial ownership interest in the project.[ ]

In support of this argument, EC and GSI rely on ten PEI memoranda that were admitted as trial exhibits. EC and GSI assert that "[t]hese documents evidence not only an agreement by and amongst employees of PEI, but also with Hugh Hefner, the majority stockholder of the entity, as well as persons outside the company." Without further citation to the reporter's record, EC and GSI contend that,

> [i]n addition to the document[s] mentioned above, there is undisputed and conclusive evidence of an agreement involving Christie Hefner and/or PEI and/or Hugh Hefner and/or Laura de Laviada and/or others, which demonstrates that there was an agreement between PEI and a third party to completely disrupt the contract that the parties had entered into.

The following antitrust question was submitted: "Did [PEI] engage in a contract, combination, or conspiracy **[**41]** in restraint of trade or commerce that harmed [EC or GSI]?" *See* *Tex. Bus. & Com. Code Ann. § 15.05(a)* (West 2011).[9] The charge included no instructions or definitions.

At the charge conference, PEI requested the following instruction, which read in relevant part as follows:

> To establish their [antitrust violation] claim, EC and GSI must prove each of the following elements:
>
> > 1. That Playboy entered an agreement with another corporation or with a person who was not an officer, director, agent, or employee of Playboy . . . .

PEI correctly argued that the charge was defective because it submitted a claim for **[*337]** agreement in restraint of trade but omitted the required elements of that claim, including that PEI entered into an agreement with another person—another corporation or a person who is not an officer, director, agent, or employee of PEI. The trial court refused PEI's request.

HN15[] "The Texas Free Enterprise and Antitrust Act [TFEAA] provides that '"every contract, **[**42]** combination, or conspiracy in restraint of trade is unlawful."' *Levinthal v. Kelsey-Seybold Clinic, P.A., 902 S.W.2d 508, 511 (Tex. App.—Houston [1st Dist.] 1994, no writ)* (quoting *Tex. Bus. & Com. Code Ann. § 15.05(a)*); *see also* *Puentes v. Spohn Health Network, No. 13-08-00100-CV, 2009 Tex. App. LEXIS 4131, at *13* (Tex. App.—Corpus Christi June 11, 2009, pet. denied) (mem. op.). In order to establish a violation of *section 15.05 of the TFEAA*, EC and GSI were "required to prove a concerted action by two or more persons." *Levinthal, 902 S.W.2d at 511* (citing *Red Wing Shoe Co., Inc. v. Shearer's Inc., 769 S.W.2d 339, 344 (Tex. App.—Houston [1st Dist.] 1989, no writ))*. "To show a concerted action by two or more persons to illegally restrain trade, a plaintiff faces the threshold requirement of identifying a co-conspirator." *Levinthal, 902 S.W.2d at 511* (citing *Red Wing Shoe Co., 769 S.W.2d at 345*).

Moreover, "[a] company cannot conspire with its own employees as a matter of law." *Red Wing Shoe Co., 769 S.W.2d at 345*; *see* *Jack Russell Terrier Network of N. Ca. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1034-35 (9th Cir. 2005)* (explaining that under the federal act, co-conspirators must be **[**43]** "actual or potential competitors" and "separate entities pursuing different economic goals" with "divergent economic interests"); *Arnold Pontiac-GMC, Inc. v. Gen. Motors Corp., 786 F.2d 564, 574 (3d Cir. 1986)* ("[T]here is no conspiracy or concerted action for the purpose of *Section 1 of the Sherman Act* when a corporation merely acts in concert with its own employees[.]"); *Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 396 (5th Cir. 1976)* ("it is well-settled that the Sherman Act's conspiracy or agreement requirement is not met by a 'conspiracy' between a corporation and its corporate officer[.]"). And one cannot sustain an action under *subsection 15.05(a) of the TFEAA* regarding conspiracies or combinations in restraint of trade when he has not provided any evidence that the defendant engaged in any concerted action with any other independent entity. *See* *Copperweld Corp. v. Independence Tube Corp., 467 U.S.*

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[9] *Section 15.05(a)* of the Texas Free Enterprise and Antitrust Act "adopted the language of the federal Sherman Antitrust Act." *Red Wing Shoe Co., Inc. v. Shearer's Inc., 769 S.W.2d 339, 343 (Tex. App—Houston [1st Dist.] 1989, no writ)*.

752, 761-62, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) (noting that in order to recover under the federal act, a plaintiff must assert concerted action between two or more entities); Red Wing Shoe Co., 769 S.W.2d at 345; *see also* Puentes, No. 13-08-00100-CV, 2009 Tex. App. LEXIS 4131, at *13 ("[A] violation **[**44]** of subsection 15.05(a) cannot be based on concerted action between a corporation and its wholly-owned subsidiary . . . .").

Now, on appeal, because PEI objected to the charge as defective on the basis that it omitted a required element of an antitrust claim—that PEI entered into an agreement with another person—we measure the sufficiency of the evidence not by the charge but by the ***antitrust law*** set out above. *See* Osterberg v. Peca, 12 S.W.3d 31, 55 (Tex. 2000) (providing that when a complaining party has not alerted the trial court of an alleged defect by objecting to the court's charge, it is the charge, and not some other, unidentified law, against which we measure sufficiency of the evidence); *see also* Equistar Chem., L.P. v. Dresser-Rand Co., 240 S.W.3d 864, 868 (Tex. 2007) (concluding that an argument that the charge submitted an improper measure of **[*338]** damages was waived by failure to present to trial court); Gen. Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 920 (Tex. 1993) (holding that the failure to object to jury questions based on state law waived assertion on appeal that federal maritime law controlled). Therefore, EC and GSI must show that the evidence establishes that PEI **[**45]** entered into a conspiracy, combination, or conspiracy with a separate and independent business or person, *see* Levinthal, 902 S.W.2d at 511, and based on our review of the record, EC and GSI have not done so.

Much of EC and GSI's antitrust argument focuses on various alleged internal plans of PEI. The memoranda referenced by EC and GSI discuss PEI's position regarding distribution of the Spanish edition of *Playboy* in the U.S., its evolving relationship with EC and GSI, and viable options that would allow for the continued publication of a Spanish language magazine. The memoranda, however, do not conclusively establish that PEI engaged in a contract, combination, or conspiracy in restraint of trade or commerce against EC and GSI with another person or business, as they assert. Rather, with only one exception, the referenced memoranda establish that PEI was reviewing the venture and was planning internally. ***HN16***[] An internal plan is not a contract, combination, or conspiracy with a separate and independent business or person, and evidence of an agreement between or among PEI's employees, agents, officers, directors, and/or stockholders does not conclusively establish the agreement element of **[**46]** an antitrust claim.

Additionally, although EC and GSI assert that the evidence establishes that there existed an agreement between PEI and other persons outside the company, our review of the record reveals that the only unaffiliated person with whom PEI communicated was Laura de Laviada, a Mexican business woman. Marks identified her as a possible successor to EC and GSI; however, there is nothing in the record that establishes PEI reached an agreement with her. Christie Hefner testified that while she might have communicated in writing with de Laviada about the matter, she did not think that she had met with her and agreed that she had never made a deal with her in Mexico. Instead, Christie Hefner testified that after the contract was terminated with EC and GSI, it took five years to find a new licensee to relaunch the publications in Mexico and the new licensee was not de Laviada.

Therefore, assuming without deciding that this is an antitrust claim and not just a claim for breach of contract as PEI urges,[10] reviewing the evidence presented at trial in the light most favorable to the jury's verdict and indulging every reasonable inference that would support it, we conclude that the **[**47]** evidence is legally sufficient to support the jury's adverse finding on the antitrust claim. *See* Del Lago Partners, Inc., 307 S.W.3d at 770; City of Keller, 168 S.W.3d at 822, 827. The evidence would enable reasonable and fair-minded people to reach the verdict under review. *See* City of Keller, 168 S.W.3d at 827.

5. Theft of Property, Service, or Trade Secrets

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[10] PEI also asserts that there are other bases to deny recovery on this antitrust claim, including (1) EC and GSI do not have standing; (2) they failed to establish the relevant product and geographic market; and (3) they failed to establish any injury to their business in Texas. Because of the disposition of this issue, however, we need not address PEI's remaining responsive assertions. *See* Tex. R. App. P. 47.1.

[*339] Finally, EC and GSI contend that the undisputed evidence conclusively established that PEI committed theft of property, theft of a service, or theft of trade secrets from both EC and GSI. After generally asserting that the evidence conclusively establishes that PEI committed theft of property, a service, and trade secrets, EC and GSI repeat, for each asserted theft, the contentions and arguments made in their antitrust issue. **[**48]** They also rely on the same evidence. EC and GSI do not, however, discuss the elements of their theft claims, elements that were detailed in the jury charge. *See* ***HN17***[] *Tex. R. App. P. 47.1* ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal."); *Martinez v. El Paso County, 218 S.W.3d 841, 844 (Tex. App.—El Paso 2007, pet. dism'd)* ("When reviewing a civil matter, an appellate court has no discretion to consider an issue not raised in the appellant's brief, even if the ends of justice so require."). Neither do they argue why the evidence is insufficient to support the jury's finding with respect to those elements. *See* *Tex. R. App. P. 47.1*; *Martinez, 218 S.W.3d at 844*. Therefore, EC and GSI's argument that the take-nothing judgment on their theft claims must be reversed fails. *See* *Tex. R. App. P. 47.1*; *Martinez, 218 S.W.3d at 844*; *see also* *Dow Chem. Co., 46 S.W.3d at 241*; *Rich, 274 S.W.3d at 886-88*.

6. Summary

Based on the above analysis, we overrule EC and GSI's second issue challenging the jury's adverse findings on their claims against PEI. **B. PEI's COUNTERCLAIMS**

In their **[**49]** third issue, EC and GSI challenge all of the jury's findings on PEI's counterclaims.

1. Breach-of-Contract Counterclaims

EC and GSI first address the jury's findings in favor of PEI on its breach-of-contract counterclaims. Specifically, EC and GSI challenge the findings that they failed to comply with the agreements and that their failures to comply were not excused. They also appear to assert charge error when they argue that PEI failed to use or rely on Illinois law in their breach-of-contract jury questions.

a. Sufficiency of the Evidence to Establish Breach

EC and GSI challenge the sufficiency of the evidence to support the jury's findings that EC and GSI breached the License Agreement and the Renegotiated Payment Plan Agreement—issues for which EC and GSI did not have the burden of proof.[11] However, the evidence establishes that the License Agreement entitled PEI to $450,000 in guaranteed royalties over the term of the License Agreement, plus percentage royalties. This included a guaranteed 1997 royalty of $100,000 to be paid quarterly. It is undisputed that as of November 1997 EC and GSI had not made their first three quarterly payments for that year and that the fourth quarterly **[**50]** payment was due. EC and GSI also owed PEI $25,000 in other payments related to certain unaudited rebillables.

The License Agreement provided that the "failure of [EC] . . . to make any payment **[*340]** required hereunder within five (5) days after notice from [PEI] that . . . payment is past due" was an event authorizing termination. On November 14, 1997, however, the parties signed the Renegotiated Payment Plan Agreement, providing that EC could have until December 18, 1997 to pay $100,000 of the overdue amount and until February 28, 1998 to pay the remaining $25,000. Even with this extension, the evidence shows that EC did not make the payments as required. PEI provided EC with the required notice and an opportunity to cure. After EC failed to cure, PEI terminated the License Agreement.

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[11] Question 15 asked whether EC and/or GSI failed to comply with the License Agreement, and Question 18 asked whether EC and/or GSI failed to comply with the Renegotiated Payment Plan Agreement. To each question, the jury answered "Yes" for EC and "Yes" for GSI.

Based on our review of the evidence under the appropriate standard, the evidence is sufficient to support the jury's findings that EC and GSI breached **[**51]** the License Agreement and the Renegotiated Payment Plan Agreement. *See City of Keller, 168 S.W.3d at 810*; *Croucher, 660 S.W.2d at 58*. It is legally sufficient because there is not a complete absence of evidence, but rather more than a scintilla of evidence, properly admitted, to support the findings and because the evidence does not establish conclusively the opposite of such findings, as urged by EC and GSI. *See City of Keller, 168 S.W.3d at 810*; *King Ranch, Inc., 118 S.W.3d at 751*. Furthermore, we conclude that the evidence is factually sufficient because it is not so weak as to make the verdict clearly wrong and manifestly unjust. *See Cain, 709 S.W.2d at 176*; *Ins. Network of Tex., 266 S.W.3d at 469-70*; *Bay, Inc., 139 S.W.3d at 329*.

b. EC and GSI's Excuse Defense

EC and GSI also challenge the jury's refusal to find that their breaches were excused—an affirmative defense for which EC and GSI had the burden of proof.[12] *See Trencor, Inc. v. Cornech Mach. Co., 115 S.W.3d 145, 153 (Tex. App.—Fort Worth 2003, pet. denied)* (citing ***HN18***[] *Tex. R. Civ. P. 94*) (setting out that excuse is an affirmative defense upon which the defendant has the burden of proof). Although the jury questions instructed **[**52]** the jury that EC and GSI's actions may be excused for PEI's prior breach, estoppel, or ratification, EC and GSI complain on appeal only of the jury's refusal to find prior breach—PEI's non-disclosure of the three Hefner internal memoranda—as an excuse. However, as set out above, there was sufficient evidence to support the jury's finding that PEI did not commit a breach of contract by keeping its internal memos internal. There likewise is evidence to support the jury's finding that EC and GSI's breaches of the License Agreement and the Renegotiated Payment Plan Agreement were not excused by any prior contractual breach on PEI's part. Thus, we conclude that the evidence is both legally and factually sufficient because the jury's answers are fully supported by the evidence that would enable reasonable and fair-minded people to reach the verdict under review, *see City of Keller, 168 S.W.3d at 827*, and those adverse findings are not against the great weight of the evidence. *See Dow Chem. Co., 46 S.W.3d at 242*.

c. Illinois Law

EC and GSI contend that PEI intentionally omitted any reference to Illinois law in their breach-of-contract jury questions and, thereby, eradicated any entitlement it had to the jury's affirmative findings of breach. EC and GSI did not, however, **[*341]** object to the jury questions on the ground that they were allegedly being submitted under the wrong state's law. And they did not request the submission of any jury instructions relating to Illinois law to accompany the questions concerning PEI's breach-of-contract counterclaims. As a result, EC and GSI have waived any error on this basis. *See* ***HN19***[] *Tex. R. Civ. P. 274* ("A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections."); *Jarrin v. Sam White Oldsmobile Co., 929 S.W.2d 21, 25 (Tex. App.—Houston [1st Dist.] 1996, writ denied)* (***HN20***[] "To complain of the trial court's omission of a requested instruction on appeal, **[**54]** a party is obliged to make a written request to the trial court . . . .").

d. Damage Award

Finally, EC and GSI argue that the evidence is insufficient to support the jury's awards of $312,500 and $48,750 in damages on PEI's breach-of-contract counterclaims. We are not persuaded by this argument because it is based on allegations which we have already concluded are not supported by the record—that the evidence demonstrates

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[12] Question 16 asked if EC and/or GSI's failure to comply with the License Agreement was excused, and Question 19 asked if EC and/or GSI's failure to comply with the Renegotiated Payment **[**53]** Plan Agreement was excused. To each question, the jury answered "No" for EC and "No" for GSI.

that neither EC nor GSI breached the agreements, that PEI submitted its breach of contract claim without reference to Illinois law, and that the evidence demonstrates that the breaches were legally excused. Therefore, we need not address this contention further. *See Tex. R. App. P. 47.1*.

2. Fraud Counterclaims

EC and GSI also contend that all findings against them on PEI's fraud claims were not supported by sufficient evidence. However, PEI elected to recover not on its fraud claims but on its breach of contract claims which we have concluded are supported by the evidence. We decline to address appellant's second issue as it is not dispositive to this appeal. *See id*.

3. Attorneys' Fees

Finally, EC and GSI challenge the jury's award of attorneys' fees in the amount of $1,680,000 **[**55]** and $500,000 contingent appellate fees. They first argue that PEI is not entitled to recover attorneys' fees, asserting that Illinois law precludes such an award. Relying on *Brundidge v. Glandale Fed. Bank* and *Hamer v. Kirk*, EC and GSI acknowledge that Illinois law permits the recovery of attorneys' fees where an agreement between the parties allows the successful litigant to recover attorneys' fees and the expenses of suit. *See Brundidge, 168 Ill. 2d 235, 659 N.E.2d 909, 911, 213 Ill. Dec. 563 (1995)*; *Hamer, 64 Ill. 2d 434, 356 N.E. 2d 524, 526, 1 Ill. Dec. 336 (1976)*. Here, the License Agreement expressly authorizes the recovery of attorneys' fees and litigation costs. Thus, this argument fails.

EC and GSI further argue that the award should be disregarded because PEI failed to introduce evidence of attorneys' fees incurred solely in connection with the prosecution of the breach of contract claims, and because PEI brought both tort claims and contract claims, this failure to segregate fees is fatal to any right to recover fees. *See Varner v. Cardenas, 218 S.W.3d 68, 69 (Tex. 2007)*. However, EC and GSI waived any objection to any failure to segregate by failing to object to the attorneys' fees jury question on the ground that PEI had not segregated **[**56]** its attorneys' fees. ***HN21***[] Where "[n]o objection [is] made based on the failure to segregate . . . any error in failing to segregate the fees [is] waived, and the trial court [can] only disregard the jury finding if it [is] unsupported by the evidence or **[*342]** [is] immaterial." *Estate of Montague v. Nat'l Loan Investors, L.P., 70 S.W.3d 242, 250 (Tex. App.—San Antonio 2001, pet. denied)*; *see also* *Petroleum Solutions, Inc. v. Head, No. 13-09-00204-CV, 2011 Tex. App. LEXIS 3289, at *147* (Tex. App.—Corpus Christi Apr. 29, 2011, pet. filed) (mem. op.) (explaining that where the appellant "did not object to the segregation of [appellee's] attorney's fees and expenses, . . . [appellant's] segregation contention was waived"). In *Montague*, the court of appeals upheld the jury's attorneys' fee award where there had been no objection to the failure to segregate, and where, as here, the jury awarded less than the total amount of attorneys' fees sought. *See 70 S.W.3d at 250*.

Finally, EC and GSI also assert that the fees should be disregarded because the evidence conclusively demonstrated that neither EC nor GSI breached either the License Agreement or the Renegotiated Payment Plan Agreement and, if there was **[**57]** any breach, it was excused as a matter of law. We have already decided these evidentiary issues against EC and GSI and, therefore, need not address them as a basis for their attorneys' fees argument. *See Tex. R. App. P. 47.1*.

4. Summary

Based on the above analysis, we overrule EC and GSI's third issue challenging the jury's findings in favor of PEI on PEI's counterclaims.

III. Conclusion

We affirm the judgment of the trial court.

NELDA V. RODRIGUEZ

Justice

Delivered and filed the 12th

day of January, 2012.

End of Document

Messner v. Northshore Univ. HealthSystem

United States Court of Appeals for the Seventh Circuit

February 8, 2011, Argued; January 13, 2012, Decided

No. 10-2514

Reporter

669 F.3d 802 *; 2012 U.S. App. LEXIS 731 **; 2012-1 Trade Cas. (CCH) P77,763; 2012 WL 129991

STEVEN MESSNER, et al., Plaintiffs-Appellants, v. NORTHSHORE UNIVERSITY HEALTHSYSTEM, Defendant-Appellee.

Subsequent History: Rehearing denied by *Messner v. Northshore Univ. Healthsystem, 2012 U.S. App. LEXIS 4778 (7th Cir. Ill., Feb. 28, 2012)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 07-cv-04446—Joan Humphrey Lefkow, Judge.

In re Evanston Northwestern Healthcare Corp. Antitrust Litig., 268 F.R.D. 56, 2010 U.S. Dist. LEXIS 36488 (N.D. Ill., 2010)

Disposition: The district court's order denying plaintiffs' motion for class certification was vacated and the case was remanded for further proceedings.

Core Terms

class certification, increased price, prices, district court, antitrust, merger, predominance, class member, methodology, plaintiffs', certification, proposed class, market power, merits, contracts, insurers, non-uniform, percent, questions, harmed, damages, post-merger, proceedings, argues, denial of class certification, common question, Clayton Act, overcharged, increases, expert testimony

LexisNexis® Headnotes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN1[] **Prerequisites for Class Action, Predominance**

Under *Fed. R. Civ. P. 23(b)(3)*, a class may be certified only if questions of law and fact common to members of the class predominate over questions affecting only individual members of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN2[] **Class Actions, Prerequisites for Class Action**

To be certified, a proposed class must satisfy the requirements of *Fed. R. Civ. P. 23(a)*, as well as one of the three alternatives in *Rule 23(b)*. As a threshold matter, a proposed class must always meet the *Rule 23(a)* requirements of numerosity, typicality, commonality, and adequacy of representation. When certification is sought under *Rule 23(b)(3)*, proponents of the class must also show: (1) that the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual class members; and (2) that a class action is superior to other available methods of resolving the controversy.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Burdens of Proof > Preponderance of Evidence

HN3[] **Class Actions, Certification of Classes**

In conducting the *Fed. R. Civ. P. 23* analysis, the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits. On issues affecting class certification, however, a court may not simply assume the truth of the matters as asserted by the plaintiff. If there are material factual disputes, the court must receive evidence and resolve the disputes before deciding whether to certify the class. Plaintiffs bear the burden of showing that a proposed class satisfies the *Rule 23* requirements, but they need not make that showing to a degree of absolute certainty. It is sufficient if each disputed requirement has been proven by a preponderance of evidence.

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

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

HN4[] **Standards of Review, Abuse of Discretion**

An appellate court reviews the denial of plaintiffs' motion for class certification for an abuse of discretion. If, however, the district court bases its discretionary decision on an erroneous view of the law or a clearly erroneous assessment of the evidence, then it has necessarily abused its discretion.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN5[] **Expert Witnesses, Daubert Standard**

Under *Fed. R. Evid. 702* and Daubert, expert testimony is admissible only if (1) the expert testifies to valid technical, scientific, or other specialized knowledge; and (2) that testimony will assist the trier of fact.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses

HN6[] **Class Actions, Certification of Classes**

When an expert's report or testimony is critical to class certification, a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN7[] **Class Actions, Appellate Review**

If a district court has doubts about whether an expert's opinions may be critical for a class certification decision, the court should make an explicit Daubert ruling. An erroneous Daubert ruling excluding non-critical expert testimony would result, at worst, in the exclusion of expert testimony that did not matter. Failure to conduct such an analysis when necessary, however, would mean that the unreliable testimony remains in the record, a result that could easily lead to reversal on appeal.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN8[] **Class Actions, Certification of Classes**

A district court cannot merely leave open the questions of what portions of an expert's testimony it may have decided (or will decide) to exclude in ruling on a class certification. Those tough questions must be faced and squarely decided.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN9[] **Class Actions, Certification of Classes**

Whenever an expert's report or testimony is critical to a class certification decision, a district court must rule conclusively on a challenge to the expert's qualifications or opinions before ruling on class certification, without regard to whether the district court ultimately grants or denies that motion.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN10[] **Class Actions, Certification of Classes**

Fed. R. Evid. 702 applies to plaintiffs and defendants alike, regardless of which side bears the burden of proof. The fact that a defendant is not required to present evidence to defeat class certification does not give that defendant license to offer irrelevant and unreliable evidence. A Daubert hearing is necessary only if the witness's opinion is "critical" to class certification. That requirement is not met if the court decides the motion for class certification on grounds not addressed by the witness.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Antitrust & Trade Law > Clayton Act > General Overview

HN11[] Regulated Practices, Private Actions

Fed. R. Civ. P. 23(b)(3) permits class certification only if the questions of law or fact common to class members "pre-dominate" over questions that are individual to members of the class. There is no mathematical or mechanical test for evaluating predominance. The United States Supreme Court has discussed predominance in broad terms, explaining that the Rule 23(b)(3) inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, with the purpose being to determine whether a proposed class is sufficiently cohesive to warrant adjudication by representation. While similar to Rule 23(a)'s requirements for typicality and commonality, the predominance criterion is far more demanding. Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. Careful application of Rule 23 is necessary in antitrust cases, as in all cases, and in antitrust cases, Rule 23, when applied rigorously, will frequently lead to certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN12[] Prerequisites for Class Action, Predominance

Fed. R. Civ. P. 23(b)(3)'s predominance requirement is satisfied when common questions represent a significant aspect of a case and can be resolved for all members of a class in a single adjudication. Or, to put it another way, common questions can predominate if a common nucleus of operative facts and issues underlies the claims brought by the proposed class. If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question. Individual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

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

HN13[] Clayton Act, Claims

Analysis of predominance under Fed. R. Civ. P. 23(b)(3) begins, of course, with the elements of the underlying cause of action. Section 4 of the Clayton Act, 15 U.S.C.S. § 15, requires plaintiffs to prove: (1) that the defendant violated federal ***antitrust law***; and (2) that the antitrust violation caused them some injury. Plaintiffs also must show damages, but individual proof of this element of a claim under the Clayton Act is not an obstacle to a showing of predominance. It is well established that the presence of individualized questions regarding damages does not prevent certification under *Rule 23(b)(3)*.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN14[] **Clayton Act, Claims**

Under the proper standard for class certification in an antitrust action, plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, but only to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN15[] **Clayton Act, Claims**

The ability to use common evidence and common methodology to prove a class's claims is sufficient to support a finding of predominance on the issue of antitrust impact for certification under *Fed. R. Civ. P. 23(b)(3)*.

Antitrust & Trade Law > Clayton Act > Claims

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

HN16[] **Clayton Act, Claims**

The ability of a direct purchaser to pass on higher costs to others does not undermine its ability to sue under the Clayton Act.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN17[] **Class Actions, Certification of Classes**

A class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification. A court may not decline to certify a class merely because it believes the class's claims will fail on the merits.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN18[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(c)(1) requires ruling on class certification at an early practicable time.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN19[] Class Actions, Certification of Classes

The procedural protections available for early judicial evaluations of the merits -- such as the assumption under Fed. R. Civ. P. 12(b)(6) that allegations in the complaint are true and the Fed. R. Civ. P. 56 requirement to give the non-moving party the benefit of conflicting evidence -- are not available under Fed. R. Civ. P. 23.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN20[] Class Actions, Certification of Classes

A court may take a peek at the merits before certifying a class, but the peek must be limited to those aspects of the merits that affect the decisions essential under Fed. R. Civ. P. 23.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN21[] Class Actions, Certification of Classes

If a proposed class consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits. If, however, a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN22[] Class Actions, Certification of Classes

A class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant. There is no precise measure for "a great many." Such determinations are a matter of degree, and will turn on the facts as they appear from case to case.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN23[] **Class Actions, Certification of Classes**

The problem posed by class members whose claims may fail on the merits for individual reasons is the obverse of a different problem with class definition: the problem of the "fail-safe" class: one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim. Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment. Defining a class so as to avoid, on one hand, being overinclusive and, on the other hand, the fail-safe problem is more of an art than a science. Either problem can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN24[] **Class Actions, Certification of Classes**

In circumstances involving minor overbreadth problems that do not call into question the validity of the class as a whole, the better course is not to deny class certification entirely but to amend the class definition as needed to correct for the overbreadth.

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For NORTHSHORE UNIVERSITY HEALTHSYSTEM, Defendant - Appellee: Duane M. Kelley, Attorney, WINSTON & STRAWN LLP, Chicago, IL; Gene C. Schaerr, Attorney, WINSTON & STRAWN LLP, Washington, DC.

For CONSUMER FEDERATION OF AMERICA, US PIRG, Amicus Curiae: Kenneth A. Wexler, Attorney, WEXLER WALLACE LLP, Chicago, IL.

For AMERICAN ANTITRUST INSTITUTE, Amicus Curiae: Avidan Joel Stern, Attorney, LYNCH & STERN, LLP, Chicago, IL.

Judges: Before SYKES, TINDER, and HAMILTON, Circuit Judges.

Opinion by: HAMILTON

Opinion

[*808] HAMILTON, *Circuit Judge*. ***HN1***[] Under *Federal Rule of Civil Procedure 23(b)(3)*, a class may be certified only if questions of law and fact common to members of the class predominate over questions affecting only individual members of the class. In this case, plaintiff-appellant Steven Messner and other named plaintiffs alleged that a merger between defendant-appellee **[**2]** Northshore University HealthSystem and Highland Park Hospital violated federal ***antitrust law***. In fact, the Federal Trade Commission found that the merger violated *section 7* of the Clayton Act, *15 U.S.C. § 18*. Plaintiffs seek treble damages and injunctive relief under *section 4* of the Clayton Act, *15 U.S.C. § 15*, and they seek certification of a class of individual patients and third-party payors who allegedly paid higher prices for hospital care as a result of the merger.

One key issue on the merits will be proof that the merger had an antitrust impact on the plaintiff class, primarily in the form of higher prices. To show the predominance of common questions regarding the merger's antitrust impact on class members, plaintiffs proposed to rely on the same economic and statistical methods used by the Federal Trade Commission staff and Northshore's own economic experts to analyze antitrust impact in the merger litigation before the FTC. The basic method, called "difference-in-differences," is designed to estimate the amount of Northshore's price increases that resulted from exercise of market power rather than from other factors. This analysis, plaintiffs claimed, will show that Northshore **[**3]** leveraged its newfound market power to impose higher prices on insurers and patients.

The district court denied plaintiffs' motion for class certification, concluding that their expert had not shown that his proposed methodology could address the antitrust impact issue on a class-wide basis. The district court believed that plaintiffs' proposed methodology required proof that defendant raised its prices at uniform rates affecting all class members to the same degree. Finding a lack of uniformity in price increases, the district court concluded that plaintiffs could not show predominance and that class certification should be denied. The district court based this conclusion on its belief that plaintiffs' expert had conceded that the common methodological framework by which he proposed to demonstrate impact to members of the class was invalid absent uniform price increases. Plaintiffs sought interlocutory appeal under *Rule 23(f)*.

Because of the importance of the issue for this case and for private antitrust enforcement, particularly with respect to hospitals and health care providers with complex pricing systems, we granted the petition for interlocutory appeal. We find that the district **[**4]** court's conclusion that a lack of uniform price increases required denial of class certification was erroneous as a matter of both fact and law, resulting in a denial that we must find was an abuse of discretion. Although plaintiffs' expert initially believed that Northshore did in fact increase its prices uniformly across all services, he acknowledged that it might not have done so, and he explained how his common methodology could show impact to the class despite such complications. Apart from the expert's supposed concession, the degree of uniformity the district court demanded simply is not required for class certification under *Rule 23(b)(3)*. In essence, it is important not to let a quest for perfect evidence become the enemy of good evidence. We vacate the district court's denial of class certification and remand this matter for further proceedings.

We begin by reviewing Northshore's merger and the FTC proceedings that found it unlawful, and then turn to the **[*809]** proceedings in the district court on class certification. On the merits of the appeal, we consider first the district court's procedural handling of a challenge to the testimony of Northshore's expert witness, then the central **[**5]** substantive issue of proving antitrust impact on a class-wide basis. We conclude by considering some additional objections to class certification raised by Northshore.

I. *The Merger and the FTC Proceedings*

On January 1, 2000, defendant Northshore, then doing business as Evanston Northwestern Healthcare Corporation, merged with Highland Park Hospital, located in Highland Park, Illinois. Prior to the merger, Northshore owned Evanston Hospital in Evanston, Illinois, as well as Glenbrook Hospital in nearby Glenview, Illinois.

In February 2004, the Federal Trade Commission filed an administrative complaint against Northshore alleging that the merger violated *section 7* of the Clayton Act, *15 U.S.C. § 18*, by substantially lessening competition for general acute care inpatient hospital services in the "area directly proximate to the three [Northshore] hospitals and contiguous geographic areas in northeast Cook County and southeast Lake County, Illinois." *In re Evanston Northwestern Healthcare Corp., 2007 FTC LEXIS 210, 2007 WL 2286195, at *3 (F.T.C. Aug. 6, 2007)*. Following an eight-week trial, an administrative law judge concluded that the merger violated the Clayton Act. The judge ordered Northshore to divest **[**6]** Highland Park Hospital. *2007 FTC LEXIS 210, [WL] at *4*.

On appeal in 2007, the Federal Trade Commission agreed with the ALJ that the merger enabled Northshore to exercise increased market power and that it used that power to increase its prices by a substantial amount. The FTC pointed out that Northshore's own economic expert found a price increase of nine to ten percent. *2007 FTC LEXIS 210, [WL] at *66.* The FTC concluded that the evidence as a whole demonstrated that Northshore's "substantially higher-than-predicted merger-coincident price increases were due to market power, rather than competitively-benign factors." *Id*. None of Northshore's alternative explanations for those price increases, the FTC concluded, were supported by the record. *Id*. The FTC rejected Northshore's arguments that the merger made Highland Park a meaningful competitor in the market, that the merger's anticompetitive effects were outweighed by quality improvements at Highland Park resulting from the merger, and that Northshore's not-for-profit status reduced the potential for anticompetitive harm. 2007 FTC LEXIS 210, [WL] at *67-*73. The FTC affirmed the ALJ's ruling that the merger violated section 7 of the Clayton Act. 2007 FTC LEXIS 210, [WL] at *76.

When it came to the question of remedy, **[**7]** however, the FTC concluded that divestiture of Highland Park was not required. The FTC instead required Northshore to use "separate and independent" teams — one for Evanston and Glenbrook, and another for Highland Park — to negotiate contracts going forward. 2007 FTC LEXIS 210, [WL] at *77-*79. This remedy, the Commission concluded, would provide for effective competition between the hospitals and avoid the "complex, lengthy, and expensive process" of divestiture. 2007 FTC LEXIS 210, [WL] at *79.

II. *Proceedings in the District Court*

In April 2008, plaintiff Messner filed this class action suit against Northshore. (Dkt. 64, Ex. A.) Messner's suit was one of several similar actions challenging the merger, all of which were consolidated under the title *In re Evanston Northwestern Healthcare Antitrust Litigation*. In their consolidated class action complaint, Messner and the other named plaintiffs accuse Northshore of monopolization and attempted monopolization of the market for "general inpatient and hospital-based outpatient services" in the "the geographic **[*810]** triangle created by . . . Evanston Hospital, Glenbrook Hospital, and Highland Park Hospital," in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. (Dkt. 224.) They **[**8]** also allege that the merger substantially lessened competition in that market in violation of section 7 of the Clayton Act, 15 U.S.C. § 18. Plaintiffs bring their claims under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26, requesting injunctive relief and treble damages for injuries they suffered as a result of the alleged antitrust violations.

Plaintiffs moved for class certification pursuant to Rule 23(b)(3) on behalf of "All persons or entities . . . who purchased or paid for inpatient hospital services or hospital-based outpatient services directly from Northshore . . . , its wholly-owned hospitals, predecessors, subsidiaries, or affiliates . . . from at least as early as January 1, 2000 to the present."[1] In support of that motion, plaintiffs offered the expert report of Dr. David Dranove, an economist on the faculty of Northwestern University who specializes in the health care industry. He would use common economic and econometric methods to prove the antitrust impact of Northshore's actions on the class and to estimate damages. Dranove would do so with the difference-in-differences method, by comparing "the percentage change in [Northshore's] prices between the pre- **[**9]** and post-merger periods . . . to the percent change in prices at a control group of local hospitals during the same period." App. 126. "If the percentage change at [Northshore] is higher than the change at the control group by a statistically significant amount," plaintiffs said, "impact can be demonstrated." App. 126-27. Plaintiffs said that this same method could also provide an estimate of damages to individual class members.

In light of the FTC's findings that the merger had violated the law and enabled Northshore to raise its prices at least nine or ten percent above competitive prices, it is understandable that Northshore put up a determined opposition to class certification. The central issue under Rule 23(b)(3) became whether plaintiffs could show on a class-wide basis the antitrust impact of **[**10]** Northshore's actions on the proposed class. Northshore argued that plaintiffs' proposed class included a number of members who, for a variety of reasons, were not affected by the alleged price increases, and that plaintiffs had failed to propose "a common methodology for identifying purported class members . . . included within these 'no impact' categories." In support of this argument, Northshore relied primarily on the expert testimony and report of Dr. Monica Noether, an expert on whom it had also relied during the FTC proceedings.

After extensive briefing and an evidentiary hearing, the district court denied plaintiffs' motion for class certification. In re Evanston Northwestern Healthcare Corp. Antitrust Litig., 268 F.R.D. 56 (N.D. Ill. 2010). Although the district court found that plaintiffs' proposed class satisfied the requirements of Rule 23(a), it concluded that questions of law

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[1] Excluded from the proposed class were "those who solely paid fixed amount co-pays, uninsureds who did not pay their bill, Medicaid and Traditional Medicare patients, governmental entities, [Northshore itself], other providers of healthcare services, and the present and former parents, predecessors, subsidiaries, and affiliates of [Northshore] and other providers of healthcare services."

and fact individual to proposed class members regarding the antitrust impact of the merger predominated over questions common to the class as a whole. *Id. at 61-65, 87*.[2]

[*811] III. *Analysis*

A. *Requirements for Class Certification*

HN2[] To be certified, a proposed class must satisfy the requirements of *Federal Rule of Civil Procedure 23(a)*, as well as one of the three alternatives in *Rule 23(b)*. *Siegel v. Shell Oil Co., 612 F.3d 932, 935 (7th Cir. 2010)*. As a threshold matter, a proposed class must always meet the *Rule 23(a)* requirements of numerosity, typicality, commonality, and adequacy of representation. When certification is sought under *Rule 23(b)(3)*, as it is here, proponents of the class must also show: (1) that the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual class members; and (2) that a class action is superior to other available methods of resolving the controversy. *Id*.

HN3[] In conducting this analysis, the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits. See, *e.g.*, *Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010)*; *Kohen v. Pacific Investment Management Co., 571 F.3d 672, 677 (7th Cir. 2009)*; **[**12]** *Payton v. County of Kane, 308 F.3d 673, 677 (7th Cir. 2002)*. On issues affecting class certification, however, a court may not simply assume the truth of the matters as asserted by the plaintiff. If there are material factual disputes, the court must "receive evidence . . . and resolve the disputes before deciding whether to certify the class." *Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676 (7th Cir. 2001)*. Plaintiffs bear the burden of showing that a proposed class satisfies the *Rule 23* requirements, see, *e.g.*, *Trotter v. Klincar, 748 F.2d 1177, 1184 (7th Cir. 1984)*, but they need not make that showing to a degree of absolute certainty. It is sufficient if each disputed requirement has been proven by a preponderance of evidence. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008)*.

HN4[] We review the denial of plaintiffs' motion for class certification for an abuse of discretion. See *Arreola v. Godinez, 546 F.3d 788, 794 (7th Cir. 2008)*. If, however, the district court bases its discretionary decision on an erroneous view of the law or a clearly erroneous assessment of the evidence, then it has necessarily abused its discretion. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)*; **[**13]** accord, *Ervin v. OS Restaurant Services, Inc., 632 F.3d 971, 976 (7th Cir. 2011)* (reversing denial of class certification).

Plaintiffs argue here that the district court made two reversible errors, one procedural, the other substantive. First, they contend that the district court failed to determine whether defense expert Noether's report and opinions were admissible under *Federal Rule of Evidence 702* before ruling on the motion for class certification. Second, they argue that the district court incorrectly applied *Rule 23(b)(3)*'s predominance requirement. We agree on both points, turning our attention first to the procedural issue, then to the substantive issue, and finally to additional arguments that Northshore makes in support of the denial.

B. *Daubert and Class Certification*

HN5[] Under *Rule 702* and *Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, expert testimony is admissible only **[*812]** if (1) the expert testifies to valid technical, scientific, or other specialized knowledge; and (2) that testimony will assist the trier of fact. *NutraSweet Co. v. X-L Eng'g Co., 227 F.3d 776, 787-88 (7th Cir. 2000)*. Before the hearing on class certification, plaintiffs moved to exclude the

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[2] The district court did not consider whether plaintiffs had satisfied *Rule 23(b)(3)*'s additional requirement that "a class action **[**11]** is superior to other available methods for fairly and efficiently adjudicating the controversy." *Evanston Northwestern Healthcare, 268 F.R.D. at 87 n.32*.

[14]** report of defendant's expert, Dr. Monica Noether, a private consulting economist. Plaintiffs argued that Noether's "economic analyses are fundamentally defective" and that her opinion "should be stricken as a whole."[3]

The district court denied plaintiffs' motion. Although it agreed that "Noether's report . . . include[s] some misleading information and analysis," the court concluded that plaintiffs' "two opportunities — in their reply brief and at oral argument — to respond to the conclusions contained in Noether's report" were sufficient to address the report's failings. *Evanston Northwestern Healthcare, 268 F.R.D. at 77*. For this reason, the district court declined to "undertake a *Daubert* analysis at this procedural juncture," explaining that it was giving "Noether's report the weight it believes it is due." *Id*.

HN6[] When an expert's report or testimony is "critical to class certification," we have held that a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification. *American Honda Motor Co. v. Allen, 600 F.3d 813, 815-16 (7th Cir. 2010)*; see also *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553-54, 180 L. Ed. 2d 374 (2011)* (expressing doubts regarding district court's conclusion that "*Daubert* **[**16]** did not apply to expert testimony at the certification stage of class-action proceedings").[4]

In *American Honda*, we used the word "critical" broadly to describe expert testimony important to an issue decisive for the motion for class certification. ***HN7***[] If a district court has doubts about whether an expert's opinions may be critical for a class certification decision, the court should make an explicit *Daubert* ruling. An erroneous *Daubert* ruling excluding non-critical expert testimony would result, at worst, in the exclusion of expert testimony that did not matter. Failure to conduct such an analysis when necessary, however, would mean that the unreliable testimony remains in the record, a result that could easily lead to reversal on appeal.

The district court's refusal to rule on plaintiffs' *Daubert* motion was an error under *American Honda*. Noether's opinions were undoubtedly "critical" to the district court's decision. Her report **[**17]** and **[*813]** testimony laid the foundation for Northshore's entire argument in opposition to class certification, and the district court obviously relied on Noether's reasoning when making its decision, quoting and discussing it many times. *E.g., Evanston Northwestern Healthcare, 268 F.R.D. at 86* (noting that Noether's "analysis . . . cast[s] doubt" on Dranove's contract analysis); *id*. (observing that Noether's supplemental report "suggest[s]" errors in Dranove's contract analysis). Given the importance of Noether's opinions, the district court needed to rule conclusively on plaintiffs' challenge to her opinions before it turned to the merits of plaintiffs' motion for class certification.

Instead of ruling on the admissibility of Noether's report, the court said it would give the report "the weight . . . it is due." *Id. at 77*. We recognize that this is a time-honored and often acceptable approach toward many difficult evidentiary issues when the judge is the trier of fact. This approach does not suffice, however, when expert testimony is in fact critical to class certification. As we explained in *American Honda*, ***HN8***[] a district court cannot merely "leave[ ] open the questions of what portions of **[**18]** [the expert's] testimony it may have decided (or will decide) to exclude." *American Honda, 600 F.3d at 816*. Those tough questions must be faced and squarely decided. *Id. at 817*, citing *West v. Prudential Securities, Inc., 282 F.3d 935, 938 (7th Cir. 2002)*; see also *Szabo,*

[3] Northshore argues that plaintiffs moved to strike only Noether's initial report, not her later testimony and supplemental report, thereby waiving any argument to exclude those materials. We disagree. Plaintiffs moved to strike Noether's expert report and also explicitly requested that "her opinion . . . be stricken as a whole," App. 1261, in part because Noether lacked expertise regarding antitrust issues affecting "consumers of healthcare plans." App. 1264. Plaintiffs renewed that objection at the start of the hearing on class certification, Dkt. 418 at 5, and objected when Noether offered new information during that hearing in response to Dranove' rebuttal report, *id*. at 67-68, 94-95. The district court repeatedly put off dealing with the substance of these objections. *Id*. at 5, 69, 95. Plaintiffs' objections gave the district court and defendant ample opportunity to address the issues. Where the district court repeatedly put off dealing with the issues, plaintiffs **[**15]** did not need to renew their unsuccessful objection every time the same witness attempted to provide additional information.

[4] We issued *American Honda* one day after the district court here issued its initial decision denying class certification. The redacted version of the district court's decision available to the public was released some time later, after our decision in *American Honda*.

249 F.3d at 676 ("Before deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23.").

To avoid this conclusion, Northshore proposes that we adopt the asymmetric rule that a definitive *Daubert* ruling is necessary only when a district court grants class certification, as in *American Honda*, but not when the court denies certification, as here. In effect, Northshore argues that a plaintiff should be allowed to rely on an expert's opinion in support of class certification only if that opinion is backed by reliable methods and information, but that a defendant may rely on unqualified or unhelpful "expert" opinions.

This result-oriented attempt to narrow *American Honda* finds support in neither the irrelevant cases cited by Northshore nor anything in *American Honda* itself. We did not suggest in *American Honda* that denials of class **[**19]** certification should be exempt from the strictures of *Daubert* and Rule 702. We made clear that ***HN9***[] whenever an expert's report or testimony is critical to a class certification decision, a district court must rule conclusively on a challenge to the expert's qualifications or opinions before ruling on class certification, without regard to whether the district court ultimately grants or denies that motion. See American Honda, 600 F.3d at 815-16. The ruling is just as important to the plaintiffs as it is to the defendants. Northshore's proposed rule would also create an unworkable logical conundrum, requiring a court to determine first whether to certify a class before considering the admissibility of the evidence it relied upon in making that determination.

We also reject two secondary arguments Northshore makes for its proposed limitation of *American Honda*. First, Northshore emphasizes that such a limitation must be read into *American Honda* because only plaintiffs bear the burden of satisfying Rule 23's requirements while defendants may present no evidence if they so choose. Northshore Br. 29, citing Carnegie v. Household Int'l, Inc., 376 F.3d 656, 662 (7th Cir. 2004); In re American Medical Systems, Inc., 75 F.3d 1069, 1086 (6th Cir. 1996). **[**20]** The general point about the burden of proof is correct but has no bearing on ***HN10***[] Rule 702, which **[*814]** applies to plaintiffs and defendants alike, regardless of which side bears the burden of proof. The fact that a defendant is not required to present evidence to defeat class certification does not give that defendant license to offer irrelevant and unreliable evidence. Second, Northshore argues that we must have meant for *American Honda* to apply only to decisions granting class certification because a *Daubert* hearing is unnecessary when certification is denied on grounds not addressed by the expert in dispute. (Northshore Br. 30). But a *Daubert* hearing is necessary under *American Honda* only if the witness's opinion is "critical" to class certification. That requirement is not met if the court decides the motion for class certification on grounds not addressed by the witness.

To conclude on this procedural issue, we decline Northshore's invitation to cut the holding of *American Honda* in half with a new exception for denials of class certification. The district court should have ruled definitively on plaintiffs' *Daubert* motion and objections before ruling on their motion for class certification. **[**21]** Northshore also argues that any error under *American Honda* was harmless. We disagree. As explained in the following section, the district court frequently discussed Noether's opinions in reaching the substantive decision that we find erroneous. We proceed to the primary substantive dispute between the parties regarding the proper application of Rule 23(b)(3) to the facts of this case.

C. *Predominance and Antitrust Impact*

HN11[] Rule 23(b)(3) permits class certification only if the questions of law or fact common to class members "pre-dominate" over questions that are individual to members of the class.[5] There is no mathematical or mechanical

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[5] Rule 23(b)(3) also conditions class certification on whether the class action device is superior to other available methods for fairly and efficiently resolving the dispute in question. We need not consider whether plaintiffs have shown superiority in this case, as this issue was neither considered by the district court nor raised by either party on appeal. There are so many common issues of law and fact relating to the issue of Northshore's liability, however, that the superiority requirement **[**23]** likely poses no serious obstacle to class certification here. See Klay v. Humana, Inc., 382 F.3d 1241, 1269 (11th Cir. 2004) (finding superiority under Rule 23(b)(3) and noting that "the more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims"). And this case, at least on its face, implicates

test for evaluating predominance. See 7AA Wright & Miller, Federal Practice & Procedure § 1778 (3d ed. 2011). The Supreme Court has discussed predominance in broad terms, explaining that the Rule 23(b)(3) "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy," with the purpose being to determine whether a proposed class is "sufficiently cohesive to warrant adjudication by representation." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). While similar to Rule 23(a)'s requirements for typicality **[**22]** and commonality, "the predominance criterion is far more demanding." Id. at 623-24. At the same time, the Supreme Court also commented in *Amchem*: "Predominance is a test **[*815]** readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." Id. at 625. We understand the comment to mean that careful application of Rule 23 is necessary in antitrust cases, as in all cases, and that in antitrust cases, "Rule 23, when applied rigorously, will frequently lead to certification." Robert H. Klonoff, *Antitrust Class Actions: Chaos in the Courts*, 11 Stan. J.L. Bus. & Fin. 1, 7 (2005) (discussing *Amchem*); accord, Behrend v. Comcast Corp., 655 F.3d 182, 191 (3d Cir. 2011).

HN12[] Rule 23(b)(3)'s predominance requirement is satisfied when "common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication." Wright & Miller, *supra*, **[**24]** § 1778. Or, to put it another way, common questions can predominate if a "common nucleus of operative facts and issues" underlies the claims brought by the proposed class. In re Nassau County Strip Search Cases, 461 F.3d 219, 228 (2d Cir. 2006), quoting Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000). "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question." Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005). Individual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole.

HN13[] Analysis of predominance under Rule 23(b)(3) "begins, of course, with the elements of the underlying cause of action." Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184, 180 L. Ed. 2d 24 (2011). Section 4 of the Clayton Act, 15 U.S.C. § 15, requires plaintiffs **[**25]** to prove: (1) that Northshore violated federal ***antitrust law***; and (2) that the antitrust violation caused them some injury. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008); Blades, 400 F.3d at 566; Bell Atlantic Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003). The same cases, and many others, also show that plaintiffs also must show damages, but individual proof of this element of a claim under the Clayton Act is not an obstacle to a showing of predominance. It is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3). See Wal-Mart v. Dukes, 131 S. Ct. at 2558 (deeming it "clear that individualized monetary claims belong in Rule 23(b)(3)"); Arreola, 546 F.3d at 801 (recognizing that "the need for individual damages determinations does not, in and of itself, require denial of [a] motion for certification" under Rule 23(b)(3)); Hardy v. City Optical, Inc., 39 F.3d 765, 771 (7th Cir. 1994) ("There have been many antitrust class actions in which the relief sought was damages, and the fact that the damages would generally be different for each member of the class was not deemed **[**26]** an insuperable obstacle."); Allapattah Servs. v. Exxon Corp., 333 F.3d 1248, 1261 (11th Cir. 2003) ("numerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate"), *aff'd*, 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005); see also Klay v. Humana, Inc., 382 F.3d 1241, 1260 (11th Cir. 2004) (only in rare, extreme cases would individual issues of damages be so complex as to defeat class certification under Rule 23(b)(3)).

In this case, common questions clearly predominate in regard to whether Northshore's **[*816]** merger violated federal ***antitrust law***. The focus of the dispute here is on the second element, referred to as "antitrust impact," Hydrogen Peroxide, 552 F.3d at 311, or "fact of damage," Bell Atlantic, 339 F.3d at 302 n.12. Under Rule 23(b)(3),

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none of the specific concerns that we have previously said will prevent a finding of superiority. See, *e.g.,* Harper v. Sheriff of Cook County, 581 F.3d 511, 516 (7th Cir. 2009) (finding no superiority where plaintiff's challenge to defendant's allegedly illegal jail management practices "can be satisfied in an individual suit without the management issues of a class action"); Andrews v. Chevy Chase Bank, 545 F.3d 570, 577 (7th Cir. 2008) (finding no superiority where class action seeking rescission of home mortgages would require a "multitude" of "individual rescission procedures").

plaintiffs had to show that it was possible to use common evidence to prove that Northshore's merger injured the members of the proposed class. To do so, plaintiffs presented Dranove's expert report and opinion. Dranove claimed that "if [Northshore] overcharged an insurer by a certain percentage, all or substantially all class members covered by that insurer will be overcharged **[**27]** by approximately the same percentage." App. 1900. As a result, he said, "Overcharges to an insurer result in injury to that insurer as well as to all or substantially all other class members who are covered by that insurer." App. 1901. As the issue was developed further in the district court, however, it became considerably more complex.

If the market for health care services functioned like a market for a generic, undifferentiated commodity (i.e., corn, wheat, or pork bellies) traded on an exchange with standard contract terms and little opportunity for individual bargaining, showing antitrust impact through such overcharges would have been relatively simple. In such a market, one can in theory, at least, estimate simple supply and demand curves to show that an acquisition of market power raised price and lowered supply. That's antitrust impact from monopolization.

Real markets are not as simple and elegant as the classic economic model, and the market for hospital services seems to be particularly complex. Insurers and other third-party payors negotiate sophisticated contracts with health care providers. Through multi-year contracts for health care services, the parties may lock those **[**28]** prices in place or negotiate for long-term price changes significantly different than would have been agreed if the prices were renegotiated each year. Factors such as a hospital's location, quality of services, and reputation also can affect the price of a particular service.

Adding even more complexity is the fact that insurers and health care providers negotiate contracts that cover not a single service but complex bundles of many different services and products. See, *e.g*., John C. Render & Neal A. Cooper, *Survey of Recent Developments in Health Care Law*, *37 Ind. L. Rev. 1161, 1189 (2004)*. A hypothetical bill for a Caesarian section, for example, might consist of a variety of bundled items: anesthesia, operating room use, surgeon's fee, post-operative care for the mother, newborn care for the baby, etc. A hospital could unbundle and re-bundle those items in different ways, adding some items in the overall charge and removing others, so that a later bill for a service still called a Caesarian section would charge for a different set of items and have a very different overall price. The record here reflects such complexity. For example, one contract repriced cardiology services after **[**29]** the physicians' fees were "unbundled" from the prices and were charged separately. The nominal prices of the hospital's charges for cardiology services dropped, but after accounting for the unbundling to ensure an apples-to-apples comparison, the overall prices increased significantly.

Even without such unbundling or re-bundling, the prices of the individual component items are themselves subject to a wide variety of market influences. For example, an advance in anesthesia technology might result in a sharp decrease in the cost of anesthesia at the same time that a new and higher standard of care for a related service requires expensive new machinery. Without any exercise of market **[*817]** power, therefore, the price for the bundled service (say, a Caesarian section or a cardiac catheterization) might go up, go down, or stay level, despite substantial changes in the prices of the components.

As a result of these complexities, changes in the nominal prices charged for particular services might actually conceal rather than reveal a health care provider's exercise of unlawful market power. The price for a service may remain nominally the same or even decrease, but only because changes in the prices **[**30]** of the underlying components of that service have changed or because the service has been restructured in a way that conceals the anticompetitive price increase.

Dranove proposed to account for these complexities by conducting what is known as a "difference-in-differences" or "DID" analysis. He would compare prices at Northshore's hospitals with prices at a control group of comparable area hospitals not party to the merger but otherwise presumably subject to the same market forces affecting prices in hospitals. App. 1901, 1904. The difference between price changes for Northshore and the control group, he explained, would estimate the average overcharge imposed on Northshore's patients due to Northshore's exercise of increased market power after the merger. App. 1904. "For example," he explained, if Northshore's hospitals "raise prices by 30% after the merger and a control group of hospitals raises price by 10%, . . . the 'difference-in-differences' is approximately 20%" and represents the approximate amount of Northshore's overcharges. App.

1921. If Northshore overcharged an insurer by this percentage, he explained, "all or substantially all class members covered by that insurer will **[**31]** be overcharged by approximately the same percentage." App. 1926. Accordingly, Dranove concluded, a contract's "increase in average price will have a common impact on all or substantially all class members." *Id*.

As things turned out, however, even that approach does not deal sufficiently with all of the relevant variations that could confound the antitrust impact analysis. In denying class certification, the district court concluded that the viability of Dranove's methodology turned on "whether [Northshore] increased prices at a uniform rate across services." *Evanston Northwestern Healthcare, 268 F.R.D. at 85*. The court added: "Dranove's method of proving classwide impact . . . rests on an assumption that [Northshore] increased prices at a uniform rate across services." *Id*. Such uniformity was absent, the district court concluded, noting for example that "even a cursory examination of the 2000 Payor A contract and the September 22, 2002 Payor A contract makes clear that the prices of some services changed at a variable rate." *Id. at 86*.[6] To the extent that Dranove claimed that the prices increased uniformly, the court believed that he "focused primarily on price changes within contracts **[**32]** — changes that are usually attributable to escalator clauses." *Id*. Price changes controlled by escalator clauses "were not due to an exercise of market power," Northshore's expert testified, because Northshore "had the opportunity to exercise market power not within a contract period, but only at the time of renegotiation." *Id*.[7] Because plaintiffs' **[*818]** proposed method for proving classwide impact "relies on an assumption that [Dranove has] not been able to validate," the district court concluded, plaintiffs failed to establish predominance in regard to antitrust impact, so class certification was denied. *Id. at 87*.

On appeal, the parties raise two general arguments regarding the district court's denial of class certification. For their part, plaintiffs contend that the district court applied an incorrect standard of predominance under *Rule 23(b)(3)* when it made uniformity of price increases a condition for class certification. In response, Northshore contends that the district court was correct to require uniformity of price increases because plaintiffs conceded that such uniformity was necessary to Dranove's methodology for showing impact **[**34]** to members of the class. We explain first that the district court applied too stringent a standard in evaluating predominance. We explain second that plaintiffs did not agree to or invite the use of the wrong standard.

1. *Predominance and Non-Uniform Price Increases*

The district court misapplied *Rule 23(b)(3)*'s predominance standard when it made uniformity of nominal price increases a condition for class certification. ***HN14***[] Under the proper standard, plaintiffs' "burden at the class certification stage [was] not to prove the element of antitrust impact," but only to "demonstrate that the element of antitrust impact *is capable of proof at trial* through evidence that is common to the class rather than individual to its members." *Behrend v. Comcast Corp., 655 F.3d at 197*, quoting with emphasis *Hydrogen Peroxide, 552 F.3d at 311-12*; accord, *Schleicher, 618 F.3d at 686* (noting that *Rule 23*'s present structure is the result of a "decision . . . to separate class certification from the decision on the merits"); *Blades, 400 F.3d at 566* ("To determine whether common questions predominate . . . the court must look only so far as to determine whether . . . common evidence could suffice to make out a **[**35]** prima facie case for the class.").

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[6] The published opinion refers to "Payor A" because much of the relevant pricing and contractual evidence was subject to a protective order.

[7] The district court and Noether appear to have believed that escalator clauses — increasing contract prices during a long-term contract — can never reflect the exercise of market power because they take effect long after contract negotiations have concluded. This is not correct. The fact that an escalator clause may be triggered months or even years after contract negotiations occurred does not necessarily mean that the escalator clause was **[**33]** immune from one contracting party's exercise of market power. Like the initial prices set in the contracts, the terms of the escalator clauses — the services to which those clauses would apply, the frequency of any price increases, and the magnitude of those price increases — were the products of the negotiations between the parties to those contracts. A firm may use market power to ensure that those negotiations result in an initial contract price higher than it might have otherwise been able to obtain. We see no general reason such a firm could not also use that market power to obtain escalator clauses more generous than would have been possible otherwise.

Through his proposed difference-in-differences or DID analysis of the contracts between Northshore and its insurers, Dranove claimed that he could show whether and to what extent Northshore's post-merger price increases were the result of increased market power resulting from the merger. In other words, Dranove claimed that he could use common evidence — the post-merger price increases Northshore negotiated with insurers — to show that all or most of the insurers and individuals who received coverage through those insurers suffered some antitrust injury as a result of the merger. App. 2541. That was all that was necessary to show predominance for purposes of *Rule 23(b)(3)*. See *Hydrogen Peroxide, 552 F.3d at 311-12*.

Contrary to Northshore's view, Dranove's ability to use common evidence to show impact on the class did not ultimately depend on assuming the uniformity of the nominal price increases imposed under any **[*819]** individual contract. For reasons we explained above, such uniformity would certainly simplify matters. It would allow Dranove to plug a single percentage ? the uniform price increase imposed on all patients covered under an individual contract **[**36]** — into his DID analysis to calculate the antitrust impact on those patients covered by that contract. But as Dranove explained in his report, a lack of uniformity would only require him to do more DID analyses for each contract — one analysis for each individual non-uniform price increase imposed in the contract being analyzed. App. 2540. As a simple example, if one post-merger contract raised the cost of hypodermic needles by 30 percent but increased the cost of saline solution by only 20 percent, DID comparison to price changes for the control group for those individual price increases could still be used to show any antitrust impact those price increases had on all patients who paid for hypodermic needles, saline solution, or both under that contract. App. 2540-41. In a more complex world, multiple analyses would be needed to show more accurately a contract's precise impact on class members. That need does not change the fact that those analyses all rely on common evidence — the contract setting out the non-uniform price increases — and a common methodology to show that impact. ***HN15***[] The ability to use such common evidence and common methodology to prove a class's claims is sufficient **[**37]** to support a finding of predominance on the issue of antitrust impact for certification under *Rule 23(b)(3)*. See *Hydrogen Peroxide, 552 F.3d at 311-12*.

By requiring uniformity of nominal price increases within and across contracts, the district court misread *Rule 23(b)(3)* to require a greater showing of common evidence than is contemplated by that rule. Under the district court's approach, *Rule 23(b)(3)* would require not only common evidence and methodology, but also common results for members of the class. That approach would come very close to requiring common proof of damages for class members, which is not required. To put it another way, the district court asked not for a showing of common questions, but for a showing of common answers to those questions. *Rule 23(b)(3)* does not impose such a heavy burden. See *Blades, 400 F.3d at 566* ("The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual."); see also *Rule 23(b)(3)* (requiring that common "questions" predominate). Because the district court applied the wrong legal standard when analyzing plaintiffs' motion for class certification, the district court abused its discretion **[**38]** when it denied the motion. See *Ervin, 632 F.3d at 976*; *Hydrogen Peroxide, 552 F.3d at 312*.

2. *The Concession Issue*

Northshore argues that these principles do not matter in the end because, it says, plaintiffs conceded that their case for common impact depended on uniform nominal price increases. In support, Northshore relies primarily on Dranove's confirmation at the hearing on the motion for class certification that "the viability of [his] method" came down to whether Northshore "really [did] increase prices at a uniform rate across services." Dkt. 418 at 41. On cross-examination, however, Dranove clarified that his "DID analysis can be performed *with or without the uniformity*." *Id. at. 57*. These statements, seemingly contradictory on their face, are easily reconciled once it is remembered that Dranove proposed two *alternative* methodologies: one in which the uniformity of merger-related price increases was presumed, and another in which such uniformity was absent. Which method to use depended on the degree of uniformity.

If price increases were, as Dranove initially believed, entirely or largely uniform, **[*820]** then he proposed to show the merger's impact on the individual class members by **[**39]** simply plugging the average price increase imposed by any given contract into his DID analysis. App. 1904-06, 1909, 1926, 1931, 2523-25, 2530, 2584. In those circumstances, the average price would accurately reflect the individual price increases found in that contract. If the average contract price went up an average of 20 percent, and all of the services in that contract experienced uniform price increases, each individual service also went up 20 percent in price. App. 1909, 2523, 2571.

This specific methodology relied on uniform nominal price increases, but the actual evidence was not that simple. As Dranove implicitly acknowledged in his reply report, if a contract's individual service prices went up at non-uniform rates due to Northshore's unequal exercise of market power, then DID analysis using that contract's overall average price increase would reveal little about the merger's antitrust impact on individual class members covered by that contract. App. 2523 n.1. According to Dranove, however, it would be most unusual for a firm possessing market power in a geographic market to exercise that power selectively to increase the prices of only some of its services. App. 1931-33, **[**40]** 2539.

For this reason, Dranove believed that any non-uniform price increases observed in Northshore's contracts with insurers could be explained by what he called "restructuring," or changes in price resulting from variations in Northshore's marginal costs or the re-bundling of component services discussed above. App. 2530, 2543-45. Such restructuring, he said, was unrelated to market power, meaning that services exhibiting non-uniform price increases could be treated as if they were subject to the same percentage price increase imposed on all other services covered in the same contract. App. 2543-44. If, for example, the price for one service went up 30 percent while all other services in that same contract went up only 20 percent, that additional 10 percent increase would not be treated as an exercise of market power for purposes of his DID analysis. Only the 20 percent increase shared by all other services in the same contract would reflect the use of market power. App. 2544. As a result, he explained, any non-uniform price increases imposed in a single contract with an insurance provider did not foreclose his use of that contract's average price increase to calculate accurately **[**41]** the impact to all patients covered by that contract. App. 2545.

Even if non-uniform price increases in a contract resulted not from restructuring but from Northshore's differential exercise of market power across different services, Dranove explained that he could still use those contracts to show impact on the class members. At his deposition, Dranove explained that if his review of documents revealed a lack of uniformity unexplained by restructuring, he would simply "adapt the methodology." Dkt. 284, Ex. I at 113, 157-58. In his initial report, Dranove explained that he could adapt his analysis if needed to accommodate "selective" price increases regarding certain services. App. 1932. And his reply report showed exactly how he would do that. The reply report emphasized that the DID analysis was fully capable of addressing non-uniform price increases: "it is still possible to apply a common methodological framework to measure impact even [when Northshore] increased prices for different services at different rates." App. 2539. As noted above, he would do so simply by conducting as many DID analyses as there were non-uniform price increases in a particular insurer's contract with Northshore. **[**42]** App. 2540. In this way, Dranove explained, he would be able to calculate "different overcharges **[*821]** across different service categories" despite any non-uniform increase in the prices charged for those services. App. 2540-41.

In other words, uniformity of nominal price increases was not necessary to Dranove's proposed methodology for determining antitrust impact to the proposed class. This explains why Dranove was willing (though perhaps a little too reluctant for his own good) to concede the non-uniformity of the price increases in Northshore's post-merger contracts. In fact, Dranove acknowledged several times that Northshore's prices did not always increase uniformly, explaining that Northshore "*almost* invariably increase[d] prices at the same rate," App. 2523, and that price increases "are applied across-the-board for all or *nearly all* services," App. 2524, in the "vast *majority* of cases." App. 2525 (emphases added). He acknowledged that one contract called for "a dramatic decrease in the price" for some services at the same time it "impose[d] a significant increase in the price of other service[s]." App. 2543.

The data in Appendix D of Dranove's reply report became the focus of attention **[**43]** during the hearing, in the district court's decision, and on appeal. The parties make much of the evidence regarding "Payor A" contained in Exhibits 161 and 162 admitted under seal in the class certification hearing. Dranove had included the price changes in Payor A's contracts in his analysis showing generally uniform rates of price changes. Noether used Payor A's contracts to show he was wrong. The district judge focused on the issue, and counsel for the plaintiffs told the judge: "I think you're just going to have to look at the numbers yourself." Dkt. 418 at 127-28. The judge did so, and in her opinion denying class certification asserted that "of the 18 prices listed in the renegotiated September 22, 2002 contract, 6 increased at a uniform rate, 9 increased at variable rates, and 3 changed pricing methodologies from the previous contract, making it difficult to draw a comparison." *268 F.R.D. at 86*.

We have also examined the contract, by comparing the 2002 prices in Exhibit 162 to the 2000 prices in Exhibit 161. The prices for eight categories of inpatient services all increased by approximately 6.0 percent. In other words, those price increases were uniform.[8] For three categories **[**44]** of outpatient services, the pricing methodology stayed the same for two (a discounted percentage of billed charges), while the third changed from a flat rate per case to a percentage of the billed charges.[9] Where the superficial variation occurred was in the pricing for specified cardiac services. There were nine categories. Five showed decreases of 9.3 to 13.0 percent. Two showed increases of 14.8 and 60 percent, respectively, and two changed from flat rates to a percentage of billed charges. The cardiac price changes, both in terms of variations and the significant price reductions, appear to be inconsistent with Dranove's approach. When one looks more closely, however, one sees that there was a significant restructuring of these services and their pricing. The baseline prices from 2000 all included the professional services of physicians. App. 2725. In the 2002 contract, the professional services of physicians have been removed from the prices. App. 2728. These superficially non-uniform changes in prices **[*822]** therefore merely pose the sort of manageable challenge that Dranove's methodology can handle. They do not undermine the methodology itself.

If Dranove believed that his entire methodology was invalidated by non-uniform price increases, he expressed that belief in a most unusual way. He admitted the existence of non-uniform increases in nominal prices. He offered an economic explanation — restructuring — why this apparent lack of uniformity was misleading. He included data in Appendix D of his reply report showing that some non-uniformity appeared even in contracts that had not undergone any restructuring. And he explained in his reports how he would account for that lack of uniformity. Dranove did not concede away (and certainly not in a single statement at the class certification hearing) the viability of the very methodology that he had defended so vigorously over the course of two lengthy expert reports. The district court's conclusion to the contrary was a **[**46]** clear error.[10]

D*. Class Members Who Did Not, or Could Not, Suffer Injury*

The district court based its denial of class certification on two critical errors: (1) a misapplication of *Rule 23(b)(3)*'s predominance standard; and (2) an erroneous belief that Dranove's DID methodology would be valid only if Northshore's contracts with insurers uniformly increased prices across all services. On appeal, Northshore argues that, even absent these errors, plaintiffs' proposed class cannot be certified because it contains many individuals **[**47]** who were not injured by Northshore's alleged exercise of market power. First, Northshore argues that the evidence shows that Blue Cross Blue Shield of Illinois, plaintiffs' "largest putative class member," as well as a number of other individuals, suffered no injury at all. Second, Northshore argues that, for several reasons, a number of class members could not have been harmed by its post-merger price increases. We address each of these analytically distinct categories of individuals in turn.

1. *Blue Cross and Other Allegedly Uninjured Parties*

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[8] The categories of inpatient services **[**45]** were general inpatient care, intensive care, vaginal delivery, C-section, boarder baby, psychiatric/substance abuse care, telemetry/PCU, and skilled nursing.

[9] The two categories of outpatient services that stayed the same were ambulatory surgery and "other outpatient services," which included emergency room services. The third category was cardiac catheterization.

[10] The district court expressed serious doubt that all nominally non-uniform price increases were actually uniform price increases that only appeared non-uniform because of behind-the-scenes restructuring. *Evanston Northwestern Healthcare, 268 F.R.D. at 86 n.31*. Because such uniformity was as unnecessary under *Rule 23(b)(3)* as it was to Dranove's DID analysis, our analysis remains the same regardless of whether the district court's doubts were well-founded. It appears that the difference of opinion on this point may have stemmed from an ambiguity in how the experts and the parties were using the term "restructure" to deal with some non-uniformity in nominal prices.

Northshore first contends that a number of members of the putative class were not harmed by any post-merger price increases. Northshore argues that Blue Cross was not actually harmed by any post-merger price increases, relying largely on Blue Cross's affidavit stating, without any real explanation, that it "did not pay artificially inflated prices" and did not suffer "any injury or damage," App. 722-23, as well as the FTC's conclusions that Blue Cross experienced no merger-related price increases between the merger in 2001 and the FTC proceedings in 2005.[11] As a result, Northshore argues, none of the class **[*823]** members who paid prices negotiated by **[**48]** Blue Cross were harmed either. Northshore makes a similar argument regarding individuals who it says were not injured because "any price increases were passed on or borne by someone other than the class member."[12]

All of this is at best an argument that some class members' claims will fail on the merits if and when damages are decided, a fact generally irrelevant to the district court's decision on class certification. See, *e.g.,* *Schleicher, 618 F.3d at 687* ("The chance, even the certainty, that a class will lose on the merits does not prevent its certification."); *Payton v. County of Kane, 308 F.3d 673, 677 (7th Cir. 2002)* (observing that "a determination on the propriety of class certification should not turn on [the] likelihood of success on the merits"). As we have previously explained:

> ***HN17***[] a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable **[**50]** because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification . . . .

Kohen, 571 F.3d at 677.

The reasons a court may not decline to certify a class merely because it believes the class's claims will fail on the merits should be clear. For one thing, it is unlikely that discovery regarding the merits of a claim will be complete by the time the court is called upon to certify a class. See ***HN18***[] *Fed. R. Civ. P. 23(c)(1)* (requiring ruling on class certification at "an early practicable time"). Any consideration of the merits at the class certification stage also runs the risk of supplanting the jury as the finder of fact. See *Behrend, 655 F.3d at 199*. This risk is particularly troubling because ***HN19***[] the procedural protections available for such early judicial evaluations of the merits — such as the assumption under *Rule 12(b)(6)* that allegations in the complaint are true and the *Rule 56* requirement to give the non-moving party the benefit of conflicting evidence — are not available under *Rule 23*. See *Szabo, 249 F.3d at 675* **[**51]** ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in *Rule 23* and has nothing to recommend it.").

Perhaps Northshore could have used its evidence regarding Blue Cross to argue that Dranove's methodologies were flawed. That would be an appropriate and limited use of merits evidence at the certification stage. See *Schleicher, 618 F.3d at 685* (***HN20***[] "a court may take a peek at the merits before certifying a class," but the peek must be "limited to those aspects of the merits that affect the decisions essential **[*824]** under *Rule 23*"). But Northshore never developed such an argument in its briefs to this court, thus waiving that argument on appeal. *E.g.,*

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[11] The ALJ observed during the FTC proceedings that this was likely because Blue Cross "had a very strong bargaining position against [Northshore]" and had "power to limit [Northshore's] price increases," and did not "undermine the conclusion that [Northshore] gained market power through the merger. *In re Evanston Northwestern Healthcare Corp., 2005 FTC LEXIS 146, 2005 WL 2845790, at *138 (F.T.C. 2005)*. On review, the FTC declined to address this "sticky and unsettled issue[ ]" because "the record demonstrates that the merger likely gave [Northshore] sufficient market power to increase the average price that it charged to all [insurers]." *2007 FTC LEXIS 210, 2007 WL 2286195, at *52*. We express no opinion on this matter, which, for the same reasons we explain below, is an issue beyond the scope of class certification.

[12] Northshore's reasons for making this latter argument are evident but misguided: the third parties to whom those costs were passed on by members of plaintiffs' proposed class lack federal antitrust standing **[**49]** under the "indirect purchaser" rule. See *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. But under *Illinois Brick*, ***HN16***[] the ability of a direct purchaser to pass on higher costs to others does not undermine its ability to sue under the Clayton Act. *BCS Services, Inc. v. Heartwood 88, LLC, 637 F.3d 750, 756 (7th Cir. 2011)* ("antitrust violators are not allowed to offset against their liability the amount of loss that the direct purchasers . . . who are allowed to sue, were able to pass on").

Awe v. Ashcroft, 324 F.3d 509, 512-13 (7th Cir. 2003). The argument that Northshore has made, however, is one that we have rejected time and again. See Schleicher, 618 F.3d at 687; Kohen, 571 F.3d at 677; Payton, 308 F.3d at 677. We now reject yet again. Also, even if we could reach the merits of plaintiffs' claims involving Blue Cross, the barebones affidavit on which Northshore relies did not so thoroughly disprove those claims as to render any further presentation **[**52]** of evidence to the contrary pointless.[13]

2. *Class Members "Immune" From Injury*

Northshore next argues that class certification is inappropriate because the class contains a number of individuals who could not have been harmed by any post-merger price increases. Among such individuals, Northshore says, are those putative class members who "met their annual plan out-of-pocket maximum or their deductible regardless of any price increase," as well as those individuals whose contracts "protect[ ] against any price increases."

At first glance, it would seem that Northshore is arguing, as it did in regard to Blue Cross, that certification must be denied because plaintiffs' proposed class contains members whose claims will fail on the **[**53]** merits. In actuality, however, Northshore is arguing that the class for which certification is requested is fatally overbroad because it contains members who could not have been harmed by any post-merger price increases — Blue Cross certainly could have been harmed, but arguably might not have been for one reason or another.[14]

This distinction is critical for class certification purposes. As explained above, ***HN21***[] if a proposed class consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits. See Schleicher, 618 F.3d at 686 ("Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win."). If, however, a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification. **[**54]** See Kohen, 571 F.3d at 677 (explaining that "if the [class] definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad" and the class should not be certified). For example, if plaintiffs had sought certification of a class shown to include an high percentage of individuals who paid for medical services at Northshore's hospitals after the merger but under Northshore's pre-merger contracts with insurers (i.e., a multi-year contract signed in 1999), that class obviously could not be certified — it would contain a vast number of people who could not have been harmed by the merger because they purchased medical services in the absence of the market power allegedly **[*825]** created by that merger. See, *e.g.,* Oshana v. Coca-Cola Co., 472 F.3d 506, 514 (7th Cir. 2006) (affirming, in class action alleging deceptive advertising, denial of certification of class defined so broadly that it included "millions" of individuals who were not deceived).

This distinction — between class members who *were not* harmed and those who *could not* have been harmed — stems in part from the "*in terrorem* character of a class action." Kohen, 571 F.3d at 678. **[**55]** Even if a class's claim is weak, the sheer number of class members and the potential payout that could be required if all members prove liability might force a defendant to settle a meritless claim in order to avoid breaking the company. *Id*. While that prospect is often feared with large classes, the effect can be magnified unfairly if it results from a class defined so broadly as to include many members who could not bring a valid claim even under the best of circumstances. *E.g.,* Oshana, 472 F.3d at 514. For this reason, ***HN22***[] "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." Kohen, 571 F.3d at 677. There is no precise measure for "a great many." Such determinations are a matter of degree, and will turn on the facts as they appear from case to case.

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[13] This discussion may prove wholly academic. Blue Cross has indicated that it does not wish to participate in any class action against Northshore, App. 723, so if a class is certified, it will opt out as is its right under Rule 23(b)(3). In light of Dranove's analysis indicating that Blue Cross and its policyholders suffered losses of $110 million as a result of the merger, however, Blue Cross probably would be within its rights if it chose to rethink its position.

[14] Northshore failed to appreciate this distinction, which is why it erroneously included all of these individuals in a single argument concerning overbreadth.

HN23[] The problem posed by class members whose claims may fail on the merits for individual reasons is the obverse of a different problem with class definition: the problem of the "fail-safe" class: one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim. Such a class definition is improper because **[**56]** a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment. See *Randleman v. Fidelity Nat'l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011)* (fail-safe class definition was one of two grounds for decertifying class); *Premier Electrical Const. Co. v. National Elec. Contractors Ass'n, 814 F.2d 358, 361-63 (7th Cir. 1987)* (explaining that *Rule 23* was amended in 1968 to prevent "one-way intervention"); *Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980)* (affirming denial of class certification), quoting *Dafforn v. Rousseau Associates, Inc., 1976 U.S. Dist. LEXIS 13910, 1976 WL 1358 (N.D. Ind. 1976)* (Eschbach, J.); *Campbell v. First American Title Ins. Co., 269 F.R.D. 68, 73-74 (D. Me. 2010)*; *Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 992 n.1 (S.D. Ind. 2007)*; *Genenbacher v. CenturyTel Fiber Co. II, 244 F.R.D. 485, 488 (C.D. Ill. 2007)*; *Indiana State Employees Ass'n. v. Indiana State Highway Comm'n, 78 F.R.D. 724, 725 (S.D. Ind. 1978)*.

Defining a class so as to avoid, on one hand, being overinclusive and, on the other hand, the fail-safe problem is more of an art than a science. Either problem can and often should be solved by refining the class **[**57]** definition rather than by flatly denying class certification on that basis. See, *e.g., Campbell, 269 F.R.D. at 73-74* (court revised class definition to correct problem); *Lewis v. First American Title Ins. Co., 265 F.R.D. 536, 551 (D. Idaho 2010)* (same); *Carson P. ex rel. Foreman v. Heineman, 240 F.R.D. 456, 492 (D. Neb. 2007)* (same); *Flanagan v. Allstate Ins. Co., 228 F.R.D. 617, 618-19 (N.D. Ill. 2005)* (same).

We are not persuaded that plaintiff's proposed class is so overly broad as to require denial of certification in this case. As for the individuals whose contracts purportedly protected them from price increases, Northshore has given us no indication how many such individuals actually exist. In fact, Northshore's brief does not call our attention to even a single contract actually containing such a provision, let alone provide any basis to believe **[*826]** that a "great many" putative class members entered into such contracts. And Northshore admits that only about 2.4 percent of the putative class members paid only their out-of-pocket maximums or deductibles. While this may prove, depending on the ultimate size of the class at issue here, to be a significant number of additional plaintiffs, **[**58]** a 2.4 percent decrease in the size of the class is certainly not significant enough to justify denial of certification. Cf. *Oshana, 472 F.3d at 514* (affirming denial of certification and noting that millions of people were improperly included in the proposed class).[15] Accordingly, we reject Northshore's argument that plaintiffs' proposed class is impermissibly overbroad. Of course, the district court is free to revisit this issue at a later time if discovery shows that the number of members who could not have been harmed by the merger was more significant than it appears at this time. See *Kohen, 571 F.3d at 679* (noting that defendant was free to depose a random sample of the class to determine whether an impermissibly high portion of the class could not have been harmed by the defendant's actions and, if so, request decertification of the class).

IV. *Conclusion*

As explained above, the district court's denial of class certification was based on a misinterpretation of the factual record, namely, the court's erroneous conclusion that Dranove had conceded away the validity of the common method by which he proposed to show antitrust impact on members of the proposed class. Once that erroneous conclusion is set aside, the evidence shows that Dranove can use common evidence and his difference-in-differences methodology to estimate the antitrust impact, if any, of Northshore's merger on the members of that class. Together with the common questions and evidence on other liability issues, this was sufficient to show predominance under *Rule 23(b)(3)*. Northshore's remaining arguments against class certification are not

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[15] HN24[] In circumstances such as these, involving minor overbreadth problems that do not call into question the validity of the class as a whole, the better course is not to deny class certification entirely but to amend the class definition as needed to correct for the overbreadth. Cf. *Washington v. Walker, 734 F.2d 1237, 1240 (7th Cir. 1984)* (noting **[**59]** that district court conditioned grant of certification on plaintiff's redefinition of class). The district court is free to address this issue as it sees fit after remand.

persuasive. We VACATE the district court's order denying plaintiffs' motion for class certification and REMAND this matter for further proceedings consistent with this opinion.

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Elec. Contrs., Inc. v. Dep't of Educ.

Supreme Court of Connecticut

September 6, 2011, Argued; January 17, 2012, Officially Released

SC 18525

Reporter
303 Conn. 402 *; 35 A.3d 188 **; 2012 Conn. LEXIS 6 ***; 192 L.R.R.M. 2954; 2012-1 Trade Cas. (CCH) P77,768; 2012 WL 45468

ELECTRICAL CONTRACTORS, INC., ET AL. v. DEPARTMENT OF EDUCATION ET AL.

Prior History: [*1]** Action for injunctive relief in connection with the plaintiffs' submission of bids on certain municipal construction projects, for declaratory relief with respect to the imposition of certain mandatory project labor agreements by the defendant city of Hartford, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the case was removed to the United States District Court for the District of Connecticut; thereafter, the District Court, Underhill, J., determined that the plaintiffs had standing to bring their action but dismissed their federal constitutional claims and remanded the case to the judicial district of Hartford for resolution of the remaining state claims; subsequently, the court, Sheldon, J., granted the plaintiffs' motion to add Mark K. McQuillan as a defendant and the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiffs appealed.

Elec. Contrs., Inc. v. Dep't of Educ., 2009 Conn. Super. LEXIS 3543 (Conn. Super. Ct., Aug. 7, 2009)

Disposition: Affirmed in part; reversed in part; further proceedings.

Core Terms

Contractors, bid, bidders, trial court, plaintiffs', nonunion, present case, competitive bidding, nonstate, bidding process, specifications, allegations, sovereign immunity, costs, defendants', projects, Relations, quotation, marks, general contractor, preemption, merits, competitive bidding statutes, lack standing, corruption, undermined, preliminary statement, individual plaintiff, antitrust, bid specifications

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview

Public Contracts Law > Bids & Formation > General Overview

HN1[] **Labor & Employment Law, Collective Bargaining & Labor Relations**

A project labor agreement is a prehire collective bargaining agreement, which requires all contractors and subcontractors on a construction project to comply with the terms of all existing collective bargaining agreements with unions representing workers from the trades performing work on the project, and requires all project workers to join the unions for their respective trades, to remain members in good standing of such unions, and not to strike while the project is under construction.

Civil Procedure > ... > Justiciability > Standing > General Overview

HN2[] Justiciability, Standing

Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he or she has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue. Standing requires no more than a colorable claim of injury; a party ordinarily establishes standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN3[] Standing, Injury in Fact

Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in the subject matter of the challenged action, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the challenged action. Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest has been adversely affected.

Civil Procedure > ... > Justiciability > Standing > General Overview

Public Contracts Law > Dispute Resolution > Bid Protests

HN4[] Justiciability, Standing

In the context of competitive bidding, it is well established that an unsuccessful bidder on a state or municipal contract has no contractual right under the common law that would afford standing to challenge the award of a contract. A bid, even the lowest responsible one, submitted in response to an invitation for bids is only an offer which, until accepted by the municipality, does not give rise to a contract between the parties. An unsuccessful bidder, therefore, has no legal or equitable right in the contract. Not unlike any other person whose offer has been rejected, the disappointed bidder has no right to judicial intervention. Moreover, no statute grants unsuccessful bidders standing to challenge the award of a state contract. In particular, state and local competitive bidding laws have not been enacted in order to protect bidders. These laws serve to guard against abuses in the award of contracts such as favoritism, fraud or corruption and are enacted solely for the benefit of the public and in no sense create any rights in those who submit bids.

Civil Procedure > ... > Justiciability > Standing > General Overview

Public Contracts Law > Dispute Resolution > Bid Protests

HN5[] **Justiciability, Standing**

Despite substantial constraints, courts recognize a limited exception to the rules of standing in order to provide a means of protecting the public's interest in properly implemented competitive bidding processes. Under this exception, unsuccessful bidders have standing to challenge the award of a public contract where fraud, corruption or acts undermining the objective and integrity of the bidding process existed. Such a suit is brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a private attorney general. The policy to limit standing so as to deny some claims brought by unsuccessful and precluded bidders is designed to protect twin goals that serve the public interest in various, sometimes conflicting, ways. The standing rules aim to strike the proper balance between fulfilling the purposes of the competitive bidding statutes and preventing frequent litigation that might result in extensive delay in the commencement and completion of government projects to the detriment of the public.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

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

HN6[] **Standards of Review, De Novo Review**

Because the issue of standing implicates subject matter jurisdiction, it may be a proper basis for granting a motion to dismiss. *Conn. Gen. Prac. Book, R. Super. Ct. § 10-31(a)(1)*. The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. Appellate review of the court's ultimate legal conclusion and resulting determination of the motion to dismiss is de novo. When a court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. The motion to dismiss admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. It is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Public Contracts Law > Dispute Resolution > Bid Protests

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN7[] **Standing, Injury in Fact**

In order to have standing to challenge a bid specification for a municipal project that required the successful bidder to agree to abide by a project labor agreement (PLA), a general contractor member has to establish a colorable claim that: (1) either it bid on the project, or it would have submitted an equivalent bid, but for the PLA requirement; and (2) inclusion of the PLA requirement effectuated fraud, corruption, favoritism or other acts undermining the objective and integrity of the bidding process.

Governments > Courts > Judicial Precedent > Dicta

HN8[] **Judicial Precedent, Dicta**

Once it becomes clear that a trial court lacks subject matter jurisdiction to hear the plaintiffs' complaint, any further discussion of the merits is pure dictum. Dictum is an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case are obiter dicta, and lack the force of an adjudication.

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

HN9[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Trial courts addressing motions to dismiss for lack of subject matter jurisdiction apply different rules and procedures depending on the state of the record at the time the motion is filed: When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss, other types of undisputed evidence, and/or public records of which judicial notice may be taken, the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint.

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

HN10[] **Defenses, Demurrers & Objections, Motions to Dismiss**

If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits or other evidence, the trial court may dismiss the action without further proceedings. If, however, the defendant submits either no proof to rebut the plaintiffs jurisdictional allegations or only evidence that fails to call those allegations into question, the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein.

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

HN11[] **Defenses, Demurrers & Objections, Motions to Dismiss**

When a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. An evidentiary hearing is necessary because a court cannot make a critical factual jurisdictional finding based on memoranda and documents submitted by the parties.

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

Public Contracts Law > Dispute Resolution > Bid Protests

HN12[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In most cases involving competitive bidding on public contracts, the allegations alone should provide a sufficient factual basis for deciding the jurisdictional issue of whether the plaintiff made a colorable claim of injury.

Public Contracts Law > Bids & Formation > General Overview

HN13[] **Public Contracts Law, Bids & Formation**

Conn. Gen. Stat. § 4a-100, also known as the prequalification statute, requires all bidders on public construction projects to satisfy certain minimum standards in order to bid or perform work on such projects. Thus, given that the competitive bidding laws provide that a contract shall be awarded to the lowest responsible qualified bidder, *Conn. Gen. Stat. § 10-287(b)(1)*, the prequalification statute ensures that bidders are both responsible and qualified, and cost necessarily rises to the top of the list of appropriate considerations for public contract specifications.

Public Contracts Law > Bids & Formation > General Overview

HN14[] **Public Contracts Law, Bids & Formation**

See *Conn. Gen. Stat. § 4a-100(a)(1)*, *(c)-(f)*, *(g)(1)*, and *(i)-(l)*.

Public Contracts Law > Bids & Formation > General Overview

HN15[] **Public Contracts Law, Bids & Formation**

Cost alone may not always be the determinative factor in awarding a public construction contract.

Civil Procedure > ... > Justiciability > Standing > General Overview

Public Contracts Law > Dispute Resolution > Bid Protests

HN16[] **Justiciability, Standing**

A plaintiff who has not submitted a proposal on a public project has standing to challenge a specification contained in the bid documents if that specification precludes the plaintiff's participation in a manner that impairs the fairness of the bidding process.

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview

Public Contracts Law > Bids & Formation > General Overview

HN17[] **Labor & Employment Law, Collective Bargaining & Labor Relations**

A public agency's discretion to require a project labor agreement (PLA) in any given circumstance is not unfettered. A balance must be struck between the potentially desirable effects of a PLA, such as the completion of a public project within time and financial constraints, and the public's interest in the fairness and economy associated with the competitive bidding process.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN18[] **Fundamental Freedoms, Freedom of Speech**

See *Conn. Const. art. 1, § 4*.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN19[] **Fundamental Freedoms, Freedom of Speech**

See *Conn. Const. art. 1, § 5*.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN20[] **Equal Protection, Nature & Scope of Protection**

See *Conn. Const. art. 1, § 1*.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN21[] **Equal Protection, Nature & Scope of Protection**

See *Conn. Const. art. 1, § 20*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN22[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Conn. Gen. Stat. § 35-26*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN23[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Conn. Gen. Stat. § 35-28*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN24[] Regulated Practices, Price Fixing & Restraints of Trade

See *Conn. Gen. Stat. § 35-29*.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN25[] Appeals, Appellate Briefs

An appellate court is not obligated to consider issues that are not adequately briefed. When an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN26[] Appeals, Appellate Briefs

Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. Claims are also inadequately briefed when they are raised for the first time in a reply brief or consist of conclusory assertions with no mention of relevant authority and minimal or no citations from the record.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Public Contracts Law > Dispute Resolution > Bid Protests

HN27[] Regulated Practices, Price Fixing & Restraints of Trade

The legislature expressly has conferred standing on a broad range of individuals under the Connecticut Antitrust Act, *Conn. Gen. Stat. § 35-24 et seq.*, including unsuccessful bidders in a municipal bidding process.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN28[] Collective Bargaining & Labor Relations, Federal Preemption

Congress implicitly mandates two types of preemption as necessary to implement federal labor policy. The first, known as Garmon preemption is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the National Labor Relations Act, *29 U.S.C.S. § 141 et seq.* To this end, Garmon preemption forbids states to regulate activity that the Act protects, prohibits, or arguably protects or prohibits. The second, known as Machinists preemption, forbids both the National Labor Relations Board and states to regulate conduct that Congress intended be unregulated because left to be controlled by the free play of economic forces. Machinists preemption is based on the premise that

Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN29[] **Collective Bargaining & Labor Relations, Federal Preemption**

The National Labor Relations Act, *29 U.S.C.S. § 141 et seq.*, is intended to supplant state labor regulation, not all legitimate state activity that affects labor.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN30[] **Appeals, Reviewability of Lower Court Decisions**

Conn. Gen. Prac. Book, R. App. P. § 63-4(a)(1) provides in part: If any appellee wishes to (A) present for review alternate grounds upon which the judgment may be affirmed that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues. Whenever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN31[] **Appeals, Reviewability of Lower Court Decisions**

See *Conn. Gen. Prac. Book, R. App. P. § 61-8*.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

HN32[] **Federal & State Interrelationships, State Sovereign Immunity**

Sovereign immunity relates to a court's subject matter jurisdiction over a case and therefore presents a question of law over which an appellate court exercises de novo review. The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under the case law. It has deep roots in Connecticut and the legal system in general, finding its origin in ancient common law. Not only do courts recognize the state's immunity as an entity, but they also recognize that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. Exceptions to this doctrine are few and narrowly construed under Connecticut jurisprudence. The presumption of sovereign immunity is not absolute and may be overcome (1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity, (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights, and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Waiver of Immunity

Governments > Legislation > Interpretation

HN33[] **State Sovereign Immunity, Waiver of Immunity**

Statutes in derogation of sovereign immunity should be strictly construed. When there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity.

Education Law > Administration & Operation > School Property > Competitive Bids

HN34[] **School Property, Competitive Bids**

See *Conn. Gen. Stat. § 10-287(b)-(d)*.

Syllabus

The plaintiffs, E Co., a nonunion contractor, and six of its individual nonunion employees, brought an action in state court against the defendants, the city of Hartford, the state department of education and its commissioner, **[***2]** and certain other contractors, seeking, inter alia, injunctive and declaratory relief after E Co.'s bids to perform work on two state financed municipal school construction projects in Hartford were rejected when the city enforced a project labor agreement in the prebid specifications that required the successful bidder to perform all project work with union labor. The case was removed to federal court, where that court dismissed all of the plaintiffs' federal claims and remanded the case to state court for consideration of the plaintiffs' remaining state claims. Thereafter, the trial court dismissed the plaintiffs' remaining claims for lack of subject matter jurisdiction, concluding that E Co. lacked standing to challenge the project labor agreement requirement because E Co. failed to make a colorable claim that such a requirement effectuated fraud, corruption, favoritism or otherwise undermined the objective or integrity of the competitive bidding process in accordance with the test for unsuccessful bidder standing set forth in *Connecticut Associated Builders & Contractors v. Hartford (251 Conn. 169, 740 A.2d 813)*. The trial court also concluded that the remaining individual plaintiffs lacked **[***3]** standing because they were not prequalified contractors and, therefore, could not and did not bid on the construction projects at issue. On appeal, the plaintiffs claimed that the trial court incorrectly concluded that they lacked standing to assert their state claims. *Held*:

1. The trial court incorrectly concluded that E Co. lacked standing, as an unsuccessful bidder, to challenge the imposition of the project labor agreement requirement and the rejection of its bids; E Co. having submitted bids on both projects, and the plaintiffs' complaint, the supporting affidavits and other evidence in the record having contained detailed allegations as to the discriminatory effect that the project labor agreement requirement would have on E Co. and other nonunion contractors, E Co. made a colorable claim that fraud, corruption, favoritism or other conduct had undermined the objective and integrity of the competitive bidding process.

2. The trial court properly concluded that the individual employees did not having standing to challenge, under the state constitution, the imposition of the project labor agreement requirement because they did not suffer the direct or actual injury required to establish **[***4]** standing; the claims of the individual employees, namely, that the project labor agreements violated their rights to freedom of speech and association because they mandated that they join a union in order to work on the school construction projects and that they violated their rights to equal protection because they barred nonunion employees from working on the projects, were too remote and speculative, as the individual employees were not prequalified to submit bids directly and, therefore, did not and could not bid on the projects.

3. The trial court incorrectly concluded that E Co. did not have standing to prosecute its claim against the city under the Connecticut Antitrust Act (act) (*§ 35-24 et seq.*); E Co., as an unsuccessful bidder in a municipal bidding process, had the statutory right to bring an antitrust claim against the city, and, because the city was acting in a proprietary rather than regulatory capacity, it was not entitled to qualified immunity under the provision in the act (*§*

35-31 [b]) affording qualified immunity for anticompetitive conduct specifically required or directed by state or federal statutes.

4. The city could not prevail on its claim, as an alternative **[***5]** ground for affirming the trial court's judgment, that the plaintiffs' claims were preempted by federal labor law, the city having acted in a proprietary capacity as a purchaser of construction services rather than in a regulatory capacity when it imposed the mandatory project labor agreements in the bid specifications for the school construction projects.

5. The dismissal of the plaintiffs' claims against the department of education and its commissioner was affirmed on the alternative ground that those claims were barred by the doctrine of sovereign immunity, the plaintiffs' allegations having been insufficient to support a claim that the department and the commissioner acted in excess of their statutory authority.

(*One justice concurring in part and dissenting in part*)

Counsel: Steven B. Kaplan, with whom was Paul R. Fitzgerald, for the appellants (plaintiffs).

Darren P. Cunningham, assistant attorney general, with whom, on the brief, was Richard Blumenthal, former attorney general, for the appellees (named defendant et al.).

Frank G. Usseglio and John T. Fussell, with whom were Karen K. Clark and Glenn A. Duhl, and, on the brief, Robert M. Cheverie and Gary F. Sheldon, for the appellees (defendant **[***6]** city of Hartford et al.).

Judges: Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js. ZARELLA, J. In this opinion ROGERS, C. J., and NORCOTT, PALMER, McLACHLAN and EVELEIGH, Js., concurred. HARPER, J., concurring in part and dissenting in part.

Opinion by: ZARELLA

Opinion

[193]** **[*405]** ZARELLA, J. The principal issue in this appeal is whether the nonunion plaintiffs, Electrical Contractors, Inc. (ECI), and six of its individual employees,[1] have standing to challenge prebid specifications requiring the successful bidder on two state financed **[**194]** school construction projects[2] in the city of Hartford to perform all project work with union labor under the terms of a project labor agreement (PLA). The plaintiffs claim that the trial court incorrectly concluded that (1) ECI lacked standing, pursuant to this court's decision in *Connecticut Associated Builders & Contractors v. Hartford, 251 Conn. 169, 740 A.2d 813 (1999)* (*Associated Builders & Contractors*), to challenge the PLA requirement and the rejection of its lowest, responsible, qualified bids on the two construction projects after ECI refused to sign and be bound by the mandatory PLA, (2) the PLA requirement did not violate the applicable competitive bidding **[***7]** laws, *General Statutes §§ 4a-100*, *4b-91*, *4b-92* **[*406]** and *10-287*, (3) the individual plaintiffs did not have standing under *article first, §§ 1*, *4*, *5* and *20, of the Connecticut constitution* to challenge the PLA requirement, and (4) ECI did not have standing to prosecute its claim that the PLA requirement was in violation of the Connecticut Antitrust Act, *General Statutes § 35-24 et seq.* The defendants, the city of Hartford (city), Morganti Group, Inc., Downes Construction Company, LLC, Custom Electric, Inc.,[3] the state

[1] The six individual plaintiffs, none of whom wish to join, pay dues or be required to support the political activities of the local electrical workers union, the International Brotherhood of Electrical Workers, are Jose L. Gonzalez, Jose **[***8]** G. Maldonado, Dan Czyzewski, Bradley Wheaton, Craig Busca and Sean Smith.

[2] The two Hartford schools are Capital Preparatory Magnet School and Annie Fisher Magnet School.

[3] The city imposed the specifications and enforced the PLA requirement against ECI in rejecting its low bids. Morganti Group, Inc., and Downes Construction Company, LLC, served as the city's construction managers on the projects.

department of education (department), and Mark K. McQuillan, the commissioner of education,[4] who allegedly approved the challenged contracts on behalf of the state,[5] disagree with the plaintiffs and raise two alternative grounds for affirmance, namely, that the plaintiffs' claims are (1) preempted by federal labor law, and (2) barred by the doctrine of sovereign immunity.[6] We affirm in part and reverse in part the judgment of the trial court.

I

FACTS

The following relevant facts are set forth in the trial court's memorandum of decision. *HN1*[] "A PLA is a prehire collective bargaining agreement which requires all contractors and subcontractors on a construction project **[*407]** **[***9]** to comply with the terms of all existing collective bargaining agreements with unions representing workers from the trades performing work on the project and requires all project workers to join the unions for their respective trades, to remain members in good standing of such unions, and not to strike while the project is under construction.[7] **[**195]** The PLAs . . . at issue share these essential features, although they set aside 15 percent of all work on each project for minority-owned . . . and/or women-owned . . . business enterprises, which are not bound by the PLAs.[8]. . .

We refer to the city, Morganti Group, Inc., Downes Construction Company, LLC, and Custom Electric, Inc., collectively as the nonstate defendants.

[4] We refer to the department and McQuillan collectively as the state defendants.

Dicin Electric Company also was named as a defendant. The plaintiffs, however, subsequently withdrew their claims against Dicin Electric Company.

[5] The state provided 90 percent of the financing for the school construction projects.

[6] The federal preemption claim is raised by the nonstate defendants. The sovereign immunity claim is raised by the state defendants.

[7] See *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 176* (describing PLA in that case as prehire agreement signed by construction manager, local unions and contractors for purpose of enhancing timely completion of project without interruption or delay through establishment of framework for labor-management cooperation and stability, with terms remaining in full force and effect throughout project, contractors agreeing to abide by collective bargaining agreements of trade unions, including making contributions to employee benefit trust funds and recognizing trade unions as sole collective bargaining **[***10]** representatives of employees working on project, and unions agreeing not to engage in any strike, slowdown or other disruption of work, but not requiring all project workers to be members of union); cf. *New York State Chapter, Inc., Associated General Contractors of America v. New York State Thruway Authority, 88 N.Y.2d 56, 65, 666 N.E.2d 185, 643 N.Y.S.2d 480 (1996)* ("[A] PLA is a prebid contract between a construction project owner and a labor union [or unions] establishing the union as the collective bargaining representative for all persons who will perform work on the project. The PLA provides that only contractors and subcontractors who sign a prenegotiated agreement with the union can perform project work. A PLA thus generally requires all bidders on the project to hire workers through the union hiring halls; follow specified dispute resolution procedures; comply with union wage, benefit, seniority, apprenticeship and other rules; and contribute to the union benefit funds. In return for a project owner's promise to insist in its specifications that all successful bidders agree to be covered by a PLA, the union promises labor peace through the life of the contract . . . ." [Citation **[***11]** omitted.]).

[8] The challenged PLAs in the present case, which are described in detail in paragraphs twenty-eight through thirty-six of the plaintiffs' second amended complaint, required that the successful bidder on each project "draw all of its field labor through referrals from a designated trade union, or that its [nonunion] employees must first join a designated trade union, as a prerequisite to executing a contract and performing the subject work." The PLAs also required, inter alia, that the successful bidder (1) abide by the "'Project Work Rules for the Greater Hartford-New Britain Building and Construction Trade Council and its affiliated [u]nions and the [c]ity of Hartford, Hartford Public Schools Construction, Renovations and Additions Program' dated [April 14, 2004]," (2) ensure that all of its field employees working on each project remain members in good standing of the relevant union during the term of the applicable PLA, (3) agree to participate in a "Labor Management Cooperative Committee" and "submit to and comply with all rulings promulgated by [that committee and by] the PLA's Joint Administrative Council," (4) pay wages and fringe benefits to all workers on the project **[***12]** in accordance with the prevailing union scale, (5) recognize the building trades council and its affiliated local unions as the sole and exclusive bargaining representatives for building trades

[*408] "In their complaint, the plaintiffs [sought] several types of declaratory, injunctive and other extraordinary relief[9] in **[**196]** connection with the projects . . . at issue based upon the common underlying claim that the city's imposition of mandatory PLAs upon successful bidders on those and similar state-financed construction projects is illegal. . . .

[*409] "After this case was filed in [the trial] court, the defendants successfully petitioned for its removal to the United States **[***15]** District Court [for the District of Connecticut] so that [the] federal constitutional claims . . . could be adjudicated in a federal forum. Upon its removal, the case was assigned to [Judge] Stefan Underhill, before whom the parties presented oral arguments after submitting extensive briefs on comprehensive motions to dismiss[10] all counts of the plaintiffs' then operative first amended complaint.[11] At the conclusion of oral argument, Judge Underhill dismissed all of the plaintiffs' federal claims, declined to exercise jurisdiction over their pendent state claims, and ordered that the case be remanded to [the trial] court for further proceedings. Left undecided in this process, with the express intention that [the trial] court should decide them on remand, were the defendants' jurisdictional challenges to the plaintiffs' state law claims.

"After the case was remanded, the [trial] court met with counsel to establish a procedure for identifying those jurisdictional challenges that remained to be adjudicated, claiming such challenges for a hearing, and filing supplemental briefs thereon. Upon receipt of the parties' claims for hearing and supplemental briefs, which incorporated by reference all relevant portions of the briefs they had previously filed in federal court, the [trial] court heard oral argument on all challenges **[*410]** claimed for hearing on July 3, 2009. For the purpose of that hearing,

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mechanics and laborers employed on the projects and covered by their respective PLAs, (6) pay any person referred by the union whom it rejected for work on the project, as was its right, for "'reporting time'" even though the rejected person had performed no work on the project, and (7) deduct union dues from each field employee's pay and send it to the union on a monthly basis.

[9] The trial court described the requested relief as follows: "In particular, [the plaintiffs sought] (1) [a declaration] that the imposition of mandatory PLAs, by or on behalf of the city, on projects approved and funded by the state defendants is illegal and improper insofar as **[***13]** PLAs restrict the performance of work on the projects, in whole or in part, to union member employees, union-referred employees, union contractors or PLA signatory contractors, (2) a [declaration] that the imposition of a mandatory PLA, by or on behalf of a public owner, that restricts the performance of work to union member employees, union-referred employees, union contractors or PLA signatory contractors for any municipal school construction project that is funded, in whole or in part, with state funds, [under] . . . *§ 10-287*, is illegal, (3) [a declaration] that ECI's bids on the two projects were the lowest qualified responsible bids, and thus that the city's rejection of those bids, based upon ECI's refusal to agree to PLAs, was illegal and improper, (4) writs of mandamus ordering the city to award and execute contracts for the electrical work on each of the two projects to ECI, (5) an injunction ordering the city and its construction managers not to execute any contract to perform electrical work on either of the two projects with any other contractor than ECI, (6) an injunction ordering the state defendants not to provide any funds in furtherance of the work on the two projects **[***14]** by any other electrical contractor than ECI, (7) a writ of mandamus ordering the state defendants to withhold funds in furtherance of the work on the two projects by any electrical contractor other than ECI, and (8) a writ of mandamus ordering the state defendants to withhold any funds in furtherance of work performed on any school construction project that is funded, in whole or in part, with state funds, [pursuant to] . . . *§ 10-287*, for which a mandatory PLA of the type . . . at issue has been imposed. In addition to the foregoing, the plaintiffs [sought] the following types of monetary relief: (1) from the . . . city, damages under *General Statutes § 35-34* for ECI's lost profits and bid preparation costs on the two projects and for the individual plaintiffs' lost wages and benefits, plus treble damages, reasonable attorney's fees and costs under . . . *§ 35-35*, and (2) from all but the state defendants, such other monetary relief as is allowable by law, including but not limited to lost profits, bid preparation costs, reasonable attorney's fees and costs."

[10] These included the motion to dismiss, dated March 27, 2009, filed by the city, Downes Construction Company, LLC, and Morganti Group, Inc., the motion to dismiss, dated March 27, 2009, filed by Dicin Electric Company and Custom Electric, Inc., and the motion to dismiss, dated April 17, 2009, filed by the department before McQuillan was joined as a **[***16]** defendant on June 15, 2009. Two separate stipulations of facts, one entered into by the city and the plaintiffs and another entered into by the department and the plaintiffs also were filed with the United States District Court on February 27, 2009, in connection with this action.

[11] The plaintiffs filed the currently operative second amended complaint on May 20, 2009, following remand by Judge Underhill to the Connecticut Superior Court.

the parties agreed that all documents and materials submitted by any party could be considered parts of the evidentiary record upon which to decide the contested issues presented on the pending motions.

"The **[***17]** defendants, in their motions [to dismiss] . . . challenged [the trial] court's subject matter jurisdiction over the plaintiffs' state law claims on three separate **[**197]** grounds. First, they claim[ed] that the plaintiffs lack[ed] standing to bring a bid protest under settled principles of Connecticut common law, as most recently applied . . . in [*Associated Builders & Contractors*] . . . . Second, the state defendants argue[d] that the plaintiffs' claims against them [were] barred by the doctrine of sovereign immunity because such claims do not rest upon allegations which, if proved, would establish that their conduct in this case was clearly in excess of their statutory authority. Third, all defendants join[ed] in claiming that the plaintiffs' general challenge to the use of PLAs in state funded municipal school construction projects [was] preempted by federal labor law, which has long approved of their use [in] public construction projects."

Following the hearing, the trial court agreed with the defendants that the plaintiffs lacked standing and that the action should be dismissed for lack of subject matter jurisdiction. In its memorandum of decision, the court concluded that ECI had failed **[***18]** to make a colorable claim that the PLA requirement effectuated fraud, corruption, favoritism or otherwise undermined the objective or integrity of the competitive bidding process under the common-law principles articulated in *Associated Builders & Contractors*. The court also concluded that the individual plaintiffs did not have standing because they were not prequalified electrical contractors and had "neither bid on either project nor could have done so . . . ." Accordingly, the trial court granted the defendants' **[*411]** motions to dismiss without reaching or deciding the alternative grounds advanced in support of their motions. Thereafter, the plaintiffs appealed to the Appellate Court from the trial court's judgment, and the appeal was transferred to this court pursuant to *General Statutes § 51-199 (c)* and *Practice Book § 65-2*.

II

STANDARD OF REVIEW

HN2[] "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing **[***19]** is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

HN3[] "Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected **[*412]** interest . . . has **[***20]** been adversely affected." (Internal quotation marks omitted.) *May v. Coffey, 291 Conn. 106, 112, 967 A.2d 495 (2009)*.

[198]** ***HN4***[] In the context of competitive bidding, it is well established that an unsuccessful bidder on a state or municipal contract has no contractual right under the common law that would afford standing to challenge the award of a contract. *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 178*. "[A] bid, even the lowest responsible one, submitted in response to an invitation for bids is only an offer which, until accepted by the municipality, does not give rise to a contract between the parties. . . . An unsuccessful bidder, therefore, has no legal or equitable right in the contract. Not unlike any other person whose offer has been rejected, the disappointed bidder has no right to judicial intervention. . . .

"Moreover, no statute grants unsuccessful bidders standing to challenge the award of a state contract. . . . In particular, state and local competitive bidding laws have not been enacted in order to protect bidders. These laws serve to guard against abuses in the award of contracts such as favoritism, fraud or corruption and are enacted solely **[***21]** for the benefit of the public and in no sense create any rights in those who submit bids. . . .

HN5[] "Despite these substantial constraints, we have recognized a limited exception to the rules of standing in order to provide a means of protecting the public's interest in properly implemented competitive bidding processes. . . . Under this exception, unsuccessful bidders have standing to challenge the award of a public contract where fraud, corruption or acts undermining the objective and integrity of the bidding process existed . . . . [S]uch a suit is brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting **[*413]** essentially as a private attorney general." (Citations omitted; internal quotation marks omitted.) *Id., 178-80*.

"Our policy to limit standing so as to deny some claims brought by unsuccessful and precluded bidders is designed to protect twin goals that serve the public interest in various, sometimes conflicting, ways. The standing rules aim to strike the proper balance between fulfilling the purposes of the competitive bidding statutes and preventing frequent litigation that might result in extensive delay **[***22]** in the commencement and completion of government projects to the detriment of the public." (Internal quotation marks omitted.) *Id., 180*.

Finally, ***HN6***[] because the issue of standing implicates subject matter jurisdiction, it may be a proper basis for granting a motion to dismiss. E.g., *May v. Coffey, supra, 291 Conn. 113*; see *Practice Book § 10-31 (a) (1)*. "The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon **[***23]** that alone." (Internal quotation marks omitted.) *Gold v. Rowland, 296 Conn. 186, 200-201, 994 A.2d 106 (2010)*. **[**199]** "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper **[*414]** party to invoke judicial resolution of the dispute."[12] (Internal quotation marks omitted.) *May v. Coffey, supra, 113*. Mindful of these principles, we address each of the plaintiffs' claims in turn.

III

ANALYSIS

A

Standing of ECI

ECI first claims that the trial court incorrectly concluded that it lacked standing to challenge the imposition of the PLA requirement and the rejection of its lowest, responsible, qualified bids for the school construction projects. ECI specifically claims that the trial court misapplied this court's narrow holding in *Associated Builders & Contractors* that the plaintiffs did not have standing because they had not bid on the project, as ECI had done in the present case. In addition, ECI claims that the court in *Associated Builders & Contractors* never considered the cost effects **[***24]** on the public bidding process of disqualifying nonunion contractors and workers, who constitute 90 percent of the local electrical workforce and 80 percent of the overall construction workforce, and never ruled on the discriminatory effects of the plaintiffs' challenge to the PLA requirement. ECI further claims that the trial court in the present case disregarded the extensive factual record before it, including "overwhelming evidence" that the effect of the PLA requirement was to exclude nonunion contractors and employees from working on the projects, and did not

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[12] In the present case, additional facts also were entered into evidence. See part I of this opinion; see also footnote 17 of this opinion.

properly consider that ECI was the lowest, responsible qualified bidder. In this regard, ECI maintains that the complaint and accompanying affidavits set forth numerous ways in which the **[*415]** PLA requirement discriminated against ECI and other nonunion contractors and caused them to suffer specific, actionable harm by effectively barring them from working on the projects.

The nonstate defendants respond[13] that ECI's claim as to the validity of the PLA requirement is virtually identical to the claim that was unsuccessfully raised by the plaintiffs in *Associated Builders & Contractors* and that ECI's attempt to distinguish the present **[***25]** case from that and other Connecticut precedent is without merit. In particular, the nonstate defendants argue that *Associated Builders & Contractors* determined that cost is not a factor to be considered in deciding whether the competitive bidding laws are undermined. They further argue that neither ECI nor other nonunion contractors presented evidence that the PLA requirement prevented nonunion contractors from bidding or working on the projects by making it economically unfeasible for them to do so. The nonstate defendants thus contend that ECI has failed to prove that it has standing because it did not establish that the PLA requirement was used to perpetuate fraud, corruption, favoritism or conduct that undermines the objective and integrity of the competitive bidding process. We agree with ECI that the trial court incorrectly concluded that it did not have standing.

Because our analysis of this claim requires us to consider how the trial court **[**200]** interpreted and applied *Associated Builders & Contractors*, we divide the following discussion into three parts. In the first part, we review the reasoning in *Associated Builders &* ***[***26]*** *Contractors*. We next consider how the trial court applied *Associated Builders & Contractors* in the present case and explain why we disagree with the trial court's conclusions. We finally examine the sufficiency of the plaintiffs' **[*416]** allegations that the PLA requirement was used to perpetuate fraud, corruption, favoritism or other conduct that undermined the objective and integrity of the competitive bidding process.

1

Associated Builders & Contractors

We begin with the reasoning in *Associated Builders & Contractors*. The trial court's decision was based almost entirely on its interpretation of that case, in which this court concluded that the plaintiffs did not have standing. The plaintiffs were a trade association of contractors and subcontractors (association) and two individual subcontractors who sought to enjoin the defendant, the city of Hartford, from awarding a contract for the construction of a municipal parking garage. *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 171*. The association claimed that, but for a PLA requirement in the bid specifications, some of its contractor members would have submitted bids on the project. *Id., 177*. The defendant subsequently **[***27]** sought to dismiss the complaint on jurisdictional grounds, alleging that the plaintiffs lacked standing. *Id., 174*.

At the outset of its decision, the court described the principal issue as "whether nonbidding contractors and subcontractors[14] ha[d] standing to challenge a bid specification for a municipal project that require[d] the successful bidder to agree to abide by a [PLA]." *Id., 170-71*. It then determined that the nonbidding general contractors, who were represented by the association, did not have standing to file the complaint. *Id., 185, 186*. The court explained: ***HN7***[] "In order to have standing, a general contractor member would have had to establish a colorable **[*417]** claim that: (1) either it bid on the project, or it would have submitted an equivalent bid, but for the [PLA] requirement; and (2) inclusion of the [PLA] requirement effectuated fraud, corruption, favoritism or other acts undermining the objective and integrity of the bidding process." *Id., 186*. The court stated that the plaintiffs had not established that the general contractor members of the association had met either part of the test because, "[w]ith

[13] The state defendants did not respond to this claim.

[14] We note that one of the plaintiffs in *Associated Builders & Contractors* was ECI. See *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 171*.

respect to the first part, the association did not show that any of its **[***28]** general contractor members had bid on the project or would have bid on the project. . . . The association cannot, therefore, invoke the standing of its general contractor members as a basis for its own standing to pursue its challenge to the validity of the [PLA] requirement." Id. After concluding that the association had not satisfied this foundational, or threshold, element, the court determined that, "[e]ven if this foundational element had been met by testimony of the association's general contractor members that they would have bid, but for the [PLA] specification, the association still cannot prevail under the second part of the standing test." *Id., 186-87*.

[201]** With respect to the second part of the test, the association had claimed that the PLA requirement "arbitrarily and anticompetitively limit[ed] access to the bidding process" because it "imposed costs [on] nonunion general contracts that made it economically unfeasible for them to bid," and, therefore, it violated "the integrity of competitive bidding . . . [and] **[***29]** injur[ed] the general public by driving up the cost of government funded projects." *Id., 187*. The court disagreed, explaining that, "[e]ven assuming that the [PLA] requirement might increase the project's cost, we know of no requirement in the competitive bidding statutes that propels cost considerations to the top of the list of appropriate considerations for public contract specifications. If cost alone were the determinative factor of appropriate bid **[*418]** criteria, disappointed bidders or nonbidders would have virtually unlimited opportunities to litigate project specifications on the ground of alternate designs, materials, safety requirements and so on. Such litigation would involve courts in comparative cost assessments that would severely impair the discretion of governmental bodies entrusted with the responsibility for governmental construction projects. It is neither unusual nor unfair for project specifications to give some potential bidders an economic advantage over others because of factors such as the bidder's expertise, specialization and reliability." *Id., 187-88*.

The court elaborated that the record failed to show that cost considerations had precluded nonunion general contractors **[***30]** from participating in the bidding process, stating in a footnote that "the plaintiffs ha[d] provided no explanation as to how the alleged increased expense to some potential bidders would raise the costs of the overall project. An increase in costs in one aspect of a project can equally well result in overall cost savings for the project. By avoiding labor disruption and maintaining a supply of skilled workers, as the project construction manager testified the [PLA] was designed to do, the [PLA] could reduce overall costs. The record . . . does not, in fact, support the association's claim that cost considerations precluded nonunion general contractors from participating in the bidding process. Two of the five bidders were nonunion contractors. The association presented no testimony to support its claim that government projects using [PLAs] had higher total costs than other similar projects without [a PLA]." *Id., 187 n.12*. The court thus concluded that the association had failed to make "a colorable factual showing" to support its claim of economic disadvantage. *Id., 187*. The court stated that the "the record . . . demonstrates a nondiscriminatory decision by the [defendant] to use **[***31]** a [PLA]"; *id., 188*; and that the "determinative **[*419]** factor" in a bidding challenge was "whether the requirements in that process had been applied consistently and in good faith." *Id., 189*.

2

Trial Court's Application of *Associated Builders & Contractors*

In relying on *Associated Builders & Contractors* when granting the defendants' motions to dismiss ECI's claim with respect to the competitive bidding statutes, the trial court initially acknowledged that none of the plaintiffs in that case had satisfied the threshold requirement of demonstrating that they had bid on the project or would have bid on the project but for the PLA requirement. The trial court then concluded that the court in *Associated Builders & Contractors* had reached the merits of the plaintiffs' claim by considering whether inclusion of the PLA requirement in the prebid specifications **[**202]** had "'effectuated fraud, corruption, favoritism or other acts undermining the objective and integrity of the bidding process'" through the imposition of costs on nonunion contractors that made it economically unfeasible for them to bid. Referring to the statements in *Associated Builders & Contractors* that cost considerations were not "'[at] the **[***32]** top of the list of appropriate considerations for public contract specifications'" and that the defendant's decision to use a PLA was nondiscriminatory and within its discretion, the trial court determined that, because ECI had raised a "virtually identical" claim, the analysis of the claim on the merits in *Associated Builders & Contractors* was applicable and dispositive of the nonstate defendants' motions to dismiss in the present case.[15] We disagree with the trial **[*420]** court's interpretation of *Associated Builders & Contractors* and the nonstate defendants' claim that the holding in that case is dispositive of their motions to dismiss.

As previously discussed, the principal issue in *Associated Builders & Contractors* was "whether *nonbidding* contractors and subcontractors ha[d] standing to challenge a bid specification for a municipal project that require[d] the successful bidder to agree to abide by a [PLA]." (Emphasis added.) *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 170-71*. The court ultimately **[***34]** determined that the plaintiffs had not shown that any of the association's general contractor members had bid on the project or would have bid on the project under the first part of the test, and, therefore, it could not "invoke the standing of its general contractor members as a basis for its own standing to pursue its challenge to the validity of the [PLA] requirement." *Id., 186*. The court nonetheless proceeded to consider whether the plaintiffs could have prevailed under the second part of the test. See *id., 186-87*. It is that portion of the analysis on which the trial court in the present case relied to resolve the standing issue. Its reliance, however, was misplaced for the following reasons.

First, any consideration of the second part of the test in *Associated Builders & Contractors* was unnecessary **[*421]** following the court's dispositive holding that the association lacked standing under the first part of the test. Accordingly, the court's conclusion in *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 186-87*, **[***35]** that the plaintiffs could not prevail under the second part of the test and the reasoning on which its conclusion was based were **[**203]** nothing more than dicta.[16] See, e.g., *Statewide Grievance Committee v. Rozbicki, 211 Conn. 232, 246, 558 A.2d 986 (1989)* (***HN8***[]) "Once it becomes clear that the trial court lacked subject matter jurisdiction to hear the plaintiffs' complaint, any further discussion of the merits is pure dict[um]. . . . When the trial court concluded . . . that subject matter jurisdiction was missing, the remainder of its [ruling was] merely advisory . . . ." [Citation omitted; internal **[**204]** quotation marks omitted.]).

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[15] The trial court concluded, on the basis of *Associated Builders & Contractors*, that (1) "a differential cost impact on union and nonunion contractors . . . affords the latter no basis for challenging [a PLA] requirement" and, therefore, "an unsuccessful bidder . . . lacks standing to complain of it . . . in a court of law," (2) "the ultimate issue to be decided on any proper bid challenge is whether the public authority gave fair and evenhanded consideration to each bidder instead of treating different bidders differently," (3) the common-law principle denying **[***33]** standing to disappointed bidders remains intact unless abrogated by a statute that expressly confers standing, (4) Connecticut's competitive bidding statutes on their face do not identify overall project cost for special protection, (5) the prequalification statute, *§ 4a-100*, which was enacted subsequent to *Associated Builders & Contractors*, does not "occup[y] the field" or preempt public officials from exercising their discretion and imposing other, or different, bid specifications, such as PLAs, as a precondition for the award of contracts on public works projects, and neither do any other related statutes; see *General Statutes §§ 4b-91*, *4b-92* and *10-287*; and (6) there was no evidence that the use of PLAs for the projects in the present case was the result of fraud, corruption or favoritism.

[16] "[D]ictum is an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination . . . . Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case . . . are obiter dicta, and lack the force of an adjudication." (Internal quotation marks omitted.) *State v. Courchesne, 296 Conn. 622, 738 n.79, 998 A.2d 1 (2010)*.

Justice **[***36]** Harper's assertion, in his concurrence and dissent, that the court's analysis under the second part of the test did not constitute dictum disregards our well established precedent and flies in the face of the court's own reasoning. The court made absolutely clear that it did not regard both parts of the test as threshold jurisdictional requirements when it referred to the first part of the test as its "foundational element"; *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 186*; and further explained that, even if that part of the test had been satisfied, the association "still" could not prevail under the second part of the test. *Id., 187*. Moreover, to the extent Justice Harper cites twelve other cases as "weighty authority" for the proposition that the two parts of the test serve as independent grounds to support a judgment on standing, all but one are unpersuasive because they are from other jurisdictions, and the remaining Connecticut case lacks the dispositive language in *Associated Builders & Contractors* describing the first part of the test that was applied in that case as a threshold requirement.

Second, we disagree with the trial court and the nonstate **[***37]** defendants that the court in *Associated Builders & [*422] Contractors* considered the merits of the plaintiffs' complaint or ruled that the plaintiffs had failed to establish that the PLA requirement had a potentially discriminatory effect on nonunion contractors due to increased costs. Although the court's reference to whether the plaintiffs had produced sufficient evidence of fraud, corruption or favoritism may have suggested that it was considering the merits of the defendant's decision to impose a PLA requirement, the court itself rejected such a notion when it stated that "[t]he general rule of standing . . . is not inconsistent with the particular standard applicable to disappointed and would-be bidders: By requiring [the plaintiffs] to produce evidence that the bidding process was undermined by fraud, corruption or favoritism, the court is simply forcing the party challenging the competitive bidding process to make a *colorable* claim of injury that it is within the zone of interests protected by the competitive bidding laws . . . . *Although the plaintiffs were not required to prove the merits of their claim, they did have the lesser burden of establishing a colorable claim*."[17] **[*423]** (Emphasis **[***38]** altered; internal quotation marks omitted.) *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 181-82*. Consistent with this view, the dissent in *Associated Builders & Contractors*

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[17] The trial court in the present case heard argument by counsel but took no testimony on all challenges the parties had claimed for a hearing on July 3, 2009. The parties also agreed that all documents and materials filed by either side could be considered parts of the evidentiary record on which to decide the issues presented on the pending motions. This included documentation the parties previously had filed in federal court, including their briefs, stipulations of fact and supporting and supplemental affidavits.

Although the parties raise no issues pertaining to the hearing in this case, we note that such a hearing is not typically required or held when the court is considering a motion to dismiss. As we explained in *Conboy v. State, 292 Conn. 642, 974 A.2d 669 (2009)*, ***HN9***[] trial courts addressing motions to dismiss **[***40]** for lack of subject matter jurisdiction apply different rules and procedures depending on the state of the record at the time the motion is filed: "When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . ***HN10***[] If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine **[***41]** this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiffs jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint . . . but may rest on the jurisdictional allegations therein. . . .

"Finally, ***HN11***[] [when] a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citations omitted; internal quotation marks omitted.) *Id., 651-54*.

To the extent this court stated in *Associated Builders & [***42] Contractors* that "the trial court was *required* to conduct an evidentiary hearing to decide whether the plaintiffs had established a colorable claim that the [PLA] requirement had undermined the integrity or objective of the competitive bidding process"; (emphasis added) *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 182*; or declared in the companion case of *Connecticut Associated Builders & Contractors v. Anson, 251 Conn. 202, 740 A.2d 804 (1999)*, that "the evidentiary showing for standing . . . was [the association's] burden to make"; *id., 214*; we now clarify that, ***HN12***[] in most cases involving competitive bidding on public contracts, the allegations alone should provide a sufficient factual basis for deciding the jurisdictional issue of whether the plaintiff made a colorable claim of injury. Because the parties in the present case agreed, however, that the trial court could consider the materials and documents they had filed in federal court, all future references to the record in this case include that documentation as well as the facts alleged in the complaint.

observed multiple times that the majority had not reached the merits, stating that "[t]he court, in a hypertechnical ruling on standing, avoids a substantive issue that . . . we should review"; *id., 193* (*Berdon, J.*, dissenting); "[t]he public interest should compel this court **[*424]** to address this issue"; id. (*Berdon, J.*, dissenting); "[t]he majority avoids [the plaintiffs'] substantive claims by narrowly ruling that the plaintiffs have no standing"; *id., 194* (*Berdon, J.*, dissenting); and that, "[b]y declining to afford the plaintiffs standing, the majority . . . simply ducks the issue of whether [PLA] requirements for a public construction contract violate state and local competitive bidding statutes." *Id., 201* (*Berdon, J.*, dissenting). In addition, the court stated on several occasions that its conclusion that the association **[**205]** lacked standing was based on deficiencies in the record; see *id., 187 n.12, 188, 189*; and that the plaintiffs had failed to make "a colorable factual showing" in **[***39]** support of their claim. *Id., 187*. Thus, neither the majority nor the dissent in *Associated Builders & Contractors* believed that the plaintiffs' claim had been decided on its merits, and the trial court in the present case should not have applied the so-called holding in *Associated Builders & Contractors* under the second part of the test to decide the issues in the present case.

Third, to the extent the trial court and the nonstate defendants regard the court's discussion of **[***43]** cost in *Associated Builders & Contractors* as resolving the issue of whether a PLA requirement is discriminatory, and thus dispositive of the standing issue in the present case, they misconstrue the court's analysis and fail to consider the subsequent evolution of Connecticut's competitive bidding laws. *Associated Builders & Contractors* did not conclude that cost was not a factor to be considered in deciding whether the competitive bidding laws were undermined, nor did it evaluate or reach any conclusions regarding the broader question of whether the PLA requirement in that case contravened the competitive bidding laws. The court merely stated that it "[knew] of no requirement in the competitive bidding statutes that propels cost considerations to *the top of the list* of appropriate considerations for **[*425]** public contract specifications" and that "*cost alone*" should not be "the determinative factor"; (emphasis added) *id., 187-88*; a statement with which ECI's attorney in the present case agreed during oral argument before this court. The court also noted that "[a]n increase in costs in one aspect of a project can equally well result in overall cost savings for the project. By avoiding labor **[***44]** disruption and maintaining a supply of skilled workers, as the project construction manager testified the [PLA] was designed to do, the requirement could reduce overall costs. The record . . . does not, in fact, support the association's claim that cost considerations precluded nonunion general contractors from participating in the bidding process." *Id., 187 n.12*. Accordingly, the court in *Associated Builders & Contractors* did not conclude, as the trial court concluded and the nonstate defendants claim, that a PLA requirement has no effect on competitive bidding because of increased costs to nonunion contractors and workers. It merely concluded that the "determinative factor" is whether the requirements of the bidding process have been applied consistently and in good faith, and that the plaintiffs had not made a "colorable factual showing" that the integrity of the bidding process had been affected by the additional costs allegedly imposed on nonunion contractors and workers by the PLA requirement. *Id., 187-89*.

Moreover, following the decision in *Associated Builders & Contractors*, the legislature enacted ***HN13***[] *General Statutes § 4a-100*, also known as the "prequalification statute," which **[***45]** requires all bidders on public construction projects to satisfy certain minimum standards in order to bid or perform work on such projects.[18] Thus,

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[18] *General Statutes § 4a-100* provides in relevant part: ***HN14***[] "(a) As used in this section: (1) 'Prequalification' means prequalification issued by the Commissioner of Administrative Services to bid on a contract or perform work pursuant to a contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any other public work by the state or a municipality, except a public highway or bridge project or any other construction project administered by the Department of Transportation, or to perform work under such a contract as a substantial subcontractor **[***46]** . . . .

* * *

"(c) The application form shall, at a minimum, require the applicant to supply information concerning:

"(1) The applicant's form of organization;

"(2) The applicant's principals and key personnel and any names under which the applicant, principals or key personnel conducted business during the past five years;

[*426] [207]** given that the competitive bidding laws provide that a **[*427]** contract shall be awarded to the

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"(3) Any legal or administrative proceedings pending or concluded adversely against the applicant or any of the applicant's principals or key personnel within the past five years which relate to the procurement or performance of any public or private construction contract and whether the applicant is aware of any investigation pending against the applicant or any principal or key personnel;

"(4) The nature of any financial, personal or familial relationship between the applicant and any public or private construction project owner listed on the application as constituting construction experience;

"(5) A statement of whether (A) the applicant has been disqualified pursuant to section 4b-95, this section or section 31-57c or 31-57d, (B) the applicant is on the list distributed by the Labor Commissioner pursuant to section 31-57a, (C) the applicant is disqualified or prohibited **[***47]** from being awarded a contract pursuant to section 31-57b, (D) the applicant has been disqualified by another state, (E) the applicant has been disqualified by a federal agency or pursuant to federal law, (F) the applicant's registration has been suspended or revoked by the Department of Consumer Protection pursuant to section 20-341gg, (G) the applicant has been disqualified by a municipality, and (H) the matters that gave rise to any such disqualification, suspension or revocation have been eliminated or remedied; and

"(6) Other information as the commissioner deems relevant to the determination of the applicant's qualifications and responsibilities.

"(d) The applicant shall include a statement of financial condition prepared by a certified public accountant which includes information concerning the applicant's assets and liabilities, plant and equipment, bank and credit references, bonding company and maximum bonding capacity, and other information as the commissioner deems relevant to an evaluation of the applicant's financial capacity and responsibility.

"(e) Information contained in the application shall be current as of the time of filing except that the statement of financial condition **[***48]** shall pertain to the applicant's most recently-completed fiscal year.

"(f) The commissioner shall determine whether to prequalify an applicant on the basis of the application and on relevant past performance according to procedures and criteria set forth in regulations which the commissioner shall adopt on or before October 1, 2005, in accordance with chapter 54. Such criteria shall include, at a minimum, the record of the applicant's performance, including, but not limited to, written evaluations of the applicant's performance on public or private projects, the applicant's past experience on projects of various size and type, the skill, ability and integrity of the applicant and any subcontractors used by the applicant, the experience and qualifications of supervisory personnel employed by the applicant, the maximum amount of work the applicant is capable of undertaking as demonstrated by the applicant's financial condition, bonding capacity, size of past projects and present and anticipated work commitments, and any other relevant criteria that the commissioner prescribes. Such regulations shall also (1) provide that the criteria considered shall be assigned separate designated numerical **[***49]** values and weights and that the applicant shall be assigned an overall numerical rating on the basis of all criteria, and (2) establish prequalification classifications, aggregate work capacity ratings and single project limits. Such prequalification classifications shall be used to establish the types of work a contractor or substantial subcontractor is qualified to perform and the aggregate work capacity ratings shall be used to establish the maximum amount of work a contractor or substantial subcontractor is capable of undertaking.

"(g) (1) The applicant shall indicate the prequalification classifications, aggregate work capacity ratings and single project limits that are sought. The commissioner may issue a certificate of prequalification to any applicant who meets the requirements of this section. Such certificate shall be effective for one year from the date issued and shall indicate the contractor's or substantial subcontractor's prequalification classifications, aggregate work capacity ratings and single project limits. . . .

* * *

"(i) The commissioner may not issue or renew a prequalification certificate to any contractor or substantial subcontractor (1) who is disqualified **[***50]** pursuant to section 31-57c or 31-57d, or (2) who has a principal or key personnel who, within the past five years, has a conviction or has entered a plea of guilty or nolo contendere for or has admitted to commission of an act or omission that reasonably could have resulted in disqualification pursuant to any provision of subdivisions (1) to (3), inclusive, of subsection (d) of section 31-57c or subdivisions (1) to (3), inclusive, of subsection (d) of section 31-57d, as determined by the commissioner.

"(j) The commissioner may revoke a contractor's or substantial subcontractor's prequalification or reduce the contractor's or substantial subcontractor's prequalification classification or aggregate work capacity ratings, after an opportunity for a hearing, if the commissioner receives additional information that supports such revocation or reduction. During the course of such hearing "lowest responsible **[*428]** qualified bidder"; *General Statutes § 10-287 (b) (1)*; the prequalification statute ensures that bidders are both responsible and qualified, and cost necessarily rises to **[*429]** the "top of the list"[19] of appropriate considerations **[**208]** for public contract specifications.[20] *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 187*.

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process, the commissioner may suspend a contractor's or substantial subcontractor's prequalification certificate if the commissioner determines that there is probable cause to believe that such contractor or substantial subcontractor engaged in conduct that significantly undermines the skill, ability or integrity **[***51]** of such contractor or substantial subcontractor. Any such suspension shall not exceed a period of three months and shall be accompanied by a written decision of the commissioner that sets forth the reasons for and duration of such suspension. The commissioner shall send notification of any such suspension to such contractor or substantial subcontractor by certified mail, return receipt requested. Such contractor or substantial subcontractor may file a response, in writing, not later than thirty days after receipt of such notice. The commissioner shall review any such response submitted by a contractor or substantial subcontractor within such thirty-day period.

"(k) (1) Any substantial evidence of fraud in obtaining or maintaining prequalification or any materially false statement in the application, update statement or update bid statement may, in the discretion of the awarding authority, result in termination of any contract awarded the contractor by the awarding authority. . . .

"(2) The commissioner shall deny or revoke the prequalification of any contractor or substantial subcontractor if the commissioner finds that the contractor or substantial subcontractor, or a principal or key **[***52]** personnel of such contractor or substantial contractor, within the past five years (A) has included any materially false statement in a prequalification application, update statement or update bid statement, (B) has been convicted of, entered a plea of guilty or nolo contendere for, or admitted to, a crime related to the procurement or performance of any public or private construction contract, or (C) has otherwise engaged in fraud in obtaining or maintaining prequalification. Any revocation made pursuant to this subsection shall be made only after an opportunity for a hearing. Any contractor or substantial subcontractor whose prequalification has been revoked pursuant to this subsection shall be disqualified for a period of two years after which the contractor or substantial subcontractor may reapply for prequalification, except that a contractor or substantial subcontractor whose prequalification has been revoked on the basis of conviction of a crime or engaging in fraud shall be disqualified for a period of five years after which the contractor or substantial subcontractor may reapply for prequalification. The commissioner shall not prequalify a contractor or substantial subcontractor **[***53]** whose prequalification has been revoked pursuant to this subdivision until the expiration of said two-year, five-year, or other applicable disqualification period and the commissioner is satisfied that the matters that gave rise to the revocation have been eliminated or remedied.

"(*l*) The commissioner shall provide written notice of any revocation, disqualification, reduction in classification or capacity rating or reinstated prequalification to the Commissioner of Public Works, the Commissioner of Consumer Protection and the President of The University of Connecticut not later than thirty days after any final determination. . . ."

[19] We nonetheless agree with *Associated Builders & Contractors* that ***HN15***[] "cost alone" may not always be "the determinative factor" in awarding a public construction contract. *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 187-88*.

[20] Justice Harper asserts that "[t]he majority's approach to cost appears to conflate two distinct levels of cost consideration," specifically, project costs associated with items such as the building's location and size, construction materials, remediation activities and time to completion, and the cost of the **[***54]** project as determined by the winning bid in the competitive bidding process. Footnote 4 of the concurring and dissenting opinion. Thus, Justice Harper essentially contends that, because the PLA requirement is a bid specification, it cannot be challenged under the competitive bidding statutes or Connecticut precedent as effectuating fraud, corruption, favoritism or acts undermining the objective or integrity of the bidding process. See id. Justice Harper, however, ignores our holding in *Unisys Corp. v. Dept. of Labor, 220 Conn. 689, 694-95, 600 A.2d 1019 (1991)*, that ***HN16***[] "a plaintiff who ha[s] not submitted a proposal on a public project ha[s] standing to challenge a *specification contained in the bid documents* if that specification preclude[s] the plaintiff's participation in a manner that impair[s] the fairness of the bidding process." (Emphasis added.) *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 180*. Likewise, Justice Harper ignores the fact that *Associated Builders & Contractors*, which cited *Unisys Corp*. with approval; see id.; did not reject the association's claim because it was an improper challenge to the bidding specifications but because the association **[***55]** had failed to make a "colorable factual showing," through allegations or other evidence, that "limiting the number of potential bidders violates not only the integrity of competitive bidding but also injures the general public by driving up the cost of government funded projects." *Id., 187*. To the extent Justice Harper suggests otherwise, we emphasize that *Associated Builders & Contractors* did not preclude any future claim that a bid specification with substantial cost effects on a

Finally, the statement in *Associated Builders & Contractors* that "[t]he trial court's determination that the **[*430]** decision to adhere to a [PLA] was within the defendant's discretion and the bounds of the competitive **[***56]** bidding statutes [and], therefore, did not exceed the limits of our case law"; *id., 182*; did not mean that a PLA requirement may never affect the integrity of the competitive bidding process. The court made the foregoing comment in response to the plaintiffs' claim that the trial court improperly had reached the merits of whether the defendant's decision to use a PLA was a proper exercise of its discretion. See *id., 181-82*. In that context, the court merely was observing that the defendant's decision to use a PLA was discretionary and that the trial court had consulted our case law and properly determined that, in order to challenge the PLA requirement, the plaintiffs were required to make a colorable claim of injury by producing evidence that the bidding process had been undermined by fraud, favoritism or corruption.[21] See *id., 182* **[**209]** . The court made a similar **[*431]** observation in *Connecticut Associated Builders & Contractors v. Anson, 251 Conn. 202, 213-14, 740 A.2d 804 (1999)*,[22] a

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large group of potential bidders violates the competitive bidding statutes, which were enacted for the public benefit "to secure the best product at the lowest price"; *Spiniello Construction Co. v. Manchester, 189 Conn. 539, 543, 456 A.2d 1199 (1983)*; and the decision in *Associated Builders & Contractors* is not dispositive of ECI's claim that the PLA bid specification affects the fairness and integrity of the bidding process by imposing additional costs solely on bidders who are not union members.

[21] The court stated, with respect to this issue: "The plaintiffs argue that the trial court's analysis of standing was improper because it reached the merits of the plaintiffs' claims in evaluating whether the [defendant's] decision to use a [PLA] was a proper exercise of its discretion. We disagree.

"The plaintiffs observe . . . that standing concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question and does not involve an inquiry into the merits of the claim. According to the plaintiffs, whether adoption of the [PLA] requirement was within the [defendant's] discretion was a question separate and apart from the question of their standing to challenge **[***59]** the [defendant's] action.

"The general rule of standing cited by the plaintiffs is not contested. As the trial court noted, however, that rule is not inconsistent with the particular standard applicable to disappointed and would-be bidders: By requiring [the association] to produce evidence that the bidding process was undermined by fraud, corruption or favoritism, the court is simply forcing the party challenging the competitive bidding process to make a colorable claim of injury that it is within the zone of interests protected by the competitive bidding laws . . . . Although the plaintiffs were not required to prove the merits of their claim, they did have the lesser burden of establishing a *colorable* claim. See *Maloney v. Pac, [183 Conn. 313, 321, 439 A.2d 349 (1981)]*. . . . The trial court's determination that the decision to adhere to a [PLA] was within the [defendant's] discretion and the bounds of the competitive bidding statutes, therefore, did not exceed the limits of our case law." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 181-82*.

[22] In *Anson*, the court summarized the **[***60]** trial court's reasoning in granting the defendant's motion to dismiss the plaintiffs' claim that the PLA requirement in the bid specifications infringed on the plaintiffs' rights of free speech and association as follows: "The [trial] court . . . stated that inclusion of a [PLA] requirement in the project specifications was justified by the legitimate public interest in completion of a public works project within time and financial constraints. The nonstrike clause contained in [PLAs] would further that interest. The [defendant's] decision to use a [PLA] was not based on any improper motive. The court determined that [t]he state has a legitimate interest in completing a public works project within time and financial constraints. Evidence showed that the commissioner decided to use the [PLA] on this project based on knowledge of the use of [PLAs] by other public entities. *The plaintiffs did not present any evidence* that the [PLA] was a means to exclude nonunion contractors or amounted to such an exclusion. The purpose of the competitive bidding statutes is not to aid the contractors by making it economically feasible for all to bid . . . but to promote the public interest in the efficient **[***61]** completion of public works projects. . . . The state's interest in its own finances when undertaking public works projects takes precedence over the finances or business methods of individual contractors. . . . The [defendant's] decision to try a [PLA] on this project was a legitimate exercise of his discretion to find a way to achieve the state's goal while remaining within the bounds of the competitive bidding statutes. . . .

"It is impossible to reconcile these findings with any conclusion other than that *the association failed to establish that the use of a* [*PLA*]*, under the circumstances of* [*the*] *case*, constituted an infringement of the constitutional rights of its members. The constitution is not violated simply because a public agency adopts a legitimate public policy that runs counter to the philosophical views or business practices espoused by the membership of the association. *The association did not make the evidentiary showing for standing that was its burden to make*." (Emphasis added; internal quotation marks omitted.) *Connecticut Associated* companion case released on the same day as *Associated Builders & Contractors*. In other words, the court in both *Associated Builders & Contractors* and *Anson* was referring to the fact that ***HN17***[] a public **[*432]** agency's discretion **[***57]** to require a PLA in any given circumstance is not unfettered. A balance must be struck between the potentially desirable effects of a PLA, such as the completion of a public project within time and financial constraints, and the public's interest in the fairness and economy associated with the competitive bidding process. Viewed through this lens, the court in *Associated Builders & Contractors* **[**210]** was attempting to determine whether the plaintiffs' allegations and other evidence in the record were sufficient to support a colorable claim that the integrity of the competitive bidding process would be seriously undermined by the imposition of the PLA requirement. See *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 187-89 and n.12*; see also footnote 17 of this opinion. Similarly, the court in *Anson* was attempting to determine whether the allegations and other evidence in the record concerning deprivation of the plaintiffs' rights of free speech and association were sufficient to support a colorable claim that the integrity of the competitive bidding process would be seriously undermined by the imposition of the PLA requirement. See *Connecticut Associated Builders & Contractors v. Anson, supra, 251 Conn. 213-14*. **[***58]** In neither case was the court considering the claims on their merits. Consequently, for all of the foregoing reasons, we conclude that, to the extent the trial court in the present case treated the analysis of the PLA requirement in *Associated Builders & Contractors* under the second part of the standing test as a decision on the merits, it misunderstood and misapplied that decision.

3

Sufficiency of the Allegations

We also agree with ECI that the trial court failed to conduct an in-depth examination of the plaintiffs' allegations to determine whether they were sufficient **[*433]** to support a colorable claim of injury. See footnote 23 of this opinion. As previously noted, "[w]hen a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Gold v. Rowland, supra, 296 Conn. 200-201*. The record includes "supporting affidavits that contain undisputed facts." (Internal quotation marks omitted.) *May v. Coffey, supra, 291 Conn. 108*. In the present case, we conclude, upon an examination of the allegations in the underlying **[***63]** complaint,[23] together with the

Builders & Contractors v. Anson, supra, 251 Conn. 213-14. We reiterate that the court's reference to an evidentiary showing must be **[***62]** understood in light of our analysis in *Conboy*. See footnote 17 of this opinion.

[23] ECI alleged, inter alia, that (1) it was a nonunion electrical contractor with extensive experience in public construction projects, (2) bid packages for the two school construction projects were put out for competitive bidding by the city pursuant to the competitive bidding laws for the purpose of determining the lowest, responsible, qualified bidder and entering into a contract for the required work with the successful bidder, (3) ECI's bid was the lowest, responsible, qualified bid for each project, (4) the state is providing 90 percent of the funding for both projects, (5) state law provides that "[a]ll orders and contracts for school building construction receiving state assistance . . . shall be awarded to the lowest responsible qualified bidder . . . after a public invitation to bid"; *General Statutes § 10-287 (b) (1)*; and that "the words 'lowest responsible and qualified bidder' shall mean the bidder who is prequalified pursuant to *section 4a-100*, and **[***64]** whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary to faithful performance of the work based on objective criteria considering past performance and information"; *General Statutes § 4b-92*; (6) ECI is prequalified under the applicable statutory provisions to bid and perform the work on both projects, (7) ECI fully meets the statutory definition of "lowest responsible and qualified bidder," (8) none of the statutory requirements that define lowest responsible qualified bidder and none of the other public bidding statutes suggest that a bidder must execute a PLA and must agree to draw all of its field labor through referrals from a designated trade union, or that its nonunion employees must first join a designated trade union as a prerequisite to execution of a contract and performance of the subject work, (9) based on the foregoing statutory requirements and regulations adopted thereto, it was illegal and beyond the city's authority to impose as a mandatory condition for the award of the two bid packages that the successful bidder execute a PLA and agree to draw all of its field labor through referrals from a designated trade union, or that **[***65]** its nonunion employees must first join a designated trade union before execution of a contract and performance of the subject work could commence, (10) the city stated in the bid documents for both projects that all bidders would have to comply with a PLA requiring

affidavits **[**211]** and **[*434]** stipulations of fact provided in support thereof, that ECI **[*435]** made the **[**212]** colorable factual showing that was missing in *Associated Builders & Contractors*. See footnote 17 of this opinion.

It is undisputed that ECI submitted a bid on both construction projects, thus satisfying the first part of the standing test. ECI also sustained its burden under the second part of the test because the complaint, the supporting affidavits and other evidence, considered in their most favorable light, contained detailed allegations as to the discriminatory effect of the PLA requirement on ECI and other nonunion contractors.

Specifically, paragraph thirty-seven of the complaint alleges twelve **[***69]** ways in which the PLA requirement would "severely impair" ECI's ability as a nonunion contractor to successfully perform work on the projects and place ECI at a competitive disadvantage relative to union contractors bidding on the same projects. Similarly, in his affidavit dated March 25, 2009, William J. Flynn, Jr., ECI's vice president for nearly fifteen years, describes how the PLA requirement would penalize ECI, or any other nonunion contractor, their field **[*436]** employees and taxpayers by significantly increasing labor costs and how the alleged harm would be ongoing. Finally, in their joint affidavit dated March 23, 2009, which draws on four studies conducted by the Beacon Hill Institute at Suffolk University in Boston, Massachusetts, concerning PLAs and the cost of public school construction in Connecticut, Massachusetts and New York, David G. Tuerck[24] and Paul Bachman[25] apply the studies' findings to the PLA requirement in the present case and describe how it would drive up project construction costs by limiting competition and imposing

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the successful bidder, among other things, to draw all of its field labor through referrals from a designated trade union, or that its nonunion employees must first join a designated trade union as a prerequisite to execution of a contract and performance of the subject work, (11) there is no provision in the PLAs that an employee of ECI who wants to join the designated trade union solely for the purpose of working on the project would be granted membership, would be assigned to work on the project by the designated trade union at the request of the ECI employee, would be allowed to work on other non-PLA projects while a member of the union for the purpose of working on the project, would have any right to be reimbursed or enjoy the benefit of contributions made on his behalf to the union pension funds or to withhold funds or to be reimbursed for contributions designated for the union's political or social activities with **[***66]** which the employee disagreed, (12) ECI, as a nonunion contractor, would incur significant and duplicative costs, as described in detail in the complaint, for providing the labor necessary to construct the projects under the required PLAs, which would severely impair ECI's ability successfully to perform the work on the projects and would place ECI at a severe competitive disadvantage relative to the union contractors bidding for the work, (13) in light of these issues, ECI requested a waiver of the PLA requirement for purposes of the subject bid on the electrical work for the projects but received no response, (14) ECI thereafter submitted its lowest responsible qualified bid with a second request for a waiver of the PLA requirement and a statement that it would not perform the work pursuant to the PLA requirement in the bid documents, (15) ECI subsequently was informed at a meeting with city officials and representatives that they intended to reject ECI's bids on the basis of ECI's refusal to agree to the PLA requirement, (16) ECI received no further written communication from the city in this regard, (17) on the basis of all information available to ECI, its bids for the projects **[***67]** were rejected due to its refusal to agree to the mandatory PLA requirement, and the contract for electrical work was awarded to and a contract executed with a union contractor that was the third lowest bidder, (18) the city's actions and stated intent to bar any contractor from projects if it does not agree to a PLA constitute blatant favoritism for union contractors and union workers, which provides union contractors and construction trade unions with an unfair and illegal competitive advantage over nonunion contractors and nonunion construction workers, (19) as demonstrated by ECI's significantly lower bid, as well as by other objective data, the imposition of PLAs in the context of public school construction diminishes competition and increases the cost of construction by 10 to 20 percent, (20) nonunion construction contractors and workers comprise over 80 percent of the construction industry in Connecticut, and the imposition of PLAs severely discourages and often eliminates their bidding on those contracts, thus decreasing competition, (21) the imposition of mandatory PLAs undermines the object and integrity of the public competitive bidding process and exhibits patent favoritism **[***68]** to the trade unions and union contractors, to the unfair and severe disadvantage of nonunion contractors such as ECI and its nonunion employees in this action, and (22) ECI would have been the successful bidder on both projects if it had not been for the mandatory PLA requirement, and because a significant amount of ECI's work is in public construction in Connecticut, the PLA requirement will severely and irreparably harm ECI's ongoing business operations as well as the employment opportunities of its individual employees, and will harm ECI's reputation and future ability to obtain work by causing future employers to raise questions about ECI's inability to obtain past work involving PLA requirements.

[24] Tuerck is a professor of economics, chairman of the economics department and executive director of the Beacon Hill Institute.

[25] Bachman is the director of research **[***71]** at Beacon Hill Institute.

costly work and hiring rules on nonunion contractors. In their affidavit, Tuerck and Bachman also describe how the area labor market analysis for **[***70]** the Hartford public school system, produced by the Fluor Corporation in March, 2003, for the purpose of recommending the most appropriate labor posture for the public works projects under consideration, recommended the use of PLAs without any analysis of cost, schedule, or quality impacts from imposing a mandatory PLA in Hartford and without any evidence that actual union disruptions of previous school construction projects had led to delays or increased costs in Connecticut such that PLAs were necessary to foster school construction in a more economical and efficient manner.[26] Accordingly, we conclude that ECI's allegations, as supplemented by the supporting affidavits and evidence in the record that the PLA requirement would have a discriminatory effect on ECI and other nonunion contractors, were sufficient **[*437]** to satisfy the second part of the standing test, which requires a colorable claim that fraud, corruption, favoritism or other conduct has seriously undermined the objective and integrity of the competitive bidding process.

Insofar as the nonstate defendants insist that ECI provided insufficient evidence to establish that it has standing, we disagree. **[**213]** One need only examine the reasons why the court in *Associated Builders & Contractors* concluded that the association did *not* have standing to understand why ECI in the present case does. In *Associated Builders & Contractors*, this court explained that the association had failed to make a colorable factual showing under the second part of the standing test because it had "provided no explanation as to how the alleged increased expense to some potential bidders would raise the costs of the overall project," the record did not "support the association's **[***72]** claim that cost considerations [had] precluded nonunion general contractors from participating in the bidding process," and "[t]he association [had] presented no testimony . . . that government projects using [PLAs] had higher total costs than other similar projects without such a requirement." *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 187 n.12*. In other words, the complaint in *Associated Builders & Contractors* alleged a violation of the competitive bidding laws in the most general, conclusory terms, without any allegations as to the specific effects of the PLA requirement on the association and other nonunion contractors.[27] In the present case, the lengthy allegations **[*438]** in the complaint and the supporting affidavits of Flynn, Tuerck and Bachman provided such information. Accordingly, we conclude that ECI made a colorable claim of injury[28] and that the trial court has subject matter jurisdiction in this matter.[29]

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[26] In their joint supplemental affidavit dated April 27, 2009, Tuerck and Bachman address the "Kotler paper"; see F. Kotler, School of Industrial and Labor Relations, Cornell University, "Project Labor Agreements in New York State: In the Public Interest" (March, 2009); which was attached as an exhibit to the city's reply brief on its motion to dismiss, and point out what they regard as significant errors in Fred B. Kotler's critique of the methodology used in the Beacon Hill Institute studies.

[27] The plaintiffs claimed in count one of their complaint, in which they alleged a violation of the competitive bidding statutes, that the PLA requirement imposed conditions that they would not otherwise have included in their bids unrelated to **[***73]** a bidder's status as the lowest qualified bidder and that the PLA requirement was arbitrary and capricious and in violation of the competitive bidding statutes because the city (1) did not consider or analyze any data as to the effect of PLAs on the projects, including cost, timeliness or efficiency, (2) did not consider or analyze the effect of PLAs on competition for work on the projects, on nonunion workers and their right not to become members of a union, on nonunion workers' health insurance coverage and pension benefits, on safety, and on public policy objectives relating to employment opportunities for minorities, women and the economically disadvantaged, and (3) had no reason to believe the projects would be subject to delays because of strikes or labor unrest or that PLAs would ensure more timely completion of the projects or would relate in any way to the provisions or purposes of the competitive bidding requirements. The plaintiffs also alleged in count one that the city, by requiring bidders to agree to the terms of a PLA, was exceeding the scope of its authority under the applicable bidding statutes, favored union over nonunion contractors and subcontractors and, by failing **[***74]** to inform bidders of the terms of the PLA, had made it impossible for a bidder to prepare a responsive bid. The plaintiffs thus alleged that the foregoing conduct caused them irreparable harm as potential bidders, interested parties, citizens and taxpayers.

[28] We do not consider ECI's claim that the trial court failed to discuss the criteria that a court should employ in determining the validity of a PLA bid specification for a publicly funded construction project because that claim would involve consideration of the merits, rather than the issue of the plaintiffs' standing. For the same reason, we do not consider the plaintiffs' claim that the trial court improperly concluded that the PLA requirement imposed by the city for the school construction projects did not violate the provisions of the applicable competitive bidding laws.

[*439] **[**214]** B

Standing of the Individual Plaintiffs

The six individual plaintiffs claim that the trial court incorrectly concluded that **[***78]** they do not have standing to challenge the imposition of the mandatory PLAs for the school construction projects under *article first, §§ 4*[30] **[*440]** and *5*,[31] of the Connecticut constitution, which guarantee freedom of speech and association, and *article first, §§ 1*[32] and *20*,[33] of the Connecticut constitution, **[**215]** which guarantee equal protection under the law.

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[29] Justice Harper contends that the majority expands the court's subject matter jurisdiction by "depart[ing] from the narrowly circumscribed doctrine of standing established by our past cases dealing with [the competitive bidding] statutes," particularly this court's holding in *Associated Builders & Contractors*, and "disregards . . . the lawmaking authority of **[***75]** the legislature." Citing *Spiniello Construction Co. v. Manchester, supra*, *189 Conn. 545, Ardmare Construction Co. v. Freedman, 191 Conn. 497, 499, 505, 467 A.2d 674 (1983)*, and *Unisys Corp. v. Dept. of Labor, supra, 220 Conn. 696*, Justice Harper specifically contends that the second part of the standing test, namely, that "the alleged illegalities amounted to fraud, corruption, favoritism or acts undermining the objective and integrity of the competitive bidding process"; *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 181*; is satisfied only when a plaintiff makes "a colorable claim that the bidding process-from the development of project specifications and bidding rules to the application of these to bidders-was tainted by procedural impropriety." We disagree. Although it is true that the alleged violations in *Spiniello* and *Ardmare*, respectively, involved irregular bids because of an oral rule addendum communicated to only one bidder and an improper signature on a bidding form, both of which flaws may be characterized as strictly *procedural* in nature; see *Ardmare Construction Co. v. Freedman, supra, 499-500*; *Spiniello Construction Co. v. Manchester, supra, 544-45*; **[***76]** the alleged violation in *Unisys Corp.* was that the single source bid specifications *favored a particular vendor*. *Unisys Corp. v. Dept. of Labor, supra, 691*. Although the plaintiff in *Unisys Corp*. also alleged favoritism on the ground that the bid specifications had been prepared with the assistance of the vendor in question; see id.; the court ultimately held that the plaintiff would have standing if it could show that the restrictions imposed by the single source specifications alone precluded it from participating in a manner that impaired the fairness of the bidding process; see *id., 695*; see also *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 180*; and that the plaintiff was entitled to an evidentiary hearing to determine whether the specifications had caused such an impairment. *Unisys Corp. v. Dept. of Labor, supra, 695, 698*. The court did not qualify its holding by adding that the plaintiff also would be required to show that the drafting of the specifications had been tainted by procedural impropriety. Thereafter, the court in *Associated Builders & Contractors* determined under the second part of the standing test that the plaintiffs in that case had **[***77]** "failed to make even a colorable factual showing" in support of their claim that the use of a PLA illegally had resulted in the absence of a level playing field for union and nonunion contractors and subcontractors interested in participating in a government building project. *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 187*. The court did *not* conclude, as Justice Harper suggests, that the inclusion of a PLA bid specification *never* can be challenged on the ground that it favors union over nonunion bidders unless accompanied by a drafting impropriety, but only that the plaintiffs had failed to assert a colorable claim of injury in that case, which accounts for the court's repeated references to deficiencies in the record as the reason for its decision. *Id., 187 n.12, 188-89*. Accordingly, *Associated Builders & Contractors* cannot dictate the result here, as Justice Harper contends, because the record in the present case, unlike the record in *Associated Builders & Contractors*, is sufficient to support the conclusion that ECI had standing.

[30] *Article first, § 4, of the Connecticut constitution* provides: ***HN18***[] "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

[31] *Article first, § 5, of the Connecticut constitution* provides: ***HN19***[] "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

[32] *Article first, § 1, of the Connecticut constitution* provides: ***HN20***[] "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

[33] *Article first, § 20, of the Connecticut constitution* provides: ***HN21***[] "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin."

They specifically claim that the PLA requirement violates their rights to freedom of speech and association because it mandates that they join a union in order to work on the projects and requires them to make payments to the union that will be used to further social and political goals that they may not support and that are unrelated to collective bargaining. They also claim that the PLA requirement violates their equal protection rights because it would severely restrict, or effectively bar, nonunion contractors such as ECI and nonunion licensed journeymen and apprentices like themselves from working on the projects, thus conferring illegal benefits, advantages and privileges on union contractors and union journeymen and apprentices. The nonstate defendants respond that the trial court properly concluded that the individual plaintiffs **[***79]** do not have standing to pursue their state constitutional claims because they are not prequalified electrical contractors, **[*441]** and, therefore, they did not, and could not have, bid on the projects.[34] We agree with the nonstate defendants that the trial court properly concluded that the individual plaintiffs lacked standing.[35]

A similar issue was raised in *Connecticut Associated Builders & Contractors v. Anson, supra, 251 Conn. 204*. In that case, the plaintiffs included two subcontractors and one of their employees, who was suing in his capacity as an individual and a taxpayer. *Id., 204 and n.1*. The trial court concluded that the individual **[***81]** plaintiff lacked standing to challenge the bidding process on the ground that it impaired his federal and state constitutional rights to freedom of speech and association. See *id., 205-206*. This court agreed, stating that the individual plaintiff and the plaintiff subcontractors had "no standing to pursue a challenge to general bid specifications because, in their own capacity, they never can bid directly for government projects. Their preclusion from the bidding process has no relationship to whether they operate union shops, or whether they are opposed philosophically to union shops. Their preclusion stems from the nondiscriminatory and uncontested industry practice of limiting bidding to general contractors. If general contractors were indeed to incur higher costs because of [PLA] contract specifications . . . the possible economic consequences of increased costs attributable to potential subcontractors [and individual employees] are too speculative and too attenuated to constitute 'some direct injury' for the purposes of conferring standing on such subcontractors [and individual **[*442]** employees]. **[**216]** See *Maloney v. Pac, 183 Conn. 313, 320-21, 439 A.2d 349 (1981)*." *Connecticut Associated Builders & Contractors v. Anson, supra, 251 Conn. 208-209*; **[***82]** see also *id., 208 n.8*.

In the present case, we agree with the trial court that the six individual plaintiffs have not suffered the direct or actual injury required under Connecticut law to establish standing because they are not prequalified electrical contractors, and, accordingly, they did not bid, nor could they have bid, on the school construction projects. Moreover, due to the fact that ECI was not the winning bidder, the individual plaintiffs never were compelled to make payments to the union or directly barred from working on the projects. We therefore conclude that they lacked standing to bring their state constitutional claims because the claims were too remote and speculative.

The individual plaintiffs rely on *Abood v. Detroit Board of Education, 431 U.S. 209, 212-13, 236-37, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977)*, in which the United States Supreme Court held that the general allegations in a complaint filed by a group of teachers who were unwilling to join a union, refused to pay dues and opposed collective bargaining in the public sector were, "if proved," sufficient to establish a cause of action under the *first* and *fourteenth amendments of the United States constitution*. **[***83]** *Abood* is distinguishable from the present case, however, because the teachers were compelled to pay, as a condition of their employment, a service fee equal in amount to union dues even if the teacher was not a union member, and any teacher who failed to meet that obligation was subject to discharge. *Id., 212*. In the present case, the individual plaintiffs were not required to

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Although **[***80]** *article first, § 20, of the Connecticut constitution* has been amended by articles five and twenty-one of the amendments to the Connecticut constitution, the classes of persons to which protection was extended under these amendments are not relevant for purposes of the individual plaintiffs' claims in this case.

[34] The state defendants did not respond to this claim.

[35] In their complaint, the individual plaintiffs made similar claims under the federal constitution. The District Court concluded that they had standing to bring those claims on the basis of its determination that the plaintiffs had made a prima facie showing that jurisdiction existed by way of their pleadings and affidavits but dismissed the claims on their merits. We adopt a different view as to the individual plaintiffs' standing to bring their state constitutional claims for the reasons discussed hereinafter.

comply with a condition of employment they opposed, such as payments to the union, nor were they subject to consequences for not joining a union, such as being barred from working on **[*443]** the projects, because ECI was not the winning bidder, and, thus, they had no opportunity to work on the projects. Consequently, unlike the teachers in *Abood*, the individual plaintiffs in the present case were only indirectly affected by the city's rejection of ECI's low bid, and they did not have standing to bring their claims.

C

Antitrust Claims

ECI's final claim is that the trial court incorrectly concluded that it did not have standing to prosecute its claim against the city for violation of the Connecticut Antitrust Act. It specifically contends that the PLA requirement in this case violates *General Statutes §§ 35-26*,[36] *35-28*[37] **[***84]** and *35-29*[38] because, inter alia, it (1) bars ECI **[**217]** and other nonunion contractors and subcontractors from executing contracts and performing work on the projects without signing the PLA and abiding by its restrictive terms, and (2) resulted in the city's refusal **[*444]** to award and execute the subject contracts with ECI, the lowest responsible qualified bidder, due to ECI's refusal to execute and abide by the PLA requirement. The nonstate defendants respond that ECI did not have standing to pursue its antitrust claim because it was inadequately briefed, and, even if it was adequately briefed, ECI failed to establish proof of a public injury to competition.[39] The trial court did not directly address ECI's antitrust claim but concluded more generally that the plaintiffs lacked standing to prosecute their "pending claims . . . ." We conclude that ECI had standing to bring its antitrust claim.

We first consider the nonstate defendants' contention that ECI's antitrust claim was inadequately briefed. It is well established that ***HN25***[] "[w]e are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." (Citations omitted; internal quotation marks omitted.) *Connecticut Coalition Against Millstone v. Connecticut Siting Council, 286 Conn. 57, 87, 942 A.2d 345 (2008)*.

In its brief, ECI addresses the standard of review, the statutory provisions allegedly violated, the portions of the complaint containing the antitrust allegations, the manner in which the antitrust statutes were violated and the relevant legal precedent. Accordingly, we conclude that the claim was adequately briefed.[40]

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[36] *General Statutes § 35-26* provides: ***HN22***[] "Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful."

[37] *General Statutes § 35-28* provides: ***HN23***[] "Without limiting *section 35-26*, every contract, combination, or conspiracy is unlawful when the same are for the purpose, or have **[***85]** the effect, of: (a) Fixing, controlling, or maintaining prices, rates, quotations, or fees in any part of trade or commerce; (b) fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale, or supply of any part of trade or commerce; (c) allocating or dividing customers or markets, either functional or geographical, in any part of trade or commerce; or (d) refusing to deal, or coercing, persuading, or inducing third parties to refuse to deal with another person."

[38] *General Statutes § 35-29* provides: ***HN24***[] "Every lease, sale or contract for the furnishing of services or for the sale of commodities, or for the fixing of prices charged therefor, or for the giving or selling of a discount or rebate therefrom, on the condition or understanding that the lessee or purchaser shall not deal in the services or the commodities of a competitor or competitors of the lessor or seller, shall be unlawful where the effect of such lease or sale or contract for sale or such condition or understanding may be to substantially lessen competition or tend to create a monopoly in any part of trade or commerce and where such goods or services are for the use, consumption **[***86]** or resale in this state."

[39] The state defendants did not respond to this claim.

[40] We reject Justice Harper's contention to the contrary. ***HN26***[] Claims are inadequately briefed when they are merely mentioned and not **[***87]** briefed beyond a bare assertion. See, e.g., *Hurley v. Heart Physicians, P.C., 298 Conn. 371, 378 n.6, 3 A.3d 892 (2010)*. Claims are also inadequately briefed when they are raised for the first time in a reply brief; e.g., id.; or consist of "conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." *Connecticut*

[*445] We next consider whether ECI has standing to bring its antitrust claim. In *Cheryl Terry Enterprises, Ltd. v. Hartford, 270 Conn. 619, 622-23, 854 A.2d 1066 (2004)* (*Cheryl Terry Enterprises*), the nonunion plaintiff school bus company claimed an antitrust violation after the defendant, the city of Hartford, rejected its lowest bid on a contract **[***88]** subject to competitive bidding and awarded the contract to a union bidder who had submitted a higher bid. We concluded that ***HN27***[] "the legislature expressly has conferred standing on a broad range of individuals under the [Connecticut **[**218]** Antitrust] [A]ct, including unsuccessful bidders in a municipal bidding process." *Id., 632*. In the present case, ECI, like the plaintiff in *Cheryl Terry Enterprises*, also had its low bids rejected on contracts subject to competitive bidding. We therefore conclude, as we did in that case, that ECI, as an unsuccessful bidder, has the statutory right to bring an antitrust claim against the city.

The nonstate defendants argue that the holding in *Cheryl Terry Enterprises* does not apply because that case involved allegations regarding a purported anti-competitive conspiracy, not the anticompetitive effects of a PLA, and that the PLA issue falls within the construction industry exception to antitrust legislation created under the National Labor Relations Act, *29 U.S.C. § 151 et seq. (2006)*. See *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 230, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993)* **[***89]** (explaining that *29 U.S.C. § 158 [f]* "explicitly permits employers in the construction industry—but **[*446]** no other employers—to enter into prehire [PLAs]"). The nonstate defendants also argue that a validly bargained for PLA is not subject to antitrust scrutiny pursuant to *General Statutes § 35-31 (b)*, which provides qualified immunity for anticompetitive conduct specifically required or directed by state or federal statutes, and that, in order to avoid this exception, the plaintiffs had to plead and prove that the PLA was not the result of a valid collective bargaining process, which they failed to do. We disagree.

The holding in *Cheryl Terry Enterprises* applies to "unsuccessful bidders in a municipal bidding process" and is not limited in the manner suggested by the nonstate defendants. *Cheryl Terry Enterprises, Ltd. v. Hartford, supra, 270 Conn. 632*. Moreover, to the extent the nonstate defendants contend that the PLA issue falls within the construction industry exception, the plaintiffs do not challenge the legality of the PLA or the process by which it was negotiated but, rather, the fact that it was included in the mandatory bid specifications with which all prospective bidders, union **[***90]** and nonunion alike, were required to comply. Finally, with respect to the applicability of *§ 35-31 (b)*, because the city and the state were acting in a proprietary rather than a regulatory capacity; see part IV A of this opinion; they are not subject, under the present facts, to qualified immunity under that statute. Accordingly, we conclude that the trial court improperly determined that ECI lacked standing to prosecute its antitrust claim.

IV

ALTERNATIVE GROUNDS FOR AFFIRMANCE

A

Federal Preemption

The nonstate defendants contend that the trial court's dismissal of the plaintiffs' complaint for lack of standing can be affirmed on the alternative ground that their **[*447]** claims are preempted by federal labor law. They argue that the PLA is a prehire collective bargaining agreement within the primary jurisdiction of the National Labor Relations Board (NLRB) and that the state has no jurisdiction to resolve the plaintiffs' claims under the principles articulated in *San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)*, and *Lodge 76, International Assn. of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396* ***[**219]*** *(1976)* **[***91]** (*Machinists*). The plaintiffs respond that their claims are not preempted by federal labor law and that the nonstate defendants not only misconstrue the claims but misapply well developed federal and state precedent. We agree with the plaintiffs.

Coalition Against Millstone v. Connecticut Siting Council, supra, 286 Conn. 87. In the present case, ECI makes arguments based on persuasive authority to which the nonstate defendants have responded. See *Hasychak v. Zoning Board of Appeals, 296 Conn. 434, 439, 994 A.2d 1270 (2010)* (issue decided because all parties addressed it in their briefs and at oral argument). Accordingly, we disagree with Justice Harper that ECI's antitrust claim in the present case was inadequately briefed.

The following additional facts are relevant to our resolution of this issue. During the proceedings in the District Court on the defendants' motions to dismiss, certain of the nonstate defendants argued, inter alia, that the plaintiffs' claims were preempted by federal labor law, namely, § 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185, and the preemption doctrines articulated in *Garmon* and *Machinists*. The District Court concluded, however, that § 301 did not preempt the plaintiff's claims[41] and that it was not necessary **[*448]** to rule on whether the *Garmon* or *Machinists* doctrines applied because "neither of those types of preemption require[s] that the preempted claim be heard in federal court. Rather, those types of preemption are requirements that federal law govern but . . . state judges are fully able and often do apply federal law . . . . And it seems to me, therefore, that the arguments made about whether some of these claims **[***92]** are or are not preempted by federal law are claims that or arguments that must be made in state court following remand." On remand, the trial court stated in its memorandum of decision that it would "not reach and decide the alternative grounds advanced in support of the defendants' motions to dismiss" in light of its conclusion that the plaintiffs lacked standing to prosecute the action on other grounds.

We begin with a brief explanation of the principles set forth in *Garmon* and *Machinists*. "Although the [National Labor Relations Act] itself contains no express pre-emption provision, [the United States Supreme Court has] held that ***HN28***[] Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy. The first, known as *Garmon* pre-emption . . . is intended to preclude state interference with the [NLRB's] interpretation and active enforcement of the integrated scheme of regulation established by the [National Labor Relations Act]. . . . To this end, *Garmon* pre-emption forbids [s]tates to regulate activity that the [National Labor Relations Act] protects, prohibits, or arguably protects or prohibits. **[***94]** . . . The second, known as *Machinists* pre-emption, forbids both the [NLRB] and [s]tates to regulate conduct **[*449]** that Congress intended be unregulated because left to be controlled by the free play of economic forces. . . . *Machinists* pre-emption is based on the premise **[**220]** that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." (Citations omitted; internal quotation marks omitted.) *Chamber of Commerce of the United States of America v. Brown, 554 U.S. 60, 65, 128 S. Ct. 2408, 171 L. Ed. 2d 264 (2008)*.

The nonstate defendants' first six arguments rely on their interpretation and application of *Garmon*. They contend that the state has no jurisdiction (1) to resolve the plaintiffs' claims that the PLA is "illegal," (2) to regulate or preclude utilization of a PLA on a publicly funded project, (3) to apply state law to regulate an employee's right to join or not to join a union, (4) to regulate the use or application of construction prehire contracts, (5) to apply state law to regulate the use or application of construction subcontracting clauses, and (6) to apply state law to regulate union security **[***95]** provisions. All of the foregoing arguments share the common premise that the imposition of a mandatory PLA bid specification is within the category of activities that the National Labor Relations Act protects, prohibits, or arguably protects or prohibits. See *Chamber of Commerce of the United States of America v. Brown, supra, 554 U.S. 65*. The nonstate defendants also argue that the plaintiffs' claims are barred under *Machinists*.

The plaintiffs respond that they are not asking the court to interpret the PLA requirement or to apply it in any manner that affects labor relations between employers and their employees but are merely asking the court to take

[41] The court explained: "Although claims under § 301 . . . in fact, are claims that are completely preempted and must be heard in a federal forum, there are no such claims in this case, as I understand it. . . .

"Section 301 [provides that] . . . 'state law is preempted insofar as resolution of the state law claim requires the interpretation of a collective bargaining agreement.' . . . Section 301 preemption does not apply for at least two reasons.

"First, I do not believe that interpretation of a collective bargaining agreement or other labor agreement is required in this case. Referral to that agreement, reference to it, reading it, understanding what it says is required. It is not required that the judge hearing this case interpret . . . a labor agreement.

"Moreover, § 301 preemption **[***93]** occurs in a case where parties to a collective bargaining agreement disagree about their rights or obligations under that agreement, and that is simply not what we have in this case. We don't have a union or union member suing an employer or vice versa. Rather, we have a disappointed bidder suing a number of parties and claiming that the obligation in the bid documents to use union labor is unlawful. That simply is not the type of claim that § 301 reaches."

full cognizance of the disparate effects of the PLA, to understand its provisions, and to deem its mandatory application to all contractors, subcontractors and field labor working on the projects a violation of the competitive bidding laws and state con-stitutional **[*450]** provisions. The plaintiffs thus argue that neither *Garmon* nor *Machinists* operates to preclude their claims and that the state has jurisdiction under the United States Supreme Court's holding in *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., supra, 507 U.S. 233* **[***96]** (*Boston Harbor*), that a similar PLA bid specification was not preempted by the National Labor Relations Act. We agree with the plaintiffs.

In *Boston Harbor*, an association of nonunion contractors sought to enjoin the enforcement of a mandatory bid specification that required all successful bidders and subcontractors to agree to abide by a PLA negotiated by the Massachusetts Water Resources Authority (MWRA) and the local trade unions. *Id., 221-22*. The association had challenged the bid specification on multiple grounds, including preemption under the National Labor Relations Act. *Id., 223*. After summarizing the preemption doctrines articulated in *Garmon* and *Machinists*, the United States Supreme Court concluded: "When we say that the [National Labor Relations Act] pre-empts state law, we mean that [it] prevents a [s]tate from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see *Machinists*, or for NLRB jurisdiction, see *Garmon*. A [s]tate does not regulate, however, simply by acting within one of these protected areas. When a [s]tate owns and manages property, for example, it must interact with private participants in the marketplace. In **[***97]** so doing, the [s]tate is not subject to pre-emption by the [National Labor Relations Act], because pre-emption doctrines apply only to state *regulation*.

[221]** "Our decisions in this area support the distinction between government as regulator and government as proprietor. We have held consistently that ***HN29***[] the [National **[*451]** Labor Relations Act] was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor." (Emphasis in original.) *Id., 226-27*. In light of this precedent, the court held that the PLA bid specification did not constitute government regulation, and, therefore, it was not subject to preemption under *Garmon* or *Machinists*. *Id., 232*. The court further explained: "[The PLA bid specification] constitutes proprietary conduct on the part of the [c]ommonwealth of Massachusetts, which legally has enforced a valid [PLA]. As Chief Judge [Stephen] Breyer aptly noted in his dissent in the [First Circuit] Court of Appeals, 'when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing [on] the very sort of labor agreement that Congress explicitly authorized and expected frequently **[***98]** to find, it does not "regulate" the workings of the market forces that Congress expected to find; it exemplifies them.'. . .

"Because . . . [the PLA bid specification] is not preempted by the [National Labor Relations Act], it follows that a preliminary injunction against enforcement of this bid specification was improper."[42] (Citation omitted.) *Id., 232-33*.

Although the issue in *Boston Harbor* was limited to whether federal preemption applied to the *enforcement* of an otherwise lawful PLA; see *id., 220*; the same logic applies to the plaintiffs' state law claims in the present case. Accordingly, we conclude that the plaintiffs' claims are not preempted by federal labor law under **[*452]** *Garmon* or *Machinists* **[***99]** because the city was acting in a proprietary capacity as a purchaser of construction services, rather than as a regulator, when it entered into the agreement with the local unions and imposed the mandatory PLA bid specification on successful bidders for the two school construction projects.[43] The District Court made the

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[42] The First Circuit Court of Appeals had held that the mandatory PLA bid specification was invalid due to federal preemption under the National Labor Relations Act. See *Associated Builders & Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Resources Authority, 935 F.2d 345, 355 (1st Cir. 1991)*, rev'd sub nom. *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., supra, 507 U.S. 218*.

[43] We are not persuaded by the contrary view in any of the supplemental authorities urged by the nonstate defendants. See *Tri-M Group, LLC v. Sharp, 638 F.3d 406, 418-26 (3d Cir. 2011)*; *Johnson v. Rancho Santiago Community College District, 623 F.3d 1011, 1023-29 (9th Cir. 2010)*, cert. denied sub nom. ***Bertalan v. Rancho Santiago Community College District, __ U.S. __, 131 S. Ct. 2096, 179 L. Ed. 2d 891 (2011)***; *Building Industry Electrical Contractors Assn. v. New York, Docket No. 10 Civ. 8002 (RPP), 2011 U.S. Dist. LEXIS 86759, *17-*35 (S.D.N.Y. August 5, 2011)* **[***100]** .

same observation when it noted that, "in this situation, the [city] is acting like a private purchaser of construction services and is permitted . . . to state a preference for union or, if it were to choose to do so, nonunion labor, just as any other buyer of construction services in the market could. I believe that view is supported by the [United States] Supreme Court's decision in . . . *Boston Harbor*."

Moreover, this is not the only court that has reached such a conclusion. In *George Harms Construction Co. v. New Jersey Turnpike Authority, 137 N.J. 8, 644 A.2d* ***[**222]*** *76 (1994)*, the New Jersey Supreme Court, in considering whether New Jersey law prohibited PLAs, observed: "[U]nder *Boston Harbor*, federal labor law does not prohibit a state entering the construction market from using the same construction-industry exception regarding [PLAs] that private purchasers of construction labor use. However, a state's laws may prohibit a [PLA] specification in public contracts without running afoul of the [National Labor Relations Act]. *Garmon* preemption does not apply because a state-law prohibition of [PLAs] on public projects is merely one way in which a state may choose to act as a market participant in the construction industry. In other words, a state may choose **[*453]** to enter or not to enter a [PLA] just like any other purchaser of construction services. *Machinists* preemption also does not apply because a state-law prohibition of [PLAs] on public projects does not constitute impermissible regulation **[***101]** of an area that the [National Labor Relations Act] contemplated would be left to the free play of economic forces. Such a prohibition amounts to nothing more than the public equivalent of a corporation's [bylaw] regarding the purchase of construction services. In short, when a state uses [PLAs] on public projects, it is not acting as a regulator of private actors; rather, it is merely defining its role as a proprietor/purchaser of labor in the construction industry. Thus, because the [National Labor Relations Act] does not preempt the field, [it] must [be] determine[d] whether New Jersey law prohibits [PLAs]." *Id., 26-27*.

The nonstate defendants argue that the plaintiffs in the present case asked the trial court to apply state law to preclude a public entity's right to utilize a PLA on a publicly funded construction project but that the United States Supreme Court has noted that denying a public entity the option to utilize a PLA, such as one available to a private owner or developer, places restrictions on Congress' intended free play of economic forces that the court identified in *Machinists*. The nonstate defendants thus argue that such a regulatory effort arguably falls within the **[***102]** *Machinists* doctrine and that the lower court lacks jurisdiction to hold the PLA "'illegal,'" as the plaintiffs have urged. The nonstate defendants, however, misconstrue the plaintiffs' claim. The plaintiffs are not claiming that a public entity should be precluded from utilizing a PLA on a publicly funded construction project but that the mandatory application of a PLA requirement to all contractors, subcontractors and field labor working on the school construction projects in this case and on other public school construction projects in Connecticut is a violation of the competitive **[*454]** bidding laws and state ***antitrust law***. Accordingly, the plaintiffs' claim does not fall within the purview of *Machinists*, as the nonstate defendants contend, and we conclude that federal law does not preempt their state law claims. For this reason, we reject the nonstate defendants' alternative ground for affirmance of the trial court's judgment.

B

Sovereign Immunity

The state defendants claim that the trial court's dismissal of the plaintiffs' complaint for lack of standing can be affirmed in part on the alternative ground that the plaintiffs' claims against them[44] are barred by the doctrine of sovereign immunity. **[***103]** The plaintiffs respond that the state defendants' sovereign immunity claim cannot be **[**223]** considered because of their failure to file a timely preliminary statement of issues pursuant to *Practice Book § 63-4 (a) (1)* or a cross appeal pursuant to *Practice Book § 61-8*. The plaintiffs further argue that, even if this defect is overlooked, sovereign immunity does not protect the state defendants because they clearly intruded on the plaintiffs' constitutionally protected interests and acted in excess of their statutory authority. We conclude that the state defendants' sovereign immunity claim is not barred by the untimely filing of their preliminary statement and that their claim succeeds on its merits.

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[44] Counts one, four, five, six, nine and ten of the ten count second amended complaint apply to the state defendants as well as certain of the nonstate defendants.

The following additional facts are relevant to our resolution of this claim. As previously noted, the trial court stated in its memorandum of decision that it would "not reach and decide the alternative grounds advanced in support of the defendants' motions to dismiss because . . . the plaintiffs lack[ed] sufficient **[*455]** interest in the outcome **[***104]** of [the] controversy to justify deciding the issues thereby presented on the basis of their advocacy." Thereafter, the state defendants did not file a preliminary statement of issues within the required twenty days of the plaintiffs' filing of their preliminary statement of issues but waited more than seven months before filing a document entitled, "Defendants' Amended Preliminary Statement of the Issues," in which they identified as the sole issue whether the plaintiffs' claims were barred by the doctrine of sovereign immunity. They also did not file a cross appeal.

We first consider the plaintiffs' claim that the untimeliness of the state defendants' preliminary statement of issues and their failure to file a cross appeal are fatal procedural flaws. ***HN30***[] *Practice Book § 63-4 (a) (1)* provides in relevant part: "If any appellee wishes to (A) present for review alternate grounds upon which the judgment may be affirmed . . . that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues.

"Whenever the failure **[**224]** to identify an issue in a preliminary statement of issues prejudices an opposing party, the court **[***105]** may refuse to consider such issue."

Practice Book § 61-8 provides: ***HN31***[] "Any appellee or appellees aggrieved by the judgment or decision from which the appellant has appealed may jointly or severally file a cross appeal within ten days from the filing of the appeal. Except where otherwise provided, the filing and form of cross appeals, extensions of time for filing them, and all subsequent proceedings shall be the same as though the cross appeal were an original appeal. No entry or record fee need be paid." We conclude that neither rule of practice precludes this court's consideration of the state defendants' sovereign immunity claim.

[*456] With respect to the untimely filing of the preliminary statement of issues, we concluded in *Mickey v. Mickey, 292 Conn. 597, 603 n.9, 974 A.2d 641 (2009)*, in which the procedural issues raised by the appellee as alternative grounds for affirmance had not been identified in the required preliminary statement, that, although the record did not indicate that the appellee had filed a preliminary statement, we nonetheless would review the issues because the appellant had not been prejudiced by the lack of such a statement. In the present case, the state defendants **[***106]** filed the required preliminary statement but the filing was merely untimely. Moreover, the plaintiffs have not argued that the untimely filing was prejudicial, and we see no reason why they would be prejudiced by our review of the state defendants' claim. See *Practice Book § 63-4 (a) (1)* ("[w]henever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue"). Accordingly, we conclude that the untimely filing of the state defendants' preliminary statement of issues does not bar review of their sovereign immunity claim.

With respect to the state defendants' failure to file a cross appeal, there would have been no reason for them to do so because they were not aggrieved by the trial court's dismissal of the plaintiffs' action. We thus proceed to consider the merits of the sovereign immunity claim.

We begin with the governing legal principles. ***HN32***[] "Sovereign immunity relates to a court's subject matter jurisdiction over a case . . . and therefore presents a question of law over which we exercise de novo review. . . . The principle that the state cannot be sued without its consent, or sovereign immunity, is **[***107]** well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law. . . . Not only have we recognized **[*457]** the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . . Exceptions to this doctrine are few and narrowly construed under our jurisprudence." (Internal quotation marks omitted.) *DaimlerChrysler Corp. v. Law, 284 Conn. 701, 711, 937 A.2d 675 (2007)*. The presumption of sovereign immunity is not absolute and may be overcome "(1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in **[***108]** excess of the officer's statutory authority." (Citations omitted.) *Id., 720*. "In making this determination, this court has recognized the well established principle that ***HN33***[] statutes in derogation of sovereign immunity should be strictly construed. . . . [When] there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity." (Internal quotation marks omitted.) *Id., 712*.

In light of our conclusion in part III B of this opinion that the individual plaintiffs lack standing, and because the plaintiffs do not challenge the state defendants' sovereign immunity claim on the ground of legislative waiver, the only remaining issue is whether the state defendants fall within the sovereign immunity exception that they acted in excess of their statutory authority on the basis of the allegations in counts one and six of the plaintiffs' complaint. In this regard, the state defendants argue that they have not waived sovereign **[*458]** immunity because *§ 10-287* imposes a mandate on municipalities, not on the state defendants, to select the lowest responsible qualified bidder. Given the state's lack of participation in the bid selection **[***109]** process, the state defendants contend that there is no statutory duty that they exceeded with respect to the school construction projects. They argue that their conduct, as alleged in the complaint, is far too attenuated, remote and unrelated to the underlying issues to strip them of their sovereign immunity. They further point out that, on its face, the complaint alleges only that the state defendants "allow[ed]" the PLA to be implemented **[**225]** and applied to the school construction projects and, consequently, that the complaint falls short of alleging that they acted in excess of their statutory authority.

The plaintiffs respond that the state defendants were not insignificant participants in the bidding process because *§ 10-287*[45] requires the department to oversee **[*459]** and administer reimbursement funding for 95 percent of the

[45] *General Statutes § 10-287* provides in relevant part: ***HN34***[] "(b) (1) All orders and contracts for school building construction receiving state assistance under this chapter, except as provided in subdivision (2) of this subsection, shall be awarded to the lowest responsible qualified bidder only after a public invitation to bid . . . .

"(2) All orders and contracts for architectural or construction management services shall be awarded from a pool of not more than the four most responsible qualified proposers after a public selection process. Such process shall, at a minimum, involve requests for qualifications, followed by requests for proposals, including fees, from the proposers **[***111]** meeting the qualifications criteria of the request for qualifications process. . . . Following the qualification process, the awarding authority shall evaluate the proposals to determine the four most responsible qualified proposers using those criteria previously listed in the requests for qualifications and requests for proposals for selecting architectural or construction management services specific to the project or school district. Such evaluation criteria shall include due consideration of the proposer's pricing for the project, experience with work of similar size and scope as required for the order or contract, organizational and team structure for the order or contract, past performance data, including, but not limited to, adherence to project schedules and project budgets and the number of change orders for projects, the approach to the work required for the contract and documented contract oversight capabilities, and may include criteria specific to the project. Final selection by the awarding authority is limited to the pool of the four most responsible qualified proposers and shall include consideration of all criteria included within the request for proposals. As used **[***112]** in this subdivision, 'most responsible qualified proposer' means the proposer who is qualified by the awarding authority when considering price and the factors necessary for faithful performance of the work based on the criteria and scope of work included in the request for proposals.

"(c) If the commissioner determines that a building project has not met the approved conditions of the original application, the State Board of Education may withhold subsequent state grant payments for said project until appropriate action, as determined by the commissioner, is taken to cause the building project to be in compliance with the approved conditions or may require repayment of all state grant payments for said project when such appropriate action is not undertaken within a reasonable time.

"(d) Each town or regional school district shall submit a final grant application to the Department of Education within one year from the date of completion and acceptance of the building project by the town or regional school district. If a town or regional school district fails to submit a final grant application within said period of time, the commissioner may withhold ten per cent of the state reimbursement **[***113]** for such project."

city's school construction costs. The plaintiffs note that the department must approve project plans and specifications as well as the bidding procedures and that, if the department had determined that mandatory PLAs were impermissible, PLAs would have been eliminated from all taxpayer funded municipal school construction projects. Instead, the plaintiffs argue that the **[***110]** department issued a "letter opinion" in 1997 via the state office of the attorney general providing that PLAs on state funded, municipal school construction projects do not violate *§ 10-287* and that the department has adopted that policy. The plaintiffs thus contend that, because the state defendants have determined that PLAs are permissible, they have in effect refused to **[**226]** enforce the statutory prescription requiring that awards shall go to the lowest, responsible, qualified bidder. We agree with the state defendants.

[*460] "For a claim under the third exception [to sovereign immunity], the plaintiffs must do more than allege that the defendants' conduct was in excess of their statutory authority; they also must allege or otherwise establish facts that reasonably support those allegations. . . . In the absence of a proper factual basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper." (Citation omitted; internal quotation marks omitted.) *DaimlerChrysler Corp. v. Law, supra, 284 Conn. 721*.

We conclude that the plaintiffs have failed to allege facts that reasonably support their claims against the state defendants. The principal allegations against the state defendants in the second amended complaint are that "the . . . [department] is providing 90 [percent] of the funding for the entire [p]roject, including the [e]lectrical [b]id [p]ackage, **[***114]** through money paid by Connecticut taxpayers and allocated by the [s]tate [l]egislature" pursuant to *§§ 10-287 (b)* and *4b-91 (c)*, which require that contracts shall be awarded to the lowest responsible qualified bidder prequalified under *§ 4a-100*, "[a]t all times relevant hereto, the [department], acting by its [c]ommissioner or his agents, has been aware of [the] [c]ity's . . . actions in imposing [the] mandatory PLA, and has continued to fund the [p]roject nonetheless," and "[b]y implementing [the] PLA, or allowing its implementation, for a public school construction project funded almost entirely by the taxpayers of the [s]tate of Connecticut and also the taxpayers of the [c]ity of Hartford, the [c]ity, the [department] and the [c]ommissioner are undermining the very object and integrity of the public competitive bidding process, and are exhibiting patent favoritism to the trade unions and to union contractors, all to the unfair and severe disadvantage of [nonunion] contractors, such as ECI and its individual plaintiff . . . [nonunion] employees **[*461]** in this particular instance." Other paragraphs allege that the *city* imposed the PLA requirement, was the "awarding authority" and acted **[***115]** beyond its delegated authority in not awarding the contracts at issue to the lowest, responsible, qualified bidder. These allegations are insufficient to support a claim that the state defendants acted in excess of their statutory authority.

The judgment is reversed insofar as the trial court dismissed the claims of the named plaintiff, Electrical Contractors, Inc., against the defendants city of Hartford, Morganti Group, Inc., Downes Construction Company, LLC, and Custom Electric, Inc., and the case is remanded with direction to deny the motions to dismiss as to those claims and for further proceedings according to law; the judgment is affirmed insofar as the trial court dismissed the claims of the named plaintiff, Electrical Contractors, Inc., against the named defendant, the department of education, and the defendant Mark K. McQuillan, the commissioner of education, and insofar as the trial court dismissed the claims of the plaintiffs Jose L. Gonzalez, Jose G. Maldonado, Dan Czyzewski, Bradley Wheaton, Craig Busca and Sean Smith.

In this opinion ROGERS, C. J., and NORCOTT, PALMER, McLACHLAN and EVELEIGH, Js., concurred.

Concur by: HARPER (In Part)

Dissent by: HARPER (In Part)

Dissent

The plaintiffs also refer to the state defendants' authority pursuant to *General Statutes § 49-41*, which requires that contractors provide to the state or municipality performance bonds for contracts to construct, modify or repair public buildings and public works.

HARPER, J., concurring in part **[***116]** and dissenting in part. In determining that the named plaintiff, **[**227]** Electrical Contractors, Inc. (ECI),[1] has standing under Connecticut's competitive bidding statutes, the majority opinion departs from the narrowly circumscribed doctrine of standing established by our past cases dealing with these statutes. Our subject matter jurisdiction in this area is inherently limited, and the majority's expansion of that jurisdiction disregards both our own precedent, **[*462]** particularly this court's clear and controlling holding in *Connecticut Associated Builders & Contractors v. Hartford, 251 Conn. 169, 181, 740 A.2d 813 (1999)*, and the lawmaking authority of the legislature. I further disagree that ECI has adequately briefed its claim under the Connecticut Antitrust Act. *General Statutes § 35-24 et seq.* Accordingly, I respectfully dissent from these holdings.

I

I agree with the majority that, under settled case law, the question of whether ECI has standing to allege a violation of the competitive bidding statutes turns on whether its claim meets the following standard: ECI "had to establish a colorable **[***117]** claim that: (1) [it] either (a) had submitted a bid or (b) would have submitted a bid but for the alleged illegalities in the bidding process and the precluded bid was functionally equivalent to the project specifications; and (2) *the alleged illegalities amounted to fraud, corruption, favoritism or acts undermining the objective and integrity of the competitive bidding process*." (Emphasis added.) *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 181*.

As our case law demonstrates, to fulfill this test's second prong, a plaintiff must make a colorable claim that the bidding process—from the development of project specifications and bidding rules to the application of these to bidders—was tainted by procedural impropriety. The court held that standing was appropriate in *Spiniello Construction Co. v. Manchester, 189 Conn. 539, 545, 456 A.2d 1199 (1983)*, for example, because the defendant allegedly had accepted an irregular bid based on an oral rule addendum communicated only to one bidder, precluding other bidders from competing on equal terms. Conversely, in *Ardmare Construction Co. v. Freedman, 191 Conn. 497, 499, 505, 467 **[*463]** A.2d 674 (1983)*, this court concluded **[***118]** that the plaintiff lacked standing to challenge the rejection of its lowest bid for failure to include a handwritten signature on the bid document because the signature requirement—however arbitrary or detrimental to the plaintiff—was uniformly applied and there was no showing of fraud or favoritism. This court reiterated the decisive significance of procedural irregularity in *Unisys Corp. v. Dept. of Labor, 220 Conn. 689, 696, 600 A.2d 1019 (1991)*, when it determined that an evidentiary hearing was required to determine whether the plaintiff's claim implicated such irregularities. There, the plaintiff had alleged that the state favored one vendor over others by using information it received from that vendor to draft requests for proposals that could be fulfilled only by that vendor and by providing information relevant to the requests exclusively to that vendor. *Id., 691*. The court concluded that this result—a single source bid specification—was not inherently illegal but that it would be invalid if it were *intended* to benefit the specific vendor rather than the public. We held that the plaintiff was entitled to an evidentiary hearing to determine **[**228]** whether it had standing under this **[***119]** standard. *Id., 695-96*. In *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 169*, the court concluded that unsuccessful bidders lacked standing to challenge the legality of a project labor agreement. The court concluded, inter alia, that the issue of standing turned not on whether some bidders were effectively excluded but on whether the bidding process was applied consistently and in good faith. *Id., 189*.

Here, ECI's long list of grievances; see footnote 23 of the majority opinion; fails to allege *any* of the features of procedural impropriety we previously have considered significant. There is no claim of informational asymmetry such that some bidders knew more than others, no claim that the defendants, the city of Hartford, **[*464]** the state department of education and its commissioner, and four other entities,[2] engaged in secret communications with any bidders, no suggestion that the defendants applied rules differently to some bidders than to others, no claim that

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[1] See footnote 1 of the majority opinion for a listing of the individual plaintiffs named in this case.

[2] See footnotes 3 and 4 of the majority opinion for a complete listing of the defendants in this case.

officials acted in bad faith. Instead, ECI premises its complaint on the fact that all bidders, "union" and "nonunion" alike, were subjected equally to the same bidding terms and requirements and that **[***120]** the defendants did not exempt ECI from that process. Rather than procedural irregularity, which ECI effectively requests rather than protests, ECI's central complaint appears to be based on the ultimate economic harm it allegedly will sustain because the project labor agreement requirements put it at a competitive disadvantage, effectively precluding it from being a successful bidder on public contracts. To tether this complaint to the purposes of the competitive bidding statutes, ECI further alleges that by requiring bidders to perform all project work with union labor under the terms of a project labor agreement, nonunion contractors, whose business models are based on maintaining a labor supply outside of the union system, are disadvantaged in their ability to successfully bid and thereafter perform. As a result, ECI argues, the project labor agreement decreases competition for the project and increases the project's costs to the public.

As the trial court properly recognized, this claim is essentially identical to one this court rejected in *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 169*, **[***121]** a case in which ECI also was a plaintiff as a subcontractor to the named plaintiff. In that case, we explained: "The crux of the association's claim is that its general contractor members were precluded from participation in the bid process because the project labor agreement requirement imposed costs **[*465]** upon nonunion general contractors that made it economically unfeasible for them to bid. As a result, the association argues, general contractors and the association have standing to challenge the project labor agreement as a specification that . . . arbitrarily and anticompetitively limits access to the bidding process. The association contends that limiting the number of potential bidders violates not only the integrity of competitive bidding but also injures the general public by driving up the cost of government funded projects." *Id., 187*.

Our reasoning in that case for concluding that such a claim did not provide a basis for standing bears repeating, as it applies with equal force to the present case: "Even assuming that the project labor **[**229]** agreement requirement might increase the project's cost, we know of no requirement in the competitive bidding statutes that propels cost considerations **[***122]** to the top of the list of appropriate considerations for public contract specifications. If cost alone were the determinative factor of appropriate bid criteria, disappointed bidders or nonbidders would have virtually unlimited opportunities to litigate project specifications on the ground of alternate designs, materials, safety requirements and so on. Such litigation would involve courts in comparative cost assessments that would severely impair the discretion of governmental bodies entrusted with the responsibility for governmental construction projects. It is neither unusual nor unfair for project specifications to give some potential bidders an economic advantage over others because of factors such as the bidder's expertise, specialization and reliability.

"The claim made by the [named plaintiff] . . . is much more sweeping than the one that we recognized in *Unisys Corp. v. Dept. of Labor, supra, 220 Conn. 690-91*. The objection to the specification in *Unisys Corp*. was not that [equipment from the defendant International **[*466]** Business Machines Corporation] would be more expensive, but that vendors of functionally equivalent hardware or software had been excluded from the bidding process. **[***123]** *Id., 691, 695*. Our focus was not on the possibility that a particular specification might limit the number of eligible bidders, but on whether the specification necessarily had an adverse impact on the integrity of the bidding *process*. See *id., 696*.

"As the trial court observed, the record . . . demonstrates a nondiscriminatory decision by the city to use a project labor agreement, in the public interest, to avoid delays in the project and to recruit and maintain the necessary workforce. The court reasonably determined that the city's legitimate business decision fell within the bounds of the discretion afforded to the city by our competitive bidding statutes.[3]

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[3] In the present case, there is evidence in the record supporting the legitimacy of this decision. The record reflects that project labor agreements had yielded successful results in other projects in the state. Moreover, regardless of whether conditions are such that this particular project labor agreement will yield the same result, it cannot be said that the objective of the defendant city of Hartford in requiring this project labor agreement is antithetical to the purpose of the competitive bidding statutes.

"In conclusion, **[***124]** we reiterate our adherence to the boundaries of the standing principles established in our existing competitive bidding case law. . . . The determinative factor [under that case law] . . . was not whether some bidders had been precluded from the bidding process but *whether the requirements in that process had been applied consistently and in good faith*. . . . That, essentially, is what has occurred in the present case as well." (Citations omitted; emphasis added.) *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 187-89*.

The reasoning and conclusions articulated in *Connecticut Associated Builders & Contractors* dictate the result here, and I am unconvinced by the majority's **[*467]** attempts to distinguish the present case from it and to diminish its precedential effect. The majority emphasizes that the court in *Connecticut Associated Builders & Contractors* did not reach the merits of the plaintiffs' claim, but that fact is irrelevant; the court in that case properly did not reach the merits because it lacked jurisdiction. The court articulated at **[**230]** length the reasons why it lacked subject matter jurisdiction to consider the merits given the limited basis for standing **[***125]** in this area, and these reasons equally should preclude reaching the merits of the claim in the present case. Like the plaintiffs in *Connecticut Associated Builders & Contractors*, ECI has failed to make any colorable factual showing of *procedural* impropriety. Although ECI has proffered arguably relevant evidence regarding the ultimate financial consequences of the project labor agreement, as the plaintiffs in *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 187 n.12*, apparently did not, evidence of a problematic outcome is alone inadequate for purposes of showing procedural impropriety under our settled case law and under the reasoning of that case.

The subsequent enactment of prequalification requirements under *General Statutes § 4a-100*, moreover, does nothing to disturb the court's reasoning in *Connecticut Associated Builders & Contractors*. That statute has absolutely no bearing on what may be included in the specifications of a public project, such as a project labor agreement,[4] and it creates no new **[*468]** basis **[**231]** for standing in relation to the competitive bidding laws.

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[4] The majority's approach to cost appears to conflate two distinct levels of cost consideration: first, the specifications of a project—a building's location, its size, the specific construction materials, the time to completion, permissible levels of noise or pollution, etc.—dictate in broad terms what a project will cost. After those specifications are set, the competitive bidding process allows a public entity to find the contractor who will satisfactorily perform the prespecified project at the lowest price. *Section 4a-100* plays a role in determining who may participate in this second level bidding process, but it is wholly unrelated to the initial development of project specifications at the first level. ECI here seeks to challenge not the process of submitting bids but the legitimacy of a mandated specification of the project itself, namely, that contractors abide by a project labor agreement. ECI expressly refused to comply with this specification, and consequently it was by definition not the lowest **[***127]** bidder on the project specified by the defendants. ECI's claim in the present case essentially asks us to nullify that specification in order to render its low bid compliant on the ground that the specification increases the project's cost. Not only is this claim unrelated to *§ 4a-100*, but the court in *Connecticut Associated Builders & Contractors* already has spoken directly to this issue: "[W]e know of no requirement in the competitive bidding statutes that propels cost considerations to the top of the list of appropriate considerations for *public contract specifications*. If cost alone were the determinative factor of appropriate bid criteria, disappointed bidders or nonbidders would have *virtually unlimited opportunities to litigate project specifications on the ground of alternate designs, materials, safety requirements and so on*." (Emphasis added.) *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 187-88*.

The potentially absurd results invited by the majority's undifferentiated emphasis on cost may be illustrated by considering a hypothetical challenge under the competitive bidding statutes to a public project based on material, rather than labor, costs. **[***128]** Suppose a public entity solicits bids to construct a building with a slate roof, rather than an asphalt shingled roof. The decision to specify the roofing materials is made on the basis of desired longevity, aesthetic preference, or arbitrary whim. Slate is much more difficult to work with than asphalt, and only a subset of contractors possess the skill and access to materials needed to work with slate efficiently. Other contractors, who out of habit, aesthetic preference, or chance do not typically work with slate, are therefore, as ECI here complains, placed at a significant competitive disadvantage because of the specified material input. Under the logic of the majority opinion, if a "non-slate" contractor were to submit a low bid, conditional on being allowed to construct the roof from asphalt, and the bid were rejected, the disappointed noncompliant bidder would have standing to bring an action based on a claimed violation of competitive bidding laws by asserting that requiring slate roofs would decrease competition and increase the costs to the public. This is plainly nonsensical and inconsistent with the limited grounds of standing permitted under existing Connecticut legislation. **[***129]** There might be reason to doubt the wisdom of insisting on a slate roof, Indeed, to the extent this statute relates to standing at all, it would seem to *limit* the field **[***126]** of prospective bidders who could satisfy the first prong of the standing test to those who are prequalified for the project, not to expand the scope of the second prong of that test.

[*469] I further disagree with the majority's characterization of the comprehensive discussion of this issue in *Connecticut Associated Builders & Contractors*, which constituted one of the two grounds on which the court in that case concluded that it lacked subject matter jurisdiction, as "nothing more than dicta." The court declared at the outset of its analysis that "the plaintiffs did not establish that the general contractor members of the association had met *either part* of this test." (Emphasis added.) Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 186. The two prongs of our test in *Connecticut Associated Builders & Contractors* are both threshold jurisdictional requirements that must be met for a plaintiff to have standing to pursue a hearing on **[***130]** the merits, and the trial court in the present case plainly held that neither was satisfied.[5] Sensible jurisprudence and weighty authority strongly support the proposition, consistent with this court's past practice,[6] that "when two independent reasons are given to support a judgment, the ruling on neither is obiter [dictum], but each is the judgment of the court and of equal validity with the other."[7] (Internal quotation **[*470] [**232]** marks omitted.) California v. United States, 438 U.S. 645, 689 n.10, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978).

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particularly if the decision is the product of arbitrary whim, and there may be cause for questioning the mandated use of arguably more expensive union labor. But under the present constitutional division of power, in the absence of a colorable claim of procedural corruption, these are judgments to be made by the legislature, not by this court.

[5] For this reason, I am not swayed by the majority's citation to Statewide Grievance Committee v. Rozbicki, 211 Conn. 232, 558 A.2d 986 (1989). In the present case, both prongs of the test in *Connecticut Associated Builders & Contractors* speak equally to subject matter jurisdiction, whereas *Rozbicki* refers to a discussion of the merits *following* a finding that jurisdiction was lacking.

[6] See, e.g., Roth v. Weston, 259 Conn. 202, 789 A.2d 431 (2002) (announcing two-pronged jurisdictional test and concluding, after thorough analysis, that neither prong was met in that case).

[7] See also, e.g., Woods v. Interstate Realty Co., 337 U.S. 535, 537, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949) **[***131]** ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum"); United States v. Title Ins. & Trust Co., 265 U.S. 472, 486, 44 S. Ct. 621, 68 L. Ed. 1110 (1924) ("where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter [dictum], but each is the judgment of the court and of equal validity with the other" [internal quotation marks omitted]); United States v. Bueno, 585 F.3d 847, 850 n.3 (5th Cir. 2009) ("[t]his circuit follows the rule that alternative holdings are binding precedent and not obiter dicta" [internal quotation marks omitted]); Bravo v. United States, 532 F.3d 1154, 1162 (11th Cir. 2008) (providing "[t]hat [an] alternative holding counts because in this circuit additional or alternative holdings are not dicta, but instead are as binding as solitary holdings"); Pyett v. Pennsylvania Building Co., 498 F.3d 88, 93 (2d Cir. 2007) ("[a]n alternative conclusion in an earlier case that is directly relevant to a later case is not dicta; it is an entirely appropriate basis for a holding in the later case"); United States v. Fulks, 454 F.3d 410, 434-35 (4th Cir. 2006) **[***132]** (stating that alternative conclusion in prior case that bears directly on subsequent case cannot be dismissed as dicta); Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 216 F.3d 1180, 1189, 342 U.S. App. D.C. 337 (D.C. Cir. 2000) ("where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter [dictum], but each is the judgment of the court, and of equal validity with the other" [internal quotation marks omitted]); United States v. Rohde, 159 F.3d 1298, 1302 n.5 (10th Cir. 1998) ("[The] alternate holding [was] not dicta. . . . Were this panel inclined to engage in the business of labeling as dicta one of the two alternative grounds . . . it would then confront [the] defendant's failure to demonstrate why that label ought not adhere to the alternative which is innocuous to her theory, rather than to the alternative which undermines it."); *Parsons v. Federal Realty Corp., 105 Fla. 105, 143 So. 912, 920 (Fla. 1932)* ("A ruling in a case fully considered and decided by an appellate court is not dictum merely because it was not necessary, on account of one conclusion reached upon one question, to consider another question **[***133]** the decision of which would have controlled the judgment. Two or more questions properly arising in a case under the pleadings and proof may be determined, even though either one would dispose of the entire case upon its merits, and neither holding is a dictum, so long as it is properly raised, considered, and determined."); QOS Networks, Ltd. v. Warburg, Pincus & Co., 294 Ga. App. 528, 532-33, 669 S.E.2d 536 (2008) ("A ruling is not dictum merely because the disposition of the case is or might have been made on some other ground. Where a case presents two or more points, any one of which is sufficient to determine the ultimate issue, but the court actually decides all such points, the case is an authoritative precedent as to every point decided, and none of such points can be regarded as having merely the status of a dictum."); State v. Preciose,

Nonetheless, even if this discussion were dicta, the reasoning expressed therein would retain its persuasive force. The claim dealt with in *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 178*, **[***134] [*471]** "raise[d] no new issues of principle with respect to the requirements of standing, either in general or in the particular context of competitive bidding." Rather, the court simply applied established principles developed in previous cases.[8] As I discuss in greater detail in the following discussion, these prior cases carved out an exceptional basis for standing as a vehicle for challenging fraudulent or corrupt official actions, but they also placed strict limits on that standing. The majority exceeds these limits, contravening not only our own precedent but legislative authority as well. The majority's concern with advancing the cost saving goals of competitive bidding laws may be well founded, but it is for the legislature—not the courts—to determine who may enforce those statutes and how. The following outline of the constitutional framework of standing in general and the historical development of our unusual standing jurisprudence with respect to competitive bidding illustrates how the majority's conclusion runs afoul of these significant principles.

The question of standing deals not only with a party's right to seek relief, but also with the fundamental authority of the court to consider an issue: "[i]f a party is found to lack standing, the court is without **[**233]** subject matter jurisdiction to determine the cause." (Internal quotation marks omitted.) *Gold v. Rowland, 296 Conn. 186, 207-208, [*472] 994 A.2d 106 (2010)*. This limit **[***136]** on judicial authority is, as the United States Supreme Court has recognized, "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey, 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)*. We similarly have noted that "subject matter jurisdiction is, with certain constitutional exceptions . . . a matter of statute, not judicial rule making." (Internal quotation marks omitted.) *Batte-Holmgren v. Commissioner of Public Health, 281 Conn. 277, 286, 914 A.2d 996 (2007)*; see Conn. Const., amend. XVIII ("[t]he powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy").

In keeping with these principles, we have ordinarily recognized two grounds upon which a plaintiff may properly have standing to challenge government action: classical, or common-law, aggrievement and statutory aggrievement—standing conferred by statute. As the majority recognizes, ECI plainly does not have standing on either of these grounds. With respect to competitive bidding statutes, however, this court has taken the unusual step of establishing a quasi-statutory basis for standing **[***137]** that invokes the public oriented goals of competitive bidding laws but that is not specifically grounded in the statutory text. For many years prior to creating this new source of standing, this court had recognized that the competitive bidding statutes "are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and to secure the best work or supplies at the lowest price practicable, and are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest." **[*473]** (Internal quotation marks omitted.) *Austin v. Housing Authority, 143 Conn. 338, 345, 122 A.2d 399 (1956)*. Under this traditional rubric, this court determined that disappointed bidders did not inherently have statutory standing; *Joseph Rugo, Inc. v. Henson, 148 Conn. 430, 435, 171 A.2d 409 (1961)*; and in doing so the court noted that "[c]ourts will only intervene to prevent the rejection of a bid when the obvious purpose of the rejection is to defeat **[***138]** the object and integrity of competitive bidding." *Id., 434*.

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129 N.J. 451, 461, 609 A.2d 1280 (1992) ("[r]ather than treating that discussion of the merits as dicta, we consider it an alternative holding").

[8] Even while dismissing the reasoning of *Connecticut Associated Builders & Contractors* as mere dicta, the majority invokes that case **[***135]** to justify its holding in the present case: "One need only examine the reasons why the court in *Connecticut Associated Builders & Contractors* concluded that the [named plaintiff] did *not* have standing to understand why ECI in the present case does." (Emphasis in original.) While the majority's assertion nicely demonstrates that it really is possible to have one's cake and eat it too, the argument suffers from a fundamental logical flaw: simply because one set of reasons leads to a particular result, it does not follow that the absence of this reasoning compels a different result. Indeed, it is only by ignoring all past precedent that the majority is able to suggest that the specific reasoning articulated in *Connecticut Associated Builders & Contractors* represents the *only* basis on which standing is properly denied.

In Spiniello Construction Co. v. Manchester, supra, 189 Conn. 543-45, this court held for the first time that even though public bidding laws create no cause of action for disappointed bidders, such a bidder had standing to pursue a claim that a town had violated these laws by accepting a conditional combined discount bid based on an oral addendum known only to one bidder, precluding other bidders from competing on equal terms. In so holding, we reasoned that "[t]here is a growing trend for courts to permit one who has been aggrieved by a refusal to award a public contract pursuant to lowest responsible bidder provisions to also vindicate the public interest by challenging such arbitrary or capricious action by governmental officials."[9] Id., 545. **[**234]** The court later emphasized the limits of **[*474]** this holding, explaining that: "In Spiniello Construction Co. v. Manchester, [supra, 539], we recognized that our prior decisions had the effect of preventing judicial review of potentially meritorious claims concerning the implementation and execution of competitive bidding statutes. We also acknowledged the fact that the group most benefited **[***139]** by the statute—the public—had no effective means of protecting their interests. . . . Thus, we held that where fraud, corruption or acts undermining the objective and integrity of the bidding process existed, an unsuccessful bidder did have standing under the public bidding statute. We limited the scope of our holding in order to strike the proper balance between fulfilling the purposes of the competitive bidding statutes and preventing frequent litigation that might result in extensive delay in the commencement and completion of government projects to the detriment of the public." (Citations omitted.) Ardmare Construction Co. v. Freedman, supra, 191 Conn. 504-505.

I am uncertain of the source of authority underlying the court's decision in *Spiniello Construction Co*.[10] Nonetheless, there and in subsequent cases we properly have cleaved to the long-standing principle that "[c]ourts will only intervene to prevent the rejection of a bid when the obvious *purpose* of the rejection is to defeat **[***141]** the object and integrity of competitive bidding." (Emphasis added.) Joseph Rugo, Inc. v. Henson, supra, 148 Conn. 434. Thus, in denying standing in Ardmare Construction Co. v. Freedman, supra, 191 Conn. 497, the court explained the factors that led to a different **[*475]** result than in *Spiniello Construction Co*.: "There, the municipality had imparted information to one bidder that it had not provided other bidders. . . . Thus, parity of information no longer existed among the bidders as envisioned by the statute. In this case . . . [t]he construction company which received the contract award was not given any special advantage over the plaintiff in submitting its bid, nor was it privy to any secret information. . . . The [commissioner of administrative services (commissioner)] did not apply its requirement inconsistently or in a discriminatory fashion. Nor was there any proof that the commissioner was acting in bad faith." (Citation omitted.) Id., 505-506. The question of whether standing was appropriate, the court concluded, **[**235]** turned not on the inherent logic or illogic of the underlying bidding terms but on the presence of inconsistency or discrimination in the *process* of crafting and applying **[***142]** those terms.

In Unisys Corp. v. Dept. of Labor, supra, 220 Conn. 696, the court reiterated the significance of procedural irregularities, noting that "[requests for proposals] are not necessarily illegal merely because the specifications of the [requests] can be met by only one vendor. . . . [M]ore must appear in order to render the specifications and the

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[9] This court's decision in *Spiniello Construction Co*. appears to have been influenced by the adoption of an "injury in fact" basis for standing in the federal courts following the enactment of the federal Administrative Procedure Act, 5 U.S.C. § 500 et seq., which in turn was applied to claims challenging federal bidding statutes. Our decision cited several federal court decisions in support of our conclusion. See, e.g., Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 865, 137 U.S. App. D.C. 371 (D.C. Cir. 1970) (explaining in case addressing **[***140]** public bidding statute, "[t]he law of standing was greatly modified by the passage of the Administrative Procedure Act"); id., 872 ("the Administrative Procedure Act applies to all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specific statutory language"). This court has long recognized, however, that "[t]he Connecticut counterpart to [the relevant provision of the Administrative Procedure Act] . . . is much more limited in scope." Ardmare Construction Co. v. Freedman, supra, 191 Conn. 503. The narrower language of our own Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; plainly does not confer on courts the authority to adopt an "injury in fact" standing analysis, and we have not adopted a similarly expansive standard for standing to bring claims under any other statutory scheme.

[10] This court has held that as a matter of formal authority, where "subject matter jurisdiction is created by statute . . . we have no power to enlarge or circumscribe it." Ambroise v. William Raveis Real Estate, Inc., 226 Conn. 757, 763, 628 A.2d 1303 (1993); id. (time window for statutorily created right of appeal not subject to judicial modification).

contract based thereon illegal . . . . [A]n objectionable and invalidating element is introduced when specifications are drawn to the advantage of one manufacturer not for any reason in the public interest but, rather, to insure the award of the contract to that particular manufacturer." (Internal quotation marks omitted.) Id. As this court later underscored in *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 188*, "[o]ur focus [in *Unisys Corp*.] was not on the **[***143]** possibility that a particular specification might limit the number of eligible bidders, but on whether the specification necessarily had an adverse impact on the integrity of the bidding process." The **[*476]** court in *Unisys Corp. v. Dept. of Labor, supra, 695-96*, drew no ultimate conclusion as to standing, holding only that these allegations raising specific claims of information disparity involving one particular competitor were sufficient to warrant an evidentiary hearing.[11]

As I previously have noted, in *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 169*, this court reaffirmed these limits on jurisdiction. The court announced: "In conclusion, we reiterate our adherence to the boundaries of the standing principles established in our existing competitive bidding case law. . . . The determinative factor, we held [in *Ardmare Construction Co*.], was not whether some bidders had been precluded from the bidding process but whether the requirements in that process had been applied consistently and in good faith. . . . That, essentially, is what has occurred in the present case as well." (Citations omitted.) *Id., 188-89*.

I find troubling the majority's abandonment of these "boundaries of the standing principles established in our existing competitive bidding case law"; *id., 188*; that plainly underlie the reasoning of *Connecticut Associated Builders & Contractors* and its predecessors. ECI complains not about procedural **[***145]** corruption but, rather, about discriminatory effect. As we explicitly held in **[*477]** *Unisys Corp*., however, even the most extreme form of discriminatory effect—a purchase order designed to be fulfilled only by a *single* possible bidder—does not alone create a basis for standing. ECI has failed to allege anything more than an unequal effect of an evenhanded process, and to permit **[**236]** standing on that basis would be an exercise of power we do not properly possess. I am mindful that cost control undoubtedly is an important goal of the competitive bidding statutes. But it is for the legislature to determine which costs are subject to challenge under the statutes and by whom.

II

ECI's claim to standing under Connecticut's antitrust statutes does not suffer from the significant statutory and jurisprudential barriers discussed in part I of this concurring and dissenting opinion. In sharp distinction to the plain absence of a private cause of action under the competitive bidding statutes, "the legislature expressly has conferred standing on a broad range of individuals under the [Connecticut Antitrust Act (act)], including unsuccessful bidders in a municipal bidding process."[12] *Cheryl Terry Enterprises, Ltd. v. Hartford, 270 Conn. 619, 632, 854 A.2d 1066 (2004)*. **[***146]** Moreover, *General Statutes § 35-28* explicitly forbids every "contract, combination, or conspiracy . . . [that] are for the purpose, or have the *effect*, of" violating the act. (Emphasis added.) The act thus clearly confers standing on disappointed bidders to pursue a theory of liability based on harmful effects.

Nonetheless, I would conclude that ECI's claim is inadequately briefed and that we should withhold judgment on this complex issue until it is properly presented **[*478]** to us. The act implicates both state and federal legislative schemes; see *Vacco v. Microsoft Corp., 260 Conn. 59, 72-73, 793 A.2d 1048 (2002)* ("[t]he legislature amended the [act] in 1992 to make explicit its intent that the judiciary shall interpret the [act] in accordance with the federal courts'

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[11] The majority, in footnote 17 of its opinion, notes that evidentiary hearings are atypical in motions to dismiss and expresses some doubt regarding whether a hearing was appropriate here. While I agree with the majority's general statement of law, this court has stated with respect to competitive bidding statutes: "Although the plaintiffs were not required to prove the merits of their claim, they did have the lesser burden of establishing a colorable claim. . . . Under the test for standing set forth in *Unisys Corp*., *Ardmare Construction Co*. and *Spiniello Construction Co*., the trial court was *required* to conduct an evidentiary hearing to decide whether the plaintiffs had established a colorable claim that the project **[***144]** labor agreement requirement had undermined the integrity or objectives of the competitive bidding process." (Citation omitted; emphasis added.) *Connecticut Associated Builders & Contractors v. Hartford, supra, 251 Conn. 182*.

[12] *General Statutes § 35-35*, for example, provides in relevant part that "*any person . . . injured* in its business or property by any violation of the provisions of this chapter shall recover treble damages . . . ." (Emphasis added.)

interpretation of federal ***antitrust law***"); and it contains important exceptions pertaining to, among other things, organized labor. See *General Statutes § 35-31*. The trial court's memorandum of decision **[***147]** did not articulate that court's reasons for denying standing on this claim, and ECI's appellate brief does little more than identify the relevant statutes and point to three unilateral acts by the defendant city of Hartford: imposing the project labor agreement on all bidders for the project, imposing the project labor agreement on nonunion workers and refusing to award the contract to ECI. ECI also identifies this court's holding in *Cheryl Terry Enterprises, Ltd. v. Hartford, supra, 270 Conn. 623*, in which we accorded standing to a disappointed low bidder who claimed that "it was not awarded the contract due to a conspiratorial agreement between a [labor] union and the defendant [city], with the purpose of obtaining a union contract." ECI, however, does not point to any such conspiratorial agreement either in its complaint at the trial court or in its brief on this issue.[13] "It is well-settled that an individual or corporation cannot alone contract, combine, or conspire **[**237]** to violate the antitrust laws. Thus, 'a violation of *[§] 35-28* . . . requires a plurality of actors.' *Shea v. First Federal Savings & Loan Association of **[*479]** New Haven, 184 Conn. 285, 306, [439 A.2d 997] (1981)* . . . ." **[***148]** (Citations omitted.) *McKeown Distributors, Inc. v. Gyp-Crete Corp., 618 F. Sup. 632, 645 (D. Conn. 1985)*. Although a number of contracts and agreements are likely relevant to this litigation, it is unclear which, if any, we should consider as the basis for ECI's claim.

While I would leave open the question of whether a colorable claim of an antitrust violation could be made out from the allegations in ECI's complaint, nonetheless it is improvident to reach any such conclusion on the basis of the underdeveloped record and the lack of adequate attention to this issue **[***149]** by the parties.

Accordingly, I respectfully dissent from these holdings.

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[13] In its complaint, ECI does allege that "[u]nlike its union contractor competitors, ECI never participated in the collective bargaining agreements and negotiations that resulted in . . . the [project labor agreement] . . . ." It is unclear, however, what significance this allegation has for purposes of the antitrust claim. As the majority notes, ECI "[does] not challenge the legality of the [project labor agreement] or the process by which it was negotiated, but, rather, the fact that it was included in the mandatory bid specifications with which all prospective bidders, union and nonunion alike, were required to comply."

Altman v. PNC Mortg.

United States District Court for the Eastern District of California

January 19, 2012, Decided; January 20, 2012, Filed

CASE NO. CV F 11-1807 LJO MJS

Reporter

850 F. Supp. 2d 1057 *; 2012 U.S. Dist. LEXIS 6460 **; 2012 WL 174966

ERNIE ALTMAN, et al., Plaintiffs, vs. PNC MORTGAGE, et al., Defendants.

Subsequent History: Dismissed without prejudice by *Altmann v. PNC Mortg., 2012 U.S. Dist. LEXIS 10632 (E.D. Cal., Jan. 27, 2012)*

Related proceeding at *Altmann v. Wells Fargo Bank, N.A., 2016 U.S. Dist. LEXIS 128959 (E.D. Cal., Sept. 15, 2016)*

Core Terms

allegations, borrower, lender, fraudulent, short sale, attorney's fees, foreclosure, punitive damages, limitations period, cause of action, purported, equitable tolling, unconscionable, circumstances, violations, fails, misrepresentation, rescission, discovery, practices, mortgage, unfair, business practice, particularity, origination, promise, malice, unfair competition, construction loan, motion to dismiss

Counsel: **[**1]** For Ernie Altmann, Creative Builders, Inc., Plaintiffs: John W. Villines, JV Law, Modesto, CA.

For PNC Mortgage, Rushmore Loan Management Services, LLC, a Delaware Limited Liability Company, Defendants: Alice M. Dostalova, LEAD ATTORNEY, Wolfe & Wyman LLP, Walnut Creek, CA.

Judges: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

[*1064] ORDER ON DEFENDANTS' F.R.Civ.P. 12 MOTIONS

(Docs. 10, 11, 12.)

INTRODUCTION

Defendants PNC Bank, N.A. ("PNC"), and Rushmore Loan Management Services ("Rushmore") seek to dismiss as legally barred plaintiff Ernie Altmann ("Mr. Altmann") and Creative Builders, Inc.'s ("CBI's") common law, statutory, punitive damages and attorney fees claims arising out of Mr. Altmann's loan for and foreclosure activity on his Stanislaus County residence ("property"). Mr. Altman and CBI (collectively "plaintiffs") fail to oppose dismissal of their claims. This Court considered PNC and Rushmore's (collectively "defendants'") *F.R.Civ.P. 12(b)(6)* motion to dismiss and *F.R.Civ.P. 12(f)* motion to strike on the record and VACATES the February 1, 2012 hearing, pursuant to *Local Rule 230(c)*, *(g)*. **[**2]** For the reasons discussed below, this Court DISMISSES this action against defendants.

BACKGROUND[1]

Summary

According to the complaint, plaintiffs pursue claims to address "Defendant's negligent, fraudulent and unlawful conduct concerning residential mortgage loan transaction with the Plaintiff." CBI "is on title" as the property owner "in exchange for loans and expenses paid by CBI on behalf of Altmann." PNC is named as a defendant as a successor in interest to defendant National City Mortgage Company ("National City"), the "original lender" of Mr. Altmann's "mortgage loan." Rushmore services Mr. Altmann's loan and "has demanded payments." The complaint alleges **[*1065]** 15 claims arising under common law and federal and California statutes as well as seeking punitive damages and attorney fees. Defendants challenge the complaint's claims as insufficiently pled and barred by limitations periods and other applicable law.

Loan Origination And Funding

In early 2007, National City "solicited" Mr. Altmann to finance the property with a construction loan so Mr. Altmann "could **[**3]** build his residential home" on the property. National City stated that the construction loan "was to later convert to a 30-year term with a fixed interest rate known as a 'take out loan.'" Mr. Altmann "was not given a copy of any of the loan documents prior to closing as required."

National City never funded the entire construction loan and never converted the loan to a "take out loan." National City fell short by $40,000 to fund the construction loan and funded construction loan draws late and "less than the amount it was supposed to fund" to require Mr. Altmann to complete construction with funds borrowed from CBI.

National City failed to carry construction insurance on the loan. A $50,000 claim arose during construction, and National City stated it would cover the loss and reimburse Mr. Altmann but failed to do so to require Mr. Altmann to again borrow from CBI.

National City offered Mr. Altmann a short-term loan to cover his expenses while National City prepared to convert the loan. Mr. Altmann made timely payments on the short-term loan, but National City returned payments to Mr. Altmann without explanation and caused a default on the loan.

Short Sale Of Property

National City offered **[**4]** Mr. Altmann a $595,000 short sale of the property and to waive its second loan on the property. A third-party buyer offered $595,000 for the property, and Mr. Altmann accepted. National City processed the short sale extremely slowly, and the buyer informed Mr. Altmann that he might cancel the sale due to delays.

When the short sale was set to close in September 2010, National City employee Lynn Rowland ("Mr. Rowland") requested a new property appraisal. The new property appraisal was $635,000, lower than the original $700,000 property appraisal. Mr. Rowland agreed to allow the buyer to reduce the sales price to $510,000 "because PNC accepted up to 85% of the appraised price."

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[1] The factual recitation is derived generally from plaintiffs' Complaint for Damages ("complaint"), the target of defendants' challenges.

At the end of September 2010, Mr. Rowland was unavailable to prevent timely closing of the short sale. On September 27, 2010, the short sale transaction was stayed due to a bankruptcy on an adjacent property and a bankruptcy debtor's easement which affected Mr. Altmann's property.

On October 1, 2010, Rushmore purchased Mr. Altmann's loan from PNC, despite the bankruptcy stay and such loan purchase "violated the bankruptcy stay and is therefore void."

In October 2010, Mr. Rowland assured Mr. Altmann that Mr. Rowland **[**5]** would handle the short sale for Rushmore, which would accept the $510,000 sale price. Mr. Rowland stated that if Rushmore did not approve the sale price, PNC would repurchase the loan to allow short sale completion.

Two weeks later, Mr. Rowland informed Mr. Altmann that PNC had "changed its mind" and would not repurchase the loan from Rushmore. In November 2010, Rushmore employee Steve Sanchez took over the short sale from Mr. Rowland and ordered a third property appraisal, which came back at $590,000. Rushmore refused **[*1066]** to honor the pre-existing short sale approval and demanded an increased price of $590,000 from $510,000 to cause the buyer to cancel the short sale.

Mr. Altmann submitted a loan modification application to Rushmore, which intends to sell the property at a foreclosure trustee sale despite the absence of notice to CBI of the trustee sale to violate due process rights.

Plaintiffs' Claims

Plaintiffs filed their complaint on October 27, 2011 to allege 15 claims which will be addressed below and seeks to recover general, special and punitive damages and attorney fees.

DISCUSSION

F.R.Civ.P. 12(b)(6) Motion To Dismiss Standards

Defendants seek to dismiss the complaint's common law **[**6]** and statutory claims as legally barred and insufficiently pled. Defendants further seek to strike the complaint's punitive damages prayer and references to subject defendants to punitive damages as well as attorney fees claims. [2]

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*; *Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997)*. **[**7]** A *F.R.Civ.P. 12(b)(6)* dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*; *Graehling v. Village of Lombard, Ill., 58 F.3d 295, 297 (7th Cir. 1995)*. A *F.R.Civ.P. 12(b)(6)* motion "tests the legal sufficiency of a claim." *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*.

In addressing dismissal, a court must: (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-338 (9th Cir. 1996)*.

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[2] Defendants seek *F.R.Civ.P. 12(f)* relief as to the complaint's punitive damages and attorney fees claims. However, defendants' motion in entirety will be analyzed under *F.R.Civ.P. 12(b)(6)* standards given *Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 971 (9th Cir. 2010)* ("We therefore hold that *Rule 12(f)* does not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law.") As such, this Court will address defendants' challenges and plaintiffs' claims under *F.R.Civ.P. 12(b)(6)* standards.

Nonetheless, a court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citation omitted). A court "need not assume the truth of legal conclusions cast in the form of factual allegations," *U.S. ex rel. Chunie v. Ringrose, 788 F.2d 638, 643, n. 2 (9th Cir.1986)*, **[**8]** and must not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated . . . laws in ways that have not been alleged." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L. Ed. 2d 723 (1983)*. A court need not permit an attempt to amend if "it is clear that the complaint could not be saved by an amendment." *Livid Holdings Ltd. v. Salomon* ***[*1067]*** *Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*.

A "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544,127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)* (internal citations omitted). Moreover, a court "will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes, 181 F.R.D. 629, 634 (S.D. Cal. 1998)*. In practice, a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain **[**9]** recovery under some viable legal theory." *Twombly, 550 U.S. at 562, 127 S.Ct. at 1969* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*.

In *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937,1949, 173 L. Ed. 2d 868 (2009)*, the U.S. Supreme Court explained:

> . . . a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. (Citations omitted.)

After discussing *Iqbal*, the Ninth Circuit Court of Appeals summarized: "In sum, for a complaint to survive [dismissal], the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)* (quoting *Iqbal, 556 U.S. 662, 129 S.Ct. at 1949*).

The U.S. Supreme Court applies a "two-prong **[**10]** approach" to address dismissal:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not "show[n]"-"that the pleader is entitled to relief." *Fed. Rule Civ. Proc. 8(a)(2)*.
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a **[**11]** court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. 662, 129 S.Ct. at 1949-1950.

A plaintiff suing multiple defendants "must allege the basis of his claim against each defendant to satisfy *Federal Rule of Civil Procedure 8(a)(2)*, which requires a short and plain statement of the claim to put defendants on sufficient notice of the **[*1068]** allegations against them." *Gauvin v. Trombatore, 682 F.Supp. 1067, 1071 (N.D. Cal. 1988)*. "Specific identification of the parties to the activities alleged by the plaintiffs is required in this action to enable the defendant to plead intelligently." *Van Dyke Ford, Inc. v. Ford Motor Co., 399 F.Supp. 277, 284 (D. Wis. 1975)*.

Moreover, "a complaint may be dismissed under *Rule 12(b)(6)* when its own allegations indicate the existence of an affirmative defense." *Quiller v. Barclays American/Credit, Inc., 727 F.2d 1067, 1069 (11th Cir. 1984)*. For instance, a limitations defense may be raised by a *F.R.Civ.P. 12(b)(6)* motion to dismiss. *Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980)*; *see Avco Corp. v. Precision Air Parts, Inc., 676 F.2d 494, 495 (11th Cir. 1982)*, *cert. denied*, **[**12]** *459 U.S. 1037, 103 S. Ct. 450, 74 L. Ed. 2d 604 (1982)*. A *F.R.Civ.P. 12(b)(6)* motion to dismiss may raise the limitations defense when the statute's running is apparent on the complaint's face. *Jablon, 614 F.2d at 682*. If the limitations defense does not appear on the complaint's face and the trial court accepts matters outside the pleadings' scope, the defense may be raised by a motion to dismiss accompanied by affidavits. *Jablon, 614 F.2d at 682*; *Rauch v. Day and Night Mfg. Corp., 576 F.2d 697 (6th Cir. 1978)*.

With these standards in mind, this Court turns to defendants' challenges to the complaint's claims.

Fraud

The complaint's (first) fraud and deceit — misrepresentation and promise with no intention to perform claim alleges that "defendants did not accurately maintain records of construction payouts and have charged for monies not received by Plaintiff, and did not fully fund the construction loan or convert it to a take-out loan." The claim further alleges that "Defendants" misrepresented material facts and that National City made a promise with intention to induce Mr. Altmann to execute the promissory note.

The complaint's (tenth) constructive fraud claim alleges that "Defendants" deceived Mr. Altmann **[**13]** into a mortgage transaction, have committed constructive fraud, extended credit to Mr. Altmann without regard to his ability to pay, and failed to maintain records of loan payouts.

The complaint's (fifteen) cause of action alleges that National City "made misrepresentations and false promises . . . to entice Altmann to execute the construction loan documents and become indebted to Defendant."

Limitations Defense

Defendants contend that the complaint's fraud claims as to loan origination are barred by the three-year limitations period of *California Code of Civil Procedure section 338(d)* for an "action for relief on the ground of fraud." Defendants point to the loan's April 2007 origination to require related fraud claims to be filed no later than April 2010, 18 months prior to the complaint's October 27, 2011 filing. Defendants further point to the absence of facts to support tolling the three-year limitations.

Defendants raise a valid limitations defense. Fraud-based claims arising from loan origination are time-barred.

Fraud Elements

Defendants further attack the fraud claims as lacking sufficient particularity to satisfy *F.R.Civ.P. 9(b)*.

The elements of a California fraud claim are: (1) **[**14]** misrepresentation (false representation, concealment or nondisclosure); (2) knowledge of the falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior* ***[*1069]*** *Court, 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 (1996)*. The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance. *Caldo v. Owens-Illinois, Inc., 125 Cal.App.4th 513, 519, 23 Cal.Rtpr.3d 1 (2004)*.

"[T]o establish a cause of action for fraud a plaintiff must plead and prove in full, factually and specifically, all of the elements of the cause of action." *Conrad v. Bank of America, 45 Cal.App.4th 133, 156, 53 Cal.Rptr.2d 336 (1996)*. There must be a showing "that the defendant thereby intended to induce the plaintiff to act to his detriment in reliance upon the false representation" and "that the plaintiff actually and justifiably relied upon the defendant's misrepresentation in acting to his detriment." *Conrad, 45 Cal.App.4th at 157, 53 Cal.Rptr.2d 336*. "The absence of any one of these required elements will preclude recovery." *Wilhelm v. Pray, Price, Williams & Russell, 186 Cal.App.3d 1324, 1332, 231 Cal.Rptr. 355 (1986)*.

Particularity [**15] Pleading Standard

F.R.Civ.P. 9(b) requires a party to "state with particularity the circumstances constituting fraud." [3] In the Ninth Circuit, "claims for fraud and negligent misrepresentation must meet *Rule 9(b)*'s particularity requirements." *Neilson v. Union Bank of California, N.A., 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003)*. A court may dismiss a claim grounded in fraud when its allegations fail to satisfy *F.R.Civ.P. 9(b)*'s heightened pleading requirements. *Vess, 317 F.3d at 1107*. [4] A motion to dismiss a claim "grounded in fraud" under *F.R.Civ.P. 9(b)* for failure to plead with particularity is the "functional equivalent" of a *F.R.Civ.P. 12(b)(6)* motion to dismiss for failure to state a claim. *Vess, 317 F.3d at 1107*. As a counter-balance, *F.R.Civ.P. 8(a)(2)* requires from a pleading "a short and plain statement of the claim showing that the pleader is entitled to relief."

F.R.Civ.P. 9(b)'s heightened pleading standard "is not an invitation to disregard Rule 8's requirement of simplicity, directness, and clarity" and "has among its purposes the avoidance of unnecessary discovery." *McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996)*. *F.R.Civ.P 9(b)* requires "specific" allegations of fraud "to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. "A pleading is sufficient under *Rule 9(b)* if it identifies the circumstances constituting **[**17]** fraud so that the defendant can prepare an adequate answer from the allegations." *Neubronner v. Milken, 6 F.3d 666, 671-672 (9th Cir. 1993)* (internal quotations omitted; citing *Gottreich v. San Francisco Investment Corp., 552 F.2d 866, 866 (9th Cir. 1997))*. The Ninth Circuit has explained:

> **[*1070]** *Rule 9(b)* requires particularized allegations of the circumstances *constituting* fraud. The time, place and content of an alleged misrepresentation may identify the statement or the omission complained of, but these circumstances do not "constitute" fraud. The statement in question must be false to be fraudulent. Accordingly, our cases have consistently required that circumstances indicating falseness be set forth. . . . [W]e [have] observed that plaintiff must include statements regarding the time, place, and *nature* of the alleged fraudulent activities, and that "mere conclusory allegations of fraud are insufficient." . . . The plaintiff must set forth what is false or misleading about a statement, and why it is false. In other words, the plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading. . . .
>
> In certain cases, to be sure, the requisite **[**18]** particularity might be supplied with great simplicity.

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[3] *F.R.Civ.P. 9(b)*'s particularity requirement applies to state law causes of action: "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the *Rule 9(b)* requirement that the *circumstances* of the fraud must be stated with particularity **[**16]** is a federally imposed rule." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003)* (quoting *Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1995)*(italics in original)).

[4] "In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of *Rule 9(b)*." *Vess, 317 F.3d at 1103-1104*.

In Re Glenfed, Inc. Securities Litigation, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in original) *superseded by statute on other grounds as stated in Marksman Partners, L.P. v. Chantal Pharm. Corp., 927 F.Supp. 1297 (C.D. Cal. 1996)*; *see Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)* (fraud allegations must be accompanied by "the who, what, when, where, and how" of the misconduct charged); *see Neubronner, 6 F.3d at 672* ("The complaint must specify facts as the times, dates, places, benefits received and other details of the alleged fraudulent activity.")

In a fraud action against a corporation, a plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal.App.4th 153, 157, 2 Cal.Rptr.2d 861 (1991)*.

F.R.Civ.P. 9(b) "does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately **[**19]** of the allegations surrounding his alleged participation in the fraud.'" *Swartz v. KPMG LLP, 476 F.3d 756, 764-765 (9th Cir. 2007)* (quoting *Haskin v. R.J. Reynolds Tobacco Co., 995 F.Supp. 1437, 1439 (M.D. Fla.1998))*. In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, "identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme." *Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir.1989)*. "To state a claim of fraudulent conduct, which carries substantial reputational costs, plaintiffs must provide each and every defendant with enough information to enable them 'to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with.'" *Pegasus Holdings v. Veterinary Centers of America, Inc., 38 F.Supp.2d 1158, 1163 (C.D. Cal. 1998)* (quoting *In re Worlds of Wonder Sec. Litig., 694 F.Supp. 1427, 1433 (N.D. Cal.1988))*.

Defendants point to the complaint's absence of facts of defendants' alleged representations or omissions made to Mr. Altmann. Defendants note the limited allegations of failure to maintain records and to fund fully the loan and unspecified representations during loan **[**20]** origination.

The complaint's conclusory allegations fail to meet *Rule 9(b)*'s strict standard. The complaint lacks precise allegations as to what defendants, through specifically identified and authorized agents or representatives, allegedly promised or represented. The complaint lacks facts to support fraud elements let **[*1071]** alone the who, what, when, when and how of alleged misconduct. Defendants correctly challenge the complaint's failure "to satisfy elements, much less the heightened federal pleading standard." The complaint relies on mere notions of misrepresentations and omissions as to Mr. Altmann's loan matters without providing supporting facts or necessary details. Given the multiple defendants and their differing roles, such allegations are insufficient to warrant dismissal of the complaint's claims sounding in fraud.

Moreover, fraud claims addressing alleged failure to fund fully the loan sound in breach of contract rather than fraud. *See Mills v. Polar Molecular Corp., 12 F.3d 1170, 1176 (2nd Cir. 1993)* (failure to carry out a promise "does not constitute fraud unless, when the promise was made, the defendant secretly intended not to perform or knew that he could not perform"). **[**21]** Purported contract breaches fail to support fraud claims.

Rosenthal Fair Debt Collection Practices Act

The complaint's second claim seeks relief under the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), *Cal. Civ. Code, §§ 1788, et seq.* The claim alleges RFDCPA violations in that "Defendants . . . threatened to take actions not permitted by law," including "collection on a debt not owed to Defendants, making false reports to credit reporting agencies, foreclosing upon a void security interest, foreclosing upon a Note of which they were not in procession [sic] nor otherwise entitled to payment, falsely stating the amount of a debt, increasing the amount of a debt by including amounts that are not permitted by law or contract, and using unfair and unconscionable means in an attempt to collect a debt."

The RFDCPA's purpose is "to prohibit debt collectors from engaging in unfair or deceptive practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts." *Cal. Civ. Code, §*

1788.1(b). The RFDCPA defines "debt collector" as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, **[**22]** engages in debt collection." Cal. Civ. Code, § 1788.2(c). "[F]oreclosure does not constitute debt collection under the RFDCPA." Izenberg v. ETS Services, LLC, 589 F.Supp.2d 1193, 1199 (C.D. Cal. 2008). The "law is clear that foreclosing on a property pursuant to a deed of trust is not a debt collection within the meaning of the RFDCPA or the FDCA [Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, et seq.]." Gamboa v. Trustee Corps, 2009 U.S. Dist. LEXIS 19613, 2009 WL 656285, * 4 (N.D. Cal. 2009). As this Court has explained previously, "[l]ogic suggests that non-judicial foreclosure is not a debt collector's act under California Civil Code section 1788.2(c)." Swanson v. ECM Mortgage Corp., 2009 U.S. Dist. LEXIS 107912, 2009 WL 3627925 (E.D. Cal. 2009).

Defendants fault the complaint's lack of facts to characterize defendants as debtor collectors under the RFDCPA. Defendants note that the complaint exempts them from the RFDCPA in that the complaint identifies defendants as a lender and loan servicer. Defendants further argue that the RFDCPA claim is barred by the one-year limitations period of California Civil Code section 1788.30(f) (civil action must be brought "within one year from the date of the occurrence of the violation").

Defendants **[**23]** are correct that the complaint fails to substantiate defendants as debt collectors to subject them to an RFDCPA claim. The complaint references only loan origination, an attempted short sale, and potential non-judicial foreclosure, none of which is debt collector activity under the RFDCPA. Morever, **[*1072]** purported debt collection occurred more than a year prior to the October 27, 2011 filing of the complaint. The RFDCPA claims fail and are subject to dismissal.

Negligence

The complaint's (third) negligence claim alleges that "Defendants breached their duty of care to Plaintiff when they failed to maintain the original Mortgage Notes[,] failed to properly create original documents, . . . failed to make the required disclosures . . ., took payments to which they were not entitled, charged fees they were not entitled to charge and made otherwise authorized negative reporting to Plaintiff's creditworthiness." The claim further accuses National City of directing Mr. Altmann into loans for which he was not qualified.

Limitations Defense

Defendants argue that claims relating to "purported misconduct during origination of the loan" are barred by the two-year limitations period of **[**24]** California Code of Civil Procedure section 339(1) (two-year limitations period for an action upon an obligation or liability not founded upon an instrument of writing). Defendants contend that negligence allegations sounding in fraud are barred by the three-year limitations period of California Code of Civil Procedure section 338(d). Defendants point to the April 2007 origination of Mr. Altmann's loan to set an April 2010 deadline to pursue negligence/fraud sounding claims to render such claims untimely with the October 27, 2011 complaint filing.

Defendants raise valid points. Negligence claims arising more than two years prior to the complaint's October 27, 2011 filing are barred, especially given the lack of facts to support tolling.

Duty Of Care

Defendants further challenge the absence of their duty of care to support a negligence claim.

"The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the plaintiff's injury." Mendoza v. City of Los Angeles, 66 Cal.App.4th 1333, 1339, 78 Cal.Rptr.2d 525 (1998) (citation omitted). "The existence of a duty of care owed by a defendant to a **[**25]** plaintiff is a prerequisite to establishing a claim for negligence." Nymark v. Heart

Fed. Savings & Loan Assn., 231 Cal.App.3d 1089, 1095, 283 Cal.Rptr. 53 (1991). "[A]bsent a duty, the defendant's care, or lack of care, is irrelevant." Software Design & Application, Ltd. v. Hoefer & Arnett, Inc., 49 Cal.App.4th 472, 481, 56 Cal.Rptr.2d 756 (1996). "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide." Vasquez v. Residential Investments, Inc., 118 Cal.App.4th 269, 278, 12 Cal.Rptr.3d 846 (2004) (citation omitted).

"The 'legal duty' of care may be of two general types: (a) the duty of a person to use ordinary care in activities from which harm might reasonably be anticipated [, or] (b) [a]n affirmative duty where the person occupies a particular relationship to others. . . . In the first situation, he is not liable unless he is actively careless; in the second, he may be liable for failure to act affirmatively to prevent harm." McGettigan v. Bay Area Rapid Transit Dist., 57 Cal.App.4th 1011, 1016-1017, 67 Cal.Rptr.2d 516 (1997).

There is no actionable duty between a lender and borrower in that loan transactions **[**26]** are arms-length. A lender "owes no duty of care to the [borrowers] in approving their loan. Liability to a borrower for negligence arises only when the lender 'actively participates' in the financed enterprise 'beyond the domain of the usual money lender.'" Wagner v. Benson, ***[*1073]*** 101 Cal.App.3d 27, 35, 161 Cal.Rptr. 516 (1980) (citing several cases). "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." Nymark, 231 Cal.App.3d at 1096, 283 Cal.Rptr. 53; *see* Myers v. Guarantee Sav. & Loan Assn., 79 Cal. App. 3d 307, 312, 144 Cal. Rptr. 616 (1978) (no lender liability when lender did not engage "in any activity outside the scope of the normal activities of a lender of construction monies").

"Public policy does not impose upon the Bank absolute liability for the hardships which may befall the [borrower] it finances." Wagner, 101 Cal.App.3d at 34, 161 Cal.Rptr. 516. The success of a borrower's investment "is not a benefit of the loan agreement which the Bank is under a duty to protect." Wagner, 101 Cal.App.3d at 34, 161 Cal.Rptr. 516 **[**27]** (lender lacked duty to disclose "any information it may have had"). "It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid." Sierra-Bay Fed. Land Bank Assn. v. Superior Court, 227 Cal.App.3d 318, 334, 277 Cal.Rptr. 753 (1991).

The complaint insufficiently attempts to allege defendants' cognizable a duty of care let alone its breach. Plaintiffs lack a negligence claim based on a lender/borrower relationship, particularly in the absence of a duty to forego foreclosure or to provide loan modification, refinancing or similar relief. "No such duty exists" for a lender "to determine the borrower's ability to repay the loan. . . . The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's." *Renteria v. United States, 452 F. Supp. 2d 910, 922-923 (D. Ariz. 2006)* (borrowers "had to rely on their own judgment and risk assessment to determine whether or not to accept the loan"). "A commercial lender is not to be regarded as the guarantor of a borrower's success and is not liable for the hardships which may befall a borrower." Sierra-Bay Fed. Land Bank Assn. v. Superior Court, 227 Cal.App.3d 318, 334, 277 Cal.Rptr. 753 (1991). **[**28]** Moreover, defendants had "no interest in the loan" in their role as loan servicers. *See* Cleveland v. Deutsche Bank Nat. Trust Co., 2009 U.S. Dist. LEXIS 7165, 2009 WL 250017, at *3 (S.D. Cal. 2009).

Defendants owed no duty of care to plaintiffs arising from Mr. Altmann's default, property foreclosure, and attempts to avoid foreclosure. The complaint lacks facts of special circumstances to impose duties on defendants in that the complaint depicts an arms-length transaction, nothing more. The complaint fails to substantiate a special lending relationship or an actionable breach of duty to substantiate a negligence claim. The negligence claim fails.

Real Estate Settlement Procedures Act

The complaint's fourth claim alleges that "Defendants" violated the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601, et seq., "at the time of closing on the sale of the Property by failing to correctly and accurately comply with the disclosure requirements therein and respond timely to Plaintiff's Qualified Written Request."

Defendants fault the complaint's failure to allege a particular RESPA statute which was violated and facts to demonstrate RESPA applicability.

Under RESPA, a QWR is a "written request from the borrower **[**29]** (or an agent of the borrower) for information relating to the servicing of such loan." *12 U.S.C. § 2605(e)(1)(A)*. Among other things, a QWR must include a "statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in **[*1074]** error or provides sufficient detail to the servicer regarding other information sought by the borrower." *12 U.S.C. § 2605(e)(1)(B)(ii)*.

Defendants point to the absence of allegations to support that plaintiffs sent a legitimate QWR and to identify grounds that Mr. Altmann's loan or account was defective or in error. Defendants are correct. The complaint merely alleges that a QWR was mailed at various times and that "Defendants have yet to properly respond." The complaint fails to plead or identify a viable or legitimate QWR.

Defendants further point to *12 U.S.C. § 2614*'s one-year limitations for violations of *12 U.S.C. § 2607*. [5] "The statute of limitations for private plaintiffs suing under RESPA is one year from the 'date of the occurrence of the violation.'" *Edwards v. First American Corp., 517 F.Supp.2d 1199, 1204 (C.D. Cal. 2007)* (quoting *12 U.S.C. § 2614*). The "primary ill" which RESPA seeks to remedy is "the potential for **[**30]** 'unnecessarily high settlement charges' caused by kickbacks, fee-splitting, and other practices that suppress price competition for settlement services. This ill occurs, if at all, when the plaintiff pays for the service, typically at the closing." *Snow v. First American Title Ins. Co., 332 F.3d 356, 359-360 (5th Cir. 2003)* (quoting *12 U.S.C. §2601(a)*). Mr. Altmann closed his loan in April 2007, well more than a year prior to the complaint's October 27, 2011 filing to bar RESPA claims in connection with loan origination.

Defendants further note the absence of a private right of action under RESPA for disclosure violations.

RESPA's purpose is to "curb abusive settlement practices in the real estate industry. Such amorphous goals, however, do not translate into a legislative intent to create a private right of action." *Bloom v. Martin, 865 F.Supp. 1377, 1385 (N.D. Cal. 1994)*, *aff'd*, *77 F.3d 318 (1996)*. "The structure of RESPA's various statutory provisions indicates **[**31]** that Congress did not intend to create a private right of action for disclosure violations under *12 U.S.C. § 2603* . . . Congress did not intend to provide a private remedy . . ." *Bloom, 865 F.Supp. at 1384*.

The absence of a private right of action dooms a purported RESPA claim based on disclosure violations.

The RESPA claim fails as a matter of law.

Breach Of Fiduciary Duty

The complaint's (fifth) breach of fiduciary duty claim alleges: "Defendants did not accurately maintain records of constructions payouts and have charged for monies not received by Plaintiff, and did not fully fund the construction loan or convert it to a take-out loan." The claim further alleges that "Defendants . . . have made several representations to Plaintiff with regard to material acts" and which were false.

"[T]o plead a cause of action for breach of fiduciary duty, there must be shown the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. The absence of any one of these elements is fatal to the cause of action." *Pierce v. Lyman, 1 Cal.App.4th 1093, 1101, 3 Cal.Rptr.2d 236 (1991)*.

A fiduciary relationship arises "between parties to a transaction wherein one of the **[**32]** parties is . . . duty bound to act with the utmost good faith for the benefit of the other party." *Herbert v. Lankershim,* ***[*1075]*** *9 Cal.2d 409,*

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[5] *12 U.S.C. § 2607(a)* prohibits referral payments for real estate settlement services, and *12 U.S.C. § 2607(b)* prohibits receipt of "any portion, split or percentage" of a settlement service fee, except for performed services.

483, 71 P.2d 220 (1937). A fiduciary relationship "ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent." Herbert, 9 Cal.2d at 483, 71 P.2d 220.

Nonetheless "no fiduciary relationship is established merely because 'the parties reposed trust and confidence in each other.'" Girard v. Delta Towers Joint Venture, 20 Cal.App.4th 1741, 1749, 26 Cal.Rptr.2d 102 (1993) (quoting Worldvision Enterprises, Inc. v. American Broadcasting Companies, Inc., 142 Cal.App.3d 589, 595, 191 Cal.Rptr. 148 (1983)). To be charged with a fiduciary obligation, a person must knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law. City of Hope Nat. Medical Center v. Genentech, Inc., 43 Cal.4th 375, 385, 75 Cal. Rptr. 3d 333, 181 P.3d 142 (2008).

"California **[**33]** courts have not extended the 'special relationship' doctrine to include ordinary commercial contractual relationships" Martin v. U-Haul Co. Of Fresno, 204 Cal.App.3d 396, 412, 251 Cal.Rptr. 17 (1988) (citations omitted). "The relationship between a lending institution and its borrower-client is not fiduciary in nature." Nymark, 231 Cal.App.3d at 1093, n. 1, 283 Cal.Rptr. 53 (citing Price v. Wells Fargo Bank, 213 Cal.App.3d 465, 476-478, 261 Cal.Rptr. 735 (1989)). A commercial lender is entitled to pursue its own economic interests in a loan transaction. Nymark, 231 Cal.App.3d at 1093, n. 1, 283 Cal.Rptr. 53(citing Kruse v. Bank of America, 202 Cal.App.3d 38, 67, 248 Cal.Rptr. 217 (1988)).

Absent "special circumstances" a loan transaction is "at arms-length and there is no fiduciary relationship between the borrower and lender." Oaks Management Corp. v. Superior Court, 145 Cal.App.4th 453, 466, 51 Cal.Rptr.3d 561 (2006) ("the bank is in no sense a true fiduciary"); *see* Downey v. Humphreys, 102 Cal. App. 2d 323, 332, 227 P.2d 484 (1951) ("A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such."). "[A]s a general rule, a financial institution **[**34]** owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." Nymark, 231 Cal.App.3d at 1096, 283 Cal.Rptr. 53.

The complaint alleges no facts to support a fiduciary relationship. The complaint offers the conclusory allegation that "Defendants . . . owed a fiduciary duty to the Plaintiff to act primarily for his benefit, to act with proper skill and diligence and not to make a personal profit from the agency at the expense of the principal, the Plaintiff." The complaint's mere reference to "fiduciary duties" is insufficient to impose a fiduciary relationship on defendants. The breach of fiduciary duty claim fails in the absence of supporting facts.

Unfair Competition Law

The complaint's (sixth) claim purports to allege violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code, §§ 17200, et seq. The claim alleges that "Defendants'" acts "constitute unlawful, unfair, and/or fraudulent business practices" as defined by the UCL.

Defendants challenge the complaint's failure to allege that plaintiffs suffered an injury cognizable under the UCL.

California Business and Professions Code section 17204 **[**35]** limits standing to bring a UCL claim to specified public officials **[*1076]** and a private person "who has suffered injury in fact and has lost money or property as a result of the unfair competition." "This provision requires [plaintiff] to show that she has lost 'money or property' sufficient to constitute an 'injury in fact' under Article III of the Constitution, *see* Birdsong v. Apple, Inc., 590 F.3d 955, 959-60 (9th Cir.2009), and also requires a 'causal connection' between [defendant's] alleged UCL violation and her injury in fact, Hall v. Time Inc., 158 Cal.App.4th 847, 70 Cal.Rptr.3d 466, 471-72 (2008)." Rubio v. Capital One Bank, 613 F.3d 1195, 1204-1205 (9th Cir. 2010).

Business and Professions Code section 17203 addresses UCL relief and provides in pertinent part:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to restore to any person in interest any **money or property**, real or personal, which may have been acquired by means of such unfair competition. (Bold added.)

"In a suit under the UCL, a public prosecutor may collect civil **[**36]** penalties, but a private plaintiff's remedies are 'generally limited to injunctive relief and restitution.'" *Kasky v. Nike, Inc., 27 Cal.4th 939, 950, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002)* (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999))*.

Defendants correctly note the complaint's absence of facts of plaintiffs' money or property allegedly lost due to a UCL violation or "as a result of unfair competition." The complaint lacks facts to support plaintiffs' standing to seek UCL relief to warrant dismissal of the UCL claim.

Defendants further fault the complaint's lack of facts to substantiate that defendants committed a UCL violation.

"Unfair competition is defined to include 'unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising.'" *Blank v. Kirwan, 39 Cal.3d 311, 329, 216 Cal.Rptr. 718, 703 P.2d 58 (1985)* (quoting *Cal. Bus. & Prof. Code, § 17200*). The UCL establishes three varieties of unfair competition - "acts or practices which are unlawful, or unfair, or fraudulent." *Shvarts v. Budget Group, Inc., 81 Cal.App.4th 1153, 1157, 97 Cal.Rptr.2d 722 (2000)*. An "unlawful business activity" includes **[**37]** anything that can properly be called a business practice and that at the same time is forbidden by law. *Blank, 39 Cal.3d at 329, 216 Cal.Rptr. 718* (citing *People v. McKale, 25 Cal.3d 626, 631-632, 159 Cal.Rptr. 811, 602 P.2d 731 (1979))*. "A business practice is 'unlawful' if it is 'forbidden by law.'" *Walker v. Countrywide Home Loans, Inc., 98 Cal.App.4th 1158, 1169, 121 Cal.Rptr.2d 79 (2002)* (quoting *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992))*.

The UCL prohibits "unlawful" practices "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1999)*. The UCL "thus creates an independent action when a business practice violates some other law." *Walker, 98 Cal.App.4th at 1169, 121 Cal.Rptr.2d 79*. According to the California Supreme Court, the UCL "borrows" violations of other laws and treats them as unlawful practices independently actionable under the UCL. *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992)*.

[*1077] A fellow district court has explained the borrowing of a violation of law other **[**38]** than the UCL:

> To state a claim for an "unlawful" business practice under the UCL, a plaintiff must assert the violation of any other law. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)* (stating, "By proscribing 'any unlawful' business practice, *section 17200* 'borrows' violations of other law and treats them as unlawful practices that the unfair competition law makes independently actionable.") (citation omitted). Where a plaintiff cannot state a claim under the "borrowed" law, she cannot state a UCL claim either. *See, e.g., Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal.App.4th 700, 718, 113 Cal.Rptr.2d 399 (2001)*. Here, Plaintiff has predicated her "unlawful" business practices claim on her TILA claim. However, as discussed above, Plaintiff's attempt to state a claim under TILA has failed. Accordingly, Plaintiff has stated no "unlawful" UCL claim.

Rubio v. Capital One Bank, 572 F.Supp.2d 1157, 1168 (C.D. Cal. 2008).

"Unfair" under the UCL "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to **[**39]** or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, 20 Cal.4th 163 at187, 83 Cal.Rptr.2d 548, 973 P.2d 527*. The "unfairness" prong of the UCL "does not give the courts a general license to review the fairness of contracts." *Samura v. Kaiser Found. Health Plan, 17 Cal.App.4th 1284, 1299, 22 Cal. Rptr. 2d 20 & n. 6 (1993)*.

The "fraudulent" prong under the UCL requires a plaintiff to "show deception to some members of the public, or harm to the public interest," *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F.Supp.2d 1099, 1121 (C.D. Ca. 2001)*, or to allege that "members of the public are likely to be deceived," *Medical Instrument Development Laboratories v. Alcon Laboratories, 2005 U.S. Dist. LEXIS 41411, 2005 WL 1926673, at *5 (N.D. Cal. 2005)*.

"A plaintiff alleging unfair business practices under these statutes [UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc., 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708 (1993)*.

The complaint fails to establish that defendants engaged in unlawful, unfair or fraudulent business practices under the UCL. In the absence **[**40]** of violation of a borrowed law, a UCL claim fails in that it cannot rest on purported deficiencies in the loan transaction, foreclosure proceedings or related matters. The complaint lacks viable statutory or common law claims and lacks reasonable particularity of facts to support a UCL claim. Reliance on other invalid claims alleged in the complaint fails to support a viable UCL claim. Furthermore, the complaint lacks particularity of fraudulent circumstances, such as a misrepresentation, for a UCL claim, especially given failure of fraud-sounding claims, as discussed above. The complaint lacks facts to describe how consumers were deceived and to hint at a wrong subject to the UCL to warrant the UCL claim's dismissal.

Breach Of Contract

The complaint's (seventh) breach of contract claim alleges that "Defendants breached their agreement with Plaintiff":

1. "[T]o exercise reasonable efforts and due diligence as promised thus failing to provide Plaintiff with an **[*1078]** affordable loan and withholding construction draws and not fully funding the construction loan or paying draws timely"; and

2. "[B]y committing wrongful acts including . . . failing to convert the loan and obtain payment and interest **[**41]** rates as promised in the 'take out loan", failing to provide loan documents."

The claim alleges that "Defendants" breached their duties by failing "to short sale the property at the price of $510,000, and later failed to repurchase the loan from Rushmore in order to complete the short sale transaction." The claim further alleges that Rushmore, a loan successor, is bound by PNC's agreement to approve the $510,000 short sale.

"The standard elements of a claim for breach of contract are: '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom.'" *Wall Street Network, Ltd. v. New York Times Co., 164 Cal.App.4th 1171, 1178, 80 Cal.Rptr.3d 6 (2008)*. "To form a contract, an 'offer must be sufficiently definite . . . that the performance promised is reasonably certain.'" *Alexander v. Codemasters Group Limited, 104 Cal.App.4th 129, 141, 127 Cal. Rptr. 2d 145*. *104 Cal. App. 4th 129, 127 Cal.Rptr.2d 145 (2002)*.

"As to the contract, where a written instrument is the foundation of a cause of action, it may be pleaded in haec verba by attaching a copy as an exhibit and incorporating it by proper reference." *Byrne v. Harvey, 211 Cal.App.2d 92, 103, 27 Cal.Rptr. 110 (1962)*; **[**42]** *Holly Sugar Corp. v. Johnson, 18 Cal.2d 218, 225, 115 P.2d 8 (1941)*. "Where a party relies in his complaint upon a contract in writing, and it affirmatively appears that all the terms of the contract are not set forth in hæc verba, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient." *Gilmore v. Lycoming Fire Ins. Co., 55 Cal. 123, 124 (1880)*.

Defendants fault the complaint's failure to allege a contract among the parties. Defendants point to the absence of CBI's agreement with either defendant or an agreement between Mr. Altmann and Rushmore. Defendants further fault the absence of alleged "specific terms of the purported contracts, or otherwise attach the contracts to the Complaint." As to the short sale, defendant note the complaint's failure to identify plaintiffs' consideration and terms breached by defendants. Defendants explain that an agreement to short sale required a writing to comply with the statute of frauds.

"In the absence of consideration, a gratuitous oral promise to postpone a sale of property pursuant to the terms of a trust deed ordinarily would be unenforceable under *section 1698* [the statute **[**43]** of frauds]." *Raedeke v. Gibraltar Sav. & Loan Assn., 10 Cal. 3d 665, 673, 111 Cal. Rptr. 693, 517 P.2d 1157 (1974)* (citing *Karlsen v. American Sav. & Loan Assn., 15 Cal.App.3d 112, 121, 92 Cal.Rptr. 851 (1971))*; *see* *Nguyen v. Calhoun, 105 Cal.App.4th 428, 445, 129 Cal.Rptr.2d 436 (2003)* ("In this case, then, we conclude that the foreclosure sale may not be set aside based on the lender's alleged breach of an oral agreement to postpone the trustee's sale.")

"A contract in writing may not be altered by an executory oral agreement. (*Civil Code, section 1698*.) An agreement to postpone a valid sale of property beyond the date when said property may be sold under and according to the terms of the trust deed obviously is an agreement to alter the terms of the instrument . . . To hold otherwise would reduce a trust deed in any case to an unsubstantial if not worthless security." *Karlsen, 15 Cal.App.3d 112, 121, 92 Cal.Rptr. 851 (1971)* **[*1079]** (citation omitted.) "An agreement by which a lender agreed to forbear from exercising the right of foreclosure under a deed of trust securing an interest in real property comes within the statute of frauds." *Secrest v. Security Nat. Mortg. Loan Trust 2002-2, 167 Cal. App. 4th 544, 547, 84 Cal. Rptr. 3d 275 (2008)*.

Defendants **[**44]** are correct that terms of purported breached agreements are not sufficiently pled. To the extent plaintiffs rely on a written contract, plaintiffs must attach the written contract or plead its terms verbatim. They have failed to do so. Moreover, a purported short sale agreement requires a writing to satisfy the statute of frauds. Again, the complaint fails to pled the terms of such agreement. Such deficiencies warrant dismissal of the breach of contract claim.

Fraudulent Property Transfer

The complaint's (eighth) fraudulent property transfer claim alleges that "PNC sold or otherwise transferred the Property to Rushmore during the original short sale transaction" when "the Property was encumbered by a bankruptcy filing that affected the Property and stayed any transaction in regard to the Property." The claim continues: "PNC's transfer of the Property to Rushmore was void and illegal under federal bankruptcy statutes due to the bankruptcy stay, and such transfer was fraudulent."

Defendants fault the claim in that they are not debtors subject to a bankruptcy to prohibit a property transfer. Defendants explain that PNC assigned Mr. Altmann's loan and did not transfer any property to demonstrate **[**45]** a property transfer from a bankruptcy estate.

Defendants are correct. The complaint merely notes a fraudulent transfer without reference to a particular state or federal statute. Defendants held no title to the property. The fraudulent property transfer claim fails as a matter of law.

Due Process Violation

The complaint's (ninth) due process violation claim alleges that "Defendants . . . initiated non-judicial foreclosure proceedings against Altmann's home" to result in "further failure to provide plaintiffs Altmann and CBI with due process in regard to the foreclosure sale."

Defendants note that exercise of California's non-judicial foreclosure procedure does not invoke procedural due process requirements.

The complaint does not reference *42 U.S.C. § 1983*, the vehicle to pursue a constitutional challenge such as the purported due process violation claim. The "ultimate issue" to determine whether a person is subject to a *section 1983* action is whether "the alleged infringement of federal rights [is] 'fairly attributable to the State?'" *Rendell-Baker*

v. Kohn, 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L. Ed. 2d 418 (1982) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982)). **[**46]** The United States Supreme Court has adopted a two-part test to address whether infringement is attributable to the state:

> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State: These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together **[*1080]** with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L. Ed. 2d 482 (1982).

A private remedy such as non-judicial foreclosure does not involve state action to invoke **[**47]** a *section 1983* claim. *Apao v. Bank of New York, 324 F.3d 1091, 1095 (9th Cir. 2003)*; *Charmicor v. Deaner, 572 F.2d 694, 696 (9th Cir. 1978)* (source of the non-judicial foreclosure " right is not conclusive as to state action"). "California's nonjudicial foreclosure procedure does not constitute state action and is therefore immune from the procedural due process requirements of the federal Constitution." *Garfinkle v. Superior Court, 21 Cal.3d 268, 281, 146 Cal.Rptr. 208, 578 P.2d 925 (1978)*.

Non-judicial foreclosure proceedings do not constitute state action to bar the complaint's due process violation claim.

In addition, the complaint fails to substantiate that defendants are state actors. "When addressing whether a private party acted under color of law, we therefore start with the presumption that private conduct does not constitute governmental action." *Sutton v. Providence St. Joseph Medical Center, 192 F.3d 826, 835 (9th Cir. 1999)*; *see* *Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir.1992)* ("Only in rare circumstances can a private party be viewed as a 'state actor' for *section 1983* purposes."); *Price v. Hawaii, 939 F.2d 702, 707-08 (9th Cir.1991)* ("[P]rivate parties are not generally acting **[**48]** under color of state law.") "*§ 1983* excludes from its reach merely private conduct, no matter how discriminatory or wrong." *American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 119 S.Ct. 977, 985, 143 L. Ed. 2d 130 (1999)* (citation and internal quotation marks omitted).

As private actors, defendants are subject to no *section 1983* claim to further warrant dismissal of the complaint's due process violation claim.

Unconscionability

The complaint's (eleventh) unconscionable contract claim urges this Court to find "prodecural unconscionability of this mortgage contract and deem such contract void" in that Mr. Altmann "could not understand and choose the terms of the loan effectively without the meaningful disclosure of the Lenders thus meeting the unequal bargaining power."

Section 1670.5(a) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

"*Civil Code section 1670.5* does not create an affirmative **[**49]** cause of action but merely codifies the defense of unconscionability." *Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal.App.3d 758, 766, 259 Cal.Rptr. 789 (1989)*.

Unconscionability has "procedural" and "substantive" elements. *A & M Produce Co. v. FMC Corp., 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114 (1982)*. The procedural element focuses on: (1) "oppression," which "arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful **[*1081]** choice'"; and (2) "surprise" which "involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *A & M Produce, 135 Cal.App.3d at 486, 186 Cal.Rptr. 114* (citations omitted). The substantive element turns on "allocation of risks between the parties, and therefore that a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner" to constitute a "one-sided" result without "justification" for it. *A & M Produce, 135 Cal.App.3d at 487, 186 Cal.Rptr. 114* (citations omitted).

The complaint alleges no facts that defendants engaged **[**50]** in oppression, surprise, or overly-harsh conduct to suggest the availability of the unconscionability defense. The complaint reveals no more than an arms length loan transaction and Mr. Altmann's attempts to avoid foreclosure. Defendants are not subject to an unconscionability claim or defense to warrant dismissal of the claim.

California Statutory Unfair Lending Practices

California has enacted anti-predatory lending statutes. *See Cal. Fin. Code, §§ 4970-4979.8*. The complaint's twelfth claim purports to allege violations of several subparts of *California Financial Code section 4973(c)*.

An initial question is whether Mr. Altmann's loan is a "covered loan" under *subsection (b) of California Financial Code section 4970* ("*section 4970*"). *Section 4970(b)* provides:

> "Covered loan" means a consumer loan in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association in the case of a mortgage or deed of trust, and where one of the following conditions are met:
>
> (1) For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction **[**51]** will exceed by more than eight percentage points the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.
> (2) The total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount.

The complaint fails to allege facts that Mr. Altmann's loan meets *section 4970(b)* conditions. *See Nool v. HomeQ Servicing, 653 F.Supp.2d 1047, 1054 (E.D. Cal. 2009)* (dismissing a *section 4970* claim for failure to allege "covered loan" conditions). In absence of necessary facts to establish a covered loan, the complaint's twelfth claim fails. *See Fortaleza v. PNC Financial Services Group, Inc., 642 F.Supp.2d 1012, 1020 (N.D. Cal. 2009)* (dismissing a claim under *California Financial Code, §§ 4973, et seq.*, in that plaintiff "failed to identify either the specific statutory provision pursuant to which plaintiff brings suit, or the specific conduct undertaken by either [defendant] in alleged violation of an applicable statutory provision").

Furthermore, the complaint's twelfth claim **[**52]** is untimely in that *California Code of Civil Procedure section 340* provides a one-year limitations period for statutes such as *California Financial Code sections 4970-4979.8*. *See DeLeon v. Wells Fargo Bank, N.A., 729 F.Supp.2d 1119, 1128-1129 (N.D. Cal. 2010)*. Plaintiffs' claims arise out of Mr. Altmann's loan origination and accrued at the loan's April 2007 consummation to render the complaint's **[*1082]** October 27, 2011 filing untimely for claims under *California Financial Code sections 4970-4979.8*.

Usury

The complaint's (thirteenth) usury laws violation claim alleges that loan documents generated by defendants "contained an illegal and usurious rate of interest that violated California's Usury laws."

Defendants fault the complaint's failure to allege usury elements.

"The essential elements of usury are: (1) The transaction must be a loan or forbearance; (2) the interest to be paid must exceed the statutory maximum; (3) the loan and interest must be absolutely repayable by the borrower; and (4) the lender must have a willful intent to enter into a usurious transaction." *Ghirardo v. Antonioli, 8 Cal.4th 791, 798, 35 Cal.Rptr.2d 418, 883 P.2d 960 (1994)*. "There is a rebuttable presumption that a transaction **[**53]** is not usurious." *Ghirardo, 8 Cal.4th at 798-99, 35 Cal.Rptr.2d 418 (1994)*.

The complaint is devoid of facts to suggest that Mr. Altmann's loan is usurious. The complaint lacks facts as to the loan's interest rate, its exceeding the statutory maximum, and the lender's willful intent.

Moreover, a usury claim is susceptible to the three-year limitations period of *California Code of Civil Procedure section 338(a)*, which address an "action upon liability created by statute." California's usury proscription is found in *California Constitution, article XV, section 1*, which states "No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than the interest authorized by this section upon any loan or forbearance of any money, goods or things in action."

The limitations defense provides further grounds to dismiss the usury claim.

Truth In Lending Act

The complaint's fourteenth claim purports to allege violations under the Truth in Lending Act ("TILA"), *15 U.S.C. §§ 1601, et seq.*, and its implementing Regulation Z, 12 C.F.R. §§ 226, et seq. The claim alleges that "material documents provided to Altmann **[**54]** . . . failed in one or more material respects to disclose to Altmann in a form and manner required by applicable statute and regulation."

Defendants challenge the complaint's TILA claims as time barred.

Damages Limitations Period

A TILA damages claim is subject to *15 U.S.C. § 1640(e)*, which provides that an action for a TILA violation must proceed "within one year from the date of the occurrence of the violation." "TILA requires that any claim based on an alleged failure to make material disclosures be brought within one year from the date of the occurrence of the violation." *Hallas v. Ameriquest Mortg. Co., 406 F.Supp.2d 1176, 1183 (D. Or. 2005)*. The limitations period runs from the date of a transaction's consummation which is the time that a consumer becomes contractually obligated on a credit transaction. *Monaco v. Bear Stearns Residential Mortgage Corp., 554 F.Supp.2d 1034, 1039 (C.D. Cal. 2008)*. The Ninth Circuit noted in *Meyer v. Ameriquest Mortgage Co., 342 F.3d 899, 902 (9th Cir. 2003)*:

> The failure to make the required disclosures occurred, if at all, at the time the loan documents were signed. The [plaintiffs] were in full possession of all information relevant to the discovery **[**55]** of a TiLA violation and a *§ 1640(a)* damages claim on the day the loan papers were signed.

[*1083] The complaint's face illustrates that TILA damages claims are time barred in that Mr. Altmann consummated his loan in April 2007 and filed his complaint on October 27, 2011, more than four years after their loan transaction. TILA damages claims are doomed.

Rescission Limitations Period

To the extent that the FAC pursues a TILA rescission claim, it too is time barred.

TILA's "buyer's remorse" provision allows borrowers three business days to rescind, without penalty, a consumer loan that uses their principal dwelling as security. *Semar v. Platte Valley Federal Sav. & Loan Ass'n, 791 F.2d 699, 701 (9th Cir. 1986)*;*15 U.S.C. § 1635(a)*. TILA rescission may be extended up to three years if the lender fails to comply with TILA disclosure requirements. *Semar, 791 F.2d at 701-702*; *15 U.S.C. § 1635(f)*.

15 U.S.C. § 1635(f) addresses the outer most limit to seek rescission:

> An obligor's right of rescission **shall expire three years after the date of consummation of the transaction** or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this **[**56]** section or any other disclosures required under this part have not been delivered to the obligor . . . (Bold added.)

The U.S. Supreme Court has described as "manifest" Congress' intent to prohibit rescission after the three-year period has run:

> *Section 1635(f)*, however, takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the "right of rescission [under the Act] shall expire" at the end of the time period. It talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous. There is no reason, then, even to resort to the canons of construction that we use to resolve doubtful cases, such as the rule that the creation of a right in the same statute that provides a limitation is some evidence that the right was meant to be limited, not just the remedy. *See* *Midstate Horticultural Co., supra, at 360, 64 S.Ct., at 130*; *Burnett, supra, at 427, n. 2, 85 S.Ct., at 1054 n. 2*; *Davis v. Mills, 194 U.S. 451, 454, 24 S.Ct. 692, 693-694, 48 L.Ed. 1067 (1904)*.

Beach v. Ocwen Fed. Bank, 523 U.S. 410, 417, 419, 118 S.Ct. 1408, 140 L. Ed. 2d 566 (1998); **[**57]** *Miguel v. Country Funding Corp., 309 F.3d 1161, 1164 (9th Cir. 2002)* ("*§ 1635(f)* is a statute of repose, depriving the courts of subject matter jurisdiction when a *§ 1635* claim is brought outside the three-year limitation period").

With Mr. Altmann's loan consummated in April 2007, a TILA rescission remedy expired prior to the October 27, 2011 filing of Mr. Altmann's complaint. TILA rescission is time barred.

Equitable Tolling

The complaint's TILA claim alleges that "the doctrine of equitable tolling applies to Altmann's claims for civil damages and rescission." Defendants challenge application of equitable tolling to save TILA claims from expired limitations periods.

"Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim." *Santa Maria v. Pacific Bell, 202 F.3d 1170, 1178 (9th* ***[*1084]*** *Cir. 2000)*. The Ninth Circuit has explained:

> Unlike equitable estoppel, equitable tolling does not depend on any wrongful conduct by the defendant to prevent the plaintiff from suing. Instead it focuses on whether there was excusable delay by the plaintiff. If a reasonable plaintiff would not have known of the existence **[**58]** of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing until the plaintiff can gather what information he needs. . . . However, equitable tolling does not postpone the statute of limitations until the existence of a claim is a virtual certainty.

Santa Maria, 202 F.3d at 1178 (citation omitted).

Courts are reluctant to invoke equitable tolling:

> A statute of limitations is subject to the doctrine of equitable tolling; therefore, relief from strict construction of a statute of limitations is readily available in **extreme cases** and gives the court latitude in a case-by-case analysis. . . . The equitable tolling doctrine has been applied by the Supreme Court in certain circumstances, but it has been applied sparingly; for example, the Supreme Court has allowed equitable tolling when the statute of limitations was not complied with because of defective pleadings, when a claimant was tricked by an adversary into letting a deadline expire . . . Courts have been generally unforgiving, however, when a late filing is due to claimant's failure "to exercise due diligence in preserving his legal rights." . . .

Scholar v. Pac. Bell, 963 F.2d 264, 267-268 (9th Cir. 1992) **[**59]** (bold added; citations omitted).

To rely on delayed discovery of a claim, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." Fox v. Ethicon Endo-Surgery, Inc., 35 Cal.4th 797, 808, 27 Cal.Rptr.3d 661, 110 P.3d 914 (2005) (quoting McKelvey v. Boeing North American, Inc., 74 Cal.App.4th 151, 160, 86 Cal.Rptr.2d 645 (1999)). "[T]o adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." Fox, 35 Cal.4th at 809, 27 Cal.Rptr.2d 661.

The doctrine of delayed discovery requires a plaintiff to plead facts showing an excuse for late discovery of the facts underlying his cause of action. Prudential Home Mortgage Co. v. Superior Court, 66 Cal.App.4th 1236, 1247, 78 Cal.Rptr.2d 566 (1998). The plaintiff must show that it was not at fault for failing **[**60]** to discover or had no actual or presumptive knowledge of facts sufficient to put it on inquiry. Prudential Home, 66 Cal.App.4th at 1247, 78 Cal.Rptr.2d 566. As to sufficiency of delayed discovery allegations, a plaintiff bears the burden to "show diligence" and "conclusory allegations" will not withstand dismissal. Fox, 35 Cal.4th 797, 808, 27 Cal.Rptr.2d 661.

The complaint lacks necessary allegations for equitable tolling. The complaint references vague TILA discrepancies and makes sweeping references to failure to provide documents and hidden facts. The complaint lacks allegations that defendants prevented plaintiffs to compare what documents they received to the TILA disclosure requirements. *See* Hubbard v. Fidelity Federal Bank, 91 F.3d 75, 79 (9th Cir. 1996) (no evidence suggested **[*1085]** that lender concealed its alleged breach). Nothing suggests that plaintiffs lacked information relevant to discovery of a TILA violation when Mr. Altmann's loan was consummated. The complaint offers nothing to demonstrate that despite plaintiffs' due diligence, they were unable to obtain information of a TILA violation. The complaint is silent as to plaintiffs' purported due diligence. Moreover, the limitations **[**61]** period for TILA rescission is a statute of repose not subject to equitable tolling. TILA claims are time barred and subject to dismissal.

Punitive Damages

The complaint includes a prayer for punitive damages and references to attempt to subject defendants to punitive damages.

Defendants contend that the complaint lacks adequate allegations to subject them to punitive damages.

California Civil Code section 3294 ("section 3294") provides that in an action "for breach of an obligation not arising from contract," a plaintiff may seek punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Cal. Civ. Code, § 3294(a). Section 3294(c)(1)-(3) defines:

> 1. "Malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others";

2. "Oppression" as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights"; and

3. "Fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact known to the **[**62]** defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

"Although the court will apply the substantive law embodied in *section 3294*, 'determinations regarding the adequacy of pleadings are governed by the Federal Rules of Civil Procedure.'" *Jackson v. East Bay Hosp., 980 F.Supp. 1341, 1353 (N.D. Cal. 1997)*.

Punitive damages are "available to a party who can plead and prove the facts and circumstances set forth in *Civil Code section 3294*." *Hilliard v. A. H. Robins Co., 148 Cal. App. 3d 374, 392, 196 Cal. Rptr. 117 (1983)*. "To support punitive damages, the complaint . . . must allege ultimate facts of the defendant's oppression, fraud, or malice." *Cyrus v. Haveson, 65 Cal.App.3d 306, 316-317, 135 Cal.Rptr. 246 (1976)*. Pleading the language in *section 3294* "is not objectionable when sufficient facts are alleged to support the allegation." *Perkins v. Superior Court, 117 Cal.App.3d 1, 6-7, 172 Cal.Rptr. 427 (1981)*.

In *G.D. Searle & Co. v. Superior Court, 49 Cal.App.3d 22, 29, 122 Cal.Rptr. 218 (1975)*, the California Court of Appeal explained punitive damages pleading:

> When the plaintiff alleges an intentional **[**63]** wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure. . . . When nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless or unlawful do not support a claim for exemplary damages; such allegations do not charge malice. . . . When a defendant must produce evidence in defense of an exemplary damage claim; fairness demands that he receive adequate notice of the kind of conduct charged against him. (Citations omitted.)

[*1086] "Allegations that the acts . . . were 'arbitrary, capricious, fraudulent, wrongful and unlawful,' like other adjectival descriptions of such proceedings, constitute mere conclusions of law . . ." *Faulkner v. California Toll Bridge Authority, 40 Cal.2d 317, 329, 253 P.2d 659 (1953)*; *see* *Lehto v. Underground Construction Co., 69 Cal.App.3d 933, 944, 138 Cal.Rptr. 419 (1997)* (facts and circumstances of fraud should be set out clearly, concisely, and with sufficient particularity to support punitive damages); *Smith v. Superior Court, 10 Cal.App.4th 1033, 1042, 13 Cal.Rptr.2d 133 (1992)* (punitive damages claim is insufficient in that it is "devoid **[**64]** of any factual assertions supporting a conclusion petitioners acted with oppression, fraud or malice."); *Brousseau v. Jarrett, 73 Cal.App.3d 864, 872, 141 Cal.Rptr. 200 (1977)* ("conclusory characterization of defendant's conduct as intentional, willful and fraudulent is a patently insufficient statement of 'oppression, fraud, or malice, express or implied,' within the meaning of *section 3294*").

Punitive damages are never awarded as a matter of right, are disfavored by the law, and should be granted with the greatest of caution and only in the clearest of cases. *Henderson v. Security Pacific National Bank, 72 Cal.App.3d 764, 771, 140 Cal.Rptr. 388 (1977)*.

Defendants are correct that the complaint lacks facts that defendants acted with requisite malice, oppression or fraud to support punitive damages claims. The complaint merely make stray references to "malice, fraud, and/or oppression" and "malicious" actions with no facts to support such conclusions. The complaint lacks sufficient allegations of defendants' wrongdoing to impose punitive damages on defendants. Moreover, dismissal of plaintiffs' claims warrants dismissal of punitive damages claims.

Attorney Fees

Defendants contend that **[**65]** the complaint lacks necessary allegations to justify an award of attorney fees to plaintiffs. Defendants explain that in absence of a statute or contractual provision for attorney fees recovery, attorney fees are not recoverable as damages in an ordinary civil action.

Attorney fees are recoverable if authorized by statute or contract. *See* *Cal. Code Civ. Proc., § 1021*. In a federal action, state law is relevant to assess "whether the contractual attorney's fee obligation was valid and enforceable." *Matter of Sheridan, 105 F.3d 1164, 1167 (7th Cir. 1997)*. "State law controls both the award of and the reasonableness of fees awarded where state law supplies the rule of decision." *Mathis v. Exxon Corp., 302 F.3d 448, 461 (5th Cir. 2002)*. *California Code of Civil Procedure section 1033.5(a)(1)* permits recovery of attorney fees "when authorized by . . . Contract." Under *California Code of Civil Procedure section 1021*, the "measure and mode" of attorney fees "is left to . . . agreement," unless attorney fees "are specifically provided for by statute."

California Code of Civil Procedure section 1021 "is a codification of the general rule, also known as the American Rule, that attorney fees, are **[**66]** not taxable as costs against the losing party. *Young v. Redman, 55 Cal.App.3d 827, 834-835, 128 Cal.Rptr. 86 (1976)*. "The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Corp. v. Maier Brewing, 386 U.S. 714, 717-718, 87 S.Ct. 1404, 18 L. Ed. 2d 475 (1967)*. "[U]nless there are pleading and proof of an express contractual provision therefor, attorneys' fees cannot be awarded a successful litigant." **[*1087]** *Robinson & Wilson, Inc. v. Stone, 35 Cal.App.3d 396, 413, 110 Cal.Rptr. 675 (1973)*.

The complaint alleges neither breach of a written agreement with an attorney fees provision nor a statute entitling plaintiffs to an award of attorney fees. In the absence of a statutory or contractual basis for attorney fees, the complaint lacks sufficient allegations for an attorney fees award to plaintiffs.

Attempt At Amendment And Malice

As discussed above, the complaint's global claims are barred legally, and plaintiffs are unable to cure the complaint's claims by allegation of other facts and thus are not granted an attempt to amend. Moreover, this Court surmises that plaintiffs brought this action in absence of **[**67]** good faith and seek to exploit the court system to delay or to vex defendants. The test for maliciousness is a subjective one and requires the court to "determine the . . . good faith of the applicant." *Kinney v. Plymouth Rock Squab Co., 236 U.S. 43, 46, 35 S. Ct. 236, 59 L. Ed. 457 (1915)*; *see* *Wright v. Newsome, 795 F.2d 964, 968, n. 1 (11th Cir. 1986)*; *cf.* *Glick v. Gutbrod, 782 F.2d 754, 757 (7th Cir. 1986)* (court has inherent power to dismiss case demonstrating "clear pattern of abuse of judicial process"). A lack of good faith or malice also can be inferred from a complaint containing untrue material allegations of fact or false statements made with intent to deceive the court. *See* *Horsey v. Asher, 741 F.2d 209, 212 (8th Cir. 1984)*. An attempt to vex or delay provides further grounds to dismiss this action.

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. DISMISSES with prejudice this action against defendants;

2. DIRECTS the clerk to enter judgment in favor of defendants PNC Bank, N.A., and Rushmore Loan Management Services and against plaintiffs Ernie Altmann and Creative Builders, Inc. in that there is no just reason to delay to enter such judgment given that the plaintiffs' claims against **[**68]** these defendants and their alleged liability are clear and distinct from claims against and liability of other defendants. *See* *F.R.Civ.P. 54(b)*; and

3. ORDERS plaintiffs, no later than January 26, 2012, to file papers to show cause why this Court should not dismiss this action against any remaining defendants, including Cal-Western Reconveyance Corporation and The Bowers Group.

This Court ADMONISHES plaintiffs that this Court will dismiss this action against any remaining defendants if the plaintiffs fail to comply with this order and fail to file timely papers to show cause why this Court should not dismiss this action against any remaining defendants.

IT IS SO ORDERED.

Dated: January 19, 2012

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE

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[Cohlmia v. St. John Med. Ctr.](#)

United States District Court for the Northern District of Oklahoma

January 20, 2012, Decided; January 20, 2012, Filed

Case No. 05-CV-384-GKF-TLW

Reporter
906 F. Supp. 2d 1188 *; 2012 U.S. Dist. LEXIS 154798 **

GEORGE S. COHLMIA, JR. M.D. and CARDIOVASULAR SURGICAL SPECIALISTS CORP., Plaintiffs, vs. ST. JOHN MEDICAL CENTER, WILLIAM HOWARD ALLRED, M.D. and WILLIAM BURNETT, M.D., Defendants.

Subsequent History: Accepted by, Costs and fees proceeding at, Motion granted by *Cohlmia v. St. John Med. Ctr., 906 F. Supp. 2d 1188, 2012 U.S. Dist. LEXIS 154021 (N.D. Okla., Oct. 26, 2012)*

Prior History: *Cohlmia v. Ardent Health Servs., L.L.C., 2010 U.S. Dist. LEXIS 122610 (N.D. Okla., Nov. 18, 2010)*

Core Terms

undersigned, patients, attorney's fees, privileges, peer review process, discovery, antitrust, billing, immunity, surgery, speciality, damages, antitrust claim, cardiovascular, RECOMMENDS, frivolous, no evidence, peer review, terminated, surgeons, deposition, tortious interference, summary suspension, summary judgment, medical staff, hourly rate, bad faith, law firm, challenges, prevailed

Counsel: **[**1]** For George S Cohlmia, Jr, M.D., Cardiovascular Surgical Specialists Corp., an Oklahoma corporation, Plaintiffs: Brad Roberson, Dawn Michelle Goeres, LEAD ATTORNEYS, Raymond Thompson Cooper, Pignato Cooper Kolker & Roberson PC, OKLAHOMA CITY, OK; Daniel Brent Graves, LEAD ATTORNEY, Mary Morrison Barcus, Graves McClain PLLC, TULSA, OK; Michael L Barkett, LEAD ATTORNEY, Barkett Law Firm PLLC, TULSA, OK.

For William C Burnett, M.D., Howard W Allred, M.D., Defendants: James W Connor, Jr, LEAD ATTORNEY, Richards & Connor, TULSA, OK; Jason Lee Glass, LEAD ATTORNEY, Savage Baum Glass & Hart PLLC, TULSA, OK; Sara R Lincoln, LEAD ATTORNEY, Womble Carlyle Sandridge & Rice PLLC (CHARLOTTE), CHARLOTTE, NC; William Hayden Spitler, IV, McDonald McCann & Metcalf LLP, TULSA, OK.

Judges: T. Lane Wilson, United States Magistrate Judge.

Opinion by: T. Lane Wilson

Opinion

[*1208] REPORT AND RECOMMENDATION

This matter has been referred to the undersigned for a report and recommendation on the motion for attorney fees filed by defendants St. John Medical Center, William Howard Allred, M.D., and William Burnett, M.D. [1] (these defendants are hereinafter referred to in the singular as "St. John"). [Dkt. 458, 460, 486]. The following represents the **[**2]** undersigned's Report and Recommendation. [2]

Background

Plaintiff, George S. Cohlmia, Jr. is a licensed physician in the State of Oklahoma. He has specialized in cardiovascular, thoracic, vascular and endovascular surgery in Tulsa since 1984. Dr. Cohlmia is the sole owner and shareholder of Cardiovascular Surgical Specialists, Inc. (hereinafter referred to in the singular as "Dr. Cohlmia"). [Dkt. # 90 at 2, 7]. Dr. Cohlmia received his board certification in surgery in 1986, and his board certification in thoracic surgery in 1987. Dr. Cohlmia has performed thousands of surgeries in Tulsa. A significant percentage of Dr. Cohlmia's patients are uninsured or under-insured Native Americans. [Dkt. # 90 at 7, 8 and Dkt. # 376 at 5]. Native Americans have traditionally accounted for greater than fifty percent (50%) of Dr. Cohlmia's patient base. [Dkt. # 376 at 21].

On August 3, 2009, the District Court entered judgment in this case in favor of St. John and against Dr. Cohlmia. [Dkt. # 448]. On August 31, 2009, St. John timely filed its **[**4]** application for attorney fees as prevailing party. [Dkt. # 458]. In support of its application, St. John relies on the Statement of Undisputed Facts and attached supporting materials from its Brief in Support of Motion for Summary Judgment filed on April 7, 2009. [3] [Dkt. ## 364, 458]. The following is a brief summary of relevant facts from St. John's brief.

Until July 2003, Dr. Cohlmia had active medical staff privileges at all five major hospitals in Tulsa. [4] Prior to 2003, Dr. Cohlmia performed most of his surgeries at Hillcrest Medical Center ("Hillcrest"). **[*1209]** [Dkt. # 376 at 5]. In the spring of 2001, Dr. Cohlmia began to explore the possibility of developing a physician-owned speciality heart hospital. Dr. Cohlmia hired a consulting firm and obtained an option on real estate. Dr. Cohlmia and his consultant first considered an affiliation with Hillcrest, but determined it was infeasible. [Dkt. **[**5]** # 376 at 9]. Dr. Cohlmia's business plan was presented to various cardiovascular surgeons in Tulsa, including the cardiology groups who practice at St. John and Hillcrest. [Dkt. # 376 at 9-10]. In February 2002, Saint Francis Hospital announced plans to open a speciality heart hospital, as a joint venture with local cardiologists and surgeons. [Dkt. # 376 at 10]. In December 2002, Dr. Cohlmia terminated his arrangement with his consultant, and by June 2002 his project was essentially dead. In April or May 2003, Dr. Cohlmia presented his business plan to cardiologists in Muskogee, Oklahoma; Fort Smith, Arkansas; and physicians in Wichita, Kansas. He did not secure an investor through these

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[1] Dr. Allred is the Vice President of Medical Affairs for St. John and is a surgeon specializing in colon and rectal surgery. Dr. Burnett is a former President of St. John's Medical Staff and is board certified in internal medicine. Dr. Allred and Dr. Burnett participated in St. John's decision to terminate Dr. Cohlmia's medical staff privileges, the incident giving rise to this lawsuit. [Dkt. # 376 at 4]. St. John Medical Center paid Dr. Allred's and Dr. Burnett's attorney fees and expenses arising out of this lawsuit.

[2] On October 31, 2010, during a telephone conference the undersigned advised counsel that his report was prepared and that he intended to recommend an award of attorney fees incurred as a result of plaintiff's claims under *Section I* and probably under *Section II of the Sherman Act*, and deny attorney fees incurred on St. John's affirmative defense of immunity under the Health Care Quality Improvement Act, on plaintiff's state law claims for Tortious Interference with Contract, and the Oklahoma Antitrust Act. [Dkt. # 529, Ex. A.]. Counsel was instructed to file supplemental briefs to address apportionment between these claims and **[**3]** defenses. Subsequently, the undersigned re-examined the pleadings, exhibits, arguments of counsel, and relevant federal law, and based on that review, has reconsidered some aspects of the recommendation.

[3] On August 27, 2009, Judge Frizzell announced from the bench his decision on St. John's Motion for Summary Judgment and specifically found that there were no genuine issues of material fact which would preclude summary adjudication given the standard in *42 U.S.C. § 11112(a)*. [Dkt. # 451 at 120].

[4] Hillcrest Medical Center, Saint Francis Hospital, SouthCrest Hospital, Tulsa Regional **[**6]** Hospital and St. John Medical Center.

efforts. [Dkt. # 376 at 12]. In June 2003, Dr. Cohlmia's real estate option expired. [Dkt. # 376 at 13]. In December 2003, President Bush signed into law a statute prohibiting physicians from referring Medicare patients to new speciality hospitals in which the physician had an ownership interest. The statute imposed a moratorium on development of speciality hospitals not already under development. [Dkt. # 376 at 13].

In the summer of 2002, Hillcrest hired Dr. Arshad Yousuf as a staff cardiovascular surgeon to expand its cardiovascular department. From the outset, the relationship between Dr. Cohlmia and Dr. Yousuf was acrimonious. [Dkt. # 376 at 14]. In January 2003, Hillcrest retained an expert to conduct a departmental review of its cardiology unit. [5] At the conclusion of the review, a report was issued that was critical of certain aspects of the unit, including patient selection. The report prompted Hillcrest to institute a moratorium on certain high risk cardiovascular surgical procedures. The moratorium applied to all physicians within the department. Once the moratorium was instituted, Dr. Cohlmia shifted a significant percentage of his practice to St. John. [Dkt. # 376 at 15].

On June 6, 2003, Dr. Cohlmia operated on two lung cancer patients at St. John. [Dkt. # 376 at 17]. Both patients were Native Americans. During the surgery on the first patient, Dr. Cohlmia removed one lung and several ribs, and he collapsed the patient's chest cavity. During the surgery on the second patient, **[**7]** Dr. Cohlmia attempted to remove a tumor in a lung that had invaded the chest wall. The following day, the patients' charts were brought to the attention of Dr. Allred by a nurse at St. John. Dr. Allred reviewed the two patients' charts and monitored their condition for several days. Dr. Allred consulted a number of physician specialists and concluded that Dr. Cohlmia had not followed adequate presurgical protocols for these lung cancer patients. [6] One of the patients died seven days following an attempted corrective surgery, and the other patient **[*1210]** was disfigured as a result of the surgery. [7] [Dkt. # 376 at 17]. A meeting to review Dr. Cohlmia's procedures in these two cases was held by St. John's Executive Officers on July 7, 2003. The following day, the officers reached a consensus and summarily suspended Dr. Cohlmia's privileges. [Dkt. # 376 at 17]. Dr. Allred notified Dr. Cohlmia in writing of the summary suspension. [8] Dr. Cohlmia's suspension was reported to the National Practitioner Data Bank as an adverse action. Dr. Cohlmia appealed the summary suspension. In August, a three day hearing was conducted on the suspension in accordance with St. John's bylaws. Retired Federal District **[**8]** Judge Thomas R. Brett served as the hearing officer. Dr. Cohlmia was represented by counsel. [Dkt. # 376 at 17]. [9] On September 4, 2003, Judge Brett upheld

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[5] Prior to 2004, Hillcrest was in financial distress. [Dkt. # 376 at 8].

[6] Dr. Allred talked with several St. John physicians regarding the two subject surgeries performed by Dr. Cohlmia. He spoke to a thoracic surgeon who disagreed with Dr. Cohlmia's decision to operate. The thoracic surgeon said he would not have operated on a patient with cancer in the lung that had spread to the mediastinum and had positive lymph notes. Dr. Allred spoke to Dr. Jay Lohrey, an oncologist, who treated one of the patients post-surgically. Dr. Lohrey felt that Dr. Cohlmia committed error and that his patient had been unnecessarily harmed. A pulmonologist who had reviewed the charts opined that Dr. Cohlmia's pre-surgical work-up was insufficient. [Dkt. # 364 at 3].

[7] At the hearing on St. John's motion for summary judgement, a "pre-surgical workup" was explained as diagnostic testing and consulting with other specialists to identify the type of cancerous tumor, the stage of the tumor, and **[**9]** the best method of treatment. [Dkt. # 451 at 12-14]

[8] According to St. John's bylaws, Dr. Allred had the authority to summarily suspend any member of the medical staff whenever necessary to "protect the life of any patient(s) or reduce the substantial likelihood of immediate injury or damage to the health or safety of any patient." [Dkt. # 364 at 2]. The letter included the following information: (1) a detailed description of the two cases and the reasons they felt the surgeries were inappropriate; (2) a statement that, based on the advice of members of the medical staff, Dr. Cohlmia's conduct posed an imminent threat of harm to patients; (3) a statement that Dr. Cohlmia had the right to request a hearing to address the summary suspension within 30 days and an identification of the person to whom he should direct the request; and (4) a statement that a hearing would be conducted by a hearing officer appointed by one of the Medical Staff Entities. [Dkt. # 364 at 4].

[9] Dr. Cohlmia and St. John were represented by their respective attorneys. Fourteen physicians testified and were cross examined (including Dr. Cohlmia), exhibits were admitted, arguments were made by counsel for both parties **[**10]** and the proceeding was recorded. [Dkt. # 451 at 56].

the suspension. St. John's Executive Committee and Board of Directors reviewed and approved Judge Brett's decision. [Dkt. # 376 at 17].

Upon learning of Dr. Cohlmia's suspension at St. John, Hillcrest required Dr. Cohlmia to conduct and document a comprehensive preoperative patient evaluation and review at its facility. Hillcrest continued to review Dr. Cohlmia's presurgical procedures. Based on the findings in these reviews, in October 2004, Hillcrest sought summary suspension of Dr. Cohlmia's privileges. Dr. Cohlmia objected to Hillcrest's actions and voluntarily suspended his practice until the issue could be resolved. Hillcrest ultimately voted not to renew Dr. Cohlmia's staff privileges. Following Hillcrest's review process, Dr. Cohlmia's medical staff privileges were terminated. [Dkt. # 376 at 19-20].

In early 2004, Dr. Cohlmia did not apply for recredentialing at Saint Francis Hospital, and in early 2005, Dr. Cohlmia withdrew his application for recredentialing at SouthCrest Hospital. [Dkt. # 376 at 19]. In February 2005, Dr. Cohlmia entered into a joint venture to develop a cardiovascular center in Tahlequah, Oklahoma at the Tahlequah City Hospital. Dr. Cohlmia conducts surgeries in Tahlequah and performs certain non-surgical procedures at an office he maintains **[**11]** in Tulsa. [Dkt. # 376 at 20-21].

Procedural History

On July 7, 2005, Dr. Cohlmia filed a 61-page Complaint, containing nine counts, naming more than twenty defendants, asserting claims for violation of *Section I* and *II of the Sherman Antitrust Act*, and *Section IV of the Clayton Antitrust Act*, **[*1211]** *42 U.S.C. § 1981*, Oklahoma Antitrust Reform Act, Tortious Interference with Contract and Prospective Advantage, Defamation, and Intentional Infliction of Emotional Distress. The Complaint sought injunctive relief, monetary damages and attorney fees. At the hearing, the undersigned was advised that Dr. Cohlmia sought $29 million in actual damages, and $90 million in treble and punitive damages. Throughout the course of these proceedings several of the claims and all of the defendants, except St. John, were dismissed for various reasons. [10]

St. John was charged in Count I with Combination and Conspiracy in Restraint of Trade in violation of *Section I of the Sherman Act* and *Section IV of the Clayton Act*, in Count III with Conspiracy to Eliminate Market Share in violation of the Oklahoma Antitrust Act, in Count IV with Tortious Interference with Contract and Prospective Advantage, in Count V with Defamation, in Count VI with Denial of Equal Rights in violation of *42 U.S.C. § 1981*, and in Count VII with Intentional Infliction of Emotional Distress. [11] [Dkt. # 2]. On September 2, 2005, Dr. Cohlmia filed a First Amended Complaint adding a claim against St. John for Conspiracy to Monopolize the Market in the violation of *Section II of the Sherman Act*. [Dkt. # 43]. [12] On September 29, 2005, St. John filed **[**13]** its first Motion to Dismiss. [Dkt. # 63].

On August 2, 2006, District Judge James Payne entered a 30-page written order addressing St. John's motion to dismiss. As to the *Section I* violation, plaintiff alleged that St. John abused the peer review process in order to prevent Dr. Cohlmia's development of a speciality heart hospital and to impede his existing medical practice. St. John requested dismissal arguing that the ouster of one physician and the resulting injury to Dr. Cohlmia's practice

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[10] At the initial attorney fees hearings, Dr. Cohlmia's counsel claimed settlement with co-defendants in this case was evidence that the claims against St. John were reasonable. The undersigned disagrees. Settlement of a case with a co-defendant has no bearing on the merits of St. John's claim for fees. The facts relevant to St. John are not necessarily the same **[**12]** facts relevant to other defendants. Unlike the defendants who settled, judgment on the merits was entered in favor of St. John and against plaintiffs. Moreover, cases, even those with no merit, settle for many reasons, including a desire to minimize legal fees and expenses. The motivations of St. John's co-defendants and the reasons any of the them entered into a settlement with plaintiff have no bearing on this proceeding.

[11] On August 1, 2005, St. John's lead attorney, Michael Lewis, filed St. John's first pleading in the case, but he neglected to file an entry of appearance. [Dkt. # 10].

[12] On September 28, 2005, William Spitler and Lesley Richer entered appearances on behalf of St. John. [Dkt. # 59].

does not equate to harm to competition, but merely harm to that competitor. Judge Payne agreed with St. John but denied dismissal at "this early stage of litigation because Dr. Cohlmia had alleged facts sufficient to survive dismissal." [13] [Dkt. # 83 at 12].

As to the Section II violation and the corresponding Oklahoma Antitrust Act claim, Dr. Cohlmia alleged that by terminating his medical staff privileges, St. John "posed a dangerous likelihood of success" of obtaining monopoly power over the cardiovascular market. Judge Payne found that Dr. Cohlmia failed to support this conclusory allegation with any facts, and **[*1212]** granted dismissal of this claim without prejudice. [Dkt. # 83 at 14].

Judge Payne dismissed with prejudice Dr. Cohlmia's claim for defamation as to any statement made outside the statute of limitation, and dismissed without prejudice all other purported defamation for failing to give St. John notice of the timing of the communication, the parties involved, and the statements deemed actionable. [Dkt. # 83 at 21].

As his civil rights claim, Dr. Cohlmia alleged that St. John's summary suspension was motivated in part by an unlawful desire to deprive Native American patients of cardiothoracic surgical services at St. John, by eliminating Dr. Cohlmia **[**15]** as their preferred physician. Dr. Cohlmia alleged that St. John's actions were motivated by its concern that Dr. Cohlmia's uninsured Native American patients were costing the facility money. Dr. Cohlmia claimed Native Americans were unlawfully discriminated against, were part of a protected class, and were represented by him, their de facto representative and advocate of their right to quality health care. [Dkt. # 83 at 21-2]. Judge Payne found "these allegations to be largely unsupported, if not nonsensical." [Dkt. # 83 at 22]. Judge Payne dismissed without prejudice plaintiffs' *Section 1981* claim for failure to allege facts to support a prima facie case. [Dkt. # 83 at 22]. Judge Payne also granted dismissal of Dr. Cohlmia's claim for intentional infliction of emotional distress, because Dr. Cohlmia failed to allege facts to support the essential elements of the claim. [Dkt. # 83 at 24]. However, Judge Payne granted Dr. Cohlmia leave to amend the Complaint, with a directive to limit the amendment to the deficiencies addressed in the Order. [Dkt. # 83 at 7]. Judge Payne also determined that the peer review process was not privileged under Oklahoma law, as argued by St. John, which **[**16]** opened the door for Dr. Cohlmia to conduct full discovery of St. John's peer review documents, depose personnel at St. John, and determine whether there was any merit to plaintiffs' unsupported allegations. [Dkt. # 83 at 26-7].

On October 10, 2006, Dr. Cohlmia filed a 76-page Second Amended Complaint, joining thirteen additional defendants and alleging additional factual support for all previously pled claims. [Dkt. # 90]. [14] On November 9, 2006, St. John filed its second Motion to Dismiss. [15] [Dkt. # 103]. Judge Frizzell conducted a hearing on the second motion to dismiss on May 31, 2007. Judge Frizzell first admonished Dr. Cohlmia's counsel for dragging out the proceeding by exceeding the scope of Judge Payne's order, which was limited to addressing deficiencies. [16] Judge Frizzell denied dismissal of the antitrust claims, reserving them for a summary judgment determination, but he added a cautionary note:

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[13] Judge Payne quoted the following authority: "antitrust laws are intended to protect competition, not competitors, and we will not depart from that purpose in order **[**14]** to improve [a doctor's] income standings in the physician league or help him win the Super Bowl of remuneration." [Dkt. # 83 at 12, citing *Summit Health, Ltd. V. Pinhas, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)]*.

[14] Although Judge Payne had dismissed with prejudice some of plaintiffs' claims, Dr. Cohlmia reasserted all claims pled in his First Amended Complaint.

[15] In April 2007, the case was transferred to District Judge Gregory Frizzell. [Dkt. # 119].

[16] Judge Frizzell stated, "I guess the thing that bothers me here if we continue this practice we're going to be sitting here a year from now still addressing the substantive allegations. And I think we need to address that and need to spend some time here this morning as to whether or not you went beyond what Judge Payne allowed you to do. . . .To keep re-pleading it is just begging for this, you know, cadre of lawyers over here to keep you tied up in motions to dismiss at the pleading stage and we're never going to advance the ball." [Dkt. # 125 at 11].

> And there's some serious hurdles that the plaintiffs have to cross here on monopoly. I mean we've got a number of hospitals in this city. So, you know, **[*1213]** you've got a big hill to climb, frankly, to survive summary judgment.

[Dkt. # 125 at 11]. Judge Frizzell dismissed plaintiff's claims **[**17]** for illegal boycott and defamation, finding there were no facts pled against St. John in those counts. [Dkt. # 125 at 15,17].

As to plaintiff's re-assertion that St. John's termination of Dr. Cohlmia's medical staff privileges violated *Section 1981* by denying Native Americans access to St. John's facility, Judge Frizzell questioned whether the required contract nexus between St. John and Native Americans **[**18]** was pled. Dr. Cohlmia claimed the protected contract right was shown by St. John's refusal to treat Native Americans and requested that Judge Frizzell allow discovery on the issue. [Dkt. # 32]. Judge Frizzell accommodated plaintiff but narrowed discovery to evidence that St. John shut its door on Native Americans. [Dkt. # 125 at 29]. A year and a half later, at the conclusion of discovery, plaintiff dismissed the *Section 1981* claim. [Dkt. # 334].

On July 16, 2007, St. John filed an Answer, asserting an affirmative defense of immunity under the Health Care Quality Improvement Act of 1986 (HCQIA), *42 U.S.C. § 11111(a)(1)*. [17] [Dkt. # 130 at 20]. A scheduling order was entered on March 27, 2008, with discovery cutoff set for November 15, 2008. [18] [Dkt. # 154]. On June 23, 2008, defendants requested four days to conduct Dr. Cohlmia's deposition. [Dkt. # 175]. The motion was granted, dividing the deposition time among defendants. [Dkt. # 181]. By March 2008, defendants had produced over 30,000 documents. This production was increased to 150,000 documents by August 2008. However, Dr. Cohlmia complained that he had not yet received "the most critical information in the case" and that he contemplated **[**19]** receiving thousands of additional documents from St. John. [Dkt. # 205 at 4, 7]. All defendants opposed any extension of the discovery deadline, but on August 20, 2008, Dr. Cohlmia requested, and later received, his first extension of the discovery deadline. [Dkt. # 205].

On August 22, 2008, the reports offered by three of Dr. Cohlmia's expert witnesses were stricken by Magistrate Judge Paul J. Cleary for failure to comply with *Rule 26*. Judge Cleary concluded that the reports contained mere conclusions without any reasons or basis for the opinions. [Dkt. # 210 at 5]. Judge Cleary rejected Dr. Cohlmia's request to allow up to 30 days before trial to cure the deficiencies. He explained, "A party cannot offer a mere litany of opinions, devoid of rationale, and contend that the report will be 'supplemented' later with the basis and reasons." [Dkt. # 210 at 11]. Judge Clearly rejected plaintiff's alternative request for twenty days to supplement saying the case had been on file for three years and **[**20]** further extensions would increase the cost of litigation for all parties. [Dkt. # 210 at 12]. The order stated:

> The reports of Riddle, Watts and Winslade do not meet the requirements of *Rule 26(a)(2)*. These experts offer opinions, but their reports wholly fail to state the basis and reasons for their conclusions. They fail to set forth the direct testimony they would offer at trial, and provide Defendants no basis for meaningful cross-examination. Even the opinions set forth are often "preliminary" or "expected opinions."

[Dkt. # 210 at 14]. Dr. Cohlmia's appeal of the order was denied by Judge Frizzell. [19] [Dkt. # 262].

[*1214] On November 7, 2008, St. John filed its first motion for summary judgment. [Dkt. # 279]. On September 21, 2008, Dr. Cohlmia filed a second motion to extend discovery. [Dkt. # 246]. On December 5, 2008, Judge Frizzell reversed a prior decision and once again accommodated plaintiff's request for additional discovery and allowed plaintiff an opportunity to supplement their expert reports. [Dkt. ## 301, 323]. Following the second discovery deadline, on February 12, 2009, Judge **[**21]** Frizzell held a hearing on St. John's motion for summary judgment regarding plaintiff's claim for tortious interference with contract. To support this claim, plaintiff argued that St. John's peer review process was a sham and that St. John's decision to report the adverse action against him to the National Practitioners Base caused Dr. Cohlmia to lose medical staff privileges in Tulsa hospitals and caused the

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[17] On March 3, 2008, James Connor, Jr. and Jason Glass entered appearances on behalf of St. John. [Dkt. # 150, 151].

[18] On April 7, 2008, Lesley Richer withdrew as counsel for St. John. [Dkt. # 157].

[19] On September 5, 2008, Hilary Velandia entered an appearance on behalf of St. John. [Dkt. # 225].

Cherokee Nation, Blue Cross and Blue Shield, and other insurance carriers to question his surgical abilities. [Dkt. # 341 at 87]. To support his claim for tortious interference, Dr. Cohlmia relied heavily on a memo dated June 6, 2003, prepared by Dr. Allred. Plaintiff argued that the memo supported his position that the summary suspension of his privileges was principally motivated by a discriminatory attitude toward Native Americans. [Dkt. # 341 at 25-26]. Dr. Cohlmia also attached copies of his expert reports, but he did not file verifying affidavits.

At the hearing, Judge Frizzell observed that Dr. Cohlmia's briefs failed to comply with the requirements of *Rule 56(f)*, and he declined Dr. Cohlmia's counsel's request for more time to supplement Dr. Cohlmia's pleadings yet again **[**22]** so that they would comport with the rules. [Dkt. # 341 at 87]. As to the merits, Judge Frizzell found that plaintiff failed to show any damages as a result of St. John's peer review process. He also declined to accept plaintiff's novel argument that damages should be presumed upon a suspension of privileges. Instead, Judge Frizzell granted judgment to St. John on plaintiff's tortious interference claim. Id. Dr. Cohlmia filed a motion to reconsider and that motion was denied. [Dkt. # 401].

On April 3, 2009, St. John filed a motion for summary judgment seeking immunity on plaintiff's federal and state antitrust claims for restraint of trade and market monopoly. St. John argued that it was entitled to immunity from these claims under HCQIA, because its peer review process was in compliance with the four objective standards set forth therein. *42 U.S.C. § 11112(a)*. [20] [Dkt. # 363]. On April 7, 2009, St. John participated in a series of joint motions in limine. The first motion sought to exclude Dr. Cohlmia from testifying as to damages, because he failed to provide the nature and amount of damages, and because Dr. Cohlmia had mitigated any loss by his successful joint venture with Tahlequah **[**23]** City Hospital. [Dkt. # 371 at 1-2]. The second motion sought to limit plaintiff's expert witnesses to the content of their expert reports and to exclude any opinion on the legal issue of whether defendants qualified for immunity under HCQIA. [Dkt. # 372]. The third motion sought to exclude Dr. Cohlmia's account of his patients' and colleagues' **[*1215]** opinion that defendants conspired to restrain competition and monopolize the market. [Dkt. # 373]. The fourth motion sought to exclude Dr. Cohlmia's testimony on matters outside his personal knowledge. [Dkt. # 374]. The fifth motion sought to exclude Dr. Cohlmia's written summaries of conversations he had with patients and colleagues. [Dkt. # 375]. The sixth motion sought to exclude evidence that St. John's peer review process resulted in the failure of Dr. Cohlmia's specialty heart hospital. [21] [Dkt. # 385].

On April 7, 2009, St. John joined in the other defendants' motion for summary judgment addressing the merits of plaintiff's federal and state antitrust claims. The opening paragraph in the brief states: "Now, after the production of thousands of pages of document, scores of depositions, and the reports and testimony of numerous expert witnesses (including antitrust economists), it is clear that plaintiffs have failed to establish material facts that entitle them to relief under the federal or Oklahoma antitrust laws." [22] [Dkt. # 376 at 1]. On July 31, 2009, Judge Frizzell conducted a hearing on St. John's motions for summary judgment. Both parties presented many of the same factual arguments they made in their motions to dismiss, filed in 2005.

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[20] Under *Section 11112(a)*, the review must have been taken (1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are **[**24]** fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). See *42 U.S.C. § 11112(a)(4)*.

[21] Judge Frizzell did not address the merits of defendants' motions in limine prior to entering summary judgment in favor of St. John and against Dr. Cohlmia.

[22] The four years of pretrial proceedings **[**25]** in this case resulted in forty depositions, 250,000 documents produced and over 250 pleadings filed. [Dkt. # 451 at 3]. St John produced, inter alia, all of Dr. Cohlmia's peer review and credentialing files; all documents, exhibits and transcripts of Dr. Cohlmia's peer review hearing; ten years of St. John's financial records [Dkt. # 209 at 1]; all peer review and credentialing files for all cardiovascular surgeons, interventional radiologists and cardiologists associated with St. John from January 1, 1998 through December 31, 2007; all credentialing and peer review documents and all patient and/or healthcare provider complaints related to Dr. Yousuf; as well as the identification of those with knowledge of the recruitment, interview, credentialing peer review, investigation and/or termination of Dr. Yousuf in his association with St. John. [Dkt. # 300 at 13].

On the immunity issue under HCQIA, St. John focused on: (1) the deposition testimony of physicians and surgeons and excerpts from transcripts of the peer review process show that Dr. Cohlmia's pre-surgical protocol departed from the proper standards of care; (2) St. John suspended Dr. Cohlmia to protect the safety of patients; **[**26]** and (3) St. John's peer review process complied with the requirements of HCQIA. Plaintiffs focused on: (1) the June 26, 2003 memo from Dr. Allred; (2) a comparison of Dr. Cohlmia's Quality Assurance scores with other surgeons; (3) the case of Brown v. Presbyterian Healthcare Services; [23] (4) the timing of Dr. Cohlmia's interest in a speciality heart hospital and St. John's termination of his privileges; (5) plaintiffs' expert opinion that St. John's peer review process was "unwarranted, unfair, unreasonable, incomplete, misleading, inaccurate" and even involved false testimony; [24] (6) a St. John official notifying a Hillcrest official that Dr. Cohlmia's privileges at St. John were summarily suspended; (7) the availability of less severe options to address Dr. Cohlmia's pre-surgical protocol; and (8) Dr. Cohlmia's performance of 34 unchallenged surgeries following the two surgeries at issue. [Dkt. # 451 at 3-75].

On the merits of the antitrust claims, St. John argued: (1) plaintiff did not have standing, (2) the Section I claims failed for lack of a showing of concerted action and market power, and (3) the Section II **[*1216]** claims failed **[**27]** for lack of showing that St. John posed a "dangerous probability" of achieving market power. Dr. Cohlmia argued that St. John's activity had the following anticompetitive effects: (1) the "diminution of quality" on a patient's choice of surgeons and denial of services to Native Americans, (2) the "retardation of innovation" as speciality heart hospitals are more productive and provide better care, and (3) St. John's sham peer review process. Dr. Cohlmia argued that he was excluded from the market because of: (1) an abusive peer review process which was tantamount to excluding Dr. Cohlmia from the profession as a whole, and (2) his ongoing efforts to secure bank financing and architectural plans for his speciality heart hospital. [Dkt. # 451 at 75-119].

At the conclusion of lengthy arguments, Judge Frizzell granted summary judgment to St. John, finding that it was entitled to immunity under HCQIA. He found that the material facts were not in dispute and that Dr. Cohlmia failed to rebut the presumption of immunity by a preponderance of evidence. Judge Frizzell addressed the significant factual differences supporting the holding in Brown and found it distinguishable and not controlling. **[**28]** [25] [Dkt. # 451 at 120-21].

As to the second motion for summary judgment on the merits of Dr. Cohlima's state and federal antitrust claims, Judge Frizzell found that plaintiff presented "no evidence of antitrust injury." [Dkt. # 451 at 122]. Dr. Cohlmia's loss of privileges at St. John had no impact on market wide prices, or on the quality or quantity of surgical or cardiology services. [Dkt. # 451 at 122]. Judge Frizzell found plaintiff presented "no evidence" of an antitrust injury in fact, because the evidence established that Dr. Cohlmia remained in the marketplace. The time line of events failed to establish that Dr. Cohlmia's interest in developing a specialty **[**29]** heart hospital was causally connected to the termination of privileges at St. John. Dr. Cohlmia is not and was not an appropriate enforcer of the Antitrust Acts, because plaintiffs presented "no connection between the alleged bad act and the alleged antitrust violation in the market." [Dkt. # 451 at 122].

As to alleged concerted action, Judge Frizzell found no violation of *Section I of the Sherman Act* because plaintiff failed to show a contract or conspiracy between separate entities, and the Act does not reach conduct which is wholly unilateral. [Dkt. # 451 at 123]. Judge Frizzell found that "no reasonable jury could find concerted action with a separate entity or entities here and that plaintiff had not produced the required standard of evidence to show concerted action or conspiracy." [Dkt. # 451 at 123]. Judge Frizzell also found, as to *Section I of the Sherman Act*,

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[23] *101 F.3d 1324 (10th Cir. 1996)*

[24] [Dkt. # 451 at 59].

[25] Specifically, Judge Frizzell said, "The evidence of ulterior motive in Brown was direct." In Brown, it was clear that an economic competitor had instigated the review and made false misstatements to the National Practitioner Databank, that the doctor was negligent, that the competitor was the principal witness against the plaintiff, and that there was "overwhelming proof of conjuring up evidence against the doctor." In contrast, Judge Frizzell found the evidence of ulterior motive to be merely "inferential." [Dkt. # 451 at 121].

that plaintiff adduced "no evidence of actual anti-competitive effects" attributed to St. John's conduct, "whether in the form of a market wide increase in price, reduction in output or diminution in the quality of any services." [Dkt. # 451 at 124]. Judge Frizzell found that St. John had only 19.3 percent of the relevant **[**30]** market share in 2006, and that a relatively small market share is indicative of a lack of market power. [26] As to *Section 2 of the Sherman Act*, **[*1217]** Judge Frizzell found there was "no evidence other than speculative evidence" that St. John had monopoly power to control prices and to exclude competition. [Dkt. # 451 at 125]. As to the Oklahoma Antitrust Act, Judge Frizzell applied the mandatory provision to construe it consistent with the federal antitrust act. As to the Essential Facilities Doctrine, which is different than the federal antitrust act, Judge Frizzell determined that the doctrine did not apply because of an insufficient number of facilities in the Tulsa market area at the relevant time. Judge Frizzell granted judgment to St. John on the merits of plaintiff's state and federal antitrust claims. [Dkt. # 451 at 125].

Discussion

HCQIA was enacted to encourage peer review in the medical profession. *42 U.S.C. § 11101(3)*. The statute protects participants in peer review activities from liability **[**31]** for damages stemming from a review, so long as the review satisfies the standards set forth in *Section 11112(a)*. Persons covered under HCQIA include professional review bodies, members and staff of such a body, any person under a contract or other formal agreement with such a body, and any person who participates with or assists such a body with the peer review process. *42 U.S.C. § 11111(a)(1)*. A "professional review body" is a health care entity, including its governing body or a committee of the medical staff of the entity which assists the governing body in conducting a professional review activity. *42 U.S.C. § 11151(11)*. Anyone providing information to the peer review body is also protected. *42 U.S.C. § 11111(a)(2)*. In the event of litigation, if immunity is established, HCQIA provides for an award of attorney fees to covered persons for their participation in the peer review process. The attorney fee provision specifically provides:

> In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under *section 11112(a)* of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially **[**32]** prevailing party defending against any such claim the cost of the suit attributed to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

42 U.S.C. § 11113. To recover attorney fees under *Section 11113*, St. John must meet four requirements. First, St. John must show it is a "covered person" as defined in *Section 11111*. Second, St. John must show it complied with the standards in *Section 11112(a)* during the review process. Third, St. John must show that it substantially prevailed on plaintiffs' claims. Fourth, St. John must show that Dr. Cohlmia's claims, or conduct during the litigation, were frivolous, unreasonable, without foundation or in bad faith.

The undersigned first addresses an issue briefed by the parties: whether St. John's entitlement to attorney fees is predicated on the reasonableness of plaintiff's challenge to St. John's affirmative defense of immunity. Put simply, that is not a requirement under *Section 11113*. The plain language of the statute specifically addresses the reasonableness of plaintiff's claims, not the reasonableness **[**33]** of plaintiff's challenge to a defendant's affirmative defense of immunity. [27] Even **[*1218]** were a court to look beyond the statute's plain language (which is not necessary), the result would be no different. As noted in *Addis v. Holy Cross Health System Corp., 88 F.3d 482 (7th Cir. 1996)*, Congress passed HCQIA:

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[26] For authority that St. John's market share was not sufficient to confer market power, Judge Frizzell cited and relied on ***Jefferson Parish Hospital District No. 2 v. Hyde, 464 U.S. 808, 104 S. Ct. 58, 78 L. Ed. 2d 76 (1983)***.

[27] HCQIA, which is designed to protect entities such as St. John from millions of dollars in damages arising out of a properly conducted peer review process, is also designed to protect such entities from needlessly **[**35]** paying smaller amounts to defend itself against unreasonable, unfounded, or frivolous claims.

> to provide incentive and protection for physicians engaging in effective professional peer review. *42 U.S.C. § 11101(5)*. These incentives were designed to encourage doctors to engage in meaningful peer review in light of the Health Care Act's imposition of intensified reporting requirements. It was Congress' hope that doctors would comply with the reporting requirements installed by the Health Care Act and thereby decrease the number of occurrences of medical malpractice.
>
> Important elements of this package of incentives were the creation of statutory immunity for those persons and entities engaged in qualified professional peer review, *42 U.S.C. § 11111(a)*, *11112(a)*, and a fee-shifting provision designed to deter plaintiffs from filing meritless lawsuits against those persons and entities, *42 U.S.C. § 11113*. Thus, 'doctors and hospitals who have acted in accordance with the reasonable **[**34]** belief, due process, and other requirements of the bill are protected from damages sought by a disciplined doctor.'

Id. at 485 (emphasis added). In Addis, the Court held the text of *Section 11113* explicitly provides that an award of fees may be appropriate to the extent a defendant prevailed on the plaintiff's claims, and its professional review process met the standards in *Section 11112(a)*. *Id. at 486*. The Ninth Circuit explained, "[t]he policy behind this provision is clear: Congress wanted to encourage professional peer review by limiting the threat of unreasonable litigation expenses." *Smith v. Ricks, 31 F.3d 1478, 1487 (9th Cir. 1994)*. Thus, St. John's entitlement to attorney fees is not predicated on whether plaintiffs' challenge to its immunity defense was without foundation. Rather, with respect to step 4, the question is whether Dr. Cohlmia's claims, or his litigation conduct in pursuing those claims, were frivolous, unreasonable, without foundation, or in bad faith.

In reviewing the four requirements, a court may analyze the pleadings, exhibits, procedural history, and orders entered in the case. Clearly, St. John is a "professional review body" as defined in *Section 11151(11)*. Dr. Allred and Dr. Burnett, as staff physicians who participated in the review process, are "covered persons" as defined in *Section 11111(a)(2)*. Judge Frizzell found that Dr. Cohlmia did not rebut the presumption of immunity, thereby concluding that St. John met the standards set forth in *Section 11112(a)*. As shown above, St. John substantially prevailed on all counts pled against it in the Second Amended Complaint. Judge Frizzell's order on summary judgment assists in determining the remaining element, whether Dr. Cohlmia's claims or conduct during the litigation were frivolous, unreasonable, without foundation, or in bad faith. The undersigned does not find that Dr. Cohlmia's "conduct" was frivolous, unreasonable, without foundation or in bad faith. The issue remains whether the "claims" asserted by Dr. Cohlmia were frivolous, unreasonable, without foundation, or brought in bad **[**36]** faith.

Judge Frizzell found that St. John was entitled to immunity, and he rejected Dr. Cohlmia's underlying premise that St. John's peer review process was a sham and served as a subterfuge for St. John to deprive him of state protected property rights, thus allowing St. John to commit torts, antitrust, and civil right violations. Moreover, Judge Frizzell found "no evidence" **[*1219]** to support any of Dr. Cohlmia's claims. The undersigned finds that the claims pled against St. John in the Second Amended Complaint were unreasonable when pled, and were clearly shown to be frivolous in the early stages of the litigation.

St. John conducted a thorough, open, and professional peer review in compliance with its bylaws. Over fourteen physicians testified, documents were exchanged, exhibits offered, the entire proceeding was recorded and transcribed, Dr. Cohlmia was represented by counsel, and the proceeding was held before a retired federal district judge, Thomas Brett. Judge Brett issued a detailed written opinion which was reviewed and approved by St John's Executive Committee and St. John's Board of Trustees. On the other hand, in commencing this action, Dr. Cohlmia made unreasonable accusations **[**37]** that St. John's peer review process was a sham and conducted in bad faith. [28] Thereafter, Dr. Cohlmia tried to show that St. John used its peer review process to run him "out of town" and, purportedly, to "deprive Native Americans of quality health care." Dr. Cohlmia engaged in costly and fruitless discovery, sought unreasonable continuations of discovery deadlines, unreasonably requested leave to conform pleadings to the rules, and even sought an unreasonable last minute supplement hoping to add substance to otherwise conclusory reports from expert witnesses. Judge Frizzell found that plaintiff produced "no evidence"

[28] St. John's professional peer **[**38]** review process preceded the professional peer review process conducted by Hillcrest Medical Center.

suggesting that St. John was involved in a conspiracy or concerted effort to restrain trade and "no evidence" that St. John had sufficient market share to have even a potential for market power. Judge Frizzell warned Dr. Cohlmia early on that St. John was one of many hospitals in Tulsa and that he had some serious hurdles to cross in establishing antitrust liability. Ignoring indicators that his case against St. John lacked substance, Dr. Cohlmia plowed ahead seeking additional discovery and disregarding the mounting costs of litigation.

Dr. Cohlmia's claim against St. John for defamation fell outside the statute of limitations. Early in the proceeding, Judge Payne characterized the allegations supporting Dr. Cohlmia's *Section 1981* claim as "largely unsupported, if not nonsensical." At the pleading stage, Judge Payne dismissed with prejudice plaintiff's claim for intentional infliction of emotional distress. Judge Frizzell granted St. John summary judgment on plaintiff's claim for tortious interference with contract. Finally, Judge Frizzell not only found that St. John was entitled to immunity, which of itself would have ended this litigation, but he went on to find there was no evidence to support Dr. Cohlmia's antitrust allegations.

At the hearing before the undersigned, Dr. Cohlmia argued that his claims were not unreasonable or frivolous, because the peer review process was tainted with irregularities. Plaintiff argued that no cardiovasular surgeon was asked to review the two surgeries in question. However, in *Brown*, the case plaintiff relies on, the Tenth Circuit was critical of the fact that a competitor of Dr. Brown's **[**39]** testified against her. The use of a cardiovascular surgeon in this case likely would have been a direct competitor of Dr. Cohlmia. In any event, Judge Frizzell found no such taint. Dr. Cohlmia relied on the June 26, 2003 memo prepared by Dr. Allred as proof that Dr. Cohlmia's summary suspension had "nothing to do with patient care" but was motivated **[*1220]** by a desire to eliminate the treatment of Native Americans at St. John's surgical facilities. Judge Frizzell rejected this argument. The undersigned also finds no merit to plaintiff's contention that the June 26 memo establishes that plaintiff's case was reasonably filed. The memorandum, which was obtained in discovery, by its very language, supports St. John's claim that it summarily suspended Dr. Cohlmia out of concern for patient care, because: (1) Dr. Cohlmia failed to follow proper pre-surgical protocol, and (2) Dr. Cohlmia had three times the mortality rate compared to other cardiovascular surgeons. In the memo, Dr. Allred expresses concern that Dr. Cohlmia was operating on patients:

> without any other consultation. He only gets consultations afterwards when it is appropriate or necessary for the patient. I reassured Dr. De Leon that **[**40]** I am aware of this being a significant problem and that we will monitor closely. It is very difficult to remove someone from the staff once they have full privileges. He has been on the staff since 1985, being brought in by Dr. Loughridge, hailed as a 'superb addition to the CV staff.' Unfortunately this has not proved to be correct. I've talked to Dr. Raines about this and they are aware that his mortality rate is three times the mortality rate of the rest of the group. They average 2-3% with his being 9.8 range. This is indeed intolerable.

[Dkt. # 414, Ex.7].

Dr. Cohlmia claims his reliance on the facts of Brown shows his case was reasonable. However, as Judge Frizzell pointed out, the facts in *Brown* are distinguishable. Dr. Brown's case involved a direct financial competitor assisting in submitting a false report to the National Practitioner Data Bank stating that Dr. Brown had been found by the hospital to be negligent, incompetent, and guilty of malpractice. After Dr. Brown notified the Data Bank that the report was false, the hospital was notified and given an opportunity to amend the data bank report, which it declined to do. At no time had the review panel or the hospital Board **[**41]** of Trustees found that Dr. Brown was negligent, incompetent, or guilty of malpractice. Also, Dr. Brown sufficiently established damages caused by the interference with her attempt to hire an associate to join her practice. *Id. at 1327-8, 1330-1334*. In this instance, St. John accurately reported the findings made by Judge Brett, as confirmed by the hospital administration, and Dr. Cohlmia transitioned to a successful relationship with a hospital in Tahlequah. Dr. Cohlmia failed to show any intentionally false statements and resulting damage.

Dr. Cohlmia also argued his claims were reasonable because St. John failed to consult with him prior to his summary suspension. However, St. John had no legal duty to consult with Dr. Cohlmia. His counsel reluctantly admitted this fact, but argued it would be a fairer practice for St. John to do so. Plaintiff further argued that its case was reasonable because Quality Assurance ("QA") reviewed the two cases which gave rise to Dr. Cohlmia's suspension. One case was assigned a four which means "practice unacceptable and potential harm to patient" and the other was given a three which is "variance from the usual standard of care and represents opportunity **[**42]** to improve care." Dr. Cohlmia argued that there were several other physicians with poorer ratings whose medical privileges were not terminated. This argument has no merit. See, e.g., *Smith v. Ricks, 31 F.3d 1478 (9th Cir. 1994)*. In Smith, Dr. Smith, a cardiologist, filed suit after the defendant hospital terminated his medical staff privileges because of poor judgment and inadequate treatment. Dr. Smith sought damages under the Sherman Antitrust Act, contending the hospital and physicians used the peer review process to **[*1221]** monopolize the market and to conspire against him to restrain trade. Dr. Smith's only challenge to the hospital's investigation was that he was not permitted to discover or introduce evidence regarding the conduct of other doctors. The court stated: "Dr. Smith essentially claims he was not the worst doctor at Good Samaritan. However, nothing in the statute, legislative history, or case law suggests the competency of other doctors is relevant in evaluating whether Good Samaritan conducted a reasonable investigation into Dr. Smith's conduct." *Id. at 1486*. The undersigned finds this reasoning to be sound and applicable here.

As to his claim that St. John and Hillcrest conspired **[**43]** to terminate his privileges, Dr. Cohlmia argued that the claim was reasonable because of his outspoken criticism of Dr. Yousuf. [29] This argument fails as well. Dr. Cohlmia was provided a full due process hearing at St. John thus providing him a fair forum to assert this claim. No subterfuge is shown by the proceeding or by the hearing examiner, Judge Brett. Other arguments made by plaintiff at the hearing were equally without merit.

Plaintiff claimed that the shear volume of discovery and pleadings filed in the case are evidence his claims were reasonable. This argument is meaningless in light of the generous scope of discovery permitted in this case, with an end result that plaintiff presented "no evidence" to support his claims. Plaintiff argued that Judge Frizzell's statement complimenting counsel on their performance during the litigation is indicative that plaintiff's case was reasonable. [30] This argument also lacks merit. Zealous representation of a client can occur even if a claim is frivolous, **[**44]** unreasonable, or lacks foundation.

For the foregoing reasons, the undersigned finds that Dr. Cohlmia's claims were unreasonable and without foundation at the onset of the case, as discovery developed, and ultimately through the granting of judgment on the merits four years later.

Reasonable Attorney Fees

In its motion for attorney fees filed on August 31, 2009, St. John requested fees and expenses in the amount of $973,601.25 under HCQIA on the basis that Dr. Cohlmia's challenge to St. John's HCQIA defense was without foundation and unreasonable. In the alternative, St. John sought attorney fees under HCQIA on the basis that Dr. Cohlmia's tortious interference and state and federal antitrust claims were without foundation and unreasonable. [Dkt. # 458 at 2, 9]. In its supplemental brief filed on December 17, 2010, St. John reserved the right to argue for an award of attorney fees on all claims brought by **[**45]** Dr. Cohlmia and in asserting its affirmative defense of HCQIA immunity. [Dkt. # 518 at 2].

By affidavit, Michael Lewis attests that he and his law firm Doerner, Saunders, Daniel & Anderson served as lead counsel for St. John. [Dkt. # 458, Ex. 1, Att. 1]. Mr. Lewis states his law firm maintained daily chronological time sheets with summaries of the legal services it rendered. Doerner, Saunders, Daniel & Anderson seeks $765,824.00 in fees and expenses which it billed to St. John. Id. By affidavit, James Connor, Jr. attests that he and his **[*1222]** law firm Richards & Connor were hired by St. John in this case. [Dkt. # 458, Ex. 2, Att. 1]. Mr. Connor states that his

[29] This argument fails at the attorney fee stage of the proceeding, because plaintiff is essentially attempting to relitigate the issue of immunity which was resolved by Judge Frizzell.

[30] Judge Frizzell made the following statement immediately prior to announcing his decision granting judgment to St. John: "First, I'd like to say that the advocacy on both sides here has been just extraordinarily good and I appreciate it very much from all of you." [Dkt. # 529, Ex. C].

law firm maintained daily chronological time sheets with summaries of legal services rendered. Richards & Connor seeks $207,777.50 in fees and expenses which it billed to St. John. The two law firms seek attorney fees for the combined work of 22 lawyers, 6 paralegals, and 4 summer clerks. Of the 22 lawyers representing St John, two served as trial lawyers and lead counsel, four served as healthcare lawyers, one served as an employment lawyer, eight served as general litigation lawyers, three served as complex litigation lawyers, one **[**46]** as a trial lawyer, one as an appellate lawyer, one as a land use lawyer, and one as a lawyer specializing in Native American law. [Dkt. # 518, Ex. A]. Doerner, Saunders, Daniel & Anderson filed a 177-page billing statement and Richard & Connor filed an 87-page billing statement. The undersigned has reviewed, in detail, each of these statements.

Dr. Cohlmia opposes St. John's motion for attorney fees arguing that his claims were not frivolous or unreasonable. Alternatively, Dr. Cohlmia challenges the attorney fees and expenses on general grounds of excessive billing and duplication of effort.

Both parties assert that factors set forth in *Burk v. City of Oklahoma City, 1979 OK 115, 598 P.2d 659, 661 (Okla. 1970)* should be considered in determining the reasonableness of the amount of fees requested. Under Burk, a court is to consider the hourly rate times the number of hours reasonably spent to determine a lodestar of the fee determination, and a court may increase or decrease fees by considering certain enumerated factors. See also *Morgan v. Galilean Health Enterprises, Inc., 1998 OK 130, 977 P.2d 357, 364 (Okla. 1998)*. Those factors include time and labor required; novelty and difficulty of the questions presented; **[**47]** skill requisite to perform the legal service properly; the preclusion of other employment caused by accepting the case; the customary fee; whether the fee is fixed or contingent; time limitations; the amount involved and the results obtained; the undesirability of the case; the nature and length of the professional relationship; and awards in similar cases. *Id. at 661-62*.

Dr. Cohlmia's counsel advised that except for the hourly rate attributed to certain paralegal work, Dr. Cohlmia does not contest the hourly rate charged by the attorneys for St. John. [31] Rather, Dr. Cohlmia enumerated specific objections to the amount of time sought in St. John's fee request. The undersigned will first address those objections.

Dr. Cohlmia challenges the reasonableness of billing full hourly rates for travel time, a sum of $13,000.00. The undesigned agrees, but only because St. John failed to show that these fees were reasonably incurred or necessary. Dr. Cohlmia challenges the reasonableness of assessing fees for St. John's challenge to plaintiff's motion to compel. **[**48]** Plaintiff assigns $20,750.00 for this activity. The undersigned agrees, because St. John continued to pursue a peer review privilege after the issue was determined by Judge Payne.

Dr. Cohlmia challenges approximately $17,126.00 in billings for paralegal time in coding at an hourly rate of $95.00, claiming $50.00 per hour is reasonable. The undersigned agrees that coding is not necessarily a legal skill and the amount requested will be reduced by $8,563.00. [32] Dr. Cohlmia challenges the **[*1223]** reasonableness of $4,700.00 in billings for preparation of a joint defense agreement. The undersigned finds the amount unreasonable, however the defense agreement resulted in some cost savings in attorney fees for duplicated work. The undersigned will reduce that amount by $2,700.00. Dr. Cohlmia challenges the duplication in work performed by attorneys with Doerner, Saunders, Daniel & Anderson and those with Richards & Connor. Mr. Lewis' firm was hired to defend the antitrust claims, and Mr. Connor's firm was hired for its expertise in cardiothoracic medicine. Dr. Cohlmia does not assign a dollar value to this objection, accordingly its denied. In addition, the undersigned finds the allocation of work **[**49]** between the two firms to be reasonable.

Dr. Cohlmia objects to duplicate billings for communications between attorneys in the same law firm, in house emails, in-house conferences and conferences with co-counsel and for activities not traditionally associated with

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[31] Except as set forth below, the undersigned finds that the hourly rates charged by St. John's counsel, including paralegals, was reasonable.

[32] There is, however, no requirement for the court to identify each hour reasonably expended by each timekeeper, nor is there any requirement that the court announce what hours are permitted for each legal task. See Case v. Unified School District *No. 233, 157 F.3d 1243 (10th Cir. 1998)*.

legal work. Dr. Cohlmia asserts that 20 percent of the billings are for these activities. The undersigned disagrees that billing for inter-office communications and communications with co-counsel is necessarily unreasonable. Such communications are often necessary and can lead to efficiencies in the distribution and provision of legal services. Nonetheless, such fees are subject to abuse and should be supported by specific explanations or more detailed time sheets allowing a ready determination of the benefit of such communications in each instance. Such support was not always present here. In addition, the undersigned finds merit in Dr. Cohlmia's **[**50]** argument that some of the billed time was for activities not traditionally associated with legal work. Thus, the amount claimed has been reduced by an additional 10 percent. A sum of $97,360.13.

Dr. Cohlmia objects to the $2,400.00 claimed for the work of summer clerks. The undersigned disagrees that billing for the work of summer clerks is necessarily unreasonable. Summer clerks can, sometimes, provide quality legal work at an hourly rate that is far less than a client would pay if the work were performed by an attorney. Such work, however, is generally not performed as efficiently as it would be by an attorney and must be more strictly scrutinized by a supervising attorney. It is difficult, with the information supplied, to determine whether such scrutiny actually occurred here. The undersigned finds that 50% of the time claimed for work of summer clerks is reasonable and, thus, will reduce this amount by one-half, or $1,200.00.

Dr. Cohlmia objects that three of St. John's attorneys separately billed their full hourly rate for attending a full day of depositions of Dr. Allred, Dr. Cohlmia, and Dr. Landgartner. In a case of this size that involves at least three highly specialized areas **[**51]** (thoracic surgery, HCQIA, and antitrust), it is not presumptively unreasonable to have three attorneys present at critical depositions. Moreover, plaintiff did not furnish the undersigned with a dollar value for this objection, accordingly, and in light of the affidavits supplied by St. John's counsel, it is denied. Dr. Cohlmia further claims that attorney fees should be excluded for any deposition not used or cited in preparation of St. John's motions for summary judgement. The undersigned rejects the notion that only the cost of discovery which was used to support a successful dispositive motion is recoverable, particularly since plaintiff fails to show **[*1224]** that the subject depositions were unnecessary and places no dollar value on this objection.

Dr. Cohlmia objects to attorney fees claimed for defending against plaintiff's antitrust claims, arguing that St. John adopted the briefs filed by Womble, Carlyle, Sandridge & Rice, a law firm in North Carolina, specifically attorney Mark Horoscak, whose expertise is ***antitrust law***. However, adopting the briefs of Mr. Horoscak likely saved St. John, and now plaintiff, substantial attorney fees. In addition, the fact that Mr. Horoscak prepared **[**52]** the briefing did not reduce the obligation of St. John's counsel to be informed of, and to participate in, its potential defenses to the antitrust claims, particularly since St. John was the sole remaining defendant at the time of the summary judgment hearing before Judge Frizzell. Knowledge of the content of these briefs was essential in preparing for the hearing. The undersigned denies this objection.

Dr. Cohlmia also challenges the "exorbitant number of timekeepers, use of block and/or indecipherable billing entries," and the excessive and unrealistic number of hours claimed. [Dkt. # 529 at 27-28]. Dr. Cohlmia does not assign a dollar value to these objections. In response, St. John asserts that 90.3 percent of the legal work performed by Doerner, Saunders, Daniel & Anderson was performed by Mr. Lewis as lead counsel; Hilary Velandia as a healthcare lawyer; Marilyn Schooling as lead paralegal and William Spitler for general litigation. The undersigned finds some validity to Dr. Cohlmia's objection. Accordingly, to accommodate this objection, the undersigned will reduce the fees requested by 10 percent to eliminate fees not attributed to principal timekeepers and block billing, a **[**53]** reduction of $97,360.13. Those objections which fail to specify a dollar value are denied for lack of sufficient evidence (again, in light of St. John's counsel's affidavits).

Finally, the undersigned RECOMMENDS that St. John's request for leave to file supplemental attorney fees in its pursuit of an attorney fee award be denied. Based on the undersigned's detailed review of the time records presented, consideration of the *Burk* factors, and review of the entire docket, the recommended fee award reflects a reasonable fee for the services provided by St. John's counsel in this litigation, taking into account its efforts on the pending motion.

Recommendation

In consideration of the objection filed and supported by Dr. Cohlmia, the undersigned **RECOMMENDS** that St. John be awarded $732,668.00 in attorney fees as prevailing party in this action pursuit to *42 U.S.C. § 11113*.

Objection

In accordance with *28 U.S.C. § 636(b)* a party may file specific written objections to this report and recommendation. Such specific written objections must be filed with the Clerk of the District Court for the Northern District of Oklahoma by February 3, 2012.

If specific written objections are timely filed, *Fed. R. Civ. P. 72(b)* **[**54]** directs the district judge to:

> determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b); see also *28 U.S.C. § 636(b)(1)*.

The Tenth Circuit has adopted a "firm waiver rule" which "provides that the failure to make timely objections to the magistrate's findings or recommendations **[*1225]** waives appellate review of factual and legal questions." *United States v. One Parcel of Real Property, 73 F.3d 1057, 1059 (10th Cir. 1996)* (quoting *Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991))*. Only a timely specific objection will preserve an issue for de novo review by the district court or for appellate review.

SUBMITTED THIS 20th day of January, 2012.

/s/ T. Lane Wilson

T. Lane Wilson

United States Magistrate Judge

End of Document

Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.)

United States District Court for the Eastern District of New York

January 25, 2012, Decided; January 26, 2012, Filed

06-MD-1738 (BMC) (JO); 05-CV-0453

Reporter
279 F.R.D. 90 *; 2012 U.S. Dist. LEXIS 13670 **; 81 Fed. R. Serv. 3d (Callaghan) 851; 2012-1 Trade Cas. (CCH) P77,781

IN RE VITAMIN C ANTITRUST LITIGATION;This document relates to: ANIMAL SCIENCE PRODUCTS, INC., et al., Plaintiffs, v. HEBEI WELCOME PHARMACEUTICAL CO. LTD., et al., Defendants.

Prior History: *Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 2011 U.S. Dist. LEXIS 153453 (E.D.N.Y., Dec. 27, 2011)*
In re Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 2011 U.S. Dist. LEXIS 99621 (E.D.N.Y., 2011)

Core Terms

purchasers, vitamin, class certification, Injunction, damages, Animal, defendants', class member, indirect, class action, courts, injunctive relief, class representative, overcharge, conflicting interest, adequacy, lawsuit, entities, conspiracy, antitrust, putative class, manufacturers, claim for damages, commonality, prices, certification, assignees, Shoe, named plaintiff, membership

LexisNexis® Headnotes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN1[] **Prerequisites for Class Action, Adequacy of Representation**

Fed. R. Civ. P. 23(a) requires that any proposed class action: (1) be sufficiently numerous; (2) involve questions of law or fact common to the class; (3) involve class plaintiffs whose claims are typical of those of the class; and (4) involve a class representative or representatives who adequately represent the interests of the class. Courts commonly use a shorthand summary to describe these requirements, referring to the four prongs simply as numerosity, commonality, typicality, and adequacy. In addition to satisfying each of the four prerequisites listed in *Fed. R. Civ. P. 23(a)*, a party seeking class certification must satisfy one of the subsections of *Fed. R. Civ. P. 23(b)*.

Plaintiffs seek to certify a class pursuant to *Fed. R. Civ. P. 23(b)(3)* must show that questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for adjudicating the controversy. Plaintiffs seek to certify a class pursuant to *Fed. R. Civ. P. 23(b)(2)* must show that a party opposing the class has acted or refused to act on grounds that apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN2[] **Class Actions, Certification of Classes**

Regardless of whether class certification is contested, a court may not certify a putative class unless it has performed a rigorous analysis and determined that each of *Fed. R. Civ. P. 23*'s requirements has been met. As part of this analysis, the court must assess all relevant evidence admitted at the class certification stage and resolve any relevant factual disputes, even if this requires a determination of issues that go to the merits of the case.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

HN3[] **Class Actions, Certification of Classes**

The party moving for class certification bears the burden of establishing by a preponderance of the evidence that each of the requirements of *Fed. R. Civ. P. 23* has been met. Despite a district court's obligation to carefully analyze each prong of *Fed. R. Civ. P. 23* before granting class certification, the Second Circuit has emphasized that *Fed. R. Civ. P. 23* should be given liberal rather than restrictive construction and has shown a general preference for granting rather than denying class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN4[] **Class Actions, Certification of Classes**

To satisfy the numerosity requirement, plaintiff must show that the putative class is so numerous that joinder of all members would be impracticable. *Fed R. Civ. P. 23(a)(1)*. Although the numerosity requirement imposes no absolute limitations and requires a case-by-case analysis of the facts, courts within the Second Circuit generally presume that joinder of all putative class members is impracticable if the class has more than 40 members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN5[] **Prerequisites for Class Action, Commonality**

Although some courts tend to merge *Fed. R. Civ. P. 23*'s commonality prong with the typicality prong, the commonality requirement is distinct from typicality in that it tests the definition of the class itself rather than focusing on the relationship between the putative class representative and the other class members. Under commonality, the class definition is tested to ensure that the class members' claims depend on a common contention that is of such a nature that it is capable of class wide resolution. *Fed. R. Civ. P. 23(a)(2)*, read literally, requires only that a class share common questions of law or fact. What matters under the commonality requirement is not the raising of common questions—even in droves—but, rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. A single common question of law or fact may suffice to satisfy this requirement if the question is capable of giving rise to a common answer through a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN6[] **Prerequisites for Class Action, Adequacy of Representation**

The adequacy requirement focuses on the fitness of purported class representatives to competently discharge the responsibility of litigating the case on behalf of absent class members. Under this prong of *Fed. R. Civ. P. 23(a)*, a court must ensure that the putative representatives possess the same interests and suffer the same injuries as the class members.Although it is important for a court to thoroughly vet any putative class representative, a court must be wary of a defendant's efforts to defeat representation of a class on grounds of inadequacy where the effect of an inadequacy finding would be to eliminate any class representation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN7[] **Prerequisites for Class Action, Adequacy of Representation**

A class representative is not adequate unless it is a member of the class it purports to represent. This requirement is evident from the opening sentence of *Fed. R. Civ. P. 23*, which explains that one or more members of a class may sue or be sued as representative parties on behalf of all members. Once it is determined that a putative representative is indeed a class member, courts generally focus the adequacy analysis on three primary areas of concern. First, the named plaintiff must demonstrate that class counsel is qualified, experienced, and generally able to conduct the litigation. Second, the named plaintiff must show that there is no conflict of interest between the named plaintiffs and other members of the plaintiff class. Finally, a named plaintiff must exhibit enough integrity and credibility to convince the court that the named plaintiff will diligently perform its fiduciary duties to the class.

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

HN8[] **Actual Monopolization, Claims**

As a general rule, indirect purchasers may not recover damages for monopolistic overcharges under federal ***antitrust law***.

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

HN9[] **Actual Monopolization, Claims**

The ownership or control exception to the Illinois Brick rule is now firmly established and has been expanded to include instances where the defendant owns or controls the intermediary that sold the goods to the indirect-purchaser plaintiff. Despite this minor expansion, however, courts remain conscious that the exceptions to the Illinois Brick rule are few and far between. A narrow construction of the ownership or control exception has led courts to apply it only when the relationship between the defendant and the middleman involves such functional economic or other unity that there effectively has been only one sale between the defendant and the indirect purchaser. A plaintiff seeking to gain the benefit of this exception must therefore present facts demonstrating that such unity exists and may not rely simply on the existence of a parent-subsidiary relationship. Crucially, this exception is available only if the plaintiff shows that the defendant has such control over the subsidiary that the defendant can be said to have set prices along the chain of distribution.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN10[] **Prerequisites for Class Action, Adequacy of Representation**

A putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent. However, a conflict of interest will not destroy adequacy under *Fed. R. Civ. P. 23* unless the conflict is fundamental and concrete; conflicts that are merely speculative should be disregarded at the class certification stage.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN11[] **Prerequisites for Class Action, Adequacy of Representation**

Because class representatives have a duty to guard the interests of the class, a court should deny class certification if the putative representative is not honest or ethical enough to adequately discharge this fiduciary duty. However, this inquiry into the representative's integrity is not an examination into his or her moral righteousness but, rather, is an inquiry directed at improper or questionable conduct arising out of or touching upon the very prosecution of the lawsuit. Because integrity considerations are restricted to their relevance to issues in the litigation, courts in the Second Circuit disregard ad hominem attacks that call the putative representative's character into question over incidents unrelated to the case before the court.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN12[] **Prerequisites for Class Action, Typicality**

The typicality criterion does not require complete symmetry between the class representative's claims and those of the absent class members. Rather, the named plaintiff must simply raise claims that arise from the same course of events as the class claims and make similar legal arguments to prove defendant's liability.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN13[] **Prerequisites for Class Action, Typicality**

In general, typicality is lacking when a putative class representative would be subject to unique defenses that threaten to become the focus of the litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN14[] **Prerequisites for Class Action, Adequacy of Representation**

Class representative status may properly be denied where the proposed representative has no meaningful commitment to the litigation and virtually no knowledge or understanding of the key litigation issues, but the Second

Circuit has expressed a general disfavor of attacks on the adequacy of a class representative based on the representative's ignorance. Courts in the Second Circuit therefore deny class certification due to the putative representative's ignorance only when the ignorance is so profound that the class representative would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys. A proposed representative can avoid such a fate simply by showing a willingness and ability to pursue the litigation on behalf of the class and a basic understanding of the litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN15[] Prerequisites for Class Action, Adequacy of Representation

It is hornbook law that, in a complex lawsuit, the class representative need not have extensive knowledge of the facts of the case in order to be an adequate representative.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN16[] Prerequisites for Class Action, Adequacy of Representation

Counsel's decision to advance litigation costs in a class action case is typical and proper. In fact, courts have explicitly recognized that this common practice facilitates *Fed. R. Civ. P. 23*'s goals by allowing individuals to initiate important lawsuits that may otherwise have been prohibitively costly. This is even true in the context of securities litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN17[] Prerequisites for Class Action, Predominance

Under *Fed. R. Civ. P. 23(b)(3)*, plaintiffs must show that questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods" for adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)* permits class certification for cases in which a class action would achieve economies of time, effort, and expense and promote uniformity of decision as to persons similarly situated. The goal of *Fed. R. Civ. P. 23(b)(3)* is to provide vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all. The predominance requirement of *Fed. R. Civ. P. 23(b)(3)* tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation. This criterion is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof and if these particular issues are more substantial than the issues subject only to individualized proof.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN18[] Prerequisites for Class Action, Predominance

The existence of individual defenses will not defeat predominance if a sufficient constellation of common issues binds class members together. Where a class is united by common issues of law and fact that are determinative of liability and causation, that is more than sufficient to satisfy predominance.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN19[] Prerequisites for Class Action, Superiority

The superiority requirement of *Fed. R. Civ. P. 23(b)(3)* is frequently satisfied when it would be prohibitively expensive for class members with small claims to proceed individually.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN20[] Prerequisites for Class Action, Superiority

Factors relevant to a finding of superiority include the manageability of a class action and the desirability of litigating the claims in a particular forum.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN21[] Prerequisites for Class Action, Typicality

A putative class representative need not be a heavy-weight in its industry to satisfy the typicality prong; the relevant inquiry is simply whether absent class members' interests are advanced by the prosecution of the representative's claim.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN22[] Grounds for Injunctions, Balance of Hardships

A plaintiff seeking a permanent injunction must ordinarily demonstrate that: (1) plaintiff has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for that injury; (3) an equitable remedy is warranted after consideration of the balance of hardships; and (4) the public interest would not be disserved by a permanent injunction.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN23[] Remedies, Injunctions

Section 16 of the Clayton Act provides that a plaintiff may sue to enjoin any threatened loss or damage by a violation of the antitrust laws. *15 U.S.C.S. § 26*. Accordingly held that a § 16 plaintiff need not demonstrate actual loss; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN24[] **Remedies, Injunctions**

While a plaintiff seeking injunctive relief for an alleged antitrust violation must demonstrate a threat of injury and while this is a threshold requirement that is appropriately addressed at the class certification stage, this injury need not be demonstrable as an accrued—or even prospective—loss of profits. Instead, plaintiff must simply show a threat of injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN25[] **Remedies, Injunctions**

The antitrust laws were enacted for the protection of competition, and a lessening of competition is precisely the kind of irreparable injury that injunctive relief under § 16 of the Clayton Act, *15 U.S.C.S. § 26*, was intended to prevent. When a purchase is made after a simulated competition at a price fixed by a trust in excess of the natural market price, the buyer has suffered an antitrust injury.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN26[] **Remedies, Injunctions**

The purpose of § 16 of the Clayton Act, *15 U.S.C.S. § 26*, is to provide courts with a flexible mechanism with which to serve the high purpose of enforcing the antitrust laws. Since courts need not precisely calculate the economic injury inflicted by an artificial price when granting injunctive relief, there is certainly no reason to do so at the class certification stage. The standard for demonstrating antitrust injury under § 16 is accordingly less stringent than the standard for demonstrating antitrust injury in a suit seeking damages.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN27[] **Prerequisites for Class Action, Adequacy of Representation**

The Second Circuit recently held that a conflict posed by dual representation does not justify refusing to certify a class where the conflict is potential rather than actual and where the district court could revisit the issue and de-certify the class if a true conflict ever manifested. A conflict of interest will not defeat class certification unless it is fundamental. In other words, a conflict undermines adequacy only if it presents antagonistic interests that go to the heart of the litigation, relating to the subject matter of the suit.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN28[] **Prerequisites for Class Action, Adequacy of Representation**

A final judgment on the merits generally precludes a plaintiff from bringing a new lawsuit raising issues that could have been litigated in the first suit but were not. Some courts have held that a class representative who splits the claims of absent class members—thereby exposing their non-litigated claims to foreclosure through claim preclusion—is inadequate to represent the class. However, participation in a *Fed. R. Civ. P. 23(b)(2)* class seeking injunctive relief does not ordinarily preclude absent class members from bringing their non-litigated claims in subsequent lawsuits.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN29[] **Special Proceedings, Class Actions**

A class action judgment binds the class members as to matters actually litigated but does not resolve any claim based on individual circumstances that was not addressed in the class action. Moreover, every federal court of appeals that has considered the question has held that a class action seeking only declaratory or injunctive relief does not bar subsequent individual suits for damages.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN30[] **Class Actions, Certification of Classes**

In the Second Circuit, membership in a *Fed. R. Civ. P. 23(b)(2)* class does not bar a member's subsequent claims for damages. *Fed. R. Civ. P. 23(b)(2)* does not provide an opportunity for class members to opt out and does not even oblige a district court to afford class members notice of the action; due process therefore requires that class certification under *Fed. R. Civ. P. 23(b)(2)* be granted only if broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury. Damages claims usually require individualized analyses of class members' circumstances and thus tend to destroy class certification under *Fed. R. Civ. P. 23(b)(2)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN31[] **Class Actions, Certification of Classes**

Although *Fed. R. Civ. P. 23(a)* contains no express requirement regarding ascertainability, courts within the Second Circuit have held that the rule impliedly prohibits certification of a class that is not identifiable by reference to objective criteria. When a class definition includes a subjective criterion, such as state of mind, the class is not ascertainable and should not be certified. When the class definition consists entirely of objective criteria, a court need only determine whether it would be administratively feasible to determine whether or not any given entity belongs to the class. Although a class is not ascertainable if determining class membership would require a mini-hearing on the merits of each case,a class is not rendered unascertainable merely because an analysis of data is necessary to determine class membership.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN32[] **Class Actions, Certification of Classes**

The ascertainability requirement is less important in a *Fed. R. Civ. P. 23(b)(2)* class since a chief objective of this rule is to provide broad injunctive relief to large and amorphous classes not capable of certification under *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN33[] **Class Actions, Certification of Classes**

Class certification pursuant to *Fed. R. Civ. P. 23(b)(2)* is appropriate when the party opposing the class has acted or refused to act on grounds that apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. The justification for allowing certification of such claims is that the relief sought must perforce affect the entire class at once. Differences between the extent of harm suffered by each class member do not make *Fed. R. Civ. P. 23(b)(2)* certification inappropriate.

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Judges: Brian M. Cogan, U.S.D.J.

Opinion by: Brian M. Cogan

Opinion

[*96] **MEMORANDUM DECISION AND ORDER**

Cogan, District Judge.

Plaintiffs are suing Chinese vitamin C manufacturers for allegedly violating Section 1 of the Sherman Act, *15 U.S.C. § 1*, by engaging in a cartel to fix prices and limit the output of vitamin C exported to the United States. The four main defendants are Hebei **[**8]** Welcome Pharmaceutical Co. Ltd.; Jiangsu Jiangshan Pharmaceutical Co. Ltd.; Northeast Pharmaceutical Co. Ltd.; and Weisheng Pharmaceutical Co. Ltd. (collectively "defendants"). Plaintiffs The Ranis Company ("Ranis") and Magno-Humphries Laboratories, Inc. ("MHL") move for class certification on behalf of a group of direct purchasers seeking treble damages against all defendants except Northeast Pharmaceutical Co. Ltd. ("Northeast"). Plaintiff Animal Science Products, Inc., ("Animal Science") has moved separately for certification of a class of direct and indirect purchasers seeking injunctive relief against all defendants, including Northeast. Defendants opposed **[*97]** both motions for class certification. For the reasons stated below, I grant class certification on behalf of a damages class represented by Ranis, but I determine that MHL cannot serve as class representative because it is not a member of the class it seeks to represent. I also grant certification of an injunction class represented by Animal Science.

BACKGROUND

Ranis and Animal Science commenced this action on January 26, 2005. Related actions were subsequently filed in other districts, and all of these cases were eventually coordinated **[**9]** by the Judicial Panel for Multidistrict Litigation and transferred to this Court for pretrial proceedings. In April, 2007, Ranis and Animal Science moved separately for class certification under Rule 23 of the Federal Rules of Civil Procedure. Both putative classes are represented by the same counsel.

Ranis seeks to represent a class composed of purchasers who bought vitamin C directly from the defendants during the class period (the "Damages Class"). The only relief sought by this putative class is damages. The exact class definition is as follows:

> All persons or entities, or assignees of such persons or entities, who directly purchased vitamin C for delivery in the United States, other than pursuant to a contract containing an arbitration clause, from any of Defendants or their co-conspirators, other than Northeast Pharmaceutical (Group) Co. Ltd., from December 1, 2001 to the present. Excluded from the proposed class are all governmental entities, Defendants, their co-conspirators, and their respective subsidiaries or affiliates.

Animal Science seeks to represent a class composed of purchasers who bought vitamin C manufactured by the defendants, regardless of whether the vitamin C was **[**10]** purchased directly from the defendant or through an intermediary (the "Injunction Class"). This putative class seeks only injunctive relief. The exact class definition is as follows:

> All persons or entities, or assignees of such persons or entities, who purchased vitamin C manufactured by Defendants for delivery in the United States, other than pursuant to a contract with a Defendant containing an arbitration clause, requiring injunctive relief against Defendants to end Defendants' antitrust violations.

Defendants opposed Ranis's motion for class certification primarily on the basis of Ranis's adequacy to serve as class representative. Defendants' chief concern is that Ranis is not presently, and has never been, involved in the vitamin C business. Instead, Ranis purchased this antitrust claim from The Graymor Chemical Company ("Graymor") for $100 and is not currently engaged in any business aside from prosecuting Graymor's claim. Defendants question the motives behind the assignment of Graymor's claim and argue that assignees may not serve as class representatives. Defendants further argue that Ranis and putative class counsel have conflicts of interest with other class members; have **[**11]** made decisions that are contrary to the class's interests; and lack the requisite integrity and candor to represent absent class members.

Before briefing was complete on Ranis's motion to certify the Damages Class, however, counsel for Ranis informed defendants of counsel's intention to add a second plaintiff as putative class representative in this action. On September 27, 2007, plaintiffs amended the complaint to add MHL as a plaintiff and the company from which MHL bought vitamin C — JSPC America, Inc. ("JSPCA") — as a defendant.[1] The parties were then permitted to supplement their class certification briefing to address this new putative class representative. Defendants' supplemental opposition to class certification again focused on the adequacy of Ranis and MHL to represent the class.

In their supplemental opposition to certification of the Damages Class, defendants argued that JSPCA, a subsidiary of defendant Jiangsu Jiangshan Pharmaceutical Co., Ltd. ("Jiangsu"), **[**12]** was not part of the price-fixing conspiracy and should therefore be dismissed **[*98]** from the case. Moreover, defendants argued that MHL — who did not purchase from any defendant other than JSPCA — should be deemed an indirect purchaser and prohibited from joining a class of direct purchasers.[2] After briefing was complete on the issue of class certification, JSPCA moved for summary judgment. On December 27, 2011, I granted JSPCA's motion and dismissed it from the case, finding that JSPCA was legally incapable of having conspired with Jiangsu or the other defendants in this action.

Defendants also opposed Animal Science's motion to certify the Injunction Class. Once again, defendants' attacks focus on the adequacy of Animal Science to serve as class representative. Defendants' primary arguments are that that Animal Science and class counsel suffer from various conflicts of interest and have demonstrated a willingness to sacrifice important class interests.

Although briefing related to class certification **[**13]** was complete in early 2008, a decision on this motion was reserved pending defendants' omnibus motion for summary judgment. On September 6, 2011, I rejected defendants' contention that the Chinese government had compelled the price-fixing conspiracy and accordingly denied defendants' motion for summary judgment.

DISCUSSION

HN1[] *Rule 23(a) of the Federal Rules of Civil Procedure* requires that any proposed class action: "(1) be sufficiently numerous, (2) involve questions of law or fact common to the class, (3) involve class plaintiffs whose claims are typical of those of the class, and (4) involve a class representative or representatives who adequately represent the interests of the class." *Myers v. Hertz Corp., 624 F.3d 537, 547 (2d Cir. 2010)*. Courts commonly use a shorthand summary to describe these requirements, referring to the four prongs simply as "numerosity,"

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[1] Legend Ingredients Group, Inc., was also added as a defendant, but the claims against this defendant were voluntarily withdrawn on June 20, 2008, allegedly because this defendant began "providing cooperation to Plaintiffs."

[2] Defendants have other reasons for arguing that MHL is inadequate; since I find this ground to be dispositive on the issue of MHL's adequacy, however, I will not address defendants' other arguments.

"commonality," "typicality," and "adequacy." See, e.g., *Gen. Tel. Co. of the Sw v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*.

In addition to satisfying each of the four prerequisites listed in *Rule 23(a)*, a party seeking class certification must satisfy one of the subsections of *Rule 23(b)*. Plaintiffs seek to certify **[**14]** the Damages Class pursuant to subsection 23(b)(3) and must therefore show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods" for adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. Plaintiffs seek to certify the Injunction Class pursuant to subsection 23(b)(2) and must therefore show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*.

HN2[] Regardless of whether class certification is contested, a court may not certify a putative class unless it has performed a "rigorous analysis" and determined that each of Rule 23's requirements has been met. *Falcon, 457 U.S. at 161*. As part of this analysis, the court must assess all relevant evidence admitted at the class certification stage and resolve any relevant factual disputes, even if this requires a determination of issues that go to the merits of the case. See *In re Initial Pub. Offering Sec. Litig., 471 F.3d 24, 41-42 (2d Cir. 2006)*.

HN3[] The **[**15]** party moving for class certification "bears the burden of establishing by a preponderance of the evidence that each of Rule 23's requirements has been met." *Myers, 624 F.3d at 547*; accord *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008)*. Despite this Court's obligation to carefully analyze each prong of Rule 23 before granting class certification, "the Second Circuit has emphasized that Rule 23 should be 'given liberal rather than restrictive construction'" and has shown a "general preference" for granting rather than denying class certification. *Gortat v. Capala Bros., 257 F.R.D. 353, 361* ***[*99]*** *(E.D.N.Y. 2009)* (quoting *Marisol A. v. Giuliani, 126 F.3d 372, 377 (2d Cir. 1997))*.

1**. THE DAMAGES CLASS**

I. *Rule 23(a)*'s Requirements — Numerosity, Commonality, Adequacy, and Typicality

A. Numerosity

HN4[] To satisfy the numerosity requirement, Ranis and MHL must show that the putative class is so numerous that joinder of all members would be "impracticable." *Fed R. Civ. P. 23(a)(1)*. Although the numerosity requirement "imposes no absolute limitations" and requires a case-by-case analysis of the facts, see *Gen. Tel. Co. of the Nw v. EEOC, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)*, **[**16]** courts within the Second Circuit generally presume that joinder of all putative class members is impracticable if the class has more than forty members. See, e.g., *Ramos v. SimplexGrinnell LP, 796 F. Supp. 2d 346, 353 (E.D.N.Y. 2011)* (citing *Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995))*.

Transaction records produced by defendants indicate that there are at least 139 discrete entities that directly purchased vitamin C during the relevant time period. Defendants do not contest numerosity in any way, and this Court finds by a preponderance of the evidence that joinder of 139 members would be difficult and inconvenient, if not impossible. *Rule 23(a)(1)* is therefore satisfied. See *Gortat, 257 F.R.D. at 362* (impracticability within the meaning of Rule 23 "does not mean impossibility of joinder, but rather difficulty or inconvenience of joinder").

B. Commonality

HN5[] Although some courts tend to merge Rule 23's commonality prong with the typicality prong, see *Marisol A., 126 F.3d at 376*, the commonality requirement is distinct from typicality in that it "tests the definition of the class itself rather than focusing on the relationship between the putative class representative **[**17]** and the other class members. See 5-23 James W. Moore et al., *Moore's Federal Practice § 23.23[6]* (3d ed. 2011). Under commonality, the class definition is tested to ensure that the class members' claims "depend on a common contention [which is] of such a nature that it is capable of class wide resolution." *Wal-Mart Stores. Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)*.

Rule 23(a)(2), read literally, requires only that a class share common "questions of law or fact." As the Supreme Court recently declared, however, what matters under the commonality requirement "'is not the raising of common questions — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.'" Id. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, *84 N.Y.U. L. Rev. 97, 132 (2009)*). A single common question of law or fact may suffice to satisfy this requirement if the question is capable of giving rise to a common answer through a class action. *Id. at 2556*.

In an effort to limit the scope of discovery in this case, defendants agreed not to oppose class certification on the grounds of commonality or predominance **[**18]** under *Rule 23(b)(3)*. Defendants' opposition papers therefore contain no argument regarding commonality. Having analyzed plaintiffs' claims, I find that the commonality requirement is satisfied. The most significant question posed by this lawsuit will generate common answers among all class members: did the defendants' price-fixing agreement cause an artificial increase in the market price of vitamin C? Because the answer to this question could not logically vary between class members, the answer will be applicable to all members of this proposed class.

C. Adequacy

HN6[] The adequacy requirement focuses on the fitness of purported class representatives to competently discharge the responsibility of litigating the case on behalf of absent class members. Under this prong of *Rule 23(a)*, a court must ensure that the putative representatives "'possess the same interests and suffer the same injuries as the **[*100]** class members.'" *In re Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 249 (2d Cir. 2011)* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625-26, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*. Although it is important for a court to thoroughly vet any putative class representative, a court must **[**19]** be "wary of a defendant's efforts to defeat representation of a class on grounds of inadequacy" where, as here, the effect of an inadequacy finding would be to "eliminate any class representation." *Kline v. Wolf, 702 F.2d 400, 402 (2d Cir. 1983)*.

As a threshold matter, ***HN7***[] a class representative is not "adequate" unless it is a member of the class it purports to represent. This requirement is evident from the opening sentence of Rule 23, which explains that "one or more members of a class may sue or be sued as representative parties on behalf of all members." Once it is determined that a putative representative is indeed a class member, courts generally focus the adequacy analysis on three primary areas of concern.

First, the named plaintiff must "demonstrate that class counsel is qualified, experienced, and generally able to conduct the litigation." *Marisol A., 126 F.3d at 378*. This factor is undisputed in this case, as defendants concede that plaintiffs' lawyers are "experienced class action attorneys" and this Court is familiar with their reputation. Second, the named plaintiff must show that "there is no conflict of interest between the named plaintiffs and other members of the plaintiff **[**20]** class." Id. Finally, a named plaintiff must exhibit enough integrity and credibility to convince the court that the named plaintiff will diligently perform its fiduciary duties to the class. See *Savino v. Computer Credit. Inc., 164 F.3d 81 (2d Cir. 1998)*; *Shakhnes ex rel. Shakhnes v. Eggleston, 740 F. Supp. 2d 602, 627 (S.D.N.Y. 2010)*. These final two factors — as well as the class membership of both MHL and Ranis — are hotly disputed by the parties. For the reasons stated below, I find that Ranis is adequate to represent the class and MHL is inadequate.

1. Class Membership of MHL and Ranis

Defendants claim that MHL is not a member of the class because MHL only purchased vitamin C from JSPCA, which is a subsidiary of defendant Jiangsu rather than a defendant itself. This fact technically brings MHL outside the definition of the class, which includes only those entities that "directly purchased vitamin C" from one of the defendants in this action. Of equal importance, defendants argue that allowing MHL to join the class would run afoul of ***HN8***[] the general rule that indirect purchasers may not recover damages for monopolistic overcharges under federal ***antitrust law***. See *Illinois Brick Co., et al., v. Illinois, et al., 431 U.S. 720, 97 S.Ct. 2061, 52 L. Ed. 2d 707 (1977)*.

Plaintiffs **[**21]** assert that MHL is in fact a direct purchaser because the parent-subsidiary relationship between Jiangsu and JSPCA means that "direct purchases from JSPCA are the same as direct purchases from Jiangsu itself." Some history of the rule set forth in *Illinois Brick* is necessary to address this argument.

The Supreme Court laid the framework for the Illinois Brick rule in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. The defendant in Hanover Shoe was a manufacturer of shoe-making machinery which was accused of driving up the price of this machinery by monopolizing the industry. The defendant argued that the plaintiff — a shoe seller which leased the defendant's machines — had not suffered any injury from these artificially increased prices because the plaintiff had passed the overcharge on to its own customers through higher shoe prices. The Supreme Court described this defense as a "pass-on" theory, and rejected it. The Court reasoned that, if such a defense were permitted, courts would be charged with the "insurmountable" task of weighing the "wide range" of market-based factors that can influence a company's decision to raise prices. *Hanover Shoe, 392 U.S. at 493*.

According **[**22]** to Hanover Shoe, if antitrust damages were measured by the plaintiff's net loss — taking into consideration any profit recouped through a price-hike in downstream sales — antitrust cases would "require additional long and complicated proceedings **[*101]** involving massive evidence and complicated theories." Id. The Court therefore held that the relevant injury in an antitrust lawsuit is simply the overcharge that a defendant inflicted on its direct purchasers; any attempts by the direct purchasers to recoup this overcharge by passing it on to more remote purchasers is irrelevant to the damages calculation.

The Court's decision in Illinois Brick was the inverse of Hanover Shoe; since defendants could not use the "pass-on" theory to claim that a direct purchaser suffered no net injury, plaintiffs could not use the "pass-on" theory to claim damages for an overcharge that was allegedly passed on from the defendant, through a middleman, to the indirect-purchaser plaintiff. The Court reasoned that the "evidentiary complexities and uncertainties" feared by the Hanover Shoe Court would be multiplied if a plaintiff who is "several steps removed from the defendant in the chain of distribution" could claim **[**23]** monetary damages for an overcharge allegedly caused by the defendant. *Illinois Brick, 431 U.S. at 732*. This case therefore established a mostly bright-line rule barring indirect purchasers from seeking damages for antitrust violations in federal court.

Although the Illinois Brick Court explained that any exception to its holding would be "narrow in scope," the Court gave examples of specific situations in which the "pass-on" theory would not require a court to consider "complex market interactions." In such situations, since a court would conceivably be capable of calculating the damages a defendant caused its remote purchasers to suffer, indirect purchasers would be permitted to sue for damages. *Id. at 736*. For example, the Court suggested in a footnote that indirect purchasers who "owned or controlled" the direct purchaser would be permitted to sue. *Id. at 736 n. 16*.

HN9[] The "ownership or control" exception is now firmly established and has been expanded to include instances where the defendant owns or controls the intermediary that sold the goods to the indirect-purchaser plaintiff. See, e.g., *In re Indus. Diamonds Antitrust Litig., 119 F. Supp. 2d 418, 421 (S.D.N.Y. 2000)*. Despite this **[**24]** minor expansion, however, courts remain conscious that the Supreme Court "intended exceptions to the Illinois Brick rule to be few and far between." *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., No. 93-CV-5148, 2002 U.S. Dist. LEXIS 19954, 2002 WL 31528625, at *10 (E.D.N.Y. Aug. 21, 2002)* (citing *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990))*. Any existing exception, moreover, should be narrowly construed to apply only to those situations in which the court is sure that a calculation of damages would not require consideration of complex market interactions. See *Illinois Brick, 431 U.S. at 745*; accord *Del. Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116, 1125 (9th Cir. 2008)* ("'[A]ny exception to the Illinois Brick direct purchaser rule must be narrowly restricted to a situation in which complex market forces are stripped of their effect due to preexisting conditions . . . so that the pass-on is clearly discernible.'" (quoting *In re Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 20 (D.D.C. 2001)))*.

A narrow construction of the "ownership or control" exception has led courts to apply it only when the relationship between the defendant and the middleman "involve[s] **[**25]** such functional economic or other unity that there effectively has been only one sale" between the defendant and the indirect purchaser. *Leider v. Ralfe, No. 01-CV-3137, 2003 U.S. Dist. LEXIS 18270, 2003 WL 22339305, at *4 (S.D.N. Y. Oct. 10, 2003)*. A plaintiff seeking to gain the benefit of this exception must therefore present facts demonstrating that such unity exists and may not rely simply on the existence of a parent-subsidiary relationship. See id.; *Mid-West Paper Prods. Co. v. Cont'l Grp., Inc., 596 F.2d 573, 589 (3d Cir. 1979)*. Crucially, this exception is available only if the plaintiff shows that the defendant has such control over the subsidiary that the defendant can be said to have "set prices along the chain of distribution." *Kloth v. Microsoft Corp., 444 F.3d 312, 321 (4th Cir. 2006)*.

Here, plaintiffs seek to invoke the "ownership or control" exception by proffering the simple fact that JSPCA is a wholly-owned **[*102]** subsidiary of Jiangsu. This evidentiary showing is singularly insufficient to convince me that Jiangsu was responsible for any overcharge inflicted on MHL by JSPCA.[3] In fact, defendants submitted the declaration of Jeffery Fang, a former JSPCA employee, who explained that he and JSPCA's sales **[**26]** manager determined the price of all vitamin C sold by JSPCA. Fang stated that Jiangsu "did not exercise control over the prices that JSPCA charged JSPCA's customers" and explained that JSPCA's pricing determinations were influenced by market factors such as competition with other vitamin C distributors. The concerns that drove the Supreme Court's decisions in *Hanover Shoe* and *Illinois Brick* are therefore present with full force in this case, and an exception to the direct purchaser rule is unwarranted.

Because MHL is an indirect purchaser and no exception to the *Illinois Brick* rule applies here, MHL lacks standing to sue for damages under federal law and cannot join the putative Damages Class. MHL therefore has no interest in vigorously pursuing the class claims and is inadequate to serve as class representative.

Defendants argue that, like MHL, Ranis is inadequate to represent the class because **[**27]** it is not even a class member. It is undisputed that Ranis never bought any vitamin C and is therefore eligible for class membership only by dint of being an assignee of Graymor's claims. While conceding that the assignment of Graymor's claim technically brought Ranis within the class definition — which explicitly accounts for assignees of direct purchasers — defendants argue that assignees were included in the class definition in order for Ranis to make a specious end-run around the rule prohibiting assignment of class membership.

Contrary to defendants' assertion, however, there is no rule prohibiting the assignment of class membership. Defendants found support for this rule in a 2006 case from the Southern District of New York in which Judge McKenna refused to allow an assignee to represent a class and warned that "very serious problems" would arise if class membership were treated as a "transferable asset." *In re Pub. Offering Fee Antitrust Litig., No. 98-CV- 7890, 2006 U.S. Dist. LEXIS 21076, 2006 WL 1026653, at *4 (S.D.N.Y. Apr. 18, 2006)*, vacated sub nom. *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons. Inc., 502 F.3d 91 (2d Cir. 2007)*. After defendants filed their brief in opposition to class certification, **[**28]** however, the Second Circuit vacated and remanded Judge McKenna's decision, holding that there are no particular dangers inherent in the practice of transferring class membership that do not arise in the context of claim assignment generally. See *Cordes. 502 F.3d at 103*. Since antitrust claims are generally assignable, the *Cordes* Court held that an assignment of class representative status in an antitrust case is likewise permissible and does not amount to champerty. Id. Ranis's status as an assignee therefore does not prevent it from joining or representing the class.

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[3] As noted in my decision granting summary judgment on behalf of JSPCA, JSPCA's former chief executive officer failed to preserve documents and e-mails relevant to this case. However, this possible spoliation did not prevent plaintiffs from seeking other evidence of Jiangsu's domination of JSPCA.

2. Conflicts of Interest

"It is axiomatic that ***HN10***[] a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent." 7A Charles Alan Wright et al., Federal Practice and Procedure § 1768 (3d ed. 2011). However, a conflict of interest will not destroy adequacy under Rule 23 unless the conflict is "fundamental" and concrete; conflicts which are merely "speculative . . . should be disregarded at the class certification stage." *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001)* (overruled on other grounds **[**29]** by *In re IPO. 471 F.3d at 24*) (internal quotation marks omitted); accord *Denney v. Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006)*.

Defendants argue that Ranis has an inherent conflict of interest with the rest of the class because Ranis's assignor, Graymor, "wanted to see higher market prices for vitamin C" in order to "increase its opportunities **[*103]** to profit as a distributor." Since the other class members all sought lower vitamin C prices, defendants argue, Ranis is more closely aligned with the defendants in this action and is therefore unlikely to vigorously pursue the class claims.

Defendants do not allege, and the facts would not support a finding, that Graymor actually took part in defendants' price-fixing conspiracy. Instead, defendants offer evidence tending to show that, at certain points in time, it was in Graymor's self-interest to see the market price of vitamin C rise. For example, Graymor's sales director wrote an e-mail in which he appeared to express satisfaction over the prospect of "dramatic price increases" in the vitamin C market. But defendants do not dispute that Graymor, like the rest of the class members, sought to *purchase* vitamin C at the lowest price possible. **[**30]** Presumably, any distributor of vitamin C aims to maximize profits by buying low and selling high. This is consistent with the e-mails cited by defendants, in which Graymor's sales director explained his intention to hold vitamin C inventory until the market price rose again, at which time Graymor could sell the inventory at a larger profit margin.

Defendants' conflict-of-interest argument must logically be based on an assumption that the entire class, save Graymor, consists of end-users who never resell vitamin C and therefore oppose price increases at all points in time. But the class is defined solely by whether or not a business purchased directly from a defendant — in other words, the class is defined by purchasing practices, not by downstream sales. There is thus no reason to believe that the entire class is homogenously end-users; in fact it is equally likely that the class consists entirely of distributors whose business habits dovetail perfectly with Graymor's.

Moreover, even if Graymor were the only distributor in the entire class, its occasional interest in high market prices would not create a conflict of interest. Plaintiffs seek to represent a class of direct purchasers **[**31]** in a damages-only suit. When antitrust plaintiffs seek only damages, *Hanover Shoe* requires a court to disregard the downstream sales of these direct purchasers. Graymor's interest in seeing market prices rise, which appears to have been an attempt to "pass-on" any overcharges suffered by Graymor, is therefore irrelevant to this case. Since Graymor's downstream-sales practices will not come into play in this case, they are incapable of causing a conflict of interest between Ranis and the class. Ranis and the rest of the class, including the end-users, have precisely the same goal in this case: to demonstrate that the defendants' alleged antitrust violations caused each plaintiff to purchase vitamin C at an artificially inflated price. This Court will look no further down the stream.

Although defendants did not cite to it, there is one important case that lends support to their conflict-of-interest argument. In *Valley Drug Company v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181 (11th Cir. 2003)*, the Eleventh Circuit held that a conflict of interest could arise between a named plaintiff and absent class members if the named plaintiff had benefitted from the defendant's antitrust violation **[**32]** by passing on the overcharge to remote purchasers. Although the Court acknowledged that Hanover Shoe requires a court to disregard downstream sales when calculating damages in an antitrust case, the Court believed that the question addressed in Hanover Shoe was distinct from the question of whether "the economic reality of the situation leads some class members to have economic interests that are significantly different from — and potentially antagonistic to — the named representatives purporting to represent them." *Id. at 1195*.

I disagree with the Valley Drug Court's holding in the context of a damages-only class. Although the Court was correct to note that Hanover Shoe dealt with the calculation of damages in an antitrust case, rather than the existence of a conflict of interest under a Rule 23(a) analysis, the Valley Drug Court failed to recognize that Hanover Shoe's holding eradicates any possibility that a named plaintiff's downstream sales could create a conflict of interest with other class members. Conceivably, if Ranis were seeking to enjoin defendants' alleged price-fixing conspiracy, evidence that it benefitted economically **[*104]** from the conspiracy could weigh into my consideration **[**33]** of whether Ranis would "vigorously prosecute the interests of the class." *Id. at 1196* (internal quotation marks omitted). But the same is not true when all class members seek simply to collect damages.

Other courts that have considered this issue have also declined to follow *Valley Drug*, finding it irreconcilable with *Hanover Shoe.* See, e.g., *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd., 246 F.R.D. 293 (D.D.C. 2007)* ("[T]he Eleventh Circuit's holding fails to appreciate the true import of the Hanover Shoe rule that a direct purchaser may recover the full amount of the overcharge, even if he is otherwise benefitted . . . ."); *In re Hypodermic Prod. Direct Purchaser Antitrust Litig., No. 05-CV-1602, 2006 U.S. Dist. Lexis 89353, at *16 (D.N.J. Sept. 7, 2006)* (citing with approval a magistrate judge's ruling that Valley Drug's "narrow reading of Hanover Shoe is neither shared by this Court nor this circuit"); *In re Wellbutrin Sr Direct Purchaser Antitrust Litig., Civil Action No. 04-5525, 2008 U.S. Dist. LEXIS 36719, 2008 WL 1946848, at *6 (E.D. Pa. May 2, 2008)* ("[T]he Court declines to follow Valley Drug and will adhere instead to the principles announced in Hanover Shoe and Illinois Brick.").

In any event, **[**34]** the *Valley Drug* decision is distinguishable from this case because it was limited to the particular characteristics of the pharmaceutical industry. Specifically, the *Valley Drug* Court relied on an assumption that the demand for pharmaceuticals is less elastic than the demand for most consumer goods. If a court need not consider fluctuations in demand levels, according to the *Valley Drug* Court, the process of determining whether an overcharge was passed on to a remote purchaser would be simplified. *Valley Drug, 350 F.3d at 1195*. The defendants do not make such an argument in this case, and this Court therefore has no reason to shrug off the *Hanover Shoe* Court's concerns over the "evidentiary complexities and uncertainties" associated with the "pass-on" theory. See *In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2010 U.S. Dist. LEXIS 125623, 2010 WL 4916723, at *3 (E.D.N.Y. Nov. 24, 2010)* (distinguishing Valley Drug on these grounds).

Defendants also argue that Ranis's lawyers have a conflict of interest. This conflict is supposedly caused by the lawyers' representation of Animal Science, an indirect purchaser that has moved for certification of the Injunction Class. Defendants surmise that the Injunction **[**35]** Class may include indirect purchasers that are also members of putative classes seeking damages under state-law provisions. Because these various class actions all seek relief against the same defendants, it is argued that both direct and indirect purchasers are "seeking to recover from the same pool of money." Defendants are apparently concerned that, by representing both direct and indirect purchasers, Ranis's lawyers will be forced to prioritize one class over another.

This argument does not make sense. The indirect purchasers who seek damages from the defendants under state law are not represented by Ranis's lawyers. Ranis's lawyers represent only two classes: the instant class, which seeks damages on behalf of direct purchasers under federal law, and a class of direct and indirect purchasers seeking only injunctive relief under federal law. The interests of these two classes do not conflict, and counsel therefore will not have to choose between them. Ranis's counsel is free to litigate the instant case vigorously without fear of prejudicing the Injunction Class in any way.

3. Ranis's Credibility and Integrity

HN11[] Because class representatives have a duty to guard the interests of the **[**36]** class, a court should deny class certification if the putative representative is not honest or ethical enough to adequately discharge this fiduciary duty. See *Savino, 164 F.3d at 87*. However, this inquiry into the representative's integrity "is not an examination into their moral righteousness, but rather an inquiry directed at improper or questionable conduct arising out of or touching upon the very prosecution of the lawsuit." *Friedman-Katz v. Lindt & Sprungli (USA), Inc., 270 F.R.D. 150, 159 (S.D.N.Y. 2010)* (internal quotation marks omitted). Because integrity considerations are "restricted to their relevance to issues in the litigation," *Rocco v. Nam Tai Elecs., Inc., 245 F.R.D. 131, 137 **[*105]** (S.D.N.Y. 2007)*, courts in this Circuit have disregarded ad hominem attacks that call the putative representative's character into question over incidents unrelated to the case before the court. See, e.g., *Jones v. Ford Motor Credit Co., No. 00-CV-8330, 2005 U.S. Dist. LEXIS 5381, 2005 WL 743213, at *18-19 (S.D.N.Y. Mar. 31, 2005)* (class representative's prior convictions for burglary and rape "by no means touch upon the class claims").

Defendants' attacks on Ranis's credibility fall into the category of criticisms that courts **[**37]** in this Circuit tend to disregard. Defendants argue that Ranis and class counsel have engaged in a dishonorable plot to conceal Graymor's "questionable business practices" from this Court. These business practices involve attempts by Robert Conway, Graymor's sales manager, to obtain tips from the defendants regarding future price trends. In various e-mails, Conway refers to these tips as "inside pricing information"; offers to pay "a reasonable fee" for the information; and vaguely asserts that Graymor was willing to "work quietly behind the scenes" to obtain such information. Defendants argue that Ranis's lawyers attempted to hide these practices from the Court by assigning Graymor's claims to Ranis and refusing to disclose Graymor's identity for more than a year.

In response to this charge, plaintiffs argue that Graymor's business practices were legitimate and that its claims were assigned to Ranis in order to protect Graymor from any potential retaliation by Chinese manufacturers. Defendants counter that Graymor could not reasonably fear retaliation, as it had left the vitamin C business two years prior to filing this lawsuit. However, it is uncontested that Graymor continued to **[**38]** purchase other products from Chinese manufacturers. Alfred J. Gordon, the president of Ranis and Graymor, submitted an affidavit stating that Graymor's identity was concealed during the early stages of this litigation because he "was concerned that publicity about [Graymor's] name could be used against [Graymor] in China and subject [Graymor] to possible retaliation." Gordon testified at deposition that he believed that "there was a shared basis of information among Chinese manufacturers" and that he was worried that Graymor could be frozen out of the market in retaliation for suing the Chinese vitamin C manufacturers.

I find that defendants have failed to rebut Gordon's explanation for keeping Graymor's identity private. Moreover, despite their sinister characterization of Graymor's business practices, defendants' exact grievance is not apparent to me. Defendants do not allege that Graymor took part in any alleged antitrust violations, nor do defendants allege that Graymor misappropriated trade secrets or violated any laws against inside trading. To the extent that Graymor's quest for "inside information" was otherwise illegal or immoral, for reasons I am unable to envision, I find **[**39]** that this conduct bears no meaningful connection to the litigation at hand.

D. Typicality

The typicality analysis focuses on whether the named plaintiff's interests align with the interests of the rest of the class. See Moore et al., supra, § 23.24[1]. The purpose of this analysis is to ensure that, by prosecuting its own case, the named plaintiff "simultaneously advances the interests of the absent class members." 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 4:16 (8th ed. 2011).

HN12[] The typicality criterion does not require complete symmetry between the class representative's claims and those of the absent class members. See *Shakhnes ex rel. Shakhnes v. Eggleston, 740 F. Supp. 2d 602, 625 (S.D.N. Y. 2010)*. Rather, the named plaintiff must simply raise claims that "arise from the same course of events" as the class claims and make "similar legal arguments to prove the defendant's liability." *Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993)*.

Defendants do not dispute that Graymor directly purchased vitamin C from one of the defendants at a price that was allegedly inflated due to an illegal conspiracy to impose price floors and limit exports to the United States. The claims and **[**40]** legal arguments brought by Ranis, as assignee of Graymor, thus appear completely parallel to the claims brought by other class members, **[*106]** and the typicality requirement is therefore satisfied.

However, defendants argue that Ranis will be subject to unique defenses not applicable to other class members. ***HN13***[] In general, typicality is lacking when a putative class representative would be "subject to unique defenses which threaten to become the focus of the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52,* 59 (2d Cir. 2000). Specifically, defendants allege that Ranis is an ignorant class representative and is being propped up by lawyers who are driving this case in pursuit of their own interests.[4]

Defendants proclaim that Ranis has no "meaningful commitment to this litigation" and "virtually no knowledge or understanding" of the key litigation issues in this case. **HN14**[] Class representative status may properly be denied on this basis, but the Second Circuit has expressed a "general disfavor of attacks on the adequacy of a class representative based on the representative's ignorance." In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 42 (2d Cir. 2009) (internal quotation marks omitted). Courts in this Circuit therefore deny class certification due to the putative representative's ignorance only when the ignorance is so profound that the class representative "would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." Maywalt v. Parker & Parsley Petrol. Co., 67 F.3d 1072, 1077-78 (2d Cir. 1995). A proposed representative can avoid such a fate simply by showing **[**42]** a willingness and ability to pursue the litigation on behalf of the class and a basic understanding of the litigation. See Baffa, 222 F.3d at 62.

Ranis clears this low hurdle easily. Gordon's deposition testimony shows that he fully understands the nature of the claims and is generally apprised of the procedural and technical aspects of the litigation. In an affidavit, he affirmed that he is dedicated to pursuing the class claims and is prepared to cooperate with discovery and trial. In fact, defendants' allegations regarding Ranis's ignorance are supported by almost nothing. The only fact offered in support of this charge is deposition testimony in which Gordon admitted that he did not completely understand why class counsel decided to dismiss the damages claims against defendant Northeast.

Class counsel explains that Northeast was dismissed because Ranis, and presumably other class members, had signed contracts with Northeast that included arbitration clauses. Pursuant to these clauses, defendants sought to compel arbitration of this entire case in Beijing.[5] Plaintiffs' decision to dismiss Northeast, and keep this case in American courts, was tactical and undoubtedly required a sophisticated **[**43]** analysis that could be difficult to explain to a layperson. As Gordon explained at deposition, he was aware that the decision to dismiss Northeast "involve[d] this arbitration in some way," but he did not understand "how that affected the rest of the situation." This is a sufficient level of knowledge and understanding for a named plaintiff, as these individuals are not expected to understand every intricacy of the litigation or possess a professional-level understanding of the law. See, e.g., Baffa, 222 F.3d at 52; Gunnells v. Healthplan **[*107]** Servs., Inc., 348 F.3d 417, 430 (4th Cir. 2003) **HN15**[] ("It is hornbook law . . . that in a complex lawsuit... the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative.").

Defendants also argue that Ranis is atypical of the class because it never purchased any vitamin C and because Graymor has been out of the vitamin C business for years. Of course, it is irrelevant that Ranis never purchased any vitamin C, as Ranis is litigating Graymor's claim. It is also irrelevant that Graymor left the business and, according to defendants, has "no stake in what happens to prices going forward." Ranis purports to represent a class seeking damages for antitrust violations that occurred in the past; Graymor's plans regarding prospective business with the defendants therefore do not matter and will not differentiate Ranis from the rest of the class in any meaningful way. This factor does not have any impact on my adequacy analysis either, as Ranis remains

[4] Defendants do not identify this argument as addressing any particular subsection of Rule 23(a). Although the argument seems to call Ranis's adequacy into question, the Second Circuit has held that such attacks on the putative class representative should be addressed under the typicality prong because an ignorant representative may give "misleading and contradictory testimony with regard to basic issues in the case that might make their claims subject to unique defenses." Baffa, 222 F.3d at 61. **[**41]** I would note, however, that the Second Circuit has addressed this issue under the adequacy prong in the past, and despite this technical change the analysis remains the same. See Maywalt v. Parker & Parsley Petrol. Co., 67 F.3d 1072, 1077-78 (2d Cir. 1995).

[5] Defendants also argue that Ranis's decision to dismiss Northeast advanced Ranis's interests at the expense of other class members who may not have signed arbitration clauses with Northeast. This argument is puzzling, as defendants fail to explain how the absent class members' interests would be served by moving this case to an arbitration panel in a country that has expressly condoned the defendants' agreements to fix the price **[**44]** of vitamin C.

incentivized to collect damages for prior antitrust violations. See *In re Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 243 (E.D.N.Y. 1998)* ("Where the plaintiffs have alleged a single conspiracy to artificially inflate prices, a representative plaintiff may satisfy the adequacy requirement without having . . . made purchases throughout the entire class period." (internal quotation marks omitted)).

Another **[**45]** argument raised by defendants is that this lawsuit is "lawyer-driven" and would never have been filed if Ranis had not been solicited by "lawyers looking for someone to 'front' a case that they had created." Defendants believe that class counsel is interested in this case solely for the "perceived financial rewards they anticipate," rather than any sincere desire to enforce antitrust laws. Defendants opine that I "should not allow the class action mechanism to be used to create litigation that would not otherwise exist."

Either defendants are naive for making this argument, or, more likely, they hope that I am naive enough to accept it. Of course this lawsuit is driven by lawyers who perceive financial rewards. It would make little sense for a law firm like plaintiffs' to bring a massive antitrust class-action on a pro-bono basis. By the same token, individual class members are unlikely to have sufficient resources — let alone fluency with federal ***antitrust law*** — to institute a lawsuit such as this. A primary objective of Rule 23 is to allow lawsuits to be brought that would not have otherwise been brought; whether the idea for a class action first arose in the mind of a lawyer, rather **[**46]** than a class member, is of no moment in a class certification analysis.

The case law and Senate Report to which defendants cite, which discuss Congress's rationale in passing the Private Securities Litigation Reform Act of 1995 ("PSLRA"), do not support defendants' argument. Defendants are correct that Congress passed this law in response to concerns that securities litigators were driving class-action lawsuits that would never have been filed by any of the class members. See S. REP. NO. 104-98, at 5 (1995) *reprinted in* 1995 U.S.C.C.A.N. 679, 685. Courts in this Circuit often cite this law with approval, noting that its provisions "were intended to curtail the vice of 'lawyer-driven' litigation . . . in contingent securities fraud class actions." *Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC, 616 F. Supp. 2d 461, 463 (S.D.N.Y. 2009)*.

However, these courts' concerns are particular to the nature of large securities litigations. The PSLRA was passed because Congress was concerned about harm to the marketplace caused by the prevalence of "frivolous 'strike' suits . . . [which] are often based on nothing more than a company's announcement of **[**47]** bad news" and which extort companies into paying large settlements simply to avoid the costs of fighting a meritless lawsuit. S. REP. No. 104-98, at 5 (1995) *reprinted in* 1995 U.S.C.C.A.N. 679, 685. In contrast, defendants in this case have never disputed that there was a widespread conspiracy among Chinese vitamin C manufacturers to fix the price of vitamin C at an artificially high level in violation of American antitrust laws.

Congress's disapproval of lawyers who drive frivolous lawsuits is therefore inapplicable to a case such as this. Moreover, the **[*108]** provisions of the PSLRA do not apply to antitrust cases; if Congress saw the need to curtail lawyer-driven antitrust class actions, it could have passed an analogous statute.

Defendants' misgivings over the potential for abuse in a lawyer-driven class action find good company among judges and scholars. See, e.g., *Thorogood v. Sears, Roebuck & Co., 627 F.3d 289, 293-294 (7th Cir. 2010)* (Posner, J.) (collecting cases and scholarship). In *Thorogood*, the Seventh Circuit listed some abuses that can arise in a lawyer-driven class action, such as settlement extortion; collusion between defense lawyers and class counsel; and intentional maximization **[**48]** of attorneys' fees. Conceivably, if these abuses were shown to exist here, this could factor into my determination of whether class counsel is an adequate guardian of class interests. But this case presents no evidence of these abuses. To the contrary, although defendants' briefs are laden with hysterical warnings about the dangers of a "lawyer-driven" class action, defendants support this argument only by two undisputed facts: 1.) Ranis is not footing the bill for this lawsuit; and 2.) Ranis had not considered bringing this lawsuit until Gordon was contacted by class counsel.

HN16[] Counsel's decision to advance litigation costs in this case is typical and proper. In fact, courts have explicitly recognized that this common practice facilitates Rule 23's goals by allowing individuals to initiate important lawsuits that may otherwise have been prohibitively costly. See, e.g., *Suffolk County v. Long Island Lighting Co.,* 710 F. Supp. 1407,1414 (E.D.N.Y. 1989) ("Rule 23 requires, as a practical matter, that attorneys advance costs on a scale not reimbursable by any normal client."); Rand v. Monsanto Co., 926 F.2d 596, 600-601 (7th Cir. 1991) (Easterbrook, J.) (remarking that a rule requiring a **[**49]** class representative, rather than class counsel, to bear the cost of litigating a class action would "cripple the class action device," would "serve no good purpose," and is "inconsistent with Rule 23"). This is even true in the context of securities litigation. See In re Worldcom, Inc., Sec. Litig., 219 F.R.D. 267, 284 (S.D.N.Y. 2003) ("[R]equiring named plaintiffs to pay litigation expenses, even their pro rata share of litigation expenses, can have deleterious effects on the federal class action device.").

I am similarly unmoved by the fact that Ranis did not consider suing until solicited by class counsel. In the past, the fact that class counsel had solicited a representative party to bring a class action was taken into consideration by courts making class certification determinations. See William B. Rubenstein et al., Newberg on Class Actions § 15:4 (4th ed. 2011). However, this concern has waned in recent years and courts are now reluctant to give much weight to this factor in a class certification analysis. See id.; Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1324 (11th Cir. 2008) (holding that, if class counsel had improperly solicited the class representative, "'the ordinary **[**50]** remedy is disciplinary action . . .' not denial of class certification" (quoting Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 932 (7th Cir. 1972))); Jim Ball Pontiac-Buick-GMC, Inc. v. DHL Express (USA). Inc., No. 08-CV-761C, 2011 U.S. Dist. LEXIS 20758, 2011 WL 815209, at *5 (W.D.N.Y. Mar. 2, 2011) (noting that defendants had argued "that counsel solicited plaintiff to be the class representative," but holding that "the class is [nonetheless] adequately represented by plaintiff's counsel"); Ballan v. Upjohn Co., 159 F.R.D. 473, 488 (W.D. Mich. 1994) ("open solicitation is no longer frowned upon as in the past").

I share these courts' doubts over the relevance of this factor in a class certification analysis. If the solicitation of a named plaintiff violated a state's ethical rules, it is conceivable that this violation, in conjunction with other evidence of ethical misconduct, could be relevant to a determination of whether class counsel is generally trustworthy and ethical enough to represent the class. Here, however, defendants do not allege that the solicitation at issue violated any state's ethical rules and make no other accusations of professional misconduct against class counsel. Denial of class **[**51]** certification on this basis is therefore unwarranted.

II. *Rule 23(b)(3)*'s Requirements — Predominance and Superiority

HN17[] Under *Rule 23(b)(3)*, plaintiffs must show that "questions of law or fact common to **[*109]** class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods" for adjudicating the controversy. As the Advisory Committee explains, *Rule 23(b)(3)* permits class certification for cases "in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated . . . ." The Supreme Court has recognized that the goal of *Rule 23(b)(3)* is to provide "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem, 521 U.S. at 617* (citation and quotation marks omitted).

The "predominance" requirement of *Rule 23(b)(3)* "tests whether the proposed [class is] sufficiently cohesive to warrant adjudication by representation." *Id. at 623*. This criterion is satisfied if "resolution of some of the legal or factual questions that qualify each class member's case as a **[**52]** genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Myers, 624 F.3d at 547* (internal quotation marks omitted). Here, plaintiffs allege that defendants engaged in a horizontal price-fixing conspiracy that caused the market price of vitamin C to rise. In cases such as this, courts have frequently held that the predominance requirement is satisfied because the existence and effect of the conspiracy are the prime issues in the case and are common across the class. See *Arden Architectural Specialties, Inc. v. Wash. Mills Electro Minerals Corp., No. 95-CV-7574, 2002 U.S. Dist. LEXIS 21506, 2002 WL 31421915, at *7 (W.D.N.Y. Sept. 17, 2002)*; *In Re Med. X-Ray Film Antitrust Litig., No. 93-CV-5904, 1997 U.S. Dist. LEXIS 21936, 1997 WL 33320580, at *5 (E.D.N.Y. Dec. 26, 1997)* ("As a general rule in anti-trust price-fixing cases, questions common to the members of the class will predominate over questions affecting only individual members."

(internal quotation marks omitted)); In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 518 (S.D.N.Y. 1996) (collecting cases).

Defendants do not deny that the alleged conspiracy's existence **[**53]** and effect are the chief issues in this case and can be demonstrated through generalized proof. Instead, defendants simply argue that common issues do not predominate because Ranis "has many individual issues not shared with other members of the class." As discussed above, however, the "individual issues" of which defendants complain — for example, Ranis's status as an assignee; Graymor's "questionable" business practices; and Graymor's interest in high vitamin C prices — are insubstantial. None of these "individual issues" presents a meritorious defense that could distinguish Ranis from any other class member. Moreover, **HN18**[] the existence of individual defenses will not defeat predominance if "a sufficient constellation of common issues binds class members together." Brown v. Kelly, 609 F.3d 467, 483 (2d Cir. 2010). This class is united by common issues of law and fact that are determinative of liability and causation; this is more than sufficient to satisfy predominance. See In re Visa Check, 280 F.3d at 140.

HN19[] Rule 23(b)(3)'s "superiority" requirement is frequently satisfied when it would be prohibitively expensive for class members with small claims to proceed individually. Seijas v. Republic of Argentina, 606 F.3d 53, 58 (2d Cir. 2010). **[**54]** In this case, plaintiffs seek to prove the existence and effect of a large conspiracy among Chinese vitamin C manufacturers. It has required and will continue to require a vast outpouring of resources to conduct even the minimum number of depositions abroad or to procure the necessary translation services required to interpret the documentary evidence. Moreover, proving that the alleged conspiracy affected the market price of vitamin C will require significant fees toward expert analyses and testimony. Direct purchasers are permitted to join the class regardless of the quantity of vitamin C purchased from the defendants; many of the class members' claims will therefore be small relative to the costs of maintaining this litigation. A class action is thus superior to requiring each class member to bring an individual claim.

[*110] Other **HN20**[] factors relevant to a finding of superiority include the manageability of a class action and the desirability of litigating the claims in a particular forum. See In re Visa Check, 280 F.3d at 133. In a case such as this, a single proceeding is far more manageable than a series of disjointed proceedings, as adjudicating the claims in a single class action will **[**55]** promote uniformity of decisions and will protect courts from wasting resources on duplicative litigation. See In re Currency Conversion Fee Antitrust Litig., 264 F.R.D. 100, 117 (S.D.N.Y. 2010). Furthermore, this Court is highly familiar with the class claims as a consequence of the coordination of many similar cases by the Judicial Panel for Multidistrict Litigation. The class members will therefore benefit from streamlined pre-trial proceedings in this forum. See id.

III. Defendants' Motion to Dismiss Ranis's Claim for Damages or Strike Ranis's Class Allegations

On September 22, 2006, defendants moved to dismiss Ranis's claim for damages on two grounds. First, defendants argued that the complaint failed to allege that Ranis had been harmed by the conspiracy, as there was no allegation that Ranis purchased any vitamin C or was assigned a valid claim by an entity that purchased vitamin C. Second, defendants argued that even if Ranis amended the complaint to allege that it had been assigned a valid claim, "its allegations would not be sufficient as a matter of law to satisfy the direct purchaser requirement set forth by the Supreme Court in Illinois Brick." In the alternative, defendants **[**56]** argued that Ranis's class allegations should be stricken under Rule 12(f) of the Federal Rules of Civil Procedure based on Judge McKenna's holding that class representative status may not be assigned. See In re Pub. Offering Fee, 2006 U.S. Dist. LEXIS 21076, 2006 WL 1026653, at *4.

Defendants' first argument was mooted when plaintiffs amended the complaint, on January 31, 2007, to include the allegation that Graymor directly purchased vitamin C from defendants and assigned its claim to Ranis. Defendants' second argument is foreclosed by the Second Circuit's decision in Cordes, which held that an assignee of an antitrust claim stands before the court "in the shoes of its assignor. 502 F.3d at 101. Since Ranis stands in the shoes of Graymor, and defendants concede that Graymor is a direct purchaser of vitamin C, there is no violation of the Illinois Brick rule, Defendants' motion to dismiss Ranis's claim for damages is accordingly denied.

The Second Circuit has also foreclosed defendants' motion to strike Ranis's class allegations. As discussed above, the *Cordes* Court reversed Judge McKenna's decision and found that the assignment of class representative status is permissible in an antitrust case, *Id. at 103*. Defendants' **[**57]** motion to strike Ranis's class allegations is therefore denied.

2. THE INJUNCTION CLASS

I. *Rule 23(a)*'s Requirements — Numerosity, Commonality, Typicality, and Adequacy

A. Numerosity

The Injunction Class includes both direct purchasers of vitamin C and indirect purchasers of vitamin C. As discussed above, there are at least 139 entities that directly purchased vitamin C from the defendants. Defendants do not contest numerosity in any way, and this Court finds by a preponderance of the evidence that the Injunction Class is sufficiently numerous because joinder of more than 139 members would be difficult and inconvenient, if not impossible. See *Gortat, 257 F.R.D. at 362*.

B. Commonality

Again, defendants do not contest commonality in this case. Having analyzed the Injunction Class's claims, I find that this class has satisfied the commonality requirement for the same reason that the Damages Class satisfied this requirement. The most significant question posed by the Injunction Class is the same question posed by the Damages Class: did the defendants' price-fixing agreement cause an artificial increase in the market price of vitamin C? The answer to this **[*111]** question will be generally applicable **[**58]** to all members of the Injunction Class.

C. Typicality

Animal Science is a manufacturer and distributor of animal feed additives and has purchased vitamin C manufactured by defendants for use in these products. Defendants do not dispute that Animal Science's claims and the class claims "arise from the same course of events" and rely on the same "legal arguments to prove the defendant's liability." *Robidoux, 987 F.2d at 936*. Defendants nevertheless argue that Animal Science is not a typical member of the Injunction Class, as it spent only $127,388.11 on vitamin C during the year 2005. Defendants explain that Animal Science's vitamin C expenditures represented a small percentage of Animal Science's total purchases for that year and thus characterize Animal Science's stake in this litigation as "de minimis."

In a price-fixing case such as this, the fact that a putative class representative purchased "only a small portion of the products whose prices were anti-competitively established" does not itself destroy typicality. *In re Playmobil, 35 F. Supp. 2d at 243*. ***HN21***[] A putative class representative need not be a heavy-weight in its industry to satisfy the typicality prong; the relevant inquiry is **[**59]** simply whether absent class members' interests are advanced by the prosecution of the representative's claim. Defendants have presented no evidence by which this Court could compare Animal Science's vitamin C expenditure with the expenditures of absent class members; there is thus no reason to accept defendants' "de minimis" characterization. Moreover, even if this expenditure is modest in comparison to the regular buying practices of absent class members, this fact does not subject Animal Science to any unique defenses or otherwise differentiate Animal Science's claim in any meaningful way. Typicality is therefore satisfied.

D. Adequacy

As discussed above, class counsel are seasoned class action litigators. Furthermore, defendants do not challenge Animal Science's assertion that it is a vigorous and well-informed class representative. Instead, defendants argue that Animal Science is inadequate to represent the Injunction Class because it is not a member of the class; suffers from various conflicts of interest; and has already demonstrated a willingness to sacrifice important class interests. I will address these arguments in turn.

1. Animal Science's Class Membership

Defendants argue **[**60]** that Animal Science is not a "proper class member of an injunctive class" because Animal Science has not satisfied the four-factor test that a plaintiff must satisfy in order to qualify for permanent injunctive relief. According to the Supreme Court, ***HN22***[] a plaintiff seeking a permanent injunction must ordinarily demonstrate that: 1.) the plaintiff has suffered an "irreparable injury"; 2.) remedies available at law are inadequate to compensate for that injury; 3.) an equitable remedy is warranted after consideration of the balance of hardships; and 4.) the public interest would not be disserved by a permanent injunction. *EBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)*. Defendants home in on the first factor of this test, arguing that Animal Science has suffered no "irreparable injury" because it has managed to pass any overcharge on to its customers and ultimately realize a profit on each of its vitamin C transactions.

This argument is flawed in three fundamental ways. First, defendants have lifted the standard for granting a permanent injunction and grafted it onto Rule 23's standard for class certification. This is clearly improper, and defendants have not pointed **[**61]** me to any case that holds a plaintiff to this standard at the class certification stage. Defendants' citation to *Hnot v. Willis Group Holdings Limited, 241 F.R.D. 204, 212 (S.D.N.Y. 2007)*, does not support their argument; the *Hnot* court simply held that a *Rule 23(b)(2)* analysis requires a court to determine whether an injunction will be appropriate if plaintiffs succeed on the merits. This determination is different from the four-factor test cited by defendants, which is essentially **[*112]** a merits determination that does not overlap with any Rule 23 considerations.

Second, Animal Science need not show that it has suffered "irreparable injury" in order to enjoin an antitrust violation. Animal Science derives its standing to sue for injunctive relief from ***HN23***[] *section 16* of the Clayton Act, which provides that a plaintiff may sue to enjoin any "threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. The Supreme Court has accordingly held that a *section 16* plaintiff need not demonstrate actual loss; "he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; **[**62]** accord *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; *Kruman v. Christie's Int'l. PLC. 284 F.3d 384, 397 (2d Cir. 2002)* (abrogated on other grounds).

Finally, defendants misconstrue the term "injury" in the context of the Clayton Act. ***HN24***[] It is true that a plaintiff seeking injunctive relief for an alleged antitrust violation must demonstrate a threat of injury, see *Zenith, 395 U.S. at 130*, and defendants correctly note that this is a threshold requirement which is appropriately addressed at the class certification stage. See, e.g., *Sullivan v. DB Invs., Inc., No. 08-CV-2785, 667 F.3d 273, 2011 U.S. App. LEXIS 25185, 2011 WL 6367740, at *26 (3d Cir. Dec. 20, 2011)* (en banc). But this "injury" need not be demonstrable as an accrued — or even prospective — loss of profits. Instead, Animal Science must simply show a threat of injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Consol, Gold Fields PLC v. Minorco, SA, 871 F.2d 252, 257 (2d Cir. 1989)* (citing *Cargill, 479 U.S. at 111*).

Defendants insist that Animal Science has suffered no actual or prospective injury because Animal Science "makes money off each of its purchases **[**63]** and resales of vitamin C" and has continued to make rosy predictions about the company's future growth. In essence, defendants are again waging a pass-on defense: because Animal Science has passed on any overcharge that it suffered as a result of the defendants' conspiracy, Animal Science has suffered no net economic injury and has no right to enjoin the conspiracy.

This theory misconstrues the purpose of the Clayton Act and, if adopted, would foreclose an unacceptable number of antitrust suits seeking injunctive relief. ***HN25***[] The antitrust laws were enacted "for the protection of competition," *Cargill, 479 U.S. at 115*, and a lessening of competition is "precisely the kind of irreparable injury that injunctive relief under *section 16 of the Clayton Act* was intended to prevent." *California v. Am. Stores Co., 492 U.S. 1301, 1304, 110 S.Ct. 1, 106 L. Ed. 2d 616 (1989)* (internal quotation marks omitted). When a purchase is made "after a simulated competition, at a price fixed by [a] trust" in excess of the natural market price, the buyer has suffered an antitrust injury. *Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 395-96, 27 S. Ct. 65, 51 L. Ed. 241 (1906)*; accord *In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 13 (1st Cir. 2008)* **[**64]** ("There is no doubt that the types of injuries alleged here — consumers paying artificially inflated prices due to antitrust violations — are antitrust injuries.").

I therefore find that Animal Science's past and prospective purchases of vitamin C at artificially inflated prices constitutes antitrust injury regardless of whether Animal Science recoups this overcharge by passing it along to remote purchasers. This finding is consistent with ***HN26***[] the purpose of *section 16* of the Clayton Act, which is to provide courts a "flexible" mechanism with which to serve "the high purpose of enforcing the antitrust laws." *Zenith, 395 U.S. at 131*. Since courts need not precisely calculate the economic injury inflicted by an artificial price when granting injunctive relief, there is certainly no reason to do so at the class certification stage. The standard for demonstrating antitrust injury under *section 16* is accordingly less stringent than the standard for demonstrating antitrust injury in a suit seeking damages, see *In re New **[*113]** Motor Vehicles, 522 F.3d at 12-13*, and it is easily met here.

2. Conflicts of Interest

Defendants argue that class counsel has a debilitating conflict of interest caused by their **[**65]** dual representation of the Damages Class and the Injunction Class. This argument is not well-articulated, but defendants quote at length from a District of Maryland case which involved an antitrust class action that was similarly divided between a damages class and an injunction class. See *In re Microsoft Corp. Antitrust Litig., 214 F.R.D. 371 (D. Md. 2003)*. The Microsoft court held that a putative class representative could not adequately protect the interests of both an injunction class and a damages class because the interests of these two classes had the potential to collide. The court explained that the members of the damages class were likely to be interested in a monetary settlement, whereas the members of the injunction class may be compelled to settle for nothing short of a complete injunction on all disputed behavior. This contradiction, the court explained, could force the class representative to choose between rejecting a settlement that would be in the interest of the damages class or "appearing to use the leverage provided by the nationwide injunctive class to achieve a monetary settlement that leaves some members of the injunctive class disgruntled." *Id. at 379*.

I disagree **[**66]** with the *Microsoft* court's holding for two reasons. First, by characterizing this problem as "at least an apparent conflict of interest," the Microsoft court implicitly acknowledged that the conflict presented was speculative rather than concrete. Defendants correspondingly insist that "potential conflicts" destroy adequacy in a Rule 23 analysis. This is incorrect; a conflict of interest will not destroy adequacy if it is "merely speculative or hypothetical." Moore et al., supra, § 23.25[2][b][ii]; accord *Hnot v. Willis Grp. Holdings Ltd., 228 F.R.D. 476, 486 (S.D.N.Y. 2005)* ("A potential for conflict need not defeat class certification."). In fact, ***HN27***[] the Second Circuit recently held that a conflict posed by dual representation did not justify refusing to certify a class because the conflict was "potential," rather than actual, and because the district court could revisit the issue and de-certify the class if a true conflict ever manifested. *Seijas v. Republic of Argentina, 606 F.3d 53, 57 (2d Cir. 2010)*; accord *Ingles v. City of New York, No. 01-CV-8279, 2003 U.S. Dist. LEXIS 2453, 2003 WL 402565, at *6 (S.D.N.Y. Feb. 20, 2003)* (Chin, J.) ("to the extent any conflicts do arise, I can adjust the definition of the **[**67]** class at that time").

Under my continuing obligation to amend class certification as necessary to ensure that Rule 23's requirements remain satisfied, see *Fed. R Civ. P. 23(c)(1)(C)*, I can revisit this conflict if it ripens.

Second, a conflict of interest will not defeat class certification unless it is "fundamental." *In re Flag, 574 F.3d at 35*. In other words, a conflict undermines adequacy only if it presents antagonistic interests which "go to the heart of the litigation, relating to the subject matter of the suit." Rubenstein et al, supra, § 18:14; accord *Dziennik v. Sealift, Inc., No. 05-CV-4659, 2007 U.S. Dist. LEXIS 38701, 2007 WL 1580080, at *8 (E.D.N.Y. May 29, 2007)*. The conflict presented here is merely the prospect that class counsel will use manipulative litigation tactics to leverage one class for the benefit of another. This does not touch upon the subject matter of the litigation and is not particular to the facts before me; it is an accusation that could be waged in any case of dual representation. Even if this conflict ripens, therefore, it is unlikely to create a "fundamental" conflict capable of destroying class certification.

Defendants also assert that there is a conflict of interest between **[**68]** two categories of Injunction Class members. Specifically, defendants argue that "direct purchasers are seeking the full amount of any overcharge while indirect purchasers will likely argue that any damages have been passed on to them." This argument is illogical. First, direct purchasers are not seeking to be compensated for an overcharge through the Injunction Class; they are seeking an injunction. Second, to the extent defendants are arguing that there is a conflict of interest between the indirect purchasers of the Injunction Class and the direct purchasers of the Damages Class, this conflict is foreclosed **[*114]** by *Hanover Shoe*. Since downstream sales are irrelevant to a damages action under *Hanover Shoe,* the Damages Class will take no position on whether the overcharge was ultimately passed on to indirect purchasers. The Injunction Class is thus free to litigate this issue without encountering any disagreement between the direct and indirect purchasers.

3. Willingness to Sacrifice Class Interests

Defendants argue that Animal Science and class counsel have structured this lawsuit in a way that splits certain class members' claims. Although all direct purchasers of vitamin C are members **[**69]** of both the Injunction Class and the Damages Class, neither class seeks damages on behalf of indirect purchasers. Since the Injunction Class seeks injunctive relief on behalf of indirect purchasers but fails to pursue damages — to which indirect purchasers may be entitled under state law — defendants argue that the Injunction Class has split the indirect purchasers' claims. The crux of this argument is that principles of res judicata will bar the indirect purchasers from bringing these claims in the future. By forfeiting the indirect purchasers' damages claims, defendants argue, Animal Science and class counsel have exhibited their disregard for the indirect purchasers' interests and have demonstrated their inadequacy to represent the indirect purchasers.

Defendants' basic understanding of claim splitting is correct: ***HN28***[] a final judgment on the merits generally precludes a plaintiff from bringing a new lawsuit raising issues that could have been litigated in the first suit, but were not. See, e.g., *Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1076 (E.D.N.Y. 2006)* (reversed on other grounds) (citing *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981))*. **[**70]** Furthermore, some courts have held that a class representative who splits the claims of absent class members — thereby exposing their non-litigated claims to foreclosure through claim preclusion — is inadequate to represent the class. See, e.g., *Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606 (S.D.N.Y. 1982)*; *In re Universal Serv. Fund Tel. Billing Practices Litig., 219 F.R.D. 661, 668 (D.Kan. 2004)*.

Contrary to defendants' assertion, however, participation in a *Rule 23(b)(2)* class seeking injunctive relief does not ordinarily preclude absent class members from bringing their non-litigated claims in subsequent lawsuits. This exception to the general claim-splitting rule has its origin in a puzzling Supreme Court decision from 1984. In *Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 880, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984)*, the Court held that a plaintiff's claim for individual discrimination under *Title VII* was not precluded by the plaintiffs earlier participation in a class action alleging a "pattern and practice" of discrimination against the same defendant for the same underlying conduct. The *Cooper* Court recited the principle that a judgment in a class action would **[**71]** extinguish absent class members' claims "on any issue actually litigated and determined," *id. at 874*, but did not directly address the claim-splitting rule. In fact, the Court's analysis revolved entirely around Title VII principles and never acknowledged that the ordinary rule against claim-splitting would have mandated a different result. See Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, *105 Colum. L. Rev. 717, 730 (2005)* ("The [Cooper] Court confronted a limited question . . . and it offered an answer informed primarily by Title VII policy, making no attempt to explain its result with reference to general preclusion principles.").

Although *Cooper* did not announce any bright-line rules, some courts have cited this case for the sweeping proposition that ***HN29***[] "a class action judgment . . . binds the class members as to matters actually litigated but does not resolve any claim based on individual circumstances that was not addressed in the class action." *Cameron v. Tomes, 990 F.2d 14, 17 (1st Cir. 1993)*. Moreover, "every federal court of appeals that has considered the question has held that a class action seeking *only declaratory or injunctive relief* does not bar subsequent **[**72]** individual suits for damages." *Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996)* (emphasis added); accord *Fortner v. Thomas, 983 F.2d 1024, 1031 (11th **[*115]** Cir. 1993)*; *Norris v. Slothouber, 718 F.2d 1116, 1117, 231 U.S. App. D.C. 78 (D.C. Cir. 1983)* (per curiam); *Crowder v. Lash 687 F.2d 996,1009 (7th Cir 1982)*. Although some of these courts have appeared to limit their holdings to particular contexts — such as prisoners' conditions of confinement, see, e.g., *Crowder, 687 F.2d at 1009 —* the Ninth Circuit has gone so far as to hold that it would offend due process to preclude any suit for damages as a result of prior membership in a *Rule 23(b)(2)* class seeking only injunctive relief. See *Frank v. United Airlines, Inc., 216 F.3d 845, 851 (9th Cir. 2000)*; *Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992)*.

Although the Second Circuit has not provided any guidance, I agree with the rationale of the other Circuits that have considered this issue and hold that ***HN30***[] membership in this *Rule 23(b)(2)* class does not bar the indirect purchasers' subsequent claims for damages. *Rule 23(b)(2)* does not provide an opportunity for class members to opt out and does not even oblige a district court to afford class members **[**73]** notice of the action; due process therefore requires that class certification under *Rule 23(b)(2)* be granted only if "broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury." *Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 162 (2d Cir. 2001)*. Damages claims usually require individualized analyses of class members' circumstances and thus tend to destroy class certification under *Rule 23(b)(2)*. See *id. at 165* (damages may not be recovered by a *Rule 23(b)(2)* class unless the damages calculation "flows directly from a finding of liability on the claims for class-wide injunctive and declaratory relief (internal quotation marks omitted)).

In the instant case, the indirect purchasers' damages claims vary between states and vary between class members based on the extent to which any overcharge was passed on through each class members' seller. See *In re Flash Memory Antitrust Litig., No. C 07-0086, 2010 U.S. Dist. LEXIS 59491, 2010 WL 2332081, at *10 (N.D.Cal. June 9, 2010)* ("Recovery in an Indirect-Purchaser case under state law requires a demonstration that a defendant overcharged its Direct-Purchasers for the product at issue, and that those Direct-Purchasers then passed **[**74]** on the overcharges to indirect purchasers."). Such individualized claims would defeat class certification under *Rule 23(b)(2)*, and the class members should therefore be permitted to bring these claims separately.[6]

Although I find that the indirect purchasers' damages claims should not be barred in subsequent suits, it is necessary to discuss the oft-cited notion that "the court conducting the action cannot predetermine the res judicata effect of the judgment." See 18A Charles Alan Wright et al., Federal Practice and Procedure § 4455 (2d ed. 2011). Reliance on this principle has caused at least one district court in this Circuit to refuse to certify a class which **[**75]** sought injunctive relief but excluded some class members' damages claims. See *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liability Litig., 209 F.R.D. 323 (S.D.N.Y. 2002)*. Although the In re MTBE court recognized that "courts generally allow plaintiffs in class actions to sue for injunctive relief on behalf of the class and then bring

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[6] I do not think that allowing class members to opt out of the Injunction Class would solve this problem. Like the Seventh Circuit, I find it "unacceptable" to require an indirect purchaser to "elect between joining an ongoing class suit and thereby forfeiting his right to seek individual damages, on the one hand, and removing himself from the class (and hence risking exclusion from any equitable relief granted) in order to preserve the possibility of bringing a subsequent damage action, on the other." *Crowder, 687 F.2d at 1009*.

damages claims in subsequent individual actions," the court nevertheless held that it had no way to "ensure" that the court considering such subsequent actions would reach the same result on the issue of claim preclusion. *Id. at 340*. The court therefore refused to certify the class and declined to make its own ruling regarding the preclusive effect of a suit seeking injunctive relief.

I disagree with the *In re MTBE* court's approach. The Restatement of Judgments lists several exceptions to the claim-splitting principle, one of which arises when "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action." *Restatement (Second) of Judgments § 26(1)(b)* **[*116]** (1982). Several Circuits have endorsed this exception. See *Mountain Pure, LLC v. Turner Holdings, LLC, 439 F.3d 920, 925 (8th Cir. 2006)*; *Vines v. Univ. of La. at Monroe, 398 F.3d 700, 712 (5th Cir. 2005)*; **[**76]** *Yapp v. Excel Corp., 186 F.3d 1222, 1234 (10th Cir. 1999)*; *Venuto v. Witco Corp., 117 F.3d 754, 758-59 (3rd Cir. 1997)*. Furthermore, the *In re MTBE* court's approach has been criticized as saying, in effect, "'I know that you have proposed a class action that may be properly maintainable, but I won't allow you to proceed because I must protect the absentees from the possibility that a subsequent court might misapply my judgment.'" *Wolff, supra, at 745*. This is an unacceptable result. I hereby expressly reserve the right of the indirect purchasers to maintain their damages claims in subsequent proceedings notwithstanding their participation in the Injunction Class. This, of course, is not a guarantee of what subsequent courts will actually do, but it is sufficient to extinguish defendants' claim-splitting concerns for the purpose of class certification. See Schwab, *449 F. Supp. 2d at 1077*.

Animal Science's brief in support of class certification persuasively demonstrates class counsel's belief that their method of structuring this litigation would not result in preclusion of the indirect purchasers' damages claims. The claim-splitting at issue here therefore does not raise any adequacy-related **[**77]** red flags on the part of Animal Science or class counsel. See *Wu v. Pearson Educ., Inc., No. 09-CV-6557, 277 F.R.D. 255, 2011 U.S. Dist. LEXIS 112308, 2011 WL 4526078, at *13, (S.D.N.Y. Sept. 30, 2011)* ("Claim-splitting is [an adequacy] concern only where the class representatives had left aside the far stronger claims for monetary damages and sought to have the weaker claims certified, for dubious strategic purposes." (internal quotation marks omitted)).

E. Ascertain ability

HN31[] Although *Rule 23(a)* contains no express requirement regarding ascertainability, courts within the Second Circuit have held that the rule impliedly prohibits certification of a class that is not identifiable by reference to objective criteria. See, e.g., *Friedman-Katz, 270 F.R.D. 150, 154 (S.D.N.Y. 2010)*. When a class definition includes a subjective criterion, such as state of mind, the class is not ascertainable and should not be certified. See *Spagnola v. Chubb Corp., 264 F.R.D. 76, 97 (S.D.N.Y. 2010)*. When the class definition consists entirely of objective criteria, a court need only determine whether it would be "administratively feasible" to determine whether or not any given entity belongs to the class. *Charron v. Pinnacle Grp. N.Y. LLC, 269 F.R.D. 221, 229 (S.D.N.Y. 2010)*.

Although **[**78]** a class is not ascertainable if determining class membership would "require a mini-hearing on the merits of each case," see id., a class is not rendered unascertainable merely because an analysis of data is necessary to determine class membership. See *Dunnigan v. Metro. Life Ins. Co., 214 F.R.D. 125 (S.D.N.Y. 2003)* ("[T]he class can be identified through an examination of the individual files of each of the participants. The fact that this manual process may be slow and burdensome cannot defeat the ascertainability requirement."); *In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583, 592 (N.D.Cal. 2010)*.

Defendants argue that the Injunction Class is unascertainable because it "contains indefinite multiple levels of indirect vitamin C purchasers, and appears on its face to reach many levels of the business, from direct purchasers to wholesalers, manufacturers, distributors, retailers and consumers." Defendants are correct that the class definition is broad and spans many levels along the distribution chain. However, the criteria used to define the class — whether an entity purchased vitamin C and whether that vitamin C was manufactured by a defendant in this action — are decidedly **[**79]** objective. The fact that these criteria may require an entity to trace the chain of sales via invoices or other company records does not render the class unascertainable, as this process seems administratively feasible. Moreover, ***HN32***[] the ascertainability requirement is less important in a *Rule 23(b)(2)* class, since a chief objective of this rule is to provide broad injunctive relief to "large and amorphous" classes not capable of certification under *Rule 23(b)(3)*. *Marisol A., 126 F.3d at 378*; accord *Rule 23(b)(2)* advisory committee's note (explaining **[*117]** that an "illustrative" example of a *Rule 23(b)(2)* class is a civil rights class "whose members are incapable of specific enumeration").

II. *Rule 23(b)(2)*

HN33[] Class certification pursuant to *Rule 23(b)(2)* is appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*. The justification for allowing certification of such claims is that "the relief sought must perforce affect the entire class at once." *Wal-Mart, 131 S. Ct. at 2558*. Differences between **[**80]** the extent of harm suffered by each class member do not make *Rule 23(b)(2)* certification inappropriate. See *Marisol A., 126 F.3d at 378*.

Defendants argue that certification pursuant to *Rule 23(b)(2)* is not appropriate because plaintiffs have not established that defendants' conduct had a "common impact" on all class members. Although defendants do not explain this argument clearly, it appears to be a reiteration of their "no irreparable injury" argument. Defendants assert that plaintiffs have failed to show that injunctive relief is appropriate with respect to the class as a whole because plaintiffs have not demonstrated that all class members suffered a net economic harm. I have already explained that this argument has no merit. Defendants' price-fixing conduct is alleged to have caused every class member to purchase vitamin C at an artificially increased price; this is a sufficient "common impact" to warrant certification under *Rule 23(b)(2)*.

Finally, defendants argue that certification under *Rule 23(b)(2)* is inappropriate because Animal Science's request for an injunction "does not . . . adequately delineate what behavior is lawful and what behavior is unlawful," and is therefore **[**81]** too vague. This argument has no place in a class certification analysis. Of course, the Court will fashion any ultimate injunctive relief in a way that provides reasonable notice to the defendants of what behavior is unlawful.

CONCLUSION

Ranis's [247] motion for certification of the Damages Class is granted. Defendants' [63] motion to dismiss Ranis's claim for damages or strike Ranis's class allegations is denied in its entirety. Animal Science's [242] motion for certification of the Injunction Class is granted. The Court hereby certifies the following classes:

> 1. All persons or entities, or assignees of such persons or entities, who directly purchased vitamin C for delivery in the United States, other than pursuant to a contract containing an arbitration clause, from any of Defendants or their co-conspirators, other than Northeast Pharmaceutical (Group) Co. Ltd., from December 1, 2001 to the present. Excluded from the proposed class are all governmental entities, Defendants, their co-conspirators, and their respective subsidiaries or affiliates.
>
> 2. All persons or entities, or assignees of such persons or entities, who purchased vitamin C manufactured by Defendants for delivery in the **[**82]** United States, other than pursuant to a contract with a Defendant containing an arbitration clause, requiring injunctive relief against Defendants to end Defendants' antitrust violations.

SO ORDERED.

/s/ BMC

U.S.D.J.

Dated: Brooklyn, New York

January 25, 2012

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Xilinx, Inc. v. Intellectual Ventures I LLC

United States District Court for the Northern District of California

January 25, 2012, Decided; January 25, 2012, Filed

No. C 11-0671 SI; No. C 11-4407 SI

Reporter
2012 U.S. Dist. LEXIS 9500 *; 2012 WL 243302

XILINX, INC., Plaintiff, v. INTELLECTUAL VENTURES I LLC, INTELLECTUAL VENTURES II LLC, Defendants. XILINX, INC., Plaintiff, v. INTELLECTUAL VENTURES, LLC, INTELLECTUAL VENTURES MANAGEMENT, LLC, et al., Defendants.

Subsequent History: Stay denied by *Xilinx, Inc. v. Invention Inv. Fund I Lp, 2012 U.S. Dist. LEXIS 170736 (N.D. Cal., Nov. 30, 2012)*

Prior History: *Xilinx, Inc. v. Invention Inv. Fund I LP, 2011 U.S. Dist. LEXIS 81986 (N.D. Cal., July 27, 2011)*

Core Terms

patents, declaratory judgment, licenses, infringement, negotiations, parties, amended complaint, non-infringement, portfolios, charts, motion to dismiss, products, alleges, asserts, competitors, invalidity, Declaration, processor, reasons, invest

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For Invention Investment Fund I LP, Invention Investment Fund II LLC, Defendants: Ameet A. Modi, Eugene Chiu, John M. Desmarais, Michael P. Stadnick, PRO HAC VICE, Desmarais LLP, New York, NY; Andrew Grant Hamill, Bradford John Black, Peter H. Chang, Black Chang & Hamill LLP, San Francisco, CA.

For Intellectual Ventures, LLC, Intellectual Ventures Management LLC, Intellectual Ventures I LLC, Intellectual Ventures II LLC, Defendants: Ameet A. Modi, Eugene Chiu, John M. Desmarais, Michael P. Stadnick, PRO HAC VICE, Desmarais LLP, New York, NY; Andrew Grant Hamill, Bradford John Black, Peter H. Chang, Peter H. Chang, Black Chang & Hamill LLP, San Francisco, CA.

For Xilinx, Inc. (3:11-cv-04407-SI), Plaintiff: Behrooz Shariati, LEAD ATTORNEY, Henry Leslie Welch, Laurie Michelle Charrington, Jones Day, Palo Alto, CA; Patrick Thomas Michael, Esq., Jones Day, San Francisco, CA.

For Intellectual Ventures Management, LLC, Intellectual **[*2]** Ventures, LLC, Latrosse Technologies, LLC, Roldan Block NY, LLC, Intellectual Ventures Funding, LLC, TR Technologies Foundation, LLC, Taichi Holdings, LLC, Noregin Assets N.V., LLC, Detelle Relay KG, LLC, Defendants: Ameet A. Modi, Eugene Chiu, John M. Desmarais, John C. Spaccarotella, Michael P. Stadnick, PRO HAC VICE, Desmarais LLP, New York, NY; Andrew Grant Hamill, Bradford John Black, Peter H. Chang, Black Chang & Hamill LLP, San Francisco, CA; Laurie Michelle Charrington, Jones Day, Palo Alto, CA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER DENYING MOTION TO DISMISS SECOND AMENDED COMPLAINT (11-0671); ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS FIRST AMENDED COMPLAINT (11-4407)

Currently before the Court in Case No. 11-0671 is the motion by defendants Intellectual Ventures I, LLC ("IV-I") and Intellectual Ventures II, LLC ("IV-II") to dismiss five claims from plaintiff Xilinx's Second Amended Complaint. Also before the Court in a related case is the motion by defendants Intellectual Ventures, LLC ("IV"), Intellectual Ventures Management, LLC ("IV Management"), and others to dismiss Xilinx's First Amended Complaint in Case No. 11-4407. Pursuant **[*3]** to *Civil Local Rule 7-1(b)*, the Court finds these matters appropriate for resolution without oral argument and hereby VACATES the January 27, 2012 hearing. Having considered the papers submitted, and for good cause shown, the Court DENIES the motion to dismiss in 11-0671 and GRANTS in part and DENIES in part the motion in 11-4407.

BACKGROUND

1. Factual background

These cases arise from a common set of facts and allegations. Plaintiff Xilinx is in the business of "designing, developing and marketing complete programmable logic solutions, including advanced integrated circuits, software design tools, predefined system functions delivered as intellectual property cores, design services, customer training, field engineering and customer support." Second Amended Complaint 11-0671 (SAC) [Docket No. 100], ¶ 2; First Amended Complaint 11-4407 (FAC), ¶ 13. The Intellectual Ventures defendants (*i.e.*, IV, IV-I, IV-II, and IV Management), are alleged to be patent holding and management companies which own and manage the rights to more than 30,000 patents and patent applications. SAC, ¶¶ 15-16. [1] Xilinx alleges that in 2005 and 2008 it became a limited partner in two funds — Intellectual Ventures **[*4]** Fund I and Intellectual Ventures Fund II — held and managed by some of the defendants. *Id.*, ¶ 20-21. Xilinx alleges that in summer 2010 the parties entered negotiations over whether Xilinx would make additional investments in IV Funds to take licenses to certain patent portfolios. *Id.*, ¶ 24. Plaintiff asserts that IV Management refused to consider granting Xilinx licenses to individual patents and Xilinx declined to pay for licenses to the portfolios. *Id.*, ¶ 24.

In late November 2010, Joseph Chernesky (a Vice-President and General Manager of IV and IV Management's Hardware Intellectual Property group) emailed Xilinx's General Counsel asking Xilinx to reconsider its decision not to **[*5]** elect into additional portfolios and suggested some urgency to renewing the parties' discussions in light of IV Management's intention to move forward "with our plans regarding the FPGA industry." Declaration of Justin Liu, Ex. 1. [2] In response, Xilinx's general counsel requested IV Management to send Xilinx a list of the portfolios that IV/IV Management believed Xilinx should reconsider. *Id.*, Ex. 2. Mr. Chernesky responded on December 7, 2010

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[1] The other defendants in Case No. 11-4407 are alleged assignees of patents in suit: Latrosse Technologies, LLC (patent '165), Roldan Block NY, LLC (patent '736), Intellectual Ventures Funding, LLC (patent '061), TR Technologies Foundation (patent '331), LLC, Taichi Holdings, LLC (patent '350), Noregin Assets N.V., LLC (patent '497), and Detelle Relay KG, LLC (patent '251). Plaintiff alleges that these entities are holding companies and that their activities are directed by IV and/or IV Management. FAC, ¶ 24.

[2] As the Court is faced with a motion challenging its jurisdiction, the Court is allowed to review material outside of the complaints at issue. *McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988)*. The Court recognizes that the parties have filed much of the information regarding their business negotiations under seal. However, the Court does not find that the parties have met the good cause standard required for continued sealing to the extent the Court relies on and cites that information in this publicly filed order.

with a list twelve "deals" (portfolios) containing sixteen "key" patents. *Id*., Ex. 4. That email was followed up the next day by Chernesky informing Xilinx's GC that IV/IV Management had "taken action to enforce our invention rights" by filing suits, including a suit against three of Xilinx's competitors in the FPGA market. *Id*., Ex. 5. Mr. Chernesky indicated that IV/IV Management took that action only after "business negotiations broke down" and to protect their obligations to investors, inventors and licensees. *Id*. The parties continued their discussions regarding the lawsuits and the relationship between Xilinx and IV, as well as the list of the sixteen patents from twelve patent portfolios and Xilinx's "election process going forward." *Id*., **[*6]** Ex. 7. As part of those negotiations, Xilinx requested that IV/IV Management provide exemplary patent information and claim charts mapping current and future Xilinx products against the sixteen patents being discussed. *See id.*, Ex. 8. In early January, IV/IV Management delivered claim charts for nine of the sixteen "key patents," representing 8 out of the 12 portfolios identified by IV. Lui Decl., ¶ 13.

As the parties' discussions continued, Xilinx asserts that IV Management representatives demanded that Xilinx take a license to all 12 of the patent portfolios (which contained the sixteen "key" patents among others), and set a deadline in late February for conclusion **[*7]** of the parties' negotiations. *Id*., ¶ 16. Xilinx alleges that IV Management demanded "tens of millions of dollars" for the licenses and an additional $10 million for future IV acquisitions. *Id*. Xilinx claims that it did not receive any additional claim charts mapping the remaining patents against Xilinx's products because Xilinx refused to sign a new non-disclosure and *FRE 408* agreement and IV Management would not produce the remaining charts without it. *Id*., ¶ 19. IV/IV Management's representative acknowledges that IV produced claim charts for only a subset of the patents at issue, but offers no explanation as to why. *See* Declaration of Joseph F. Chernesky [Doc. No. 78], ¶ 4. IV/IV Management's representative also asserts that at no point did IV refuse to allow Xilinx to invest into a "subset of the portfolios identified during the 'true-up' process," but does not dispute Xilinx's point that IV refused to allow Xilinx to take individual licenses to any of the "key" patents. *Id*.

The parties' negotiations broke down when Xilinx filed the 11-0671 suit on February 14, 2010 and the next day defendants filed an amended complaint in an action pending in Delaware action adding Xilinx as a defendant. **[*8]** Liu Decl., Ex. 16.

2. Procedural background

On December 8, 2010, some of the IV defendants in these actions filed suit against three of Xilinx's competitors in the District Court of Delaware (Delaware action). That action contends that Xilinx's competitors are infringing four of IV's patents, which patents are among the sixteen "key" patents identified by the IV defendants in the negotiations with Xilinx. Following the filing of the Delaware action and the breakdown of the parties' negotiations, Xilinx filed Case No. 11-0671 SI in this Court on February 14, 2011. That lawsuit originally named numerous defendants, including IV, IV Management, IV-I and IV-II. The suit sought a declaratory judgment of non-infringement and invalidity as to each of the sixteen patents identified by the IV defendants as "key." On February 15, 2011, the IV entities litigating the Delaware action filed an amended complaint adding Xilinx as a defendant. Subsequently, defendants moved to dismiss the complaint pending here (No. 11-0671 SI), or in the alternative, to transfer the claims regarding the four "overlapping" patents to the Court in Delaware. Plaintiff responded by moving the Court to enjoin defendants **[*9]** from prosecuting the claims against Xilinx in the Delaware action.

In ruling on the motions, this Court held that plaintiff's declaratory relief claims regarding the four patents at issue in the Delaware action should be transferred to the Delaware court. July 27, 2011 Order [Docket No. 86] at 6. This Court also dismissed Xilinx's claims with respect to seven patents (patents '251, '736, '165, '331, '350, '497, and '061) because those patents were not owned by or assigned to any parties to the suit. *Id.*, at 5. With respect to the remaining five patents (patents '527, '415, '865, '001 and '301), the Court granted defendants' motion to dismiss for failure to plead the invalidity assertions with specificity and failure to identify the products or conduct alleged not to infringe. *Id*., at 9-10. Plaintiff was given leave to amend. Finally, the Court dismissed defendants Invention Investment Fund I LLP, Invention Investment Fund II LLC, Intellectual Ventures LLC, and Intellectual Ventures Management LLC from the 11-0671 action, because they were not shown to have any ownership interest in the five remaining patents in suit. *Id*., at 10. Plaintiff filed its Amended Complaint against the two **[*10]** remaining defendants (IV-I and IV-II) on August 18, 2011, and by stipulation, filed the operative Second Amended Complaint on September 30, 2011.

On September 2, 2011, Xilinx filed Case No. C 11-4407, and filed a First Amended Complaint on October 17, 2011. In that case, Xilinx re-raises it claims for a declaratory judgment of invalidity against the seven patents dismissed from the 11-0671 action (patent nos. '251, '736, '165, '331, '350, '497, and '061), and adds as defendants the entities who are on record with the USPTO as being the assignees for each of those seven patents.

DISCUSSION

1. Motion to Dismiss SAC in 11-0671

Defendants IV-I and IV-II (collectively "IV" for purposes of this motion) move to dismiss claims five through ten of the SAC. Those claims involve three patents: the '865 patent, the '001 patent, and the '301 patent. IV argues that no real, immediate controversy exists between the parties regarding these patents sufficient to sustain declaratory judgment jurisdiction.

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested **[*11]** party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201(a)*. The dispute, however, must be "real and substantial" and "definite and concrete, touching the legal relations of parties having adverse legal interests[.]" *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*. A district court must ask "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id*. (citations omitted). To determine whether jurisdiction exists, the party invoking jurisdiction must point to "some affirmative act by the patentee" that forms the basis for an actual controversy between the parties. *Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1338-39 (Fed. Cir. 2008)*. The "affirmative act" necessary to sustain declaratory judgment jurisdiction can arise in "a variety of ways, for example, by creating a reasonable apprehension of an infringement suit . . . demanding the right to royalty payments, . . . or creating a barrier to the regulatory approval of a product that is necessary **[*12]** for marketing." *Id.,537 F.3d at 1339*; *but see* *Trend Micro Corp. v. WhiteCell Software, Inc., 2011 U.S. Dist. LEXIS 12248 (N.D. Cal. Feb. 8, 2011)* (finding lack of declaratory judgment jurisdiction where defendant patent holder "has not made any claim that [plaintiff] infringes" its patent, has not "threatened or otherwise communicated" with plaintiff regarding infringement of that patent, and has "not even performed an infringement analysis to determine whether any" of plaintiff's products may infringe the patent).

A. '865 and '001 Patents

Defendants argue that there is no definite and immediate controversy between the parties with respect to Xilinx's non-infringement claims under the '865 and '001 patents because IV Management did not accuse any specific Xilinx product of infringing these two patents and did not, as part of the parties' business negotiations in late 2010 and early 2011, provide claim charts for the '865 or '001 patents (while it did provide claim charts for other patents at issue). *See* Motion to Dismiss (MTD) SAC at 9-10.

The Court finds that, on the record before it, Xilinx has demonstrated a real and definite dispute between the parties sufficient to confer declaratory **[*13]** judgment jurisdiction over Xilinx's non-infringement claims as to the '865 and '001 patents. The Court notes that it was IV's representative who identified these two patents among the sixteen "key" patents IV believed should be "of interest" to Xilinx. *See, e.g.*, Liu Decl, Ex. 4. IV made this identification in the context of business negotiations and in an attempt to convince Xilinx that it should "true-up" and invest in the twelve portfolios containing the sixteen "key" patents. *Id*., Ex. 7. IV, however, refused to allow Xilinx to take licenses to any of the individual "key" patents, insisting that Xilinx instead "elect" into some or all of the twelve portfolios. While IV makes much of the fact that it did not threaten Xilinx with litigation, but instead was simply engaging in "business negotiations," the Court notes that IV identified the sixteen key patents for Xilinx shortly before filing suit against three of Xilinx's competitors in order to "enforce" IV's intellectual property rights but only "after our efforts to engage these companies in business discussions broke down." Liu Decl., Ex 5. This conduct all indicates that a real, immediate case or controversy exists. *See, e.g.,* ***[*14]*** *Hewlett-Packard Co. v. Acceleron LLC, 587 F.3d 1358, 1363 (Fed. Cir. 2009)* (finding correspondence exchanged between a patent holding company and a manufacturer, where correspondence referenced patent held by company as well as a product line of manufacturer's and imposed a deadline for a response, was sufficient to create declaratory judgment jurisdiction)

Though IV now attempts to argue that there is no "real" and "immediate" controversy over the '865 and '001 patents, based on the record before the Court it appears that those patents were a necessary part of IV's attempt to induce Xilinx to invest in broad portfolios of patents, by holding out Xilinx's alleged need to secure licenses to the sixteen "key" patents. Although IV did not provide Xilinx with claim charts for the '865 and '001 patents, that could be because either Xilinx refused to sign a new NDA/408 agreement (as Xilinx asserts, Liu Decl., ¶ 19) or because IV did not believe —despite its attempts to convince Xilinx otherwise — that Xilinx should be interested in the '865 and '001 patents in light of its current and future products. In support of its motion, IV's declarant explains that despite Xilinx's request for claim **[*15]** charts for each of the sixteen "key" patents, IV "prepared and delivered" to Xilinx charts for only a subset of the patents. IV does not explain why it did this, or attempt to rebut Xilinx's argument. *See, e.g.*, Chernesky Decl., ¶ 4. Similarly, while IV's declarant asserts that the true-up process did not involve allegations of "infringement" with respect to the '865 and '001 patents, IV does not introduce evidence that it backed away from its belief that the '865 and '001 patents were "key" and should be of interest to Xilinx given Xilinx's current or future products, or that IV stopped pushing Xilinx to invest in the specific portfolios containing these two "key" patents. *Id.*, ¶ 5. These factors, and IV's failure to adequately rebut plaintiff's evidence and arguments, also support a finding of a real, immediate case or controversy. *Cf. Microsoft Corp. v. Phoenix Solutions, Inc., 741 F. Supp. 2d 1156, 1162 (C.D. Cal. 2010)* (finding declaratory judgment jurisdiction where correspondence between parties identified fifteen patents and sought to negotiate licenses over fifteen patents, even though defendant subsequently provided claim charts for only nine patents). [3]

In sum, Xilinx has pointed to sufficient evidence to show that IV's own actions have created a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the exercise of declaratory judgment jurisdiction over Xilinx' invalidity claims with respect to the '865 and '001 patents.

B. '301 Patent

IV argues that there is no justiciable **[*17]** controversy as to non-infringement between the parties as to the '301 patent because Xilinx fails to identify a current or future product with "sufficient specificity" that contains or will contain an "ARM dual-core Cortex A9 MPC Core processor;" a component which allegedly infringes Claim 4 of the '301 patent. MTD SAC at 6-8. In opposition, Xilinx states that at "least one of its 28 nm programmable logic products, including a variation of the 7-Series FPGA does indeed contain an ARM core processor," as alleged in paragraph 95 of the SAC. Xilinx Oppo. to MTD SAC at 12. Xilinx also points out that in IV's own claim chart for the '301 patent, IV describes how the ARM Core processor is used with Xilinx's 28 nm programmable logic technology. Liu Decl., Ex. 11 at 1. Moreover, Xilinx provides evidence that devices incorporating the ARM Core processor have not only been announced to the public, but are also being fabricated and tested and the first devices scheduled for

[3] The Court has reviewed **[*16]** the case cited in defendants' statement of recent decision, *Streck, Inc. v. Research & Diagnostic Sys., 665 F.3d 1269, 2012 U.S. App. LEXIS 458 (Fed. Cir. Jan. 10, 2012)*, but finds that case inapposite. In *Streck*, the issue before the Court was whether the district court had declaratory relief jurisdiction over defendants' cross-claims for invalidity with respect to *all* claims for *all* of the patents in dispute, where the plaintiff was asserting only some claims against defendants' products. The Federal Circuit affirmed the district court's holding that jurisdiction existed against only the asserted claims, and reiterated that the standard for declaratory relief jurisdiction, under *MedImmune*, is that a party seeking declaratory judgment has the burden of establishing jurisdiction under the totality of circumstances test.

production in early 2012. Lui Decl., ¶ 26. The Court finds that Xilinx has made an adequate showing that is has potentially infringing products far enough along in not only the development process but the production process **[*18]** to create a real, concrete and immediate exposure to infringement liability. *Cf.* *Sierra Applied Scis., Inc. v. Advanced Energy Indus., 363 F.3d 1361, 1379 (Fed. Cir. 2004)* (party asserting declaratory judgment jurisdiction needs to show that "design of the potentially infringing subject of the declaratory-judgment suit [is] substantially fixed" to support jurisdiction); *see also* *Int'l Harvester Co. v. Deere & Co., 623 F.2d 1207, 1216 (7th Cir. 1980)* (dismissing for lack of case or controversy where "because of the relatively early stage of its development, the design which is before us now may not be the design which is ultimately produced and marketed.").

C. Declaratory Judgment for Invalidity Claims

IV argues that because the Court does not have declaratory judgment jurisdiction over Xilinx's non-infringement claims with respect to the '865, '001 and '301 patents, the Court likewise does not have jurisdiction over Xilinx's claims as to invalidity in Claims Six, Eight and Ten of the SAC. However, because the Court has found sufficient jurisdiction over the non-infringement claims, it has jurisdiction over the invalidity claims asserted in Claims Six, Eight and Ten.

D. Scope of Declaratory [*19] Relief

Finally, defendants ask the Court to dismiss Xilinx's declaratory relief claims to the extent Xilinx seeks declaratory relief of non-infringement for "all" Xilinx products. IV argues that, despite Xilinx's identification of specific products or product families to support each of its non-infringement allegations in the SAC, the non-infringement claims are still impermissibly broad and indefinite. The Court rejects this argument and finds that Xilinx has adequately responded to the concerns expressed in the Court's July 27, 2011 Order and identified specific products and product families that it claims are non-infringing. In the July 2011 Order, the Court noted that Xilinx's total failure to identify any product or product line with specificity did "not allow defendants to assess the true nature of any potential counterclaims that they have, nor can they mount a meaningful defense in the face of such bare allegations." Order at 10. Here, however, Xilinx has identified a specific product or product family which it asserts do not infringe with respect to each of the patents at issue. *See* SAC at ¶¶ 35, 50, 65, 80, 95 & pgs. 15-16. That is sufficient at this stage to allow IV to mount **[*20]** its defense.

For the foregoing reasons, defendants' motion to dismiss the SAC is DENIED.

2. Motion to dismiss complaint in 11-4407

A. Non-infringement claims with respect to '061 patent

Defendants argue that declaratory judgment jurisdiction does not exist for the non-infringement claims as to the '061 patent for the same reasons argued above with respect to the '865 and '001 patents — i.e., that IV and IV Management did not accuse any specific Xilinx product of infringing the '061 patent and did not provide a '061 claim chart. *See* MTD FAC at 12-13. However, as above, the Court finds that given the context of the parties' licensing negotiations, Xilinx has presented sufficient evidence to show that IV and IV Management's actions have created a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the exercise of declaratory judgment jurisdiction over Xilinx' invalidity claims with respect to the '061 patent.

B. Non-infringement claims with respect to '251 and '331 patents

Defendants argue that declaratory judgment jurisdiction does not exist over the non-infringement claims as to the '251 and '331 patents for the same reasons **[*21]** argued above with respect to the '301 patent. *See* MTD FAC at

9-10. However, as above, the Court finds that Xilinx has made an adequate showing that is has potentially infringing products — incorporating the ARM Core processor — far enough along in the development and production process to create a real, concrete and immediate exposure to infringement liability. [4]

C. UCL claim

Defendants also move to dismiss pursuant to *Rule 12(b)(6)* Xilinx's claim under California's Unfair Competition Law (UCL), *Business and Professions Code section 17200*. To survive a *Rule 12(b)(6)* motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." **[*22]** *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 544, 555*

In the FAC, Xilinx alleges that order to convince Xilinx to make future investments in IV Funds, defendants IV and IV Management made various misrepresentations — in particular that IV or IV Management owned, had the right to license and the right to enforce the patents at issue in the parties' discussions. FAC, ¶ 146. Xilinx asserts that it was harmed by this conduct because it was forced to "expend time and resources litigating" the jurisdictional issue of who could enforce the patents in the first case (No. 11-0671) on the prior round of motions to dismiss. *Id*., ¶ 154. Xilinx also asserts that had it known that IV or IV Management "had no rights to enforce" the patents at issue in this case, Xilinx would not have "expended the **[*23]** time and resources to investigate the claims or to negotiate for a possible license." *Id*., ¶ 155. Xilinx alleges IV and IV Management's conduct was "unfair" under the UCL. *Id*., ¶ 160.

Conduct is "unfair" under the UCL when either it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law," *see* *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)* (applying heightened standard to "competitor claims"); or when the practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," *see, e.g.,* *Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal. App. 4th 700, 719, 113 Cal. Rptr. 2d 399 (Cal. App. 2001)* (quotation omitted); *see also* *Distor v. US Bank NA, 2009 U.S. Dist. LEXIS 98361, 22-23 (N.D. Cal. Oct. 22, 2009)* (under this test, the court weighs the utility of the defendant's conduct against the gravity of the harm to the alleged victim). The Ninth Circuit has recognized that California courts have not settled on which test — the heightened *Cel-Tech* **[*24]** test or the more lenient balancing test — applies to claims that the arise in the consumer context and not the competitor-to-competitor context. *See* *Lozano v. AT&T Wireless Servs., 504 F.3d 718, 736 (9th Cir. 2007)*. This Court need not decide which standard applies in this case (*i.e.*, whether Xilinx and IV Management are competitors when IV Management is simply a holding company and produces no products) because Xilinx has failed to allege a UCL claim even under the more lenient standard.

There are two significant problems with Xilinx's UCL claim. First, Xilinx fails to acknowledge that even if a party does not own a patent or is not an assignee with standing to sue on that patent, it can still be a party authorized to engage in licensing discussions. *See, e.g.,* *Propat Int'l Corp. v. RPost US, Inc., 473 F.3d 1187, 1192 (Fed. Cir. 2007)* (recognizing that patent owners may give third parties the right to license, select targets of suit and other "power of attorney" powers, without conferring on third parties the right to sue and enforce the patent). Xilinx acknowledges that IV and IV Management are patent holding companies and Xilinx has not alleged any conduct that reasonably exceeds **[*25]** the power of someone authorized to engage in patent licensing discussions on behalf of the patents' owners. In other words, even if IV and/or IV Management did not own or were not the

[4] IV again argues that declaratory judgment jurisdiction for invalidity claims is lacking because there is no jurisdiction over the non-infringement claims. As above, that argument is rejected. IV also re-raises its argument that Xilinx's non-infringement claims are impermissibly broad in seeking a judgment that "all" Xilinx products do not infringe. As above, the Court rejects that argument and finds that Xilinx's FAC adequately specifies the products and families of products, so that IV can defend this case.

assignee for the patents under discussion, assuming IV is authorized to license the patents at issue the conduct alleged cannot be considered "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."

As a second matter, Xilinx has failed to allege sufficient facts to support its allegation of injury from IV and IV Management's misrepresentations. Under the UCL, only someone who has suffered an "economic injury arising from reliance" on a party's misrepresentations has standing to sue. *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 327, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*. Xilinx's first allegation of injury — that Xilinx was forced to expend time and resources litigating jurisdictional issues in No. 11-0671 — is insufficient as a matter of law. Litigation costs cannot form the basis of "harm" under the UCL to confer standing. *See* *Buckland v. Threshold Enterprises, Ltd., 155 Cal. App. 4th 798, 816, 66 Cal. Rptr. 3d 543 (Cal. App. 2007)*, overruled on other grounds by *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877*. [5]

Xilinx's second alleged harm is also insufficient. Xilinx alleges simply that if it had been informed that IV and IV Management did not have "rights to enforce" the patents at issue in this case, it would not have expended time and resources to investigate the claims or negotiate licenses. Xilinx, however, ignores the licensing issue. There are no facts alleged to support the assertion that Xilinx would not have engaged in these same investigations and negotiations if — as defendants contend — IV and IV Management were authorized to engage in licensing **[*27]** discussions for the patents.

For the foregoing reasons, plaintiff's UCL claim must be dismissed. The Court has significant doubts as to whether Xilinx will be able to amend to cure these deficiencies, but will give plaintiff leave to amend.

D. Discretion to decline declaratory judgment jurisdiction

In its Reply, for the first time, defendants request that if the Court finds that an actual case or controversy exists, it should nonetheless exercise its discretion and decline declaratory judgment jurisdiction. *See* *EMC Corp. v. Norand Corp., 89 F.3d 807, 810 (Fed. Cir. 1996)* (even if "there is an actual controversy, the district court is not required to exercise declaratory judgment jurisdiction, but has discretion to decline that jurisdiction."). To support their request, defendants argue that any conduct that led to the existence of declaratory judgment jurisdiction was the result of Xilinx asking IV and/or IV Management for a list of patents it should "consider" and the exchange of claim charts requested by Xilinx. This argument, however, overlooks the fact that IV and IV Management started these business negotiations by approaching Xilinx, proposing that there were a number of portfolios **[*28]** that Xilinx should reconsider investing in, and suggesting an "urgency" requiring discussions within the next "few weeks" because IV intended to move forward with "its plans regarding the FPGA industry." Liu Decl., Ex. 1. The IV entities then sued three of Xilinx's competitors in the FPGA industry two weeks later. *Id.*, Ex. 5. The Court concludes that the IV defendants created the circumstances supporting declaratory judgment jurisdiction.

Defendants also argue that the "real" dispute between the parties is in the Delaware action (against Xilinx and its three competitors) and that Xilinx filed in this Court simply to gain a foothold here. Defendants also assert that because Xilinx argued that the *Delaware* action should be stayed pending the USPTO's examination of patents at issue in that case *and* because Xilinx or its counsel have likewise initiated reexamination proceedings on at least six of the seven patents in suit in this case, equity does not counsel proceeding with this case. However, no motion to stay in light of any actions by the USPTO has been made to this Court. If one is made, the Court will consider it. At

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[5] Also, **[*26]** as IV points out, in Xilinx's original complaint in the 11-0671 action, Xilinx itself alleged that IV Management had not shown it had the right to "bring an action" to enforce any of the patents at issue in this case. *See, e.g.*, 11-0671 Docket No. 1, ¶ 38 ('251 patent). It is hard to see how Xilinx was misled by these representations when it apparently knew that IV and/or IV Management were not assignees at least by the time Xilinx filed suit in February 2011. Moreover, the current assignee of a patent can be readily discerned from the United State Patent and Trade Office website. *See* <*http://assignments.uspto.gov/assignments/?db=pat>*.

this juncture, the Court believes this action should proceed and **[*29]** will not exercise its discretion to decline jurisdiction.

CONCLUSION

For the foregoing reasons, the Court DENIES defendants' motion to dismiss the Second Amended Complaint in 11-0671. The Court GRANTS defendants' motions to dismiss the UCL claim in the First Amended Complaint in 11-4407, and DENIES the remainder of the motion. If plaintiff wishes to file an amended complaint addressing the deficiencies in its UCL claim it must do so on or before **February 6, 2012.**

IT IS SO ORDERED.

Dated: January 25, 2012

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

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McCoy v. Gamesa Tech. Corp.

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

January 26, 2012, Decided; January 26, 2012, Filed

11 C 592

Reporter
2012 U.S. Dist. LEXIS 9431 *; 2012 WL 245166

AARON MCCOY, Plaintiff, vs. GAMESA TECHNOLOGY CORPORATION, INC., GAMESA WIND US, LLC, IBERDROLA RENEWABLES, INC., STREATOR-CAYUGA RIDGE WIND POWER, LLC, Defendants. IBERDROLA RENEWABLES, INC., and GAMESA TECHNOLOGY CORPORATION, INC., Third-Party Plaintiffs, vs. OUTLAND RENEWABLE ENERGY, LLC, OUTLAND RENEWABLE ENERGY FIELD SERVICES, LLC and OUTLAND ENERGY SERVICES, LLC, Third-Party Defendants.

Subsequent History: Injunction denied by *McCoy v. Gamesa Tech. Corp., 2012 U.S. Dist. LEXIS 38745 (N.D. Ill., Mar. 22, 2012)*

Prior History: *McCoy v. Gamesa Tech. Corp., 2012 U.S. Dist. LEXIS 9278 (N.D. Ill., Jan. 26, 2012)*

Core Terms

alleges, wind, turbine, counterclaim, conspiracy, Energy, farms, antitrust, lock, tortious interference, competitor, induced, Counts, business relationship, conspiring, motion to dismiss, subcontract, injuries, modified, alleged conspiracy, injunction, purchasers

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For Streator-Cayuga RIdge Wind Power LLC, also known as Strator-Cayuga Ridge Wind Power LLC, Cross Defendant: Kurt Edward Olsen, LEAD ATTORNEY, Law Offices of Kurt E. Olsen, Chicago, IL.

For Iberdrola Renewables, Inc., an Oregon Corporation, ThirdParty Plaintiff, Cross Claimant, Counter Defendant: Kurt Edward Olsen, LEAD ATTORNEY, Law Offices of Kurt E. Olsen, Chicago, IL.

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Judges: Charles P. Kocoras, United States District Judge.

Opinion by: Charles P. Kocoras

Opinion

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on Counter-Defendant Iberdrola Renewables, Inc.'s ("Iberdrola") motion to dismiss Counter-Plaintiff Outland Renewable Energy, LLC, Outland Renewable Energy Field Services, LLC, and Outland Energy Services, LLC's (collectively, "Outland") counterclaim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons set forth below, Iberdrola's motion is granted.

BACKGROUND[1]

This lawsuit arises out of personal injuries that Aaron McCoy ("McCoy"), an Outland employee, suffered while performing maintenance services on a wind turbine manufactured by Gamesa Wind U.S., LLC ("Gamesa"). The

[1] For the purposes of a motion to dismiss, the Court accepts all well-pleaded allegations in the complaint as true. *Justice v. Town of Cicero, 577 F.3d 768, 771 (7th Cir. 2009)*.

wind turbine was located at the Cayuga Ridge wind farm ("Cayuga Ridge"), a wind farm operated by Iberdrola. Though the case was born as a personal injury suit, **[*5]** it has expanded into a web of counterclaims, crossclaims, and counter-crossclaims that are, at best, only tangentially related to McCoy's injuries. Outland's present counterclaim, for example, includes allegations of antitrust violations and tortious interference with business relationships that have no bearing on McCoy's negligence suit.

The Gamesa-Outland Relationship

Gamesa manufactures and sells wind turbines to various wind farms. At its peak, Gamesa controlled more than 10% of the U.S. market for wind turbine sales. As part of the sale of its turbines, Gamesa requires that purchasers contract with Gamesa for operation, maintenance, and repair services ("O&M Services") for the wind turbines for a specified period of time. As Gamesa does not have an internal O&M Services division, it subcontracts its O&M Services to other companies such as Outland.

Between August 2006 and October 2008, Gamesa subcontracted its O&M services to Outland through purchase orders, which would encompass work for a specific task or set of tasks. By 2010, Outland generated approximately $6.1 million in revenue through Gamesa purchase orders.

To ensure longer-term commitments, Gamesa and Outland entered into **[*6]** a Framework Services Agreement (the "FSA") on October 3, 2008. Under the FSA, Gamesa would subcontract its O&M Services to Outland at certain Iberdrola-operated wind farms for a longer period of time. On November 19, 2009 Outland and Gamesa entered into a new agreement, the Maintenance Services Agreement (the "MSA"). Purchase orders executed under the MSA placed additional Iberdrola wind farms, including Cayuga Ridge, under a long-term agreement. The MSA further required Outland to train its employees on health and safety standards and to comply with any of Iberdrola's site-specific rules and safety procedures.

The Gamesa-Iberdrola Relationship

Prior to this action, Iberdrola had been purchasing wind turbines from Gamesa for use on its wind farms. In 2009, Gamesa and Iberdrola entered into a strategic agreement to jointly develop and operate wind farms. Outland alleges that as of 2009 Iberdrola owned approximately 25% of Gamesa and currently owns approximately 14% of Gamesa.

The Safety Protocols and McCoy's Injury

Outland technicians use a "lock-out, tag-out" ("LOTO") safety procedure when dealing with potentially hazardous electrical energy. Under the LOTO procedure, the turbine is powered **[*7]** down and a technician locks the controls such that the turbine cannot be powered up while the lock is in place. Each individual technician maintains his own lock and controls the key to that lock, and no other individual can remove the lock and power up the turbine. The technician then applies a tag to the lock upon which he describes the nature of the maintenance he is performing to inform other technicians of the need for the lock. The tag states that it is only to be removed by the person who affixed it to the lock. Having applied the lock and tag, the technician may climb to the top of the turbine tower to safely perform maintenance services. The LOTO procedure complies with industry standards and federal regulations.

In September 2010, Iberdrola and Gamesa modified the standard LOTO procedure such that a technician would not retain his key after locking the power controls. Rather, the technician would leave the key near the lock while he scaled the tower to service the turbine. Upon completing his work, the technician would retreat to a "safe zone" away from hazardous electrical equipment and communicate via radio with an Iberdrola technician, who would unlock the power controls **[*8]** and power up the turbine. Upon ensuring that the turbine was functioning properly, the technician would climb down from the tower. This modified LOTO procedure increased efficiency, as a technician would not need to repeatedly climb up and down the tower and re-energize the turbine to perform multiple maintenance operations. Outland's off-site management was unaware of the use of the modified LOTO procedure.

On October 20, 2010, McCoy and several other Outland technicians were working uptower in different turbines at Cayuga Ridge. The technicians were using the modified LOTO procedure rather than the standard LOTO procedure. When one technician radioed an Iberdrola technician to re-energize a wind turbine, the Iberdrola technician mistakenly powered up the turbine that McCoy was servicing. This resulted in an electrical explosion that caused McCoy's injuries.

As a result of the accident, the United States Occupational Health and Safety Administration ("OSHA") conducted an investigation. On April 8, 2011 OSHA issued six citations to Outland concerning the modified LOTO procedure. Although neither Gamesa nor Iberdrola were cited, Outland alleges that OSHA informally warned Iberdrola that **[*9]** it would seek criminal penalties if another accident occurred at an Iberdrola site.

Gamesa's Attempted Takeover of Outland

In the summer of 2010, Gamesa shifted its business model. Rather than continuing to subcontract its O&M Services to other companies, Gamesa decided to develop an internal O&M Services division. However, Gamesa had assured Outland that the companies would not compete. Despite these assurances, Gamesa openly attempted to recruit Outland technicians. These attempts were ultimately unsuccessful, with only a few Outland technicians moving to Gamesa. Finally, in January 2011, the head of service at Gamesa expressed interest in formally acquiring Outland. Outland's President declined Gamesa's offer.

Gamesa then allegedly secretly attempted to put Outland out of business so that it could hire its employees at minimal cost while simultaneously eliminating Outland as a competitor. Throughout this time, Gamesa allegedly misrepresented to Outland that Outland would continue to receive Gamesa's purchase orders.

On February 17, 2011 Outland and Duke Energy, one of Iberdrola's competitors, entered into a letter of intent pursuant to which Duke Energy would purchase a 25% interest **[*10]** in Outland. Gamesa determined that this deal could potentially allow Outland to withstand Gamesa's destablization attempts. On February 26, 2011 Gamesa called Outland and stated that Iberdrola may refuse to allow Outland to perform O&M Services on its wind farms if the deal went through because Iberdrola and Duke Energy were competitors. However, on March 27, 2011 Outland contacted Iberdrola directly. Iberdrola informed Outland that it endorsed Outland's prospective agreement with Duke Energy and reassured Outland that the competition between Duke Energy and Iberdrola was not a concern.

As a result of this conversation, Gamesa allegedly escalated its approach. On April 14, 2011 Gamesa called Duke directly and stated that it opposed Duke Energy's agreement with Iberdrola. During this conversation, Gamesa attempted to induce Duke to abstain from purchasing an interest in Outland, but Duke Energy rejected Gamesa's interference. On May 11, 2011 Duke Energy and an unnamed institutional investor entered into an agreement with Outland for the sale of 100% of the interests in Outland.

The very next day, Gamesa sent a letter to Outland declaring Outland in default under the MSA for violation **[*11]** of the health and safety requirements of the agreement and cited to the OSHA violations issued to Outland. Gamesa also stated that Iberdrola demanded that Gamesa remove Outland from all of its wind farms. Shortly thereafter, Gamesa ceased subcontracting any new business to Outland. Within days thereafter, both Duke Energy and the unnamed institutional investor reduced the amount that they were willing to pay for Outland by approximately $15 million dollars. The acquisition ultimately failed.

In various letters between May and July 2011, Gamesa reiterated that Outland was in default under the MSA and the dormant FSA. On August 31, 2011 Gamesa's attorneys sent letters to Outland in which they disclosed that Gamesa had contacted various third parties in an attempt to interfere with Outland's ability to receive subcontracts with these third parties. Outland alleges that Gamesa acted in concert, combination, or conspiracy with Iberdrola throughout these events.

Procedural Posture

On December 7, 2010 McCoy filed a negligence action against Gamesa's parent corporation, Gamesa Technology Corporation, Inc., and Iberdrola in Illinois state court, which was removed to this Court on January 26, 2011. **[*12]** [2] Iberdrola filed a third-party complaint against Outland for contribution, upon which Outland mounted its offensive, which included a twenty-three count counterclaim against Gamesa and a nine count counterclaim against Iberdrola. Iberdrola now moves to dismiss Outland's counterclaim in its entirety.

LEGAL STANDARD

A *Rule 12(b)(6)* motion to dismiss is used to test the legal sufficiency of a complaint. To state a claim, the allegations in the complaint must set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. While detailed factual allegations are not required, a plaintiff must provide enough factual support to raise his right to relief above a speculative level. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice;" rather, a claim must provide sufficient factual matter "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* **[*13]** (citing *Twombly, 550 U.S. at 570*). In ruling on a motion to dismiss, a court accepts all well-pleaded facts and allegations as true and draws all reasonable inferences in the plaintiff's favor. *Justice v. Town of Cicero, 577 F.3d 768, 771 (7th Cir. 2009)*.

DISCUSSION

The nine counts of Outland's counterclaim fall into three broad categories: (1) claims for tortious interference with business relationships (Counts I-V), (2) antitrust claims (Counts VI, VII, and IX), and (3) a request for injunctive relief (Count VIII). Although the gravamen of Outland's claims involve Gamesa's behavior, Outland implicates Iberdrola in the majority of its claims by alleging that Gamesa and Iberdrola conspired to engage in the illicit conduct. Therefore, we first address Outland's conspiracy allegations.

I. Conspiracy

Outland's claims against Iberdrola are premised upon two conspiracy theories. First, Outland alleges that Gamesa and Iberdrola tortiously interfered with Outland's business relationships by conspiring to eliminate Outland as a competitor. Second, Outland alleges that Gamesa and Iberdrola violated several federal and state antitrust laws by both conspiring to eliminate Outland as a competitor **[*14]** and by conspiring to engage in an unlawful tying arrangement. We address each of these conspiracy theories in turn.

A. Conspiracy to Eliminate Outland

To establish a civil conspiracy under Illinois law, a plaintiff must show that each alleged conspirator "knowingly and voluntarily participated in a common scheme to commit an unlawful act or a lawful act in an unlawful manner." *McClure v. Owens Corning Fiberglas Corp., 188 Ill. 2d 102, 720 N.E.2d 242, 258, 241 Ill. Dec. 787 (Ill. 1999)*.

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[2] On August 30, 2011 McCoy filed an amended complaint naming Gamesa and Streator-Cayuga Ridge Wind Power, LLC as additional defendants.

Allegations that the parties entered into an agreement must include sufficient factual support to raise the right to relief above the speculative level. *Twombly, 550 U.S. at 555*.

Outland's counterclaim falls woefully short of implicating Iberdrola in a conspiracy, either directly or circumstantially. Outland premises its conspiracy allegations exclusively on two facts. First, Outland points to the financial ties between Gamesa and Iberdrola as an indication that Iberdrola would benefit if Gamesa's plan was successful. Second, Outland alleges that Iberdrola required or urged Gamesa to remove Outland from its wind farms. However, these allegations, even if true, do not allow for the reasonable inference that there was a broader agreement between **[*15]** Iberdrola and Gamesa to destroy Outland. Outland's counterclaim encompasses allegedly tortious conduct by Gamesa that spans nearly a year, but Outland has not alleged at what point Iberdrola agreed to participate in Gamesa's plan. Rather, Outland conclusorily alleges that Iberdrola acted "in concert, combination, or conspiracy" with Gamesa, and this naked assertion does not raise the possibility of a conspiracy above the speculative level. [3]

To the contrary, Outland's counterclaim demonstrates that Gamesa acted **[*16]** independently of Iberdrola. A court may dismiss a claim if the complaint includes facts that undermine the claim. *McMillian v. Litscher, 72 Fed. App'x 438, 441 (7th Cir. 2003)*; *Junction Solutions, LLC v. MBS Dev., Inc., No. 06 C 1632, 2007 U.S. Dist. LEXIS 86953, 2007 WL 4234091, at *5 (N.D. Ill. Nov. 20, 2007)* (citing *EEOC v. Concentra Health Servs., Inc., 496 F.3d 773, 776 (7th Cir. 2007))*. Outland's naked assertion of a conspiracy is belied by the allegations that Gamesa had its own agenda and was acting independently of Iberdrola. For example, Outland's allegation that Iberdrola "required or urged" Gamesa to remove Outland from its wind farms suggests that the companies were not involved in a common scheme. Additionally, when Iberdrola informed Outland that it endorsed the Duke Energy acquisition and that the agreement was "not a concern," Gamesa was forced to "escalate its approach" to destabilize Outland. This suggests that Iberdrola had actually subverted Gamesa's plan.

Ultimately, Outland details Gamesa's plan through twenty pages of allegations, after which it conclusorily alleges that Iberdrola acted "in concert, combination, or conspiracy" with Gamesa. This conclusory allegation is insufficient to survive **[*17]** a motion to dismiss. Accordingly, Counts III and IV, which exclusively implicate Iberdrola through allegations of a civil conspiracy to eliminate Outland as a competitor, are dismissed.

B. Antitrust Conspiracy

Counts VI, VII, and IX allege antitrust violations arising under two distinct theories. First, Outland alleges that Gamesa and Iberdrola violated the Sherman Act, *15 U.S.C. §§ 1-7*, and the Texas Free Enterprise and Antitrust Act, *Tex. Bus. & Com. Code § 15.50* (the "Texas Antitrust Act"), [4] by conspiring to eliminate Outland as a competitor in the market for O&M Services on Gamesa wind turbines. As discussed above, however, Outland has failed to sufficiently plead the existence of such a conspiracy. Second, Outland claims that Gamesa and Iberdrola violated the Clayton Act, *15 U.S.C. § 14*, the Minnesota Antitrust Act, *Minn. Stat. § 325D.52*, and the Texas Antitrust Act by conspiring to engage in an illegal tying arrangement of Gamesa O&M Services to Gamesa wind turbines. [5] A

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[3] Outland maintains that it need not provide greater factual support for its claims because a motion to dismiss must only be granted "if it is impossible for the plaintiff to prevail under any set of facts that could be proven consistent with the allegations." (Pl.'s Resp. at 2) (quoting *Jackson v. United States Steel Corp., No. 05-CV-486DRH, 2006 U.S. Dist. LEXIS 16233, 2006 WL 897903 at *2 (S.D. Ill. Apr. 3, 2006))*. Outland misstates the prevailing law. As discussed above, the current legal standard for testing the sufficiency of a complaint is set forth in *Twombly* and its progeny and requires that a complaint plead sufficient facts that raise the right to relief above the speculative level. *550 U.S. at 555*.

[4] Count **[*18]** IX alleges that Iberdrola violated *Section 15.50* of the Texas Antitrust Act. *Section 15.50* deals with covenants not to compete, and Outland has not pled any such cause of action in its complaint. Presumably, Outland intended to allege a violation of *Section 15.05*, which prohibits conspiracies in restrain of trade and mirrors the language of the Sherman Act.

tying arrangement is the practice of selling one product or service on the condition that the buyer also purchases a different product or service. *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

Outland alleges that Gamesa and Iberdrola conspired to engage in an unlawful tying arrangement by requiring purchasers of Gamesa's wind turbines to contract with Gamesa for O&M Services on those turbines. To succeed on an antitrust conspiracy claim, a plaintiff must establish that the alleged conspirators "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Omnicare, Inc. v. UnitedHealth Grp., Inc., 629 F.3d 697, 706 (7th Cir. 2011)* **[*19]** (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. However, Outland's allegations of a tying conspiracy are even more attenuated than those of its alleged conspiracy to eliminate Outland as a competitor. Outland exclusively relies on the financial ties between Gamesa and Iberdrola to support its allegation of a tying conspiracy. The fact that Iberdrola may profit from Gamesa's alleged tying scheme, without more, is insufficient to plausibly suggest that Iberdrola played any role in the design, development, or implementation of Gamesa's alleged tying scheme. Therefore, Outland has failed to sufficiently plead a tying conspiracy.

As Outland has failed to plead an antitrust conspiracy under either theory, Counts VI, VII, and IX are dismissed. We now turn our attention to Outland's remaining claims for tortious interference with existing and prospective business relationships (Counts I, II, and V) and Outland's request for injunctive relief (Count VIII).

II. Tortious Interference Claims

Counts I and II allege that Iberdrola interfered with Outland's existing and prospective business relationship with Gamesa. To state a claim for tortious interference with an existing **[*20]** contractual relationship, a plaintiff must allege: (1) the existence of a valid and enforceable contract, (2) the defendant's awareness of the contract, (3) the defendant's unjustified and intentional inducement of a breach of the contract, (4) a subsequent breach of the contract, and (5) damages. *Cody v. Harris, 409 F.3d 853, 859 (7th Cir. 2005)* (citing *Fellhauer v. City of Geneva, 142 Ill. 2d 495, 568 N.E.2d 870, 878, 154 Ill. Dec. 649 (Ill. 1991))*. The elements of a claim for tortious interference with a prospective economic relationship are similar: (1) plaintiff's reasonable expectation of entering into a valid business relationship, (2) defendant's knowledge of this expectation, (3) defendant's intentional interference that prevents plaintiff's reasonable expectation from materializing, and (4) damages. *Voelker v. Porsche Cars N. Am., Inc., 353 F.3d 516, 527-28 (7th Cir. 2003)* (citing *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 131 Ill. 2d 145, 545 N.E.2d 672, 676, 137 Ill. Dec. 19 (Ill. 1989))*.

The parties dispute whether Outland has sufficiently alleged that Iberdrola unjustifiably and intentionally induced Gamesa to breach the MSA and prevented Outland's prospective relationships from materializing. Under Illinois law, a defendant **[*21]** has induced a breach only if "the contract would otherwise have been performed," i.e., "that it was breached and abandoned by reason of the defendant's wrongful act and that such act was the moving cause thereof." *Farley v. Kissell Co., 18 Ill. App. 3d 139, 310 N.E.2d 385, 390 (Ill. App. Ct. 1974)* (internal quotation omitted); *see* *Morris v. Northstar Aerospace (Chi.) Inc., No. 11 C 210, 2011 U.S. Dist. LEXIS 150091, 2011 WL 6938455, at *4 (N.D. Ill. Dec. 29, 2011)* (dismissing a claim of tortious interference with a contract when it was not plausible that the alleged interference caused the breach). Similarly, for claims of tortious interference with a prospective business relationship, "the interference complained of must induce or cause a breach or termination of the relationship or expectancy." *Heying v. Simonaitis, 126 Ill. App. 3d 157, 466 N.E.2d 1137, 1141, 81 Ill. Dec. 335 (Ill. App. Ct. 1984)*.

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[5] Courts routinely evaluate antitrust claims under the Minnesota Antitrust Act of 1971 and the Texas Antitrust Act by applying federal ***antitrust law***. Therefore, Outland's state and federal antitrust claims rise and fall together. *See* *Howard v. Minn. Timberwolves Basketball Ltd. P'ship, 636 N.W.2d 551, 557 (Minn. Ct. App. 2001)*; *Marlin v. Robertson, 307 S.W.3d 418, 422 n.2 (Tex Ct. App. 2009)*.

The only factual support that Outland provides for its allegation that Iberdrola caused Gamesa to breach its existing and prospective agreements with Outland are statements made by Gamesa that Iberdrola did not want Outland personnel on its wind farms. The sole assertion that Iberdrola required or urged Gamesa to remove Outland from Iberdrola sites is directly contradicted by **[*22]** the first 122 allegations of Outland's counterclaim, in which Outland unambiguously alleges that Gamesa intended to breach the MSA independent of any alleged demands by Iberdrola. For example, Outland alleges that Gamesa "intended to . . . frivolously terminate the MSA" and that Gamesa designed and implemented a plan to "terminate the remaining contractual work represented by the MSA." Outland alleges an intricate scheme by Gamesa to eliminate Outland as a competitor that began nearly one year before Gamesa made any representation that Iberdrola would no longer accept Outland personnel on its wind farms. As Gamesa had been plotting to breach the MSA for a considerable time period, it is not plausible that Iberdrola induced Gamesa to breach the agreement. Outland's allegations that Iberdrola caused Gamesa to breach its agreements, when considered in light of Gamesa's scheme to destroy Outland, do little to plausibly suggest that Iberdrola caused Gamesa to breach the MSA. Therefore, Counts I and II are dismissed.

Count V alleges that Iberdrola intentionally interfered with "Outland's directives, training, and safety protocols by directing Outland's on-site technicians to use a [modified] **[*23]** LOTO procedure," thereby forcing Outland to breach the MSA. Tortious interference with a contractual relationship requires an allegation that a defendant (Iberdrola) induced a third party (Gamesa) to breach its contract with a plaintiff (Outland). *Skopp v. First Fed. Sav. of Wilmette, 189 Ill. App. 3d 440, 545 N.E.2d 356, 361, 136 Ill. Dec. 832 (Ill. App. Ct. 1989)*. Here, Outland alleges that Iberdrola induced Outland, not Gamesa, to breach the MSA. Outland cannot state a claim for tortious interference by alleging that Iberdrola induced Outland to breach its own agreement. Accordingly, Count V is dismissed.

III. Injunctive Relief

Count VIII alleges that Outland seeks an injunction to prevent Iberdrola from taking further action to interfere with Outland's ongoing and prospective business relationships and from making false or disparaging statements with respect to Outland. A request for an injunction is a remedy and not a cause of action. As the remainder of Outland's claim has been dismissed for failing to state a claim, Outland is not entitled to this relief, and Count VIII is dismissed.

IV. Dismissal Without Prejudice

Iberdrola requests that Outland's counterclaim be dismissed with prejudice. Outland has not previously requested **[*24]** leave to amend its counterclaim, and at this stage we cannot definitively conclude that Outland is unable to provide additional factual support of a conspiracy to implicate Iberdrola. Therefore, Outland's counterclaim is dismissed without prejudice. Should Outland request leave to file an amended counterclaim pursuant to *Federal Rule of Civil Procedure 15(a)*, the Court will evaluate Outland's request at that time.

The Court does, however, express serious concern over the tenuous relationship between Outland's counterclaim and McCoy's personal injury suit that spawned the present litigation. Outland contends that Iberdrola and Gamesa used McCoy's accident as a pretext for implementing their scheme to destroy Outland and evade responsibility for McCoy's injuries. The broad scheme alleged by Outland bears no relation to whether McCoy is entitled to compensation for his injuries, either from Gamesa, Iberdrola, or Outland. Moreover, Outland's counterclaim would unjustifiably prolong the adjudication of McCoy's right to recover for his injuries. We recognize that Outland, as a third-party defendant, is entitled to assert any counterclaims it may have against Iberdrola, the third-party plaintiff **[*25]** *See* *Fed. R. Civ. P. 14(a)(2)(B)*. However, a court may nevertheless sever any counterclaims that are "discrete and separate" from the original claims such that "one claim is capable of resolution despite the outcome of the other claim." *Gaffney v. Riverboat Servs. of Ind., Inc., 451 F.3d 424, 442 (7th Cir. 2006)* (citing *Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1016 (7th Cir. 2000))*; *Fed. R. Civ. P. 21*. Should Outland request leave to re-plead its counterclaim rather than file an independent suit against Iberdrola, the Court would consider the possibility of severance at that time.

CONCLUSION

In light of the foregoing, Iberdrola's motion to dismiss Outland's counterclaim in its entirety is granted.

/s/ Charles P. Kocoras

Charles P. Kocoras

United States District Judge

Dated: January 26, 2012

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Cellco P'ship v. Hope

United States District Court for the District of Arizona

January 30, 2012, Decided; January 30, 2012, Filed

No. CV11-0432-PHX-DGC

Reporter

2012 U.S. Dist. LEXIS 10621 *; 2012-1 Trade Cas. (CCH) P77,827; 2012 WL 260032

Cellco Partnership d/b/a Verizon Wireless, Plaintiff, vs. Jason Hope; et al., Defendants.

Subsequent History: Reconsideration denied by, in part, Reconsideration granted by, in part *Cellco P'ship v. Hope, 2012 U.S. Dist. LEXIS 30019 (D. Ariz., Mar. 6, 2012)*

Prior History: *Cellco P'ship v. Hope, 2011 U.S. Dist. LEXIS 115331 (D. Ariz., Sept. 29, 2011)*

Core Terms

Defendants', customers, alleges, aggregators, argues, funds, sufficient facts, mail, network, contracts, mail fraud, fails, motion to dismiss, fraudulent, refunds, wire fraud, wireless, communications, accounting, conversion, agrees, obtain money, letters, constructive trust, withholding, deceptive, providers, tortious interference, enterprise, practices

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For Rick R Perry, Defendant: Dennis Ira Wilenchik, Wilenchik & Bartness PC, Phoenix, AZ.

For Cylon LLC, Text Charge LLC, Eye Level Holdings LLC, New Economic Order LLC, Saguaro Media LLC, New EIN LLC, Ink Sign Holdings LLC, Yellow **[*3]** Ball Holdings LLC, Message Plan LLC, FYISMS.COM LLC, MYTXTSMS.COM LLC, Standard Plan LLC, Standard Message LLC, SMS City LLC, City-O-Games.Com LLC, Hot-Hot-News.Com LLC, WorldTxts.Com LLC, TopicText.Com LLC, All-Game-Cheats.Org LLC, News Alerts LLC, Jason Hope, TopicText.Com LLC, Text Charge LLC, Quinn McCullough, Ink Sign Holdings LLC, Standard Plan LLC, FYISMS.COM LLC, WorldTxts.Com LLC, New Economic Order LLC, City-O-Games.Com LLC, Eye Level Holdings LLC, Standard Message LLC, MYTXTSMS.COM LLC, SMS City LLC, New EIN LLC, Counter Claimants: Alison Erika Klingel, LEAD ATTORNEY, Squire Sanders (US) LLP - Phoenix, AZ, Phoenix, AZ; Donald A Wall, LEAD ATTORNEY, Squire Sanders & Dempsey LLP, Phoenix, AZ; Brian Andrew Cabianca, Squire Sanders & Dempsey (US) LLP - Phoenix, AZ; Dennis Ira Wilenchik, Wilenchik & Bartness PC, Phoenix, AZ; Joel Grant Woods, Grant Woods PC, Phoenix, AZ; Kathleen Erin Martoncik, Wilenchik & Bartness PC, Phoenix, AZ.

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Judges: David G. Campbell, United States District Judge.

Opinion by: David G. Campbell

Opinion

ORDER

Pending before the Court are Defendants' motion for an accounting and for Plaintiff to release funds (Doc. 211), Defendants' motion to dismiss Plaintiff's first amended complaint (Doc. 232), and Plaintiff's motion to dismiss Defendants' third amended counterclaims (Doc. 235). Each motion has been fully briefed (Docs. 229, 236; 241, 260; 242, 261). For the reasons that follow, the Court will deny Defendants' motion for an accounting and release of funds, grant in part and deny in part Defendants' motion to dismiss Plaintiff's first amended complaint, and grant in part and deny in part Plaintiff's motion to dismiss Defendants' third amended counterclaims.[1]

I. Factual Background.

Verizon operates a wireless **[*6]** telephone network. Part of Verizon's service involves providing premium text message service ("PSMS"), which offers Verizon customers such applications as ring tones, horoscopes, recipes, celebrity gossip, and news alerts. Verizon contracts with third-party companies, known as "aggregators," who, in turn, contract with Verizon-approved PSMS providers. The providers supply PSMS services to wireless customers, typically by marketing them on the internet. When a Verizon customer orders a PSMS service, the service is delivered to the customer's phone over the Verizon network and Verizon includes the charge for the PSMS on the customer's monthly wireless bill. Verizon keeps part of the payment for these services and forwards the remaining amount to the aggregators, who collect their respective fees and pass the rest on to the PSMS providers. Verizon requires its providers to adhere to the Consumer Best Practices Guidelines for Cross Carrier Mobile Content Services promulgated by the Mobile Marketing Association ("MMA Best Practices"). Defendants, who did business under the name "Cylon," and later "JAWA," are in the business of providing PSMS services directly over the internet and through **[*7]** aggregators. Defendants acted as PSMS providers under contract with Verizon aggregators.

Verizon brought this action against Defendants, alleging that they fraudulently obtained access to the Verizon network, violated MMA Best Practices in soliciting business from Verizon customers, and deceived Verizon customers, resulting in Verizon incurring costs to remedy customer complaints and stop Defendants' conduct. Verizon's first amended complaint asserts seven causes of action: (1) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962(c)*; (2) violation of RICO, *18 U.S.C. § 1962(d)*; (3) violation of the Arizona Organized Crime, Fraud, and Terrorism Act ("ACFTA"), *A.R.S. § 13-2310(A)*; (4) violation of ACFTA, *A.R.S.§ 13-2312(B)*; (5) common law fraud; (6) violation of Arizona's Consumer Fraud Act, *A.R.S. § 44-1522 (A)*, and (7) tortious interference.

II. Defendants' Motion for an Accounting/Release of Funds.

Defendants claim that prior to filing the instant lawsuit, Verizon launched an attack on JAWA that included terminating JAWA's service to Verizon customers, instructing aggregators not to pay JAWA, refunding customers who had not complained, and "withholding **[*8]** money rightfully due to both the Aggregators and JAWA for services already provided that were not refunded to customers." Doc. 211 at 3. Defendants move the Court to order an accounting from Verizon of money it is currently withholding from its aggregators, and, indirectly, from JAWA. Defendants further move the Court to order Verizon to release these funds. *Id*. at 2, 6. Defendants claim that from the start of this litigation, "it has been undisputed that Verizon was holding money that does not legally belong to it." *Id*. Defendants claim that Verizon counsel has been aware of the retained funds since August, 2011, and that they recently estimated the amount to be $8 million. *Id*. Defendants state that they informed Verizon, through counsel, that their own accounting determined the amount to be $9 million. *Id*. Defendants argue that regardless of the exact amount, it is undisputed that Verizon is withholding money to which it is not legally entitled and that the Court should order an accounting from Verizon because JAWA lacks any other remedy at law to require Verizon to state the exact amount withheld. *Id*. at 4. Defendants further argue that the Court should order Verizon to release **[*9]** these funds because withholding them amounts to impermissible self-help and the proper legal avenue for holding such funds is to seek a pre-judgment order or garnishment, which Verizon has not done. *Id*.

Verizon opposes Defendants' motion, characterizing it as "an attempt to obtain final relief based upon unsubstantiated allegations" that have no basis in law. Doc. 229 at 1. Verizon disputes Plaintiffs' assertion that it

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[1] The parties' requests for oral argument are denied. The issues have been fully briefed and oral argument will not aid the Court's decision. *See* *Fed. R. Civ. P. 78(b)*; *Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998)*.

has admitted to withholding funds and states that there is no evidence on the record to support Defendants' facts. *Id*. at 2. Verizon also argues that Defendants' request has no basis in law. *Id*. Verizon argues that the only basis for Defendants' request under the Federal Rules of Civil Procedure is a request for pre-judgment relief, and that an injunction cannot issue on the basis of unverified allegations. *Id*. at 3. Verizon also argues, on the basis of this Court's opinion in *Wolf v. Martin, No. CV 10-8163 PCT DGC, 2010 U.S. Dist. LEXIS 112982, 2010 WL 3984826 (D. Ariz. Oct. 12, 2010)*, that an accounting request is not a proper basis for an injunction. *Id*. Verizon asserts that Defendants' request for pre-judgment payment amounts to a "mandatory injunction" and that Defendants' motion falls far short **[*10]** of meeting the exacting standards of proof and serious harm required for such an order. *Id*. at 3-4 (citing *Tinsley v. Schriro, No. CV 07-1676-NVW-CRP, 2008 U.S. Dist. LEXIS 113259, 2008 WL 2783279, at **9-10 (D. Ariz. June 26, 2008)* and *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009))*. Finally, Verizon argues that *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)*, the only case Defendants cite as a legal basis for relief, does not support the pre-judgment relief that Defendants request. Doc. 229 at 4-5.

Defendants have failed to establish that they are entitled to the requested relief. Defendants would have the Court rule in their favor merely because Verizon does not provide evidence to controvert Defendants' claim that Verizon is in possession of funds owing to Defendants. Doc. 236 at 2. Defendants also argue that because Plaintiff's counsel has made multiple representations to Defense counsel that it is withholding funds, and Defendants have direct knowledge of these representations, verification of this fact is unnecessary. *Id*. The Court does not agree that these allegations provide sufficient grounds for the Court to grant Defendants' motion.

Defendants previously petitioned **[*11]** the Court for a preliminary injunction, claiming, among other things, that Verizon and the aggregators were withholding approximately $19 million for services they had provided, and asking the Court to order Verizon not to withhold payments owed to JAWA for its messaging services. Doc. 60, ¶¶ 6, 38(b)(4). The Court denied Defendants' motion because they had not shown a likelihood of success on the merits of their counterclaims. *See* Doc. 133 at 17-23. Here, also, Defendants state that Verizon's actions amount to conversion (Doc. 236 at 3), but Defendants make no attempt to establish the four factors required for injunctive relief, including a showing that they are "likely to succeed on the merits" (*see, e.g., Winter v. Natural Res. Def. Council, 555 U.S. 7, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008))*, or a showing that the balance of hardships tips sharply in their favor and the existence of "serious questions" that go to the merits of their claim (*see Alliance for Wild Rockies v. Cottrell, 622 F.3d 1045, 1049-53 (9th Cir. 2010))*.

Defendants argue that their motion is not a request for injunctive relief and that Verizon's obligation to turn over the withheld funds does not depend on the success of its **[*12]** counterclaims because it is Verizon, not Defendants, that has improperly "helped itself" to pre-judgment relief by withholding the funds. Doc. 236 at 3-4. But regardless of whether Defendants have styled their motion as one for injunctive relief, Defendants have provided no other legal basis for the relief sought. As the Court stated in *Wolf*, Defendants' request for an accounting "is not a proper request for equitable relief." *2010 U.S. Dist. LEXIS 112982, 2010 WL 3984826, at *2* (declining Plaintiff's request for an accounting from Defendants because "[t]he Federal Rules of Civil Procedure provide ample tools for Plaintiff to conduct discovery and present evidence of profits to which he is entitled)). *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)*, which Defendants cite, is not to the contrary. In that case, the Supreme Court stated that the prerequisite to an equitable accounting, like any other equitable remedy, is an inadequate remedy at law. *Dairy Queen, 369 U.S. at 478*. The Court went on to reason that a cause of action cognizable at law may require an equitable accounting in rare cases where the accounts are too complicated for a jury to handle, but that "[t]he legal remedy cannot be characterized as inadequate **[*13]** merely because the measure of damages may necessitate a look into petitioner's business records." *Id*.

Defendants have made no showing that legal remedies are insufficient to address their claims that Verizon improperly converted funds owing to the aggregators and JAWA. Defendants argue for the first time in their reply that discovery is not a sufficient route for determining the amount Verizon has wrongfully withheld because Verizon has failed to uphold its discovery obligations. Doc. 236 at 5. Defendants' allegations to this effect are general and conclusory. *Id*. ("Direct requests . . . and even conversations with counsel . . . have also not been successful in convincing Verizon to uphold its discovery obligations."). Absent a showing of specific discovery violations, the

Court is not persuaded that Defendants are left without adequate legal remedies for pursuing the requested relief. Moreover, as noted above, Defendants have not shown, apart from unsubstantiated and directly disputed allegations, that Plaintiffs are impermissibly withholding payments. The Court will deny Defendants' motion for an accounting and release of funds.

III. Defendants' Motion to Dismiss Plaintiff's First [*14] Amended Complaint.

When analyzing a complaint for failure to state a claim to relief under *Rule 12(b)(6)*, the factual allegations "'are taken as true and construed in the light most favorable to the nonmoving party.'" *Cousins v. Lockyer, 568 F.3d 1063, 1067 (9th Cir. 2009)* (citation omitted). To avoid a *Rule 12(b)(6)* dismissal, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This plausibility standard requires sufficient factual allegations to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'" *Id. at 1950* (citing *Fed. R. Civ. P. 8(a)(2)*). A claim may be dismissed where the complaint lacks a cognizable legal theory, lacks sufficient facts alleged under a cognizable legal theory, or contains allegations disclosing some absolute defense or bar to recovery. *See* *Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1988)*; **[*15]** *Weisbuch v. County of L.A., 119 F.3d 778, 783, n.1 (9th Cir. 1997)*.

A. Counts 1 and 2: RICO.

Defendants argue that Verizon's claim under *18 U.S.C. § 1962(c)* is based only on conclusory statements and fails as a matter of law. Defendants' arguments — contained in multiple overlapping bullet-points and supported mainly by footnotes — boil down to two core arguments: (1) that Verizon lacks standing because only Verizon customers, not Verizon, itself, can claim direct injury from Defendants' alleged fraud, and (2) that Verizon has failed to allege the necessary elements, including intent to obtain money from Verizon, for the predicate crimes of mail and wire fraud. *See* Doc. 232 at 10-12.

Verizon argues that Defendants already made, and the Court already rejected, most of Defendants' arguments in its order responding to Defendants' original motion to dismiss. Doc. 241 at 3, *see* Docs. 117, 164. The Court agrees that it has already addressed — and rejected — Defendants' lack of standing and lack of direct injury arguments. The Court ruled that Verizon was a proper plaintiff under RICO because it satisfied the proximate cause requirement, as described in *Holmes v. Securities Investor Protection* ***[*16]*** *Corp*, of showing "some direct relation between the injury asserted and the injurious conduct alleged." Doc. 164 at 2-3; *see* *503 U.S. 258, 265-66, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*. The Court found that Verizon had sufficiently alleged conduct on the part of Defendants — including making false representations to Verizon to obtain access to Verizon's customer network and using "cloaking" software to hide from Verizon its sales and services on unauthorized and misleading webpages — that caused Verizon injury in the form of damage to its business reputation, loss of customers, and expenses incurred in reimbursing customers and addressing thousands of complaints. Doc. 164 at 3. The Court also stated that factual questions regarding proximate cause are to be decided at summary judgment or trial, not on a motion to dismiss. *Id*. (citing *Newcal Indus., Inc. v. Ikon Office Solutions, 513 F.3d 1038, 1055 (9th Cir. 2008))*.

The first amended complaint realleges the same conduct (*see, e.g., id*., ¶¶ 76-84) and the same damages (*see, e.g., id*., ¶¶ 93-98). Defendants again argue that Verizon is only a derivative victim of the alleged harms against its customers and that a derivative victim is not entitled to bring RICO claims. **[*17]** Doc. 232 at 10-12; 10, n. 17, 11, n. 21. The cases upon with Defendants rely involve third-party victims who had no direct relation to the parties sued. *See* *Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 981 (9th Cir. 2008)* (dismissing claims brought by a county bearing the healthcare costs of illegal immigrants against employers for helping their employees violate immigration laws); *Laborers & Operating Eng'rs' Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc., 42 F. Supp. 2d 943, 948 (D. Ariz. 1999)* (dismissing claims brought by trust funds paying members' medical expenses against a tobacco company for harms to their members' health). In contrast to these injuries that the courts have found "too attenuated" or lacking in "direct relation" to the defendants' actions to support a claim, Verizon has alleged a direct relationship between itself and Defendants. Verizon has alleged that Defendants engaged in deceptive sales practices while fraudulently operating as an approved vendor for Verizon, causing customers to incur disputed charges, all billed and collected by Verizon. Verizon previously argued, and the Court agrees, that Verizon's alleged injuries of harm **[*18]** to its reputation and customer base and its expenses incurred resolving customer complaints are not too attenuated from Defendants' alleged conduct to support a claim. *See* Doc. 117 at 5-6 (contrasting *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137 (9th Cir. 2008))*. The Court will reject Defendants' arguments that Verizon does not have standing to bring a RICO claim because it is not an aggrieved customer and it has not alleged a sufficient causal connection between Defendants' alleged actions and its alleged harm.

Defendants also argue that Verizon has not pled sufficient facts to support a claim for the predicate crimes of mail and wire fraud. Doc. 232 at 10-12. Defendants first argue on the basis of *United States v. Lew, 875 F.2d 219, 221 (9th Cir. 1989)*, and *Williams v. Dow Chemical Co., 255 F. Supp. 2d 219, 225-26 (S.D.N.Y. 2003)*, that RICO requires a defendant to have the intent to obtain money or property from the one deceived and that Verizon's claim fails because Verizon has only alleged that Defendants sought to obtain money from Verizon customers, not Verizon, itself. Doc. 232 at 11; 11, n. 19.

Verizon responds that both *Lew* and *Dow Chemical* are distinguishable from the **[*19]** current case because in those cases defendants did not receive money from the person deceived, but Defendants in this case regularly received money from Verizon out of the payments Verizon collected from its customers. Doc. 241 at 5; 5, n. 4. The Court agrees that the outcomes in *Lew* and *Dow Chemical* do not control this case. In *Lew*, the Ninth Circuit reversed convictions of mail fraud against an immigration attorney who sent fraudulent documents on behalf of his clients to the Department of Labor ("DOL") because there was no evidence that the clients, from whom the defendant received payment, had been deceived. *875 F. 2d at 221-22 (9th Cir. 1989)*. In *Dow Chemical*, the court found that defendant's misrepresentations about a product to the Environmental Protection Agency ("EPA") did not constitute wire or mail fraud because, though intended to deceive the EPA, they were not made with the intent to obtain money, but only with the intent to obtain regulatory approval. Neither case speaks to the alleged deception against Verizon in this complaint.

Verizon argues that *United States v. Bonallo, 858 F.2d 1427 (9th Cir. 1988)*, a bank fraud case cited by the Ninth Circuit in the mail and wire **[*20]** fraud context (*see, e.g., Lew, 875 F. 2d at 221*; *United States v. Dowie*, 411 Fed. Appx., 21, 28 (9th Cir. 2010)), is directly on point. In *Bonallo*, the Ninth Circuit rejected a former bank employee's argument that he had not defrauded the bank, but only its customers, when he allegedly withdrew money from his own account and falsified ATM records to have the funds deducted from the accounts of other customers. *858 F. 2d at 1429, 1434, n. 9*. The court reasoned that defendant's misrepresentation of the records was directed at the bank and that defendant was "effectively harming the bank which was obliged to reimburse customers" for erroneously charged withdrawals. *Id*. As Verizon notes, the court in *Lew* cited to *Bonallo* as providing the element missing in *Lew*: "an intent to obtain money . . . from the victim of the deceit." *875 F. 2d at 222*, *see* Doc. 242 at 6. Verizon argues that *Bonallo* is analogous to the instant case because Verizon likewise reimbursed customers wrongfully charged by Defendants' deceptive sales practices. Doc. 242 at 6.

Defendants reply that *Bonallo* is inapposite because Verizon does not allege that it had a legal obligation to reimburse customers; rather, it simply **[*21]** made a "unilateral decision" to do so. Doc. 260 at 5. This argument is not persuasive. In rejecting the argument that removing money from customer accounts did not amount to an intent to obtain money from the bank, the court in *Bonallo* reasoned that it is "common knowledge that banks reimburse the accounts of wrongly charged customers." *858 F. 2d at 1434, n. 9*. The relevant question is whether Verizon has alleged facts to show that Defendants were aware or had "common knowledge" that Verizon refunded customer accounts. Defendants also argue that *Bonallo* is distinguishable because, unlike a bank which obtains title interest in depositors' funds while its customers receive a contract-claim against the bank, Verizon had no legal interest, apart from its own share, of customer payments. This argument is also unpersuasive because it is not clear how, under the facts alleged, Verizon does not take title interest to funds paid directly to Verizon, even if Verizon is contractually obligated to pay portions of those funds to aggregators who, in turn, are contractually obligated to pay PSMS providers, including Defendants.

The Court concludes that Verizon has alleged an intent on the part of **[*22]** Defendants to obtain money from Verizon. First, unlike the cases Defendants cite in which defendants did not seek money from those deceived (the DOL and the EPA), the facts in this case portray a scheme in which Defendants sought to obtain money from Verizon. The FAC alleges that Defendants submitted applications to operate as an approved vender within Verizon's provider network as a way to receive payments from Verizon while Verizon bore the responsibility of billing customers, collecting payments, and responding to customer complaints. *See* Doc. 222, ¶¶ 41, 60-61, 66-68. Second, the facts pled lead to the reasonable inference that Defendants anticipated that Verizon would bear the cost associated with its fraudulent sales once Defendants' deceptive marketing practices generated a large number of complaints. The FAC alleges that Defendants set up a number of "silo" companies that they could quickly shut down if Verizon detected that they were deceiving customers, enabling Defendants to continue their unauthorized marketing practices, implicitly leaving Verizon, like the bank in *Bonallo*, with the responsibility of making refunds while Defendants escaped detection. *Id*., ¶¶ at 41, 69-70. **[*23]** Verizon alleges that Defendants' schemes caused Verizon to field more than 3,300 customer complaints and to issue more than $375,000 in reimbursements. *Id*., ¶¶ 94-96. Defendants raise a factual issue, arguing that Verizon did not reimburse customers from its own profits, but only from money that it withheld from Defendants and aggregators. Doc. 232 at 11, n. 19. Verizon responds, and the Court agrees, that this assertion rests on facts outside the complaint and that, in any case, Defendants do not dispute that they received money from Verizon during the fraud scheme. Doc. 241 at 5, n. 4. The Court finds that for purposes of withstanding a motion to dismiss, Verizon has alleged sufficient facts to show that Defendants acted with an intent to obtain money from Verizon.

Defendants next argue that Verizon has not alleged sufficient facts to support specific acts of mail fraud or wire fraud. Doc. 232 at 10, 12. Defendants argue that Verizon's use of the mails to bill its customers occurred only after customers incurred charges and is therefore not sufficiently related to Defendants' allegedly fraudulent sales schemes. Defendants also argue that Verizon has not alleged sufficient facts to **[*24]** support wire fraud because no e-mails, including the March 2009 e-mail which Defendant Jason Hope sent to regain access to Verizon's network, were sent from JAWA to Verizon. Doc. 232 at 12.

1. Mail Fraud.

Verizon responds that it has alleged sufficient facts to support mail fraud. Doc. 241 at 7. Verizon first argues that the FAC alleges that Defendants sent applications to the Cellular Telecommunications & Internet Association ("CTIA") to lease short codes, enabling them to act as PSMS providers over the Internet. *Id., see* FAC, Doc. 222, ¶ 89. Verizon argues that these applications contained false addresses and contact information in order to mask Defendants' identities, and that this deception, passed along to Verizon when it approved each short code campaign, was "an essential element of [Defendants'] scheme" to hide their identities from Verizon and market their PSMS to its customers. *Id*.; *see* FAC, Doc. 222, ¶¶ 66(e), 71. Verizon also argues that the FAC alleges that Defendants knew and depended upon Verizon's use of the mails to bill its customers. *Id*. at 7-8 (*see* Doc. 222, ¶ 91). Verizon argues that these facts are sufficient to support mail fraud because the mailings of both the **[*25]** short code applications and the bills to Verizon customers were "for the purpose of, and essential to, the scheme's success." *Id*. at 7. Verizon relies on the Ninth Circuit's opinion in *United States v. Hubbard, 96 F. 3d 1223, 1228 (9th Cir. 1996)* ("In order for the mailing to be 'sufficiently closely related,' it must be for the 'purpose of executing the scheme,' or 'incident to an essential part of the scheme'") (internal citations omitted), and the Supreme Court's opinion in *Schmuck v. United States, 489 U.S. 705, 710-11, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989)* ("[T]he use of the mails need not be an essential element of the scheme. . . . It is sufficient for the mailing to be incident to an essential part of the scheme . . . or a step in the plot.") (internal citations omitted).

Defendants reply that Verizon's alleged mail fraud violations are not "sufficiently closely related" to the alleged fraudulent scheme. Doc. 260 at 6. Defendants first argue that Verizon never alleged that Defendants used the mails to send applications to CTIA. *Id*. at 7. Defendants are correct that the FAC does not expressly say that Defendants used the U.S. mail to send its short code applications. *See* Doc. 222, ¶ 89. The FAC begins its section **[*26]** entitled "Defendants' Violations of Federal Criminal law" with the over-arching allegation that Defendants used "the U.S. mail and/or interstate wires" as part of their conspiracy to defraud Verizon. *See id*. at ¶ 87. When, two paragraphs later, the FAC cites Defendants' short code applications to CTIA and Verizon, it designates these as a violation of the mail fraud statute, with the words "mail fraud" in parentheses, just as it designates other violations in the same section as either mail fraud or wire fraud. *See id*. at ¶¶ 89-91. Taken in the light most favorable to the non-moving party, the Court finds that the allegation that Defendants used the U.S. mail/and or interstate wire to commit fraud applies to the allegations related to Defendants' short code applications and that the parenthetical reference to mail fraud is meant to distinguish which was used, mail or wire. Thus construed, Verizon has made sufficient allegations at this stage to support a mail fraud claim. Defendants' factual assertion that "no applications were **ever** sent via U.S. mail to CTIA or Verizon" (Doc. 260 at 6. (emphasis in original)) is a factual issue; Verizon will bear the responsibility of proving use **[*27]** of the mails at trial. Defendants make no additional arguments for why the short code applications were not sufficiently related to the alleged fraud scheme to constitute mail fraud. The Court is persuaded that Verizon has alleged sufficient facts showing that Defendants' applications for short code leases — a preliminary step required for Defendants to do business over the internet — were essential for carrying out the alleged fraud scheme against Verizon.

Defendants next argue that the mailing of bills to Verizon customers is not sufficiently related to the alleged fraud scheme. Doc. 260 at 7. Defendants repeat the argument that the alleged fraud scheme was simply to obtain access to Verizon's network; therefore, any customer bills sent after Defendants accessed the network were unrelated to the alleged fraud. *Id*. The Court rejects this argument for the reasons stated above. Verizon has alleged sufficient facts to show that Defendants' scheme was not only to gain access to Verizon's network of customers, but also to obtain money from Verizon. Because a jury could reasonably conclude that billing Verizon's customers was necessary to the success of Defendants' scheme, or "incident to **[*28]** an essential part of the scheme," the Court finds that Verizon has alleged sufficient facts to support a mail fraud claim. *See* *Schmuck, 489 U.S. at 710-11*.

2. Wire Fraud.

Verizon argues that it has alleged sufficient predicate acts of wire fraud to support its RICO claims. Doc. 241 at 8. The Court agrees. As shown above, the mail or wire communication need not be with the plaintiff directly, as long as it is connected in some way to the success of the overall scheme. Verizon has alleged multiple acts of wire fraud involving the use of fake URL's meant to direct Verizon away from the actual sites where they conducted their sales, the use of cloaking software to keep Verizon from discovering the actual URL sites, and the use of these sites and text messaging to conduct deceptive sales transactions. *See* FAC, Doc. 222, ¶¶ 76-79, 90. Defendants' principal argument is that these wire communications were not part of a scheme to defraud Verizon because the facts alleged do not establish an intent to obtain money from Verizon. Doc. 260 at 4. For the reasons already stated, the Court rejects this argument. Because a jury could reasonably conclude that Defendants engaged in wire transactions as **[*29]** part of an overall scheme to obtain money from Verizon, the Court finds that Verizon has alleged sufficient facts to support a wire fraud claim.

3. Individual Defendants.

Defendants also argue that Verizon has failed to state a RICO claim against four specific defendants, Christa Johnson (Stephens), Quinn McCullough, Steve Urhman, and Rick Perry, because Verizon has failed to allege facts showing that these individuals took an "operation or management" role in the alleged enterprise as required under *Reves v. Ernst & Young, 507 U.S. 170, 179, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)*. Doc. 222 at 12.

Verizon argues that the Court already rejected this argument in its prior order, stating that Verizon had alleged the roles of the co-conspirators with sufficient detail and that whether Verizon had sufficient evidence to back up its allegations must be determined after discovery. Doc. 241 (citing Doc. 164 at 4). Verizon also argues that Defendants' reliance on Reves is misplaced, both because that case dealt with a motion for summary judgment, not a motion to dismiss, and because the "operation and management" issue in that case pertained to an outside accounting firm that acted merely as an instrument of a corporation's fraudulent **[*30]** scheme rather than someone directly involved in the alleged fraudulent conduct. Doc. 241 at 4, n. 2 (citing to *Marceau v. IBEW, Local 1269, 618 F. Supp. 2d 1127, 1170 (D. Ariz. 2009)* (distinguishing the role of the outside accounting firm in *Reves* from that of a defendant corporation that did not merely provide outside services, but was "directly involved" in its unlawful acts and thus "clearly had some part in directing the enterprise's affairs.")).

The Court's prior order is not dispositive of Defendants' argument because that order pertained to whether Verizon's pleadings had satisfied the particularity requirement of *Rule 9(b)* for the purpose of giving Defendants' notice of the alleged fraud claims against them; it did not discuss the sufficiency of the allegations to make a RICO claim against each individual co-defendant. *See* Doc. 164 at 4. The Court must look to whether Verizon has alleged sufficient facts to state a claim under *18 U.S.C. § 1962(c)* as to each of the four defendants named in Defendants' motion to dismiss.

Under *§ 1962(c)*, it is unlawful for a person employed by or associated with an enterprise "to conduct or participate, directly or indirectly, in the conduct of **[*31]** such enterprise's affairs through a pattern of racketeering activity." *18 U.S.C. § 1962(c)*. The Court agrees that *Reves* is the controlling authority on this statute, and that *Reves*' approach applies equally on a motion to dismiss. *See* *Walter v. Drayson, 538 F.3d 1244, 1247 (9th Cir. 2008)*. *Reves* interpreted this section to require that the employee or associate have "some part in directing [the enterprise's] affairs." *507 U.S. at 179*. *Reves* went on to explain that "the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required." *Id*. (emphasis in original).

The Court concludes that Verizon has not alleged sufficient facts to meet this requirement with respect to Defendant Quinn McCullough, but that Verizon has alleged sufficient facts with respect to the remaining three Defendants. The FAC names all four individuals as being "employed by" and working "in concert with" defendants Hope and DeStefano to further **[*32]** the scheme described in the complaint. *See* FAC, Doc. 222, ¶¶ 9-11, 13. The FAC alleges that after Verizon suspended Cylon's access to its network and required defendants Hope and DeStefano to disclose their association with any short codes, Hope and DeStefano designated these defendants "to lease the short codes from the CTIA and activate short code campaigns on the Verizon Wireless network." *Id*., ¶¶ 59, 71. The FAC also alleges that all four Defendants were named as contact persons for the "silo" companies, created to carry out the scheme. *Id*. at 111-115. The FAC does not allege that these Defendants took any actions, themselves, to set up these "silo" companies; nor does it allege that the listing of these individuals as the contact persons was anything more than a nominal listing, like that of the false addresses, or that it led to any actions related to the direction of the "silo" companies or of the overall enterprise. *See Id*., ¶¶ 66, 68, 71, 73, 75. The FAC does allege that Stephens, Perry, and Urhman participated in a meeting in September, 2009, to discuss setting up the "silo" companies, the use of URLs, and the concealment of these URLs from Verizon. *Id*., ¶¶ 68, 113, 115. **[*33]** The FAC also alleges that all three of these Defendants were involved in discussions regarding the development of cloaking software, and that Defendant Perry tested the software and knew it would deflect Verizon's auditors. *Id*., ¶¶ 80, 115. The Court finds that a jury could reasonably conclude from the facts alleged that Defendants Stephens, Perry, and Urhman, through their participation in meetings discussing actions essential to the operation of Defendants' scheme, played "*some* part in directing the enterprise's affairs." *See* *Reves, 507 U.S. at 179* (emphasis in original). By contrast, the FAC does not allege any facts to show that Defendant McCullough was even aware of the "silo" companies or the use of his name. The Court will grant Defendants' request to dismiss defendant McCullough from Verizon's RICO claims and deny Defendants' request to dismiss Defendants Stephens, Perry, and Urhman.

4. Verizon's *18 U.S.C. § 1962(d)* Claim.

Defendants also argue that the Court should dismiss Verizon's *§ 1962(d)* claim because it has failed to state a predicate claim under *18 U.S.C. § 1962(c)*. Doc. 232 at 13. For the reasons stated above, the Court finds that

Verizon has alleged sufficient facts **[*34]** to make a claim under *§ 1962(c)*. With the exception of Defendant McCullough, the Court will deny Defendants' request to dismiss either of Verizon's RICO claims.

B. Counts 3 and 4: *A.R.S. §§ 13-2310(A)* & *13-2312(B)*.

Defendants ask the Court to dismiss the claims brought under Arizona's civil racketeering law for the same reasons it asks the Court to dismiss the federal RICO claims. For the reasons stated above, the Court will grant Defendants request with respect to Defendant McCullough and will deny Defendants' request for all other Defendants.

C. Count 5: Common Law Fraud.

Defendants argue that Verizon has failed to allege sufficient facts to show the elements of common law fraud. Defendants note that under Arizona law, common law fraud consists of nine elements: "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury." Doc. 232 at 13-14 (citing *Nielson v. Flashberg, 101 Ariz. 335, 419 P.2d 514, 517-18 (Ariz. 1966))*.

Defendants **[*35]** argue that Verizon's alleged false representations are based entirely on a March 2009 e-mail from Jason Hope to an entity called "Open Market."[2] Doc. 232 at 14, Exh. 1. Defendants argue that Verizon's claim fails because Defendants made no representations to Verizon itself; Defendants could not have known that information indirectly transmitted to Verizon was false or have intended for it to induce action on Verizon's part; Defendants cannot be held liable for Verizon's reliance on information that did not come directly from Defendants; and Verizon has suffered no damages because it profited from Defendant's sales. *Id*. at 14.

The Court finds that Verizon has alleged sufficient facts in the FAC to show all the elements of a common law fraud claim.[3] Even discounting the 2009 e-mail because, as Defendants argue, it did not make any representations directly to Verizon and none of its allegedly false representations was material (*Id*. at 14-15, 14-15 ns. 23-25), the Court is not persuaded that Verizon's claim rests on this e-mail. Verizon alleges that Defendants made false **[*36]** representations to Verizon itself by pointing Verizon auditors to MMA-compliant webpages and concealing from Verizon the actual, non-compliant web pages. Doc. 222, ¶¶ 168, 170. Verizon alleges that its reliance on the false web pages was reasonable because Defendants created these sites specifically to gain access to Verizon's network but then switched to non-compliant sites when soliciting customers. *Id*., ¶ 170. The Court finds that Verizon has sufficiently alleged that Defendants knowingly represented facts (the use of compliant web-pages) to Verizon that were both false and material in order to induce Verizon to give Defendants access to their network and that Verizon reasonably relied on these false representations to do so. Verizon has also alleged that it incurred substantial expenses due to Defendants' actions. *Id*., ¶¶ 172-73. Defendants' argument that Verizon incurred no damages because it made a net profit from Defendants' sales is a factual issue on which Verizon will bear the burden of proof at trial. The Court will deny Defendants' motion to dismiss the common law fraud claim.

D. Count 6: Arizona's Consumer Fraud Act, *A.R.S. § 44-1522*.

Defendants argue that the Court dismissed Verizon's claims under *A.R.S. § 44-1522* in its prior order and request the Court to state that this claim remains dismissed. Doc. 232 at 15. In its prior order, the Court found that Arizona

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[2] Defendants elsewhere identify Open Market as one of the aggregators with whom Verizon did business. *See* Doc. 220, ¶ 27.

[3] Verizon has not responded to Defendants' fraud arguments. Because the Court may dismiss a claim **[*37]** under *Rule 12(b)(6)* only if it is satisfied that the claim is legally unsound, it has considered Defendants' arguments in light of the allegations in the FAC.

courts required, and the Ninth Circuit agreed, that a plaintiff be a consumer in a transaction to come under the protection of Arizona's Consumer Fraud Act. Doc. 164 at 6-7 (citing, e.g., *Waste Mfg. & Leasing Corp. v. Hambicki, 183 Ariz. 84, 900 P. 2d 1220, 1224 (Ariz. Ct. App. 1995)* ("The purpose of the Act is to provide *injured consumers* with a remedy"); *Dunlap v. Jimmy GMC of Tucson, Inc., 136 Ariz. 338, 666 P. 2d 83, 87 (Ariz. Ct. App. 1983)* ("The Consumer Fraud Act provides *an injured consumer* with an implied private right of action against a violator of the act."); *Sutter Home Winery, Inc. v. Vintage Selections, Ltd., 971 F. 2d 401, 407 (9th Cir. 1992)* ("The clear intent of this provision is to protect unwary buyers from unscrupulous sellers)). The Court dismissed **[*38]** this claim because the alleged fraud in the complaint "did not occur 'in connection with' Verizon's purchase of merchandise." Doc. 164 at 7. Verizon has reasserted its Consumer Fraud Act claim in the FAC to preserve it for appeal (Doc. 222 at 45, 45 n. 2), but offers no further response to Defendants' argument or to the Court's prior finding. The Court will grant Defendants' request to dismiss this claim.

E. Tortious Interference.

Defendants argue that the Court should dismiss Verizon's tortious interference claim because Verizon fails to make a valid claim under Arizona law based on Restatement (Second) of Torts ("Restatement") *§§ 766* or *766A*. Doc. 232 at 7-8, 8-9. *Restatement § 766* pertains to the intentional and improper interference with the performance of another's contract with a third party "by inducing or otherwise causing the third person not to perform the contract." *Restatement § 766*. *Restatement § 766A* pertains to the intentional and improper interference with the performance of another's contract with a third party "by preventing the other from performing the contract or causing his performance to be more expensive or burdensome." *Id*. at *§ 766A*. Thus, *§ 766* would pertain **[*39]** only to allegations that Defendants' actions caused Verizon customers not to perform their contracts with Verizon, and *§ 766A* would pertain only to allegations that Defendants' actions made it more expensive or burdensome for Verizon to perform on its contracts with customers. Defendants argue for a further distinction: that *§ 766* requires that the improper actions be directed at the customers, and that *§ 766A* requires that the actions be directed at Verizon itself. On the basis of this distinction, Defendants argue that Verizon cannot make a proper claim under *§ 766* because Verizon has not alleged actions taken against its customers, but only against Defendants' customers. *Id*. at 7. Defendants also argue that Verizon's reliance on *§ 766A* fails because Verizon has not alleged actions directed at Verizon. *Id*. at 6, 8-9. Defendants also argue that the claims fail under both theories because Verizon cannot prove that any customers breached their contracts with Verizon as a result of Defendants' actions, and Verizon has pointed to no particular contract obligation whose performance was made more expensive or burdensome because of Defendants' alleged conduct. *Id*.

Verizon argues that the **[*40]** Court has already addressed and rejected Defendants' arguments and that the only potentially new argument — that Verizon has failed to identify a particular contract provision whose performance was made more burdensome or expensive by Defendants' actions — fails because Defendants cite no basis for the proposition that the increased expense or burden be related to a specific contract provision. Doc. 241 at 9, 9, n. 8. Verizon argues that it is sufficient for a claim under *§ 766A* that "the cost that [the plaintiff] incurs in order to *obtain the performance by the third party* has increased." *Id*. (citing *Restatement § 766A, cmt. c*) (emphasis added by Plaintiff). Verizon argues that the increased cost and burden of servicing its customers' complaints were directly related to its efforts to continue to obtain its customers' performance of their own contract obligations, namely payment. *Id*. Verizon also argues that its claim is valid under *§ 766* because it has alleged that Defendants' conduct caused Verizon customers to cancel their contracts. *Id*. (citing FAC, Doc. 222, ¶ 183). Verizon states that Defendants' argument that it cannot prove that any customers, in particular, were induced to **[*41]** breach their contracts with Verizon attacks only the veracity, not the sufficiency of Verizon's claim. *Id*. at 9-10.

1. *Restatement § 766*.

The Court finds that Verizon has alleged sufficient facts to support a claim for tortious interference with contract under Arizona law on the basis of *§ 766*. The Court previously found Defendants' arguments that its alleged actions were not directed at Verizon's customers, but only at its own customers, unavailing because "Verizon has pled sufficient facts to show plausibly that Defendants knew the customers were common to both parties and that Verizon would be injured by Defendants' actions." *Id*. at 8. Defendants now argue that it would be nonsensical to suppose that Defendants "would have any reason to interfere with and destroy its own contracts with its customers." *Id*. The Court need not suppose a rationale on Defendants' part, however, to evaluate the sufficiency of Verizon's claims. It is entirely plausible that a party could employ deceptive sales practices that would jeopardize its contracts with its own customers and that this would, in turn, interfere with the contractual relationship between those customers and another party. That is exactly **[*42]** what Verizon alleges happened in this case. *See* FAC, Doc. 222, ¶¶ 78-79 (alleging that Defendants deceptively sold their services to customers on URLs, using pop-up screens to hide pricing information and failing to disclose subscription information, and that they sent text messages that obscured the price of PSMS content). Verizon has alleged that Defendants' deceptive sales practices caused Verizon customers to cancel their contracts with Verizon. *See* FAC, Doc. 222, ¶ 183. The question is not, as Defendants suggest, whether Defendants can be held liable for interference with their own contracts (*see* Doc. 232 at 7, n. 10); the question is whether Verizon has alleged sufficient facts to support a claim that Defendants' actions induced customers not perform on their contracts with Verizon. The Court finds that it has. Whether customers actually breached their contracts with Verizon as a result of Defendants' actions is a factual issue upon which Verizon will bear the burden of proof at trial, and is not dispositive of Verizon's claim at the pleading stage.

2. *Restatement § 766A*.

Defendants' argument that Verizon's claim fails under *§ 766A* because the complaint does not allege actions **[*43]** Defendants took directly against Verizon is also unavailing. First, the fact that this section applies to actions "preventing the [plaintiff] from performing the contract or causing his performance to be more expensive or burdensome" does not necessitate that these actions be expressly directed at the plaintiff. *See, e.g.*, *§ 766A, cmt. g.* ("if the plaintiff is under a contract to keep a highway in repair, a defendant who intentionally inflicts additional expense upon him by damaging the highway is subject to liability"). Second, the FAC alleges many acts by Defendants directed at Verizon itself, such as fraudulently gaining authorization for multiple short code campaigns without disclosing the involvement of defendants Hope and DeStefano and using cloaking software to block Verizon's access to its unauthorized URL sites. *See* FAC, Doc. 222, ¶¶ 59, 71, 83. The fact that Defendants claim to have had no direct contact with Verizon is immaterial for the sufficiency of this claim. As the Court previously noted, the intent to interfere with a plaintiff's contract is met where the actor "knows that the interference is certain or substantially certain to occur as a result of his action." *See* **[*44]** Doc. 164 at 8 (quoting *§ 766A, cmt. g*). The Court also finds that Verizon has made a plausible claim that providing wireless service was made more costly and burdensome because Defendants, whom Verizon unwittingly enlisted as PSMS providers on the basis of Defendants' deceptive short code campaigns, caused Verizon to incur a higher volume of customer complaints and requests for refunds and to suffer damage to its goodwill and reputation. *See, e.g.*, FAC, Doc. 222, ¶¶ 93-98. The Court need not address Verizon's argument that *§ 766A* encompasses situations where, as here, Verizon alleges that Defendants made the cost related to securing *the other's performance* more costly and burdensome because the Court concludes that Verizon has alleged facts to show that Defendants' actions made its own provision of wireless services — effectuated, in part, through the services of Verizon-approved venders — more costly and burdensome. Specifically, Verizon alleges that Defendants' fraud permitted a portion of its approved PSMS wireless services to be provided without standard pricing disclosures intended to minimize the incidence of improper billing leading to a high incidence of customer complaints. **[*45]** *See* FAC, Doc. 222 ¶¶ 3-5, 56-57, 94-96. The increased burden and expense of these complaints is directly related to Verizon's provision of services to its customers via its PSMS providers.

Because the Court finds that Verizon has pled sufficient facts to allege tortious interference under either *§§ 766* or *766A*, the Court will deny Defendants' request to dismiss these claims.

IV. Verizon's Motion to Dismiss Defendants' Third Amended Counterclaims.

Defendants (collectively referred to as "JAWA") filed a second amended answer to Verizon's complaint containing JAWA's third amended counterclaims ("the TAC"). Doc. 220. The TAC consists of ten causes of action: (1) tortious interference with contract and business expectancies; (2) conspiracy to tortiously interfere; (3) business disparagement/injurious falsehood; (4) conversion; (5) unjust enrichment; (6) constructive trust; (7) violation of the Sherman Act; (8) violation of the New Jersey Antitrust Act; (9) abuse of process; and (10) violation of RICO. *See* Doc. 220,TAC, ¶¶ 97-209. Verizon filed a motion to dismiss the TAC, arguing that JAWA fails to allege sufficient facts to state a claim for any of the causes of action. Doc. 235 at 2. The **[*46]** same legal standards apply here as to Defendants' motion to dismiss the FAC (dicussed in Part III, above).

A. Count 1: Tortious Interference.

JAWA alleges that it has business expectancies and contracts with wireless customers and separate written contracts with four aggregators: Motricity, OpenMarket, IPX, and mBlox. TAC, Doc. 220, ¶ 99. JAWA alleges that Verizon knew of these business expectancies and contracts and knew that its alleged actions (filing this lawsuit and notifying aggregators and customers not to do business with JAWA) would burden and result in the breach of these business relationships. *Id*., ¶ 100. JAWA alleges that Verizon intentionally and improperly interfered with its contracts and business relationships, resulting in the breach of JAWA's services to its customers and adversely affecting JAWA's ability to conduct current and future business and making performance of its existing contracts more burdensome. *Id*. at ¶¶ 101-102. JAWA alleges that Verizon's actions caused it irreparable harm and estimates that the damages exceed one billion dollars. *Id*. at ¶ 102.

Verizon argues that JAWA's allegation that its interference was improper is a legal conclusion unsupported **[*47]** by facts because JAWA has alleged no actions that were not privileged or were not proper for Verizon to take as a matter of law. Doc. 235 at 3-4. Verizon argues that its actions filing this lawsuit and notifying those with a close relationship to the case are absolutely privileged under the *Noerr-Pennington* doctrine. *Id*. at 3. Verizon also argues that Arizona law recognizes a party's right to protect its own contractual interests even if asserting those interests causes a third party to breach or terminate an existing contract. *Id*. at 4 (citing cases).

JAWA responds that Verizon's actions interfering with its contracts and business expectations were improper because Verizon went beyond protecting its own contractual interests and included demands that its aggregators terminate JAWA on all wireless networks, not just Verizon. Doc. 242 at 11. The TAC refers to specific demands Verizon made in its letters to aggregators and incorporates by reference one of the letters. TAC, Doc. 220, ¶¶ 60, 61.[4] JAWA also responds that Verizon's actions were improper because Verizon employed economic pressure, defamation, restraint of trade, and antitrust. *Id*. at 11-12.

As the Court has previously noted, tortious interference with contract requires a showing of improper conduct. *See* Doc. 133 at 17 (citing *Carey v. Maricopa County, 2009 U.S. Dist. LEXIS 18475, 2009 WL 750220 at *7 (D. Ariz. Mar. 10, 2009)*; *Neonatology Assocs. v. Phoenix Perinatal Assocs., 164 P.3d at 693 (Ariz. App. 2007))*. The Court agrees with Verizon that its demand letters to aggregators cannot serve as the basis of improper conduct because they are protected under the *Noerr-Pennington* doctrine. Verizon relies on *Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1007 (9th Cir. 2008)*, in which the Ninth Circuit held that this doctrine, stemming from two Supreme Court cases that held that those who petition the government are immune from liability for their petitions, protects federal constitutional rights and therefore applies in state law tort actions. *546 F. 3d at 1006-1007*. *Theme Promotions* found that the doctrine protects presuit demand letters, provided the representations made in them are not so objectively baseless that they threaten what **[*49]** amounts to "sham litigation." *Id. at 1007-1008*. The Court has already found that Verizon is likely to succeed on its claims that JAWA used deceptive means to gain access to Verizon's network. *See* Doc. 133 at 17. The Court therefore cannot find that Verizon's claims are objectively baseless.

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[4] The Motricity letter that JAWA refers **[*48]** to as Exhibit 1 is not attached to the TAC as JAWA indicates, but it is attached to JAWA's motion for leave to amend counterclaims. *See* Doc. 169-1 at 82-85.

Verizon's alleged demands to its aggregators are also protected by state law privilege to the extent they are asserted for the protection of its own legally protected interests. *See Wyatt v. Ruck Constr., Inc., 571 P.2d 683, 687 (Ariz. App. 2001)* ("If a defendant has a present, existing interest to protect he is privileged to prevent the performance of a contract of another which threatens it."). The TAC alleges that Verizon demanded that its aggregators "shut off service to JAWA, not only on the Verizon network, but on the networks of all Wireless Carriers." TAC, Doc. 220, ¶ 60. The TAC goes on to cite six demands Verizon made, all of which the Court finds pertain to the aggregators' provision of services, collection of payments, or offers of refunds to customers serviced by JAWA through Verizon's own network. *See Id*., ¶ 61, Exh. 1 ("Motricity Letter"); Doc. 169-1 at 82-85. JAWA's allegation that **[*50]** Verizon impermissibly interfered with contracts unrelated to Verizon is based only on its allegation that Verizon's direction to its aggregators "was so broad and intimidating and so forceful that it effectively ensured that JAWA's services were cut off with respect to ***all carriers' customers*** . . . ." *Id*., ¶ 62. (emphasis in original). Whatever alleged effect Verizon's demands may have had on JAWA's contracts with the aggregators on other networks, the Court finds that JAWA has failed to allege any demands that were not, themselves, within the scope of protecting Verizon's own existing interests.

The Court also finds that JAWA's allegations that Verizon employed economic pressure, defamation, restraint of trade, and antitrust are conclusory statements based entirely on the same set of allegations. The TAC also fails to allege any improper communications from Verizon to its customers. Absent factual allegations of improper conduct, the Court agrees that JAWA's claim that Verizon's actions were "wrongful, improper and without justification or excuse" (TAC, Doc. 220, ¶ 101) is conclusory. The Court will grant Verizon's request to dismiss JAWA's tortious interference claim.

B. Count 2: Conspiracy [*51] to Tortiously Interfere.

JAWA's claim of conspiracy to tortuously interfere with JAWA's business expectancies and contracts fails for the same reason that its underlying claim fails.

C. Count 3: Business Disparagement/Injurious Falsehood.

JAWA claims that Verizon "knowingly (or in reckless disregard of the truth) published false statements of fact about and disparaging to JAWA to third parties with malice, without privilege, and with the intention to harm JAWA'S pecuniary interests." TAC, Doc. 220, ¶ 111. JAWA bases this claim on allegations that Verizon made false and defamatory statements in the complaint in this case, in its press release regarding this case, in its March 8, 2011 letter to Motricity, and in other statements made to aggregators and wireless carriers. *Id*., ¶ 112. JAWA identifies particular statements in the press release and letters in which Verizon claimed that JAWA was involved in an "intricate fraudulent enterprise" and a "massive fraud scheme," and JAWA alleges that Verizon made similar statements to aggregators and wireless carriers. *Id*.

Verizon argues that none of the alleged actions support a claim of business disparagement as a matter of law. Doc. 235 at 6. Verizon **[*52]** first argues, and the Court agrees, that allegations made in connection with a judicial proceeding are privileged. *Id*. (citing, e.g., *Sierra Madre Dev., Inc. v. Via Entrada Townhouses Assn., 20 Ariz. App. 550, 514 P.2d 503, 510 (Ariz. Ct. App. 1973)* (holding that non-frivolous statements made in a complaint cannot be the basis of a defamation claim). Verizon also argues that its letters to aggregators are privileged as long as the aggregators have a significant relationship with the lawsuit (*Id*. (citing *Hall v. Smith, 214 Ariz. 309, 152 P.3d 1192, 1196 (Ariz. Ct. App. 2007)* (citing to the *Restatement (Second) Torts § 587*)) and that they are protected by the *Noerr-Pennington* doctrine. *Id*. Verizon also argues that neither the letters nor the press release, nor any other alleged communications, support a claim of disparagement because they do no more than accurately summarize the privileged information and JAWA has not alleged any statements that are purportedly false. *Id*. at 7.

JAWA responds that Verizon's claim of privilege under *Hall v. Smith* does not apply to its communications with its aggregators because, unlike the cases involving an insurer or parent company discussed in *Hall*, the aggregators do not have a financial **[*53]** interest in Verizon or decision-making authority in the present litigation. Doc. 242 at

12. JAWA also argues that no privilege applies to Verizon's communication with the press or Verizon customers and that whether or not the alleged statements were false is not a proper inquiry on a motion to dismiss. *Id*. at 13.

The Court is not persuaded that a judicial privilege applies to Verizon's letters to the aggregators. In *Hall*, the court cited to the general principle that courts not extend absolute privilege to new situations that do not pertain to the policy upon which the privilege is based. *152 P. 3d at 1197*. The court in *Hall* reviewed Arizona case law interpreting privilege under the Restatement (Torts) *§ 587* and concluded that "the recipient [of the communication] must have had a close or direct relationship to the [lawsuit] for the privilege to apply." *Id. at 1196*. The Court in *Hall* found that a litigating party's communications to its parent company were protected by the privilege because the parent company had sent its own employees to conduct investigations, had helped select attorneys, and its relation to the litigation was "close and direct." *Id. at 1197-99*. No similar facts are **[*54]** in evidence respecting the aggregators' role in the current litigation. As already noted, however, Verizon's communications with its aggregators are privileged under the *Noerr-Pennington* doctrine to the extent they are based on objectively reasonable claims, and they are privileged under state privilege law to the extent they are made to protect Verizon's contractual rights. Verizon's statements that JAWA was involved in fraud are unquestionably related to its claims that the Court has found objectively reasonable, and they directly relate to the demands Verizon made to stop JAWA's allegedly fraudulent activities on the Verizon network. The Court finds that the allegedly false statements in the letters cannot support JAWA's business disparagement claim.

The Court is not persuaded that the press release is similarly privileged. *See Green Acres Trust v. London, 141 Ariz. 609, 688 P.2d 617, 623 (Ariz. App. 1984)* (finding that no privilege attached to communications made to a newspaper by party litigants). Verizon cites no authority for the proposition that a privilege as to one party carries over to the same communications made to another party, or, as here, to the public via the press. JAWA has alleged **[*55]** specific defamatory statements. *See* TAC, Doc. 220, ¶ 112. Verizon's arguments that its statements were not false or defamatory and that they were made with the legitimate purpose of informing its customers of their right to refunds and not for an improper purpose are factual matters that do not defeat JAWA's claims at the pleading stage. The Court will grant Verizon's request to dismiss this claim to the extent it relies on Verizon's statements made in the complaint and in letters to the aggregators, and will deny the request as it relates to other allegedly false statements made to third parties.

D. Count 4: Conversion.

The TAC alleges that Verizon holds approximately $9 million in funds from aggregators who owe these funds as payments to JAWA. Doc. 220, ¶ 115. The TAC also alleges that Verizon improperly refunded approximately $9 million to customers. *Id*. The TAC alleges that all funds in question are clearly identifiable as those billed by Verizon for JAWA's PSMS services. *Id*., ¶ 117. The TAC also alleges that funds Verizon failed to collect on behalf of JAWA are subject to a claim of conversion as accounts receivable. *Id*., ¶ 119.

Verizon argues that the Court should dismiss JAWA's **[*56]** conversion claim because JAWA has failed to plead sufficient facts to show that it is entitled to immediate possession of these funds and the TAC alleges that Verizon owes these funds to its aggregators, not to JAWA. Doc. 235 at 8. Verizon also argues that a contractual obligation to pay is not sufficient to support a claim of conversion, which requires a possessory interest, generally in the nature of a lien. *Id*. (citing, e.g., *Universal Mktg. & Entm't, Inc. v. Bank One of Arizona, 203 Ariz. 266, 53 P. 3d 191 (Ariz. App. 2002))*. Verizon also argues that JAWA has not pled sufficient facts to show that Verizon had an obligation to treat the funds in question in a specific manner, as required for a showing of conversion under Arizona law. *Id*. at 9.

JAWA responds that it has alleged a sufficient possessory interest in the funds at issue because the money that Verizon collected was specifically designated for JAWA. Doc. 242 at 13. JAWA cites to *Case Corp. v. Gehrke, 208 Ariz. 140, 91 P. 3d 362, 366-68 (Ariz. App. 2004)*, to show that a plaintiff has a possessory interest in funds deposited into a specific account for that party. *Id*. JAWA further argues that even if Verizon did not segregate the funds, JAWA still has **[*57]** a valid claim for conversion because the funds owing to it can be easily traced using Verizon's billing statements. *Id*.

The Court finds that the TAC has failed to allege sufficient facts to support a claim of conversion under Arizona law. *Case Corp*., on which JAWA relies, is distinguishable from the facts alleged here because in *Case Corp*. the plaintiff had a security agreement giving it a possessory interest in defendant's equipment and in proceeds from the sales of that equipment, which were to be placed in a separate account and electronically submitted to plaintiff within seven days. *91 P. 3d at 366*. The court in *Case Corp*. specifically distinguished those facts from *Autoville, Inc. v. Friedman, 20 Ariz. App. 89, 510 P. 2d 400, 402 (Ariz. App. 1973)*, in which it held that a car salesman had no possessory interest, but only that of an ordinary creditor, in the proceeds of car sales made on behalf of a dealer who had promised him commissions because "the specific sale proceeds at issue had not been set aside in a special account for [plaintiff] or otherwise segregated." *Case Corp., 91 P. 3d at 366*. Although JAWA argues that the funds owing to it are easily segregable on the basis of Verizon's billing **[*58]** statements, JAWA has not alleged facts, like those in *Case Corp*., showing that Verizon was required to pay it "a specifically secured amount from a definite source." *See id*. Likewise, it has not shown that it had a possessory interest in the funds refunded to customers or in Verizon's accounts receivable. *Autoville* stated that "the modern rule, in which Arizona joins, is that money can be the subject of a conversion provided that it can be described, identified or segregated, and an obligation to treat it in a specific manner is established." *510 P. 2d at 402*. JAWA has failed to allege facts to show that Verizon had an obligation to JAWA to treat the funds at issue in a specific manner or even that Verizon had any contractual obligation to pay JAWA. The Court will grant Verizon's request to dismiss JAWA's conversion claim.

E. Count 5: Unjust Enrichment.

The TAC alleges that Verizon continues to hold approximately $9 million in funds it collected for JAWA's services and that it wrongfully refunded an additional $8 million to Verizon customers. TAC, Doc. 220, ¶ 125. The TAC alleges that Verizon has been enriched by the money it withheld and that it has been enriched in customer goodwill **[*59]** for the refunds it wrongfully made using money that should have been paid to JAWA. *Id*., ¶¶ 126, 127. The TAC also alleges that JAWA has been impoverished by the money withheld from it, by money it paid at Verizon's behest to settle an Illinois judgment, and by the operating costs it expended to offer services for which it has not been compensated. *Id*., ¶¶ 128, 129. The TAC alleges that in the event it is not granted relief under its other claims to compensation for these funds, it is entitled to an unjust enrichment claim. *Id*., ¶ 130.

Verizon argues that the TAC fails to allege sufficient facts to show the elements of an unjust enrichment claim, namely: "'(1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a legal remedy.'" Doc. 235 at 9 (quoting *Trustmark Ins. Co. v. Bank One, Arizona, NA, 202 Ariz. 535, 48 P. 3d 485, 491 (Ariz. App. 2002))*. The Court does not agree. JAWA has alleged facts to show Verizon's enrichment (TAC, Doc. 220, ¶¶ 126, 127) and its own impoverishment (*id*., ¶¶ 128, 129). The TAC also alleges a causal connection (Verizon's holding **[*60]** of money owing to JAWA) that it alleges is "unlawful[]," or without justification. *See id*., ¶ 130. To the extent that JAWA's other claims fail to provide a legal remedy to address Verizon's alleged enrichment at JAWA's expense, the Court finds that JAWA has alleged sufficient facts to state a claim for unjust enrichment.

F. Count 6: Constructive Trust.

The TAC asks the Court to impose a constructive trust on the funds it alleges Verizon has unlawfully withheld from JAWA. TAC, Doc. 220, ¶¶ 126. Verizon argues that the TAC fails to allege a sufficient basis for a constructive trust because "[t]here is no 'specific,' identifiable property over which the Court could impose a constructive trust." Doc. 235 at 10. For the reasons already stated above with regard to JAWA's conversion claim, the Court agrees. *See Burch & Cracchiolo, P.A. v. Pugliani, 144 Ariz. 281, 697 P. 2d 674, 679 (Ariz. App. 1985)* ("A prerequisite to the imposition of a constructive trust is the identification of a specific property belonging to the claimant. . . . A general claim for money damages will not give rise to a constructive trust.") (internal cites omitted). The Court is not persuaded that *Turley v. Ethington, 213 Ariz. 640, 146 P. 3d 1282, 1285 (Ariz. Ct. App. 2006)*, **[*61]** which JAWA cites for the proposition that courts are not required to use an "unyielding formula" when granting a constructive trust, is to the contrary. *See* Doc. 242 at 15. *Turley* dealt with a constructive trust over real property and did not address whether a claim for money damages provides an adequate basis for a constructive trust where the claimant has stated that funds owing to it are traceable but has not identified a secured interest or contractual entitlement to specific funds. The Court will grant Verizon's request to dismiss JAWA's constructive trust claim.

G. Counts 7 & 8: Antitrust.

The TAC alleges that Verizon violated the Sherman Act and the New Jersey Antitrust Act by orchestrating an illegal boycott of JAWA by the aggregators and other wireless carriers in order to reduce competition in the PSMS market. TAC, Doc. 220, ¶¶ 136-185. Verizon argues that the Court should dismiss these claims primarily because JAWA has alleged no facts to support an agreement between the aggregators or to show that Verizon reached an agreement with other wireless providers. Doc. 235 at 11-15. The Court agrees, for the reasons already discussed in relation to JAWA's tortious interference claim, **[*62]** that the TAC only alleges demands Verizon made to each aggregator, individually, to protect Verizon's interests in ending JAWA's allegedly fraudulent sales practices on its own network. The TAC alleges that an agreement existed between the aggregators not to do business with JAWA (TAC, Doc. 220, ¶ 142), but the TAC has not alleged facts to support a showing that Verizon took any actions to induce aggregators to operate in concert, according to a "contract, combination, or conspiracy" to restrain trade as required for a claim under *Section 1* of the Sherman Act. *See Tanaka v. Univ. of S. Cal., 252 F. 3d 1059, 1062 (9th Cir. 2001)*. Additionally, although the TAC alleges that Verizon communicated with other wireless carriers and "coerced the Carriers to agree to boycott JAWA" (TAC, Doc. 220, ¶ 158), this allegation is conclusory. *See* Doc. 235 at 12 ("JAWA does not allege any time or place in which any meeting or communication occurred, nor the individuals who may have communicated or agreed."). The Supreme Court addressed the adequacy of a Sherman Act pleading in *Twombly* and concluded that "parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified **[*63]** point does not supply facts adequate to show illegality." *550 U.S. at 557*. Because the Court finds that the TAC fails to allege sufficient facts to show an agreement to boycott JAWA, the Court need not address JAWA's allegations based on the "rule of reason" that Verizon's alleged actions reduced competition. *See* TAC, Doc. 220, ¶¶ 145-55; 170-80. The Court will grant Verizon's request to dismiss JAWA's Sherman Act claim. Because the New Jersey Antitrust Act mirrors federal ***antitrust law*** (*See N.J. Stat. Ann. § 56:9-18*; *Inter-City Tire and Auto Ctr., Inc. v. Uniroyal, Inc., 701 F.Supp. 1120 (D. N.J. 1988)*, *aff'd Inter-City Tire and Auto Ctr., Inc. v. Uniroyal, Inc., 888 F.2d 1380 (3d Cir 1989)*, *Uniroyal, Inc. v. Erbesh, 888 F.2d 1382 (3d Cir 1989))*, the Court will also dismiss JAWA's New Jersey Antitrust claim.

H. Count 9: Abuse of Process.

The TAC alleges that Verizon used the judicial process for improper purposes including seeking customer goodwill by issuing refunds, seeking to retain profits owing to JAWA, and seeking to put JAWA out of business to enhance its competitive advantage in the same industry. TAC, Doc. 220, ¶ 187.

The parties agree that to assert a claim for abuse of process, **[*64]** a party must allege "(1) a willful act in the use of judicial process; (2) for an ulterior purpose not proper in the regular conduct of the proceedings." *See* Docs. 235 at 18; 242 at 15 (quoting *Crackel v. Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, 887 (Ariz. Ct. App. 2004)* (quoting *Nienstedt v. Wetzel, 133 Ariz. 348, 651 P.2d 876, 881 (Ariz. Ct. App. 1982))*. Verizon argues, and the Court agrees, that JAWA has failed to allege facts to support its abuse of process claim. *See* Doc. 235 at 18. The TAC alleges no particular use of the legal process other than Verizon's filing of the complaint. *See* TAC, Doc. 220, ¶ 59. JAWA argues in its response that Verizon also abused the legal process by requesting injunctive relief. Doc. 242 at 16. Although the TAC alleges that Verizon had "ulterior motives" (TAC, Doc. 220, ¶ 187), its allegations fail to show how Verizon's actions used the legal process "primarily to accomplish a purpose for which the process was not designed." *See Nienstedt, 651 P. 2d at 881*. The Court will grant Verizon's request to dismiss JAWA's abuse of process claims.

I. Count 10: RICO.

The TAC alleges that Verizon, together with the aggregators, operated as an enterprise that engaged in a pattern of racketeering **[*65]** activity in violation of *18 U.S.C. § 1963(c)* ("RICO"). TAC, Doc. 220, ¶¶ 190-91. The TAC alleges that the predicate acts of racketeering included mail fraud and wire fraud under *18 U.S.C. §§ 1341*, *1343*. *Id*., ¶ 192. In particular, the TAC alleges that Verizon and other members of the enterprise used the U.S. mail and interstate communications to issue sham refunds and to steal and convert approximately $18 million owing to JAWA. *Id*., ¶ 193.

Verizon argues that JAWA fails to plead key elements necessary for a RICO claim, including what the alleged "enterprise" is and what conduct Verizon engaged in with the aggregators in violation of RICO. Doc. 235 at 19 (citing *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985))*. Verizon also argues that JAWA fails adequately to plead the predicate acts of mail and wire fraud because it has pled no facts to show fraudulent misrepresentation and it fails to satisfy the requirement of Federal *Rule 9(b)* that acts of fraud be pled with particularity, including the time, place, and content of the misrepresentation. Doc. 235 at 19-20.

The Court agrees that the TAC fails to plead acts of fraudulent misrepresentation in relation to Verizon's alleged scheme **[*66]** to offer sham refunds and to withhold money from JAWA, and that this failure is fatal to its predicate claims of mail and wire fraud. To allege a violation of mail or wire fraud, a plaintiff must show (1) a scheme or artifice to defraud, (2) the use of U.S. mails or wires in furtherance of the scheme, and (3) specific intent to deceive or defraud. *See* *Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir.2004)* (mail fraud); *Schreiber Dist. Co. v. Serv-Well Furniture Co., 806 F. 2d 1393, 1400 (9th Cir. 1986)* (wire fraud). JAWA argues on the basis of *Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 648-49, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*, that no allegations of fraud or misrepresentation are required. Doc. 242 at 19. *Bridge* stated that "[u]sing the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation." *553 U.S. at 648*. *Bridge* held that mail fraud occurs through an attempt to defraud even if no one relies on the fraudulent misrepresentation, not that mail fraud does not require an attempt to defraud or deceive. *See* *id. at 648-57* (rejecting the argument that fraud claims under **[*67]** RICO require "first-party reliance."). This distinction does not relieve JAWA of the need to allege specific acts of fraud or attempted fraud to establish the underlying offense. JAWA directs the Court to ¶¶ 194-209 of the TAC to show that it has properly alleged racketeering activity with particularity. Doc. 242 at 19. The only particulars cited in these paragraphs, however, are the letters Verizon sent to aggregators (who, JAWA alleges, are actually part of the racketeering enterprise), demanding that they cut off business with JAWA on Verizon's network and that they indemnify Verizon for its losses (TAC, Doc. 220, ¶¶ 194-95), and the filing of this lawsuit and unspecified solicitations to customers, encouraging them to seek refunds in apparent contradiction of the terms of Verizon's Illinois settlement (*id*., ¶¶ 202-204). The TAC alleges only that the letters caused the aggregators to be fearful of Verizon, not that they made fraudulent representations. *See id*., ¶ 197. Moreover, even construing the communications to customers as made with the intent to deceive because they offered refunds in apparent contradiction to the terms of the Illinois settlement, the TAC does not allege with **[*68]** particularity the content of these communications or how they misrepresented the terms of that settlement. *See id*., ¶ 204. Having found that the TAC fails to allege with particularity specific acts of fraud to support the alleged underlying RICO offenses, the Court need not address Verizon's other arguments that JAWA has failed to show that Verizon and the aggregators worked in concert as an "enterprise" or that their alleged conduct constituted a pattern of racketeering activity. *See* Doc. 235 at 19. The Court will grant Verizon's request to dismiss JAWA's RICO claims.

IT IS ORDERED:

1. Defendants' motion for an accounting and release of funds (Doc. 211) is **denied**.

2. Defendants' motion to dismiss Plaintiff's first amended complaint (Doc. 232) is **granted in part** and **denied in part** as set forth in this order.

3. Plaintiff's motion to dismiss Defendants' third amended counterclaims (Doc. 235) is **granted in part** and **denied in part** as set forth in this order.

Dated this 30th day of January, 2012.

/s/ David G. Campbell

David G. Campbell

United States District Judge

End of Document

In re Ciprofloxin Hydrochloride Antitrust Litig.

United States District Court for the Eastern District of New York

January 30, 2012, Decided; January 31, 2012, Filed

Case No. 00-MDL-1383 (FB)

Reporter

2012 U.S. Dist. LEXIS 11600 *; 2012-1 Trade Cas. (CCH) P77,787; 2012 WL 293560

IN RE CIPROFLOXIN HYDROCHLORIDE ANTITRUST LITIGATION

Prior History: *In re Ciprofloxin Hydrochloride Antitrust Litig., 2011 U.S. Dist. LEXIS 51682 (E.D.N.Y., May 13, 2011)*

Core Terms

costs, patent, plaintiffs', antitrust, reasons

LexisNexis® Headnotes

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Governments > Courts > Authority to Adjudicate

Governments > Courts > Rule Application & Interpretation

HN1[] **Costs & Attorney Fees, Costs**

A court has broad discretion to determine whether to overlook a party's failure to comply with local rules. Where equity so requires, the Court will exercise its inherent power to review an award of costs, even if no objections were made to the Clerk before costs were awarded.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN2[] **Judges, Discretionary Powers**

Under *Fed. R. Civ. P. 54(d)(1)*, unless a federal statute, the Federal Rules of Civil Procedure, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. There is a strong presumption that the prevailing party will be awarded costs under *Rule 54(d)* — an award against the losing party is the normal rule obtaining in civil litigation, not an exception. It is within the district court's discretion to deny costs for a variety of reasons, including misconduct by the prevailing party, the public importance of the case, the difficulty of the issues, or the losing party's limited financial resources. The losing party shoulders the burden of rebutting the presumption against it and, should a district court decide to deny costs, it must articulate its reasons.

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

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN3[] **Clayton Act, Remedies**

There is no statute or rule that supercedes a district court's *Fed. R. Civ. P. 54(d)(1)* discretion to award or deny costs to a plaintiff who has failed to prevail in an antitrust action. The Clayton Act provides that a party injured by an antitrust violation shall recover the cost of suit. *15 U.S.C.S. § 15(a)*. It does not alter a court's discretion to award or deny costs to a plaintiff who has failed to prove a violation.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN4[] **Costs & Attorney Fees, Costs**

In considering an award of costs, a district court should consider the amount of costs, the good faith of the losing party, and the closeness and difficulty of the issues raised by a case. The closeness of a case is judged not by whether one party clearly prevails over another, but by the refinement of perception required to recognize, sift through and organize relevant evidence, and by the difficulty of discerning the law of the case.

Counsel: [*1] For Arkansas Carpenters Health and Welfare Fund, Maria Locurto, Paper, Allied-Industrial, Chemical, and Energy Workers International Union, AFL-CIO, CLC, United Food & Commercial Workers and Participating Food Industry Employers Tri-State Health & Welfare Fund, Plaintiffs: Bernard Persky, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For Dr. Sol Lubin, Plaintiff: Marc H. Edelson, LEAD ATTORNEY, Edelson & Associates, LLC, Doylestown, PA; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For Ann Stuart, Plaintiff: Marc H. Edelson, LEAD ATTORNEY, Edelson & Associates, LLC, Doylestown, PA; Peter L. Masnik, LEAD ATTORNEY, Kalikman & Masnik, Haddonfield, NJ; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For Louisiana Wholesale Drug Co., Inc., Plaintiff: Bruce E. Gerstein, LEAD ATTORNEY, Garwin, Gerstein & Fisher, LLP, New York, NY; John G. Odom, LEAD ATTORNEY, Odom & Des Roches, New Orleans, LA; Monica L. Rebuck, Hangley Aronchick Segal & Pudlin, Harrisburg, PA.

For Linda K. McIntyre, Plaintiff: Elwood S. Simon, LEAD ATTORNEY, Elwood S. Simon & Associates, P.C., Birminghan, MI; Joseph **[*2]** Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1112, Plaintiff: James P. Watts, LEAD ATTORNEY, Zimmerman Reed PLLC, Phoenix, AZ; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-2093, Plaintiff: Frank Verderame, LEAD ATTORNEY, Plattner Verderame PC, Phoenix, Az; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1113, One or more Plaintiff(s) in 01-cv-1114, One or more Plaintiff(s) in 01-cv-1121, One or more Plaintiff(s) in 00-cv-7648, One or more Plaintiff(s) in 01-cv-1122, One or more Plaintiff(s) in 01-cv-2692, Plaintiffs: Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1107, Plaintiff: Daniel C. Girard, LEAD ATTORNEY, PRO HAC VICE, Girard Gibbs LLP, San Francisco, Ca; Eric H. Gibbs, LEAD ATTORNEY, Girard & Green, San Francisco, Ca; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1158, Plaintiff: David Lee Fiol, LEAD ATTORNEY, Lieff Global, LLP, San Francisco, CA; Eric B. Fastiff, LEAD ATTORNEY, Lieff Cabraser **[*3]** Heimann & Bernstein LLP, San Francisco, CA; Joseph R. Saveri, LEAD ATTORNEY, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1115, Plaintiff: Andrew J. Ogilvie, Mark F. Anderson, LEAD ATTORNEYS, Kemnitzer Anderson Barron & Ogilvie, San Francisco, Ca; Jennifer S. Abrams, Joseph J. Tabacco, LEAD ATTORNEYS, Berman DeValerio Pease & Tabacco, San Francsico, Ca; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1108, Plaintiff: Guido Saveri, Richard Saveri, LEAD ATTORNEYS, Saveri & Saveri Inc., San Francisco, CA; Michael Hackard, LEAD ATTORNEY, Hackard, Holt & Heller, Gold River, CA; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1109, Plaintiff: Kenneth A. Wexler, LEAD ATTORNEY, The Wexler Firm, Chicago, IL; Marc H. Edelson, LEAD ATTORNEY, Edelson & Associates, LLC, Doylestown, PA; Samuel D. Heins, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneappolis, MN; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-2691, **[*4]** Plaintiff: Mario N. Alioto, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1110, Plaintiff: Sharon T. Maier, LEAD ATTORNEY, Ross Dixon & Bell LLP, San Diego, Ca; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1116, Plaintiff: Jeffrey R. Krinsk, LEAD ATTORNEY, Finkelstein and Krinsk, San Diego, Ca; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-2094, Plaintiff: Kevin I. Goldberg, LEAD ATTORNEY, Goldberg & Finnegan, Silver Spring, MD; Robert Keith Jenner, LEAD ATTORNEY, Greenberg & Bederman, Silver Spring, MD; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1117, One or more Plaintiff(s) in 01-cv-1118, Plaintiffs: Andrew Bennett Spark, LEAD ATTORNEY, Law Office of Andrew Bennett Spark, Esq., Sarasota, Fl; Ralph L. Friedland, LEAD ATTORNEY, LawServ, Chartered, Sarasota, FL; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1119, Plaintiff: **[*5]** Kenneth J. Vianale, LEAD ATTORNEY, Vianale & Vianale LLP, Boca Raton, FL; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1120, Plaintiff: David A. Nester, LEAD ATTORNEY, Nester & Constance, Belleville, Il; Joseph P. Danis, LEAD ATTORNEY, Carey & Danis, St. Louis, Mo; Joseph R. Saveri, LEAD ATTORNEY, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1520, Plaintiff: Daniel E. Gustafson, PRO HAC VICE, Karla Marie Gluek, Samuel D. Heins, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneappolis, MN; Kenneth A. Wexler, LEAD ATTORNEY, The Wexler Firm, Chicago, IL; Marc H. Edelson, LEAD ATTORNEY, Edelson & Associates, LLC, Doylestown, PA; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 00-cv-7649, Plaintiff: Peter L. Masnik, LEAD ATTORNEY, Kalikman & Masnik, Haddonfield, NJ; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 00-cv-7482, Plaintiff: Linda P. Nussbaum, LEAD ATTORNEY, Grant & Eisenhofer P.A., New York, NY; **[*6]** Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 00-cv-5246, Plaintiff: Dan Drachler, LEAD ATTORNEY, Seattle, WA; Joseph Lipofsky, Joseph S. Tusa, Robert S. Schachter, LEAD ATTORNEYS, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 00-cv-6219, Plaintiff: Wallace A. Showman, LEAD ATTORNEY, Law Office of Wallace A. Showman, New York, NY; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 00-cv-4428, Plaintiff: Joseph Lipofsky, LEAD ATTORNEY, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 00-cv-5033, Plaintiff: Joseph S. Tusa, LEAD ATTORNEY, Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 00-cv-7650, Plaintiff: Bruce E. Gerstein, LEAD ATTORNEY, Garwin, Gerstein & Fisher, LLP, New York, NY; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-644, Plaintiff: Richard B. Brualdi, LEAD ATTORNEY, The Brualdi Law Firm, New York, NY; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) **[*7]** in 01-cv-648, Plaintiff: M. Christine Carty, LEAD ATTORNEY, Schnader Harrison Segal & Lewis LLP, New York, NY; Monica L. Rebuck, Steve D. Shadowen, LEAD ATTORNEYS, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-646, Plaintiff: Michael Straus, LEAD ATTORNEY, Straus & Boies, Birmingham, AL; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-647, Plaintiff: Jules Brody, LEAD ATTORNEY, Stull, Stull & Brody, New York, NY; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-1111, Plaintiff: B. J. Wade, LEAD ATTORNEY, Glassman Edwards Wade & Wyatt, P.C., Memphis, Tn; William M. Audet, LEAD ATTORNEY, Audet & Partners, LLP, San Francisco, CA; William H. Garvin, III, LEAD ATTORNEY, Law Offices of William H. Garvin III, P.A., Tallahassee, Fl; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For One or more Plaintiff(s) in 01-cv-3924, Plaintiff: John C. Cabaniss, LEAD ATTORNEY, Law Offices of John C. Cabaniss, Milwaukee, WI; Joseph P. Danis, LEAD ATTORNEY, Carey & **[*8]** Danis, St. Louis, Mo; Joseph R. Saveri, LEAD ATTORNEY, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Peter B. Bensinger, Jr., LEAD ATTORNEY, Barlit Beck Herman Palenchar Scott, Chicago, IL; Joseph Lipofsky, Zwerling, Schachter & Zwerling, LLP, New York, NY.

For CVS Pharmacy, Inc., Rite Aid Corporation, Arthur's Drug Store, Inc., Indirect Purchasers Class, Plaintiffs: Monica L. Rebuck, Hangley Aronchick Segal & Pudlin, Harrisburg, PA.

One or more Plaintiff(s) in 00-cv-12450, Plaintiff, Pro se.

One or more Plaintiff(s) in 01-cv-3924, Plaintiff, Pro se.

For Bayer AG, Defendant: Phillip A. Proger, LEAD ATTORNEY, Jones Day Reavis & Pogue, Washington, DC; Kevin D McDonald, Jones Day, Washington, DC.

For Bayer Corp., Defendant: Fred H. Bartlit, Jr., LEAD ATTORNEY, Bartlit, Beck, Herman, Palenchar & Scott LLP, Chicago, IL; Michael J. Valaik, LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL; Phillip A. Proger, LEAD ATTORNEY, Jones Day Reavis & Pogue, Washington, DC; Kevin D McDonald, Jones Day, Washington, DC; Sean W. Gallagher, Barlit Beck Herman Palenchar & Scott LLP, Chicago, IL.

For Hoechst Marion Roussel, Inc., Defendant: David E. Everson, LEAD ATTORNEY, **[*9]** Stinson, Mag & Fizzell, P.C., Kansas City, MO; Victoria Lee Smith, Stinson, Morrison, Hecker, LLP, Kansas City, MO.

For The Rugby Group, Inc., doing business as, Rugby Laboratories, Inc., Defendant: David E. Everson, LEAD ATTORNEYLEAD ATTORNEY, Stinson, Mag & Fizzell, P.C., Kansas City, MO; Victoria Lee Smith, Stinson, Morrison, Hecker, LLP, Kansas City, MO.

For Watson Pharmaceuticals, Inc., Defendant: David E. Everson, LEAD ATTORNEYLEAD ATTORNEY, Stinson, Mag & Fizzell, P.C., Kansas City, MO.

For Barr Laboratories, Inc., Defendant: Joseph Serino, Jr., LEAD ATTORNEY, Kirkland & Ellis, New York, NY; Karen N. Walker, LEAD ATTORNEY, Kirkland & Ellis, Washington, DC; Edwin U, Kirkland & Ellis LLP, Washington, DC.

For One or more Defendant(s) in 01-cv-2093, Defendant: Jeffrey Hall, LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott, Chicago, Il; Patrick Xavier Fowler, LEAD ATTORNEY, Snell & Wilmer LLP, Phoenix, Az.

For One or more Defendant(s) in 01-cv-1107, One or more Defendant(s) in 01-cv-2691, One or more Defendant(s) in 01-cv-1110, Defendants: Amy A. Stathos, LEAD ATTORNEY, Jones Day Reavis & Pogue, Los Angeles, Ca; Jeffrey A. LeVee, LEAD ATTORNEY, Jones Day Reavis & Pogue, Los Angeles, **[*10]** CA.

For One or more Defendant(s) in 01-cv-1158, Defendant: Amy A. Stathos, LEAD ATTORNEY, Jones Day Reavis & Pogue, Los Angeles, Ca; Jeffrey A. LeVee, LEAD ATTORNEY, Jones Day Reavis & Pogue, Los Angeles, CA; Kevin D McDonald, LEAD ATTORNEY, Jones Day, Washington, DC; Phillip A. Proger, LEAD ATTORNEY, Jones Day Reavis & Pogue, Washington, DC; William V. O'Reilly, LEAD ATTORNEY, Jones, Day, Reavis, & Pogue, Washington, DC.

For One or more Defendant(s) in 01-cv-1115, Defendant: Amy A. Stathos, LEAD ATTORNEY, Jones Day Reavis & Pogue, Los Angeles, Ca; Jeffrey A. LeVee, LEAD ATTORNEY, Jones Day Reavis & Pogue, Los Angeles, CA; Phillip A. Proger, LEAD ATTORNEY, Jones Day Reavis & Pogue, Washington, DC; William V. O'Reilly, LEAD ATTORNEY, Jones, Day, Reavis, & Pogue, Washington, DC.

For One or more Defendant(s) in 01-cv-1108, Defendant: Jeffrey A. LeVee, LEAD ATTORNEY, Jones Day Reavis & Pogue, Los Angeles, CA.

For One or more Defendant(s) in 01-cv-1116, Defendant: Christopher J. Healey, LEAD ATTORNEY, Luce Forward Hamilton and Scripps, San Diego, Ca.

For One or more Defendant(s) in 01-cv-2094, Defendant: Karen N. Walker, LEAD ATTORNEY, Kirkland & Ellis, Washington, DC; Sarah Dryden Mackey, LEAD **[*11]** ATTORNEY, Jones, Day, Reavis & Pogue, Washington, DC.

For One or more Defendant(s) in 01-cv-1117, Defendant: David E. Everson, LEAD ATTORNEY, Stinson, Mag & Fizzell, P.C., Kansas City, MO; Fred H. Bartlit, Jr., LEAD ATTORNEY, Bartlit, Beck, Herman, Palenchar & Scott LLP, Chicago, IL; John Kevin Carey, LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, Fl; Jonathan L. Greenblatt, LEAD ATTORNEY, Shearman & Sterling, Washington, DC; Joseph Ianno, Jr., LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; Karen N. Walker, LEAD ATTORNEY, Kirkland & Ellis, Washington, DC; Phillip A. Proger, LEAD ATTORNEY, Jones Day Reavis & Pogue, Washington, DC.

For One or more Defendant(s) in 01-cv-1118, Defendant: Joseph Ianno, Jr., LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL.

For One or more Defendant(s) in 01-cv-1119, Defendant: Fred H. Bartlit, Jr., LEAD ATTORNEY, Bartlit, Beck, Herman, Palenchar & Scott LLP, Chicago, IL; Joseph Ianno, Jr., LEAD ATTORNEY, Carlton Fields, P.A., West Palm Beach, FL; Karen N. Walker, LEAD ATTORNEY, Kirkland & Ellis, Washington, DC.

For One or more Defendant(s) in 01-cv-1120, Defendant: Heather S. Woodson, LEAD ATTORNEY, Stinson, Mag & Frizzell, P.C., Leawood, **[*12]** Ks; Jonathan L. Greenblatt, LEAD ATTORNEY, Shearman & Sterling, Washington, DC; Kevin D McDonald, LEAD ATTORNEY, Jones Day, Washington, DC; Phillip A. Proger, LEAD ATTORNEY, Jones Day Reavis & Pogue, Washington, DC; Thomas D. Yannucci, LEAD ATTORNEY, PRO HAC VICE, Kirkland & Ellis, Washington, DC; William V. O'Reilly, LEAD ATTORNEY, Jones, Day, Reavis, & Pogue, Washington, DC.

For One or more Defendant(s) in 01-cv-1520, Defendant: Fred H. Bartlit, Jr., LEAD ATTORNEY, Bartlit, Beck, Herman, Palenchar & Scott LLP, Chicago, IL; Jonathan L. Greenblatt, LEAD ATTORNEY, Shearman & Sterling, Washington, DC; Karen N. Walker, LEAD ATTORNEY, Kirkland & Ellis, Washington, DC; Mark Alan Jacobson, LEAD ATTORNEY, Lindquist & Vennum, Minneapolis, Mn; Phillip A. Proger, LEAD ATTORNEY, Jones Day Reavis & Pogue, Washington, DC.

For One or more Defendant(s) in 00-cv-7649, Defendant: Karen A. Confoy, LEAD ATTORNEY, Sterns & Weinroth, P.C., Trenton, NJ.

For One or more Defendant(s) in 00-cv-7650, Defendant: Fred H. Bartlit, Jr., LEAD ATTORNEY, Bartlit, Beck, Herman, Palenchar & Scott LLP, Chicago, IL; Kevin D McDonald, LEAD ATTORNEY, Jones Day, Washington, DC; Lawrence D. Rosenberg, LEAD ATTORNEY, Jones, Day, **[*13]** Reavis & Pogue, New York, NY; Phillip A. Proger, LEAD ATTORNEY, Jones Day Reavis & Pogue, Washington, DC; William V. O'Reilly, LEAD ATTORNEY, Jones, Day, Reavis, & Pogue, Washington, DC.

For One or more Defendant(s) in 01-cv-644, Defendant: Barbra S. Levy, LEAD ATTORNEY, Jones Day reavis & Pogue, New York, NY; Fred H. Bartlit, Jr., LEAD ATTORNEY, Bartlit, Beck, Herman, Palenchar & Scott LLP, Chicago, IL; Jonathan L. Greenblatt, LEAD ATTORNEY, Shearman & Sterling, Washington, DC; Karen N. Walker, Thomas D. Yannucci, LEAD ATTORNEYS, Kirkland & Ellis, Washington, DC; Kevin D McDonald, LEAD ATTORNEY, Jones Day, Washington, DC; Phillip A. Proger, LEAD ATTORNEY, Jones Day Reavis & Pogue, Washington, DC; Thomas D. Yannucci, LEAD ATTORNEY, PRO HAC VICE, Kirkland & Ellis, Washington, DC; William V. O'Reilly, LEAD ATTORNEY, Jones, Day, Reavis, & Pogue, Washington, DC.

For One or more Defendant(s) in 01-cv-648, Defendant: Barbra S. Levy, LEAD ATTORNEY, Jones Day reavis & Pogue, New York, NY; David E. Everson, LEAD ATTORNEY, Stinson, Mag & Fizzell, P.C., Kansas City, MO; Fred H. Bartlit, Jr., LEAD ATTORNEY, Bartlit, Beck, Herman, Palenchar & Scott LLP, Chicago, IL; Jonathan L. Greenblatt, LEAD ATTORNEY, **[*14]** Shearman & Sterling, Washington, DC; Thomas D. Yannucci, PRO HAC VICE, Karen N. Walker, LEAD ATTORNEYS, Kirkland & Ellis, Washington, DC; Kevin D McDonald, LEAD ATTORNEY, Jones Day, Washington, DC; Kimberly S. Penner, LEAD ATTORNEY, McCarter & English, LLP, New York, NY; Phillip A. Proger, LEAD ATTORNEY, Jones Day Reavis & Pogue, Washington, DC; William V. O'Reilly, LEAD ATTORNEY, Jones, Day, Reavis, & Pogue, Washington, DC.

For One or more Defendant(s) in 01-cv-647, Defendant: Barbra S. Levy, LEAD ATTORNEY, Jones Day reavis & Pogue, New York, NY; Miriam S. Higgins, LEAD ATTORNEY, HeartShare Human Services of New York, Brooklyn, NY.

For One or more Defendant(s) in 01-cv-1111, Defendant: Anna M. Grizzle, Dale R. Grimes, Robert E. Cooper, Jr., LEAD ATTORNEYS, Bass Berry & Sims, Nashville, Tn; David E. Everson, LEAD ATTORNEY, Stinson, Mag & Fizzell, P.C., Kansas City, MO; Fred H. Bartlit, Jr., LEAD ATTORNEY, Bartlit, Beck, Herman, Palenchar & Scott LLP, Chicago, IL; James D. Wilson, LEAD ATTORNEY, Harris Shelton Dunlap Cobb & Ryder, Memphis, Tn; Jonathan L. Greenblatt, LEAD ATTORNEY, Shearman & Sterling, Washington, DC.

Judges: FREDERIC BLOCK, Senior United States District Judge.

Opinion by: FREDERIC BLOCK

Opinion

MEMORANDUM [*15] AND ORDER

BLOCK, Senior District Judge:

Defendants' motions for summary judgment in this antitrust action were granted and affirmed on appeal. Plaintiffs now move this court to vacate the award of $127,558.55 in costs imposed by the Clerk of the Court pursuant to *Federal Rule of Civil Procedure 54(d)(1)*. For the reasons that follow, that motion is granted.

I

Defendant Bayer AG and its subsidiary, Bayer Corporation (collectively "Bayer"), possess the patent for the active ingredient in the antibiotic ciprofloxacin hydrochloride ("Cipro"). The patent was issued in June 1987 and scheduled to expire in December 2003, with an additional six-month period of pediatric exclusivity until June 2004.

In 1991, defendant Barr Laboratories, Inc. ("Barr") filed an Abbreviated New Drug Application ("ANDA") seeking approval to market a generic version of Cipro. Barr included a pre-expiration challenge ("ANDA-IV" certification), through which it sought permission to market the generic drug before Bayer's patent expired on the grounds that the patent was invalid or would not be infringed. *See* *21 U.S.C. § 355(j)(2)(B)*. An ANDA-IV certification is an act of infringement, *see* *35 U.S.C. § 271 (e)(2)(A)*; *Arkansas Carpenters Health and Welfare Fund v. Bayer AG, 604 F.3d 98, 101 (2d Cir. 2010)*, **[*16]** and Bayer responded by suing Barr for patent infringement in January 1992 in the Southern District of New York. To fund the litigation, Barr entered into an agreement with defendant The Rugby Group ("Rugby"), then a subsidiary of defendant Hoechst Marion Roussel, Inc. ("HMR"),[1] under which Barr agreed to share its potential profits from the generic drug with Rugby in exchange for Rugby's agreement to finance a portion of the litigation.

In January 1997, Bayer and Barr settled the patent litigation by agreeing to what is known as a "reverse exclusionary payment" — Bayer, the patent holder, payed Barr, the alleged infringer, to stay off the market and end the litigation. Bayer agreed to pay Barr $49.1 million upfront, plus either quarterly payments of $12.5 million to $17.125 million until six months prior to the patent's expiration or a license to sell Bayer-manufactured Cipro, and it gave the generic manufactures permission to sell Cipro at a reduced rate for six months before the patent's expiration.

As a result of this settlement, purchasers of Cipro **[*17]** filed over 30 antitrust actions in 2000, which were consolidated in the Eastern District of New York before Judge David Trager. In 2005, the court granted defendants' summary judgment motions and held that because the agreements did not restrain competition beyond the scope of the patent they had no anti-competitive effect. *See* *In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514 (E.D.N.Y. 2005)* ("*Cipro I*"). Plaintiffs appealed.

The Second Circuit retained jurisdiction over the direct purchaser plaintiffs' appeals, but transferred the indirect purchaser plaintiffs' appeal, which included claims arising out of patent law, to the Federal Circuit. The Federal Circuit affirmed, holding that the district court applied an appropriate level of antitrust scrutiny "because any anti-competitive effects . . . were within the exclusionary zone of the patent" and that the state antitrust claims were properly dismissed. *In re Ciprofloxacin Hydrochloride Antitrust Litigation, 544 F.3d 1323, 1341 (2008)* ("*Cipro II*"). The Second Circuit also affirmed, emphasizing that it was bound by its decision in *Joblove v. Barr Labs. Inc., (In re Tamoxifen Citrate Antitrust Litig.), 466 F.3d 187 (2d Cir. 2006)* **[*18]** ("*Tamoxifen*"). *See* *Arkansas Carpenters Health and Welfare Fund v. Bayer AG, 604 F.3d 98 (2010)* ("*Cipro III*").

Defendants filed their requests for bills of costs on December 1, 2010. Plaintiffs filed no objections. On May 13, 2011, Magistrate Judge Steven Gold directed the clerk to tax costs in the full amount sought. On May 18, 2011, the Clerk taxed plaintiffs $53,066.80 in favor of Bayer; $36,952.75 in favor of Barr; and $37,539.00 in favor of HMR, Rugby, and Watson. On May 20, 2011, plaintiffs filed the motion to vacate costs now before the Court.

II

a. Timeliness.

[1] Rugby was subsequently sold to defendant Watson Pharmaceuticals, Inc. ("Watson") (collectively, with Barr and HMR, "generic defendants").

Federal Rule of Civil Procedure 54(d)(1) provides that, after a clerk taxes costs, a district court may review the clerk's action "[o]n motion served within the next 7 days." Plaintiffs complied with this rule, as their motion was filed within seven days of the Clerk's entry. Local Rule 54.1(b), however, imposes an additional procedural requirement: "A party objecting to any cost item shall serve objections . . . prior to or at the date and time scheduled for taxation." If no objections are filed, "any item listed may be taxed within the discretion of the Clerk." Local Rule 54.1(b).

Plaintiffs' failure to **[*19]** object prior to entry of costs thus constitutes a default under the local rules. *See* Dejesus v. Starr Technical Risks Agency, Inc., No. 03 Civ. 1298, 2005 U.S. Dist. LEXIS 7152, 2005 WL 957389 at *1 (S.D.N.Y. 2005) ("Court finds that plaintiff defaulted under Local Rule 54.1 by not objecting to the bill of costs prior to [date of hearing]."]); Weisbart v. U.S. Dept. of Taxation, No. 97 Civ. 6020, 2001 U.S. Dist. LEXIS 21937, 2001 WL 1782873 at *4 (E.D.N.Y. 2001) (declining to consider the merits of an objection to the Clerk's award of costs where the losing party failed to comply with Local Rule 54.1(b)). Plaintiffs' explanation for missing the deadline is that their counsel contacted the Clerk's office to inquire when objections were due and was told, inaccurately, that a hearing date would be set and they had until the hearing date to file objections.

HN1[] The Court "has broad discretion to determine whether to overlook a party's failure to comply with local rules." D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 109 n.2 (2d Cir. 2006) (quoting Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 73 (2d Cir. 2001)). Where equity so requires, the Court will exercise its "'inherent power' to review an award of costs, even if no objections were made **[*20]** to the Clerk before costs were awarded." *See* Weisbart v. U.S. Dept. of Taxation, No. 97 Civ. 6020, 2001 U.S. Dist. LEXIS 21937, 2001 WL 1782873 at *4 (E.D.N.Y. 2001). Here, equity favors review of plaintiffs' motion on the merits.

b. Award of costs.

HN2[] Under Rule 54(d)(1), "[u]nless a federal statute, [the Federal Rules of Civil Procedure], or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party." There is a strong presumption that the prevailing party will be awarded costs under Rule 54(d) — "an award against the losing party is the normal rule obtaining in civil litigation, not an exception." *See* Whitfield v. Scully, 241 F.3d 264, 270 (2d Cir. 2001). It is within the district court's discretion to deny costs for a variety of reasons, including "misconduct by the prevailing party, the public importance of the case, the difficulty of the issues, or the losing party's limited financial resources." Id. at 270; *see also* McDonnell v. American Leduc Petroleums, Limited, 456 F.2d 1170, 1188 (2d Cir. 1972); *see also* Ramnarain v. City of New York, 474 F.Supp. 2d 443, 448 (E.D.N.Y. 2007).[2] The losing party shoulders the burden of rebutting the presumption against it **[*21]** and, should a district court decide to deny costs, it "must articulate its reasons." *See* Whitfield, 241 F.3d at 270.

Plaintiffs argue that the Court should deny defendants costs here because the litigation was "close, complex and protracted." These are valid reasons to deny defendants costs. *See* Remington Products, Inc. v. North American Philips, Corp., 763 F. Supp. 683, 687 (D. Conn. 1991); *see also* Rivera v. City of Chicago, 469 F.3d 631, 635 (7th Cir. 2006) (***HN4***[] "the district court should consider the amount of costs, the good faith of the losing party, and the closeness and difficulty of the issues raised by a case"); Whitfield, 241 F.3d at 270 (costs may be denied because of "difficulty **[*22]** of the issues"); White & White, Inc. v. American Hosp. Supply Corp., 786 F.2d 728, 732 (6th Cir. 1986) (affirming denial of costs in "close and difficult" case). "The closeness of a case is judged not by whether one party clearly prevails over another, but by the refinement of perception required to recognize, sift through and organize relevant evidence, and by the difficulty of discerning the law of the case." White & White, Inc., 786 F.2d at 732.

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[2] ***HN3***[] There is no statute or rule that supercedes a district court's Rule 54(d)(1) discretion to award or deny costs to a plaintiff who has failed to prevail in an antitrust action. *See* White & White, Inc. v. American Hosp. Supply Corp., 786 F.2d 728, 731 (6th Cir. 1986). The Clayton Act provides that a party injured by an antitrust violation "shall recover . . . the cost of suit." 15 U.S.C. § 15(a). It does not alter a court's discretion to award or deny costs to a plaintiff who has failed to prove a violation.

The law regarding reverse exclusionary payments was in flux throughout the course of this litigation. At the time plaintiffs' complaint was filed, no circuit court had ruled on the legality of reverse exclusion payment agreements and the Federal Trade Commission viewed such settlements as violations of ***antitrust law***. *See Cipro II, 604 F.3d at 104-105*. As of 2003, when Judge Trager denied defendants' motions to dismiss, the Second Circuit had not yet decided the question and "courts within other circuits [had] found that agreements between pioneer drug manufacturers and generic manufacturers that filed ANDA IVs seeking to market a generic version of the pioneer drug constitute horizontal market allocations agreements and are, thus, *per se* **[*23]** illegal." *In re Ciprofloxacin Hydrochloride Antitrust Litigation, 261 F. Supp. 2d 188, 237 (E.D.N.Y. 2003)*. Judge Trager distinguished these cases and determined that the agreements at issue here were not *per se* illegal. *Id. at 257*. This triggered two years of discovery prior to the court's 78-page opinion, in 2005, granting defendants summary judgment.

The Second Circuit panel noted that it was bound by *Tamoxifen*, which was decided while this case was pending on appeal. *Cipro II, 604 F.3d at 105*. It pointed to several reasons, however, why en banc reconsideration of the issue would be appropriate. *Id. at 108-110*. Although the Circuit ultimately denied rehearing en banc, Judge Pooler penned a vigorous dissent. *See Arkansas Carpenters Health and Welfare Fund, 625 F.3d 779 (2d Cir. 2010)*. The Federal Circuit also relied heavily on *Tamoxifen*, as well as recent Eleventh Circuit case law. *See Cipro III, 544 F.3d at 1335-1336*.

In short, the law of this case has been difficult to discern, as evidenced by the depth and length of the Judge Trager's analysis, the conflicting circuit court approaches and the development of the issue over the long life of the case. Moreover, there is no suggestion **[*24]** that plaintiffs brought this action in bad faith. Accordingly, the Court finds that this litigation was sufficiently close, complex and protracted to warrant the parties bearing their own costs.

SO ORDERED.

FREDERIC BLOCK

Senior United States District Judge

Brooklyn, New York

January 30, 2012

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[Lample v. Cal. Physicians' Serv.](#)

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

January 30, 2012, Filed

B231849

Reporter
2012 Cal. App. Unpub. LEXIS 721 *; 2012 WL 275512

AMALIA CORONA LAMPLE, Plaintiff and Appellant, v. CALIFORNIA PHYSICIANS' SERVICE, Defendant and Respondent.

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

Subsequent History: Request denied by *Lample (Amalia Corona) v. California Physicians' Service, 2012 Cal. LEXIS 3647 (Cal., Apr. 18, 2012)*

Costs and fees proceeding at *Lample v. Cal. Physicians' Serv., 2016 Cal. App. Unpub. LEXIS 3988 (Cal. App. 2d Dist., May 31, 2016)*

Prior History: [*1] APPEAL from a judgment of the Superior Court of Los Angeles County. Los Angeles County Super. Ct. No. BC441127. William F. Highberger, Judge.

Disposition: Reversed and remanded.

Core Terms

premium, subscribers, unfair, methodology, calculate, rates, regulations, caps, consumer, demurrer, alleges, weighted average, cause of action, leave to amend, coverage, plans, trial court, products, courts, cell, health care service plan, disclose, cases, sustain a demurrer, competitor, geographic, amend, second amended complaint, business practice, judicial notice

Counsel: Kiesel Boucher Larson, William Larson; and Herbert L. Greenberg for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Gregory N. Pimstone, Craig S. Bloomgarden, Joanna S. McCallum and Joanna Rosen for Defendant and Respondent.

Judges: PERLUSS, P. J.; WOODS, J., JACKSON, J. concurred.

Opinion by: PERLUSS

Opinion

Amalia Corona Lample filed an action on behalf of herself and all others similarly situated alleging California Physicians' Service, doing business as Blue Shield of California (Blue Shield), violated California's unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) (UCL) by charging certain subscribers to its preferred provider health care service plans premiums that exceed the rate caps identified in *Health and Safety Code sections 1399.805* and *1399.811*.[1] Lample also asserted a claim for fraudulent concealment based on Blue Shield's failure to disclose its unlawful practice to its subscribers. The trial court sustained Blue Shield's demurrer without leave to amend, concluding Blue Shield's alleged conduct was not prohibited by *sections 1399.805* **[*2]** and 1399.811 as a matter of law and therefore did not violate the UCL. The court also sustained the demurrer to Lample's fraud claim, finding it derivative of the UCL claims. Because Lample's claims under the UCL were not properly dismissed, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Pertinent Statutory and Regulatory Environment*

a. *The federal Health Insurance Portability and Accountability Act*

The federal Health Insurance Portability and Accountability Act (HIPAA), which became law in 1996, requires every health insurance issuer to offer for sale individual health insurance coverage to individuals who had had group health care coverage prior to the expiration of their federal COBRA[2] benefits and who satisfy certain other criteria. (See *42 U.S.C § 300gg-41*.) HIPAA was intended to provide a safety net for those individuals who, due to job loss or change in employer-provided benefits, had lost their group health insurance by guaranteeing those persons "the availability" of health care coverage regardless of otherwise disqualifying factors, including preexisting health conditions. (*42 U.S.C § 300gg-41*; **[*3]** see Sen. Rep. No. 104-56, 1st Sess., p. 1 (1995) ["The current health insurance market provides too little protection for individuals and families with significant health problems and makes it too difficult for employers—particularly small employers—to obtain adequate coverage for their employees. [HIPAA] will reduce many of the current barriers to obtaining health coverage by making it easier for people who change jobs or lose their jobs to maintain adequate coverage and by providing increased purchasing power to small businesses and individuals."].)

b. *California law on coverage for HIPAA-eligible individuals*

In 2000 the California Legislature passed, and the Governor signed, Senate Bill No. 265 (1999-2000 Reg. Sess.), codified in *sections 1366.35*, *1399.805*, *1399.811* and *Insurance Code sections 10785*, *10900-10902.6*, to implement an **[*4]** "acceptable alternative mechanism to HIPPA." (Stats. 2000, ch. 810, §§ 1-6; see *42 U.S.C. § 300gg-44* [health insurance issuer may comply with HIPAA legislation either by compliance with the federal law or with "an acceptable alternative [state law] mechanism"]; *45 C.F.R. § 148.120(b)* [same]; see also Assem. Com. on Health, Analysis of Sen. Bill No. 265 (1999-2000, Reg. Sess.), as amended July 6, 2000 [legislation is intended as "acceptable alternative mechanism" to HIPAA].)

California's HIPAA-based legislation combined HIPAA's guarantee of access to available health care coverage with affordability, with the latter component achieved by imposing premium caps on the products California insurers and health care service plans are required to make available to HIPAA-eligible consumers. (See Assem. Com. on Health, Analysis of Sen. Bill No. 265, as introduced at p. 4 ["The purpose of this bill is to combine access with affordability, since insurers and plans already are required under HIPAA to make coverage available to this population. [B]ecause HIPAA does not restrict premium rates, California insurers are charging at least 200 percent of the normal group rates for HIPAA coverage. [¶] This **[*5]** bill addresses the affordability issue" by imposing rate

[1] Statutory references are to the Health and Safety Code unless otherwise indicated.

[2] COBRA is an acronym for the Consolidated Omnibus Budget Reconciliation Act of 1985, which mandates that certain employees and their dependents be offered the option of paying premiums to continue medical coverage for a limited period after the termination of coverage under a group health plan. (See *29 U.S.C. §§ 1161-1167*; *42 U.S.C. §§ 300bb-1 to 300bb-8*.)

caps on HIPAA products.]; see also Sen. Bill No. 265 (1999-2000 Reg. Sess.), as amended Aug. 30, 2000 ["high premiums" charged by health care service plans and insurers for HIPAA products are cost prohibitive, "destroy[ing] the federal intent [of HIPPA] to make health care coverage portable when a worker loses employer-based coverage].)

The statutory rate caps for HIPAA products delivered by health care service plans through preferred provider arrangements (HIPAA PPO plans) are codified in *sections 1399.805, subdivision (a)(1)(A)* and *1399.811, subdivision (a)(1)*.[3] Both statutes provide that "in no case" shall the premium charged for any HIPAA PPO plan exceed "the average premium paid by a subscriber of the Major Risk Medical Insurance Program who is of the same age and resides in the same geographic area as the federally eligible individual."

c. *The Major Risk Medical Insurance Program*

The Major Risk Medical Insurance Program (MRMIP), enacted in 1989 and substantially amended in 1990 (predating HIPAA), is California's state-subsidized health care coverage program for "high risk" individuals who cannot obtain coverage in the individual health insurance market due to, among other things, preexisting health conditions. (See *Ins. Code, § 12700, subd. (a)* [Legislature "finds **[*7]** and declares" that "many Californians do not have employer-sponsored group health coverage and are unable to secure adequate health coverage for themselves and their dependents because of preexisting medical conditions, and a number of employer sponsored groups have difficulty obtaining or maintaining their health coverage because some members of the group either have or are viewed as being at risk for having high medical costs"]; see generally *Ins. Code, §§ 12700-12739.4* [statutory provisions pertaining to MRMIP].)

The MRMIP is administered by the Managed Risk Medical Insurance Board (the MRMIP Board), which, among other things, has broad authority to determine program eligibility, approve subscriber contributions and premium rates and issue rules and regulations to carry out the purposes of the MRMIP. (See *Ins. Code, § 12711* [vesting MRIMIP Board with regulatory authority].) The MRMIP Board determines MRMIP premiums based on risk categories defined by a subscriber's geographic location and age group. (See *Ins. Code, § 12737*; *Cal. Code Regs., tit. 10, § 2698.400, subd. (a)(1)* [dividing California into six geographic regions and establishing 12 defined age groups]; see also *Cal. Code Regs., tit. 10, § 2698.400, subd. (b)* **[*8]** ["n]o other risk categories are allowed for the purpose of this program"].) These "rating cells"—defined groups based on age group and geographic regions—are then used by the MRMIP Board along with regulatory formulas to determine MRMIP subscriber premiums.

2. *The Complaint*

In July 2010 Lample, a subscriber to Blue Shield's HIPPA preferred provider program, filed an action on behalf of herself and a putative class of all other similarly situated California residents. The operative second amended complaint alleges that, from 2001 through 2009, Blue Shield charged subscribers to its HIPAA PPO plans, including her, premiums in excess of the average premium paid by a subscriber of the MRMIP who was of the same age and resided in the same geographic area, in violation of *sections 1399.805, subdivision (a)(1)(A)*, and *1399.811, subdivision (a)(1)*.

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[3] California insurance companies and health care service plans are subject to two distinct regulatory schemes. Health care service plans such as Blue Shield are governed by the Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene Act) (see *§ 1340 et seq.*) and fall under the regulatory **[*6]** authority of the Department of Managed Health Care. (See *Nieto v. Blue Shield of Cal. Life & Health Ins. Co. (2010) 181 Cal.App.4th 60, 84-85, 103 Cal. Rptr. 3d 906*.) Other health care issuers, including traditional indemnity health care insurers, are subject to provisions of the Insurance Code and fall under the regulatory authority of the Department of Insurance. (*Blue Cross of California, Inc. v. Superior Court (2009) 180 Cal.App.4th 1237, 1243, 102 Cal. Rptr. 3d 615*; *Viola v. California Dept. of Managed Health Care (2005) 133 Cal.App.4th 299, 309, fn. 3, 34 Cal. Rptr. 3d 626*.) California's HIPAA-based legislation governs both health insurers and health care service plans. (Compare *§§ 1366.35*, *1399.805*, *1399.811* [health care service plans] with *Ins. Code, §§ 10785*, *10900-10902.6* [health benefit plans governed by Ins. Code].)

Lample's pleading acknowledges that neither *section 1399.805* nor *1399.811* defines the methodology to calculate the "average premium paid" by a subscriber of the MRMIP within a particular risk category. It also recognizes that, at least prior to 2009, the Department of Managed Health Care had not adopted regulations that require use of a particular **[*9]** formula or calculation method.[4] However, paragraph 22 of the pleading alleges the Department of Managed Health Care and the Department of Insurance decided, soon after *sections 1399.805* and *1399.811* were enacted, that the MRMIP Board would calculate and provide both departments with the "average premium paid" by MRMIP subscribers by using a "weighted average by region and age range." The "weight" is based on the number of subscribers enrolled in a particular plan for each rating cell. The use of the weighted mean, rather than a "straight average," prevents a plan with only a few subscribers in a particular cell from having undue significance in the average premium calculation.[5]

According to the complaint, the MRMIP Board annually calculated the average premium paid for MRMIP products in accordance with the weighted mean methodology and, pursuant to their agreement, communicated that information to the Department of Managed Health Care to give to HIPPA PPO providers. Although this information was available to health care service plans on request, Blue Shield did not request it from the Department of Managed Health Care. Instead, using its own methodology, Blue Shield calculated premiums for its HIPAA products based on the average of the rates each provider of HIPAA PPO service plans sought to charge MRMIP subscribers, that is, a straight average of premium rates without regard to the number of subscribers to each plan in a particular rating cell. As a result, Lample alleges, Blue Shield charged its HIPAA eligible subscribers as much as 55 percent more than other health care service preferred provider **[*11]** plans that had adhered to the Department of Managed Health Care's methodology for calculating the average premium paid.

Lample's putative class action asserts Blue Shield's HIPAA PPO premiums violated *sections 1399.805* and *1399.811* and thus constitute an unlawful business practice under *Business and Professions Code section 17200*. Lample sought both an injunction prohibiting Blue Shield from continuing to calculate premiums in violation of the statutory rate caps and restitution for herself and all similarly situated Blue Shield subscribers. Lample's pleading also asserts a cause of action for fraud on behalf of herself and the putative class, claiming Blue Shield had a duty to disclose to its subscribers that its rates were in excess of the statutory rate caps.

3. *Blue Shield's Demurrer to the Second Amended Complaint*

Blue Shield demurred to the second amended complaint, arguing the court could determine it had not violated *sections 1399.805* and *1399.811* as a matter of law. Blue Shield observed that neither *section 1399.805* nor *1399.801* nor any formal regulation promulgated by the Department of Managed Health Care defined the phrase "average premium paid" by a subscriber or identified **[*12]** a particular methodology to calculate the rate caps. The MRMIP Board, Blue Shield argued, is not the regulatory authority for health care service plans—the Department of Managed Health Care is—and the MRMIP Board's methodology was not binding on it. Moreover, Blue Shield argued, the Department of Managed Health Care had approved its methodology, and Blue Shield could not be held liable for its good faith conduct in accordance with that approval.

In support of its demurrer Blue Shield requested the trial court take judicial notice of excerpts of the legislative history of Assembly Bill No. 718 (2009-2010 Reg. Sess.) (AB 718), legislation proposed by the Department of Managed Health Care in January 2009 to specifically define the phrase "average premium paid by a subscriber" used in *sections 1399.805* and *1399.811*. The Department explained in a position paper in support of the proposed

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[4] In late 2009 the Department of Managed Health Care adopted a policy interpreting *sections 1399.805* and *1399.811*'s "average premium paid" language to require application of a formula that uses "weights" based upon the "MRMIP population base of an entire region . . . rather than the population of a single age band . . . within that region." Lample alleges the new policy was adopted without complying with California's Administrative Procedures Act (*Gov. Code, § 11340.5*) and has separately petitioned for a writ **[*10]** of mandate to compel the Department to rescind the 2009 policy, alleging it is invalid. (L.A. Sup. Ct. Case No. BC445662.)

[5] Although not specifically alleged in Lample's complaint, it is reasonable to infer that the more expensive plan will have fewer subscribers.

legislation that clarifying language was needed because the statutes did not specify the methodology to be used to calculate the rate caps and the phrase had been interpreted differently by regulators and regulated entities. The Department stated it "never formally adopted a position on the matter, nor has **[*13]** the current Insurance Commissioner," and "the lack of clear guidance in the statute [has] resulted in health plans selling PPO products using different 'average premium formulas.'"

The Department of Managed Health Care's position paper also detailed the methodologies used by various health plans to calculate the "average premium paid" by MRMIP subscribers in a particular rating cell, that is, within a particular age group and geographic region. For example, the Department observed, the MRMIP Board uses "a weighted average of all rates for the MRMIP plans . . . . The 'weight' comes from the number of subscribers in any given rating cell (aka age category, i.e. 30-34)." Blue Shield, in contrast, uses a "straight (unweighted) average of each MRMIP health plan's rates, in any given rating cell, rounded to whole dollars. For instance, if there are five plans participating in MRMIP, Blue Shield would take their rates from a rating cell, add them, then divide by five to get its HIPAA PPO rate for that rate cell."

Lample opposed the demurrer, insisting paragraph 22 of the operative second amended complaint alleges a long-standing interpretation of *sections 1399.805* and *1399.811* by the Department **[*14]** of Managed Health Care, made contemporaneously with the legislative enactment, which required use of the MRMIP Board's weighted average formula to calculate the average premium paid in accordance with *sections 1399.805* and *1399.811*. In addition, Lample objected to Blue Shield's request for judicial notice because AB 718 had been withdrawn by its legislative sponsor, and the truth of the facts described in the material presented to the court was not subject to judicial notice. Finally, Lample argued she had properly pleaded a cause of action for fraudulent nondisclosure because Blue Shield never told its subscribers it was using its own methodology, rather than the rates calculated by the MRMIP Board, to ensure its HIPAA PPO product premiums fell within statutory rate caps.

4. *The Trial Court's Order Sustaining Blue Shield's Demurrer Without Leave To Amend*

The trial court granted Blue Shield's request for judicial notice of the Department of Managed Health Care's 2009 position paper in support of AB 718 and sustained Blue Shield's demurrer without leave to amend. The court explained, "Although the questions presented are somewhat complex, they are fundamentally a legal question as to **[*15]** what is the reference point for government-imposed pricing of these policies. The Court agrees with defendant's analysis that they are entitled to use the procedures which have been employed to date and that plaintiff's contrary analysis of how these policies ought to be priced is not legally mandated by the statute. The second cause of action is derivative of the legal theory pled in the first cause of action, so it necessarily falls if the first cause of action falls. [¶] Under the circumstances, there is no reason to drag out this case in the trial court simply to re-posture the same question as a ruling on a motion for summary judgment. Therefore, having agreed with defendant's position, the Court finds no reason to allow leave to amend."

DISCUSSION

1. *Standard of Review*

On appeal from an order dismissing an action after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. (*McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 415, 106 Cal. Rptr. 2d 271, 21 P.3d 1189*; *Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 967, 9 Cal. Rptr. 2d 92, 831 P.2d 317*.) We give the complaint a reasonable interpretation, "treat[ing] the demurrer as **[*16]** admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." (*Aubry, at p. 967*; accord, *Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1126, 119 Cal. Rptr. 2d 709, 45 P.3d 1171*.) We liberally construe the pleading with a view to substantial justice between the parties. (*Code Civ. Proc., § 452*; *Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1081, 6 Cal. Rptr. 3d 457, 79 P.3d 569*.)

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]"' [Citations.] This abuse of discretion is reviewable on appeal 'even in the absence of a request for leave to amend' [citations], and even if the plaintiff does not claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend." (*Aubry v. Tri-City Hospital Dist., supra, 2 Cal.4th at pp. 970-971*.) We determine whether the plaintiff has shown "in what manner he can amend his complaint and how that amendment will **[*17]** change the legal effect of his pleading." (*Goodman v. Kennedy (1976) 18 Cal.3d 335, 349, 134 Cal. Rptr. 375, 556 P.2d 737*.)

2. *The UCL—Business and Professions Code Section 17200*

Unfair competition under the UCL means "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." Written in the disjunctive, *Business and Professions Code section 17200* establishes "three varieties of unfair competition—acts or practices which are unlawful, unfair, or fraudulent." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (*Cel-Tech*); accord, *Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243*.)

The "unlawful" prong of the UCL "'borrows' violations of other laws by making them independently actionable as unfair competitive practices." (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937*; accord, *Kasky v. Nike, supra, 27 Cal.4th at p. 949*; *Ticconi v. Blue Shield of California Life & Health Ins. Co. (2008) 160 Cal.App.4th 528, 539, 72 Cal. Rptr. 3d 888*.) The "unfair" prong authorizes a cause of action under the UCL if the plaintiff can demonstrate the objectionable act, while not unlawful, is "unfair" within the meaning of the UCL. (*Cel-Tech, supra, 20 Cal.4th at p. 182*.)[6]

In this court Lample contends her complaint states a cause of action under the UCL on two distinct theories: (1) Blue Shield violated *sections 1399.805* and *1399.811* of the Knox-Keene Act by charging HIPAA-eligible PPO subscribers more than the average premium paid by a subscriber to the MRMIP in the same age category and geographic region, an unlawful business practice; and (2) Blue Shield's premium charges, even if not unlawful, were an unfair practice within the meaning of *Business and Professions Code section 17200*.[7]

3. *The* ***[*19]*** *Trial Court Erred in Sustaining the Demurrer to the Claim for an Unlawful Business Practice Without Leave To Amend*

Lample alleges Blue Shield violated *sections 1399.805* and *1399.811* of the Knox Keene Act—and thus the UCL—by charging her and other similarly situated HIPAA PPO subscribers a premium that exceeded the "average premium paid" by a similar MRMIP subscriber. This allegation has two separate components: First, as her primary contention, Lample asserts Blue Shield violated the Knox-Keene Act by failing to adopt the weighted average formula developed by the MRMIP Board. Second, Lample's pleading, read liberally as we must, contends that Blue Shield has set premiums based on an average of the rates charged by plan providers, rather than the average premium paid by a subscriber to MRMIP, and has therefore violated the Knox-Keene Act.

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[6] The **[*18]** definition of "unfair" within the meaning of the UCL is discussed in part 4 below.

[7] Although Lample did not argue in the trial court that she had stated a viable cause of action under the "unfair" prong of the UCL, we requested letter briefing from the parties on the question whether the complaint states, or can be amended to state, a cause of action for an unfair business practice under *Business and Professions Code section 17200*. (See generally *Aubry v. Tri-City Hospital Dist., supra, 2 Cal.4th at p. 967* [order sustaining demurrer without leave to amend is improper if complaint states, or can be amended to state, cause of action under any possible legal theory].)

a. *Even if the statutory language does not expressly require a weighted average of premiums paid by subscribers, Lample can amend her complaint to allege a long-standing administrative interpretation of sections 1399.805 and 1399.811 that mandates use of that methodology*

Focusing on the allegations relating to the MRMIP Board's weighted average methodology, **[*20]** Blue Shield argued in its demurrer it was not liable under the UCL as a matter of law because neither section 1399.805 nor 1399.811 expressly requires the use of a weighted average based on a plan's enrollment numbers and neither statute vests the MRMIP Board with the authority to determine the maximum allowable rates to be charged by health care service plans, which are regulated by the Department of Managed Health Care, not the MRMIP Board. Accordingly, its failure to adopt the MRMIP Board's methodology for calculation of premiums is not unlawful.

The interpretation of the phrase "the average premium paid by a subscriber" in sections 1399.805 and 1399.811, like any other issue of statutory construction, is ultimately a question of law for the court. (*In re Tobacco II Cases (2009) 46 Cal.4th 298, 311, 93 Cal. Rptr. 3d 559, 207 P.3d 20*; *People ex rel. Lockyer v. Shamrock Foods Co. (2000) 24 Cal.4th 415, 432, 101 Cal. Rptr. 2d 200, 11 P.3d 956*.) In construing those statutes "[o]ur fundamental task . . . is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute[s]. [Citation.] We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity, then we presume **[*21]** the lawmakers meant what they said, and the plain meaning of the language governs. [Citations.] If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we '"select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences."'" (*Day v. City of Fontana (2001) 25 Cal.4th 268, 272, 105 Cal. Rptr. 2d 457, 19 P.3d 1196*; accord, *People v. Lawrence (2000) 24 Cal.4th 219, 230, 99 Cal. Rptr. 2d 570, 6 P.3d 228*.)

As Lample acknowledges, the term "average" can have a variety of meanings depending on the context in which it is used; and sections 1399.805 and 1399.811 do not specify how the average premium paid by a similarly situated subscriber to an MRMIP plan is to be calculated. (Cf. *Garfield Medical Center v. Belshe (1998) 68 Cal.App.4th 798, 807-808, 80 Cal. Rptr. 2d 527* [the term "mean" as used in federal statute governing payments to hospitals for Medicaid patients is ambiguous; it includes "the arithmetic mean (also known as the arithmetic average), the weighted **[*22]** mean (also known as weighted average), the geometric mean, and the harmonic mean. The appropriateness of a particular mean as a statistical tool depends upon the purpose.'"].) Lample also concedes the statutes do not expressly vest the MRMIP Board with the authority to determine "the average premium paid by a subscriber."

The legislative history of sections 1399.805 and 1399.811 is not particularly helpful as an interpretative tool on this question. (See generally *Day v. City of Fontana, supra, 25 Cal.4th at p. 272* [if statutory terms are ambiguous, "then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history"].) As introduced, Senate Bill No. 265 did not tie rate caps to the premiums paid by MRMIP subscribers. However, after it became clear the Legislature intended to impose rate caps on HIPAA PPO products, the California Association of Health Plans and Blue Cross of California urged that the ceiling on premiums be based on MRMIP premiums. (See Assem. Com. on Health, Rep. on Sen. Bill No. 265 (1999-2000 Reg. Sess.), June 29, 1999, at p. 5 ["if a cap must be placed on the premium for [HIPAA-eligible] individuals, a more appropriate **[*23]** benchmark would be the rates paid in MRMIP"].) The critical language in the bill was thereafter amended several times: Initially, the cap on premiums was to be "the overall average premium paid" by MRMIP subscribers (see Sen. Bill No. 265 (1999-2000 Reg. Sess.), as amended July 8, 1999), then the "actual premium paid" by MRMIP subscribers (*id.,* as amended June 22, 2000), and finally the "average premium paid" by MRMIP subscribers, but with the additional qualifying phrase "who is of the same age and resides in the same geographic region." (*Id.,* as amended Aug. 29, 2000.)

No explanation for these changes or the final choice of wording is contained in the legislative materials. While the intent of the legislation is clear—to make health care service plans available to, and affordable for, HIPAA-eligible subscribers—any inference the Legislature vested the MRMIP Board with making that calculation or required the average premium paid to be calculated using a specific type of weighted average formula would be entirely speculative. (See Campbell v. Regents of University of California (2005) 35 Cal.4th 311, 331, 25 Cal. Rptr. 3d 320, 106 P.3d 976 ["[i]n our view therefore, the legislative history appears unclear"; we may not **[*24]** read intent into the statute when the legislative history "does not clearly support it"].)

Notwithstanding these obstacles to a single, clear interpretation of the mandatory rate cap provisions in sections 1399.805 and 1399.811, Lample has alleged in paragraph 22 of the second amended complaint that a long-standing interpretation of the these statutes, adopted contemporaneously with the enactment of the legislation by the Department of Managed Health Care, requires calculation of "the average premium paid by a subscriber" by reference to the MRMIP Board's weighted average methodology. In particular, paragraph 22 alleges, "Shortly after sections 1399.805 and 1399.811 were enacted in 2000, "representatives from the MRMI[P Board], the Department of Managed Health Care (DMHC) and the Department of Insurance (DOI) met to work out implementation details—including how to calculate 'the average premium paid.' They discussed what would be the appropriate way for the MRMI[P Board] to provide this data to the DMHC and the DOI. The agreement, pursuant to the requests of the DMHC and the DOI, was that the MRMI[P Board] provide a weighted average by region and age range, i.e., the 'average premium **[*25]** paid.'"

The policy upon which Lample relies was not enacted as a formal regulation despite the Department's apparent authority to do so. (See § 1399.817 [vesting the director of the Department of Managed Health Care with the discretion to "issue regulations that are necessary to carry out the purposes of this article"].) What significance, therefore, does this alleged agency interpretation of the statutory language have? In Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 78 Cal. Rptr. 2d 1, 960 P.2d 1031 (*Yamaha*) the Supreme Court distinguished the level of judicial deference to be accorded an agency's quasi-legislative acts, in which the agency exercises its delegated lawmaking power, from interpretative acts, in which the agency gives its view of the meaning or legal effect of a statute or regulation, "questions lying within the constitutional domain of the courts." (Id. at p. 11.) Although courts are bound by an agency's rulemaking as long as it is authorized by the enabling legislation, the binding effect of an agency's interpretation of a statute or regulation is "fundamentally situational." (Id. at p. 12.) "Its power to persuade is both circumstantial and dependent on the presence or absence **[*26]** of factors that support the merit of the interpretation." (Id. at p. 7.) Thus, when "the meaning and legal effect of a statute is at issue, the agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth." (Id. at pp. 7-8; accord, California Veterinary Medical Association v. City of West Hollywood (2007) 152 Cal.App.4th 536, 555, 61 Cal. Rptr. 3d 318.)

The *Yamaha* Court identified two broad categories of circumstances relevant to a court's assessment of the weight due an agency's interpretation: "In the first category are factors that 'assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended or entwined with issues of fact, policy and discretion.'" (Yamaha, supra, 19 Cal.4th at p. 13.) The second category includes factors suggesting the agency decision is "likely to be correct." (*Ibid.*) This second group of factors includes "indications of careful consideration by senior agency officials," as well as evidence that the interpretation was contemporaneous with the enactment and long-standing. **[*27]** (*Ibid.*)

Lample argues the complaint alleges a long-standing regulatory interpretation by the Department of Managed Health Care to use the MRMIP weighted calculations to define the phrase "the average premium paid by a subscriber." That interpretation is entitled to deference, she contends, because the Department of Managed Health Care, based on its own substantial expertise in this field, has determined the MRMIP Board was in the best position to calculate the average premium paid by a MRMIP subscriber using the information available to it.

We agree a thoroughly considered, contemporaneous administrative interpretation of the statutory language that requires use of the MRMIP Board's weighted average methodology to calculate the "average premium paid by a subscriber" would be both reasonable and consistent with legislative intent: The weighted average methodology prevents higher premiums paid to a plan with only a few subscribers from having a disproportionate impact in the mean calculation, thus furthering the Legislature's objective of making such health plans more affordable. (See, e.g., Garfield Medical Center v. Belshe, supra, 68 Cal.App.4th at p. 808 [agency's interpretation of "mean" **[*28]** in statute to require a "weighted mean" to prevent hospitals from being treated "as if they were the same size when, in fact, that is not true" was a reasonable gap-filling interpretation of statute consistent with intent of legislation].) Such an interpretation also eliminates the problem of regulated entities using multiple methodologies to define the average premium paid, a problem that, if left unresolved, would undermine, rather than promote, the purpose of imposing rate caps in the first place.

The legal status, and thus the interpretative significance, of the policy alleged by Lample, however, is far from clear. An administrative interpretation by the Department of Managed Health Care may be entitled to some deference depending on the context in which it was adopted (see *Yamaha, supra, 19 Cal.4th at p. 12*); an "underground regulation," on the other hand, adopted in violation of the requirements of California's Administrative Procedure Act (APA) (*Gov. Code, § 11400 et seq.*) receives no deference at all. (See *Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 576, 59 Cal. Rptr. 2d 186, 927 P.2d 296* [administrative interpretations that are not, but should have been, enacted as formal regulations under **[*29]** the APA are entitled to no deference; to hold otherwise would undermine the APA's purpose of eliminating the use of "underground regulations," that is, rules which only the government knows about]; *Yamaha, at pp. 19-20* (conc. opn. of Mosk, J.) [Administrative "interpretations" that are not enacted as formal regulations fall into two categories: "The first is the class of regulations that *should* have been formally adopted under the APA but were not. In such cases the law is clear that in order to effectuate the policies behind the APA, courts are to give *no weight* to these interpretive regulations." The second is those interpretations that are not subject to the APA because "they are expressly or implicitly exempted from or outside the scope of APA requirements"].)

Lample indicates she can amend her complaint to allege facts clearly showing the policy is not akin to an underground regulation, but one that, based on the context and circumstances surrounding its adoption, is entitled to judicial deference. At the pleading stage, she is entitled to an opportunity to attempt to do so—that is, to allege facts and circumstances surrounding the adoption of the Department of Managed Health Care's **[*30]** policy to interpret the maximum rate cap in *section 1399.805* and *1399.811* by reference to the MRMIP Board's weighted average methodology for calculating the average premium paid by a subscriber that would justify reliance by a court on that policy to resolve any possible ambiguity in the statutory language. (See *Coca-Cola Co. v. State Bd. of Equalization (1945) 25 Cal.2d 918, 921, 156 P.2d 1* ["the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized"].)[8]

b. *Blue Shield's argument its rates were approved by the Department of Managed Health Care does not support the trial court's order sustaining the demurrer without leave to amend*

Blue Shield opposes affording Lample the opportunity to amend her complaint, asserting her UCL claim fails as a matter of law because the MRMIP Board has no authority to regulate health care service plans. This is true, of course, but immaterial. Lample's contention is not that Blue Shield violated a MRMIP Board regulation but rather that Blue Shield violated *sections 1399.805* and *1399.811* as interpreted by Blue Shield's own regulator, the Department of Managed Health Care.

Indeed, citing *Yamaha, supra, 19 Cal.4th 1*, Blue Shield has acknowledged an administrative interpretation of *sections 1399.805* and *1399.811* by the Department of Managed Health Care would be highly significant in determining whether it had violated the statutes' mandatory rate caps, but **[*32]** argues the Department stated in its 2009 position paper in support of AB 718 that it had not taken any formal position as to which methodology should be used to calculate the average premium paid by a MRMIP subscriber. Whether or not judicial notice of a

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[8] At oral argument Blue Shield insisted the demurrer was properly sustained because it would violate due process to impose civil liability based on an agency interpretation of which it had no notice. Blue Shield's purported lack of notice of the Department of Managed Health Care's interpretation of the governing statutes was not the basis for the court's order, nor would it have been proper for the court to make such a determination on demurrer. A due process violation is not apparent from the face of the complaint; and any analysis of that issue, **[*31]** which rests on the facts and circumstances surrounding the Department of Managed Health Care's adoption of the interpretation asserted by Lample, cannot properly be made from the limited evidentiary presentation offered in support of Blue Shield's demurrer.

legislative position paper was proper under Evidence Code section 452, subdivision (c)[9]—an issue the parties vigorously dispute—the Department's statement in 2009 that it had no formal interpretation of the phrase "average premium paid by a subscriber" does no more, at least on demurrer,[10] than highlight a factual dispute regarding Lample's allegation the Department had a consistent and long-standing interpretation prior to 2009 that required use of the MRMIP Board methodology, an allegation supported by information contained in documents judicially noticed by the trial court at Lample's request.

Blue Shield also argues it cannot, as a matter of law, be liable under the UCL for doing something its regulator expressly approved. (See § 1344, subd. (d) ["[n]o provision of this chapter imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, order or written interpretative opinion of the director"]; see also Puentes v. Wells Fargo Home Mortgage, Inc. (2008) 160 Cal.App.4th 638, 644, 72 Cal. Rptr. 3d 903 [when Legislature has permitted certain conduct, courts may not override that determination by declaring such conduct to be actionable under Bus. & Prof. Code, § 17200].) This argument, which relies, in part, on the truth of statements contained in the Department of Managed Health Care's position paper in support of AB 718, is fundamentally flawed: The Department's position paper simply stated new legislation was necessary to ensure consistency in application **[*34]** by its regulated entities. Nothing in that paper establishes the Department "approved" Blue Shield's methodology, and no other regulatory approval of Blue Shield's conduct was before the trial court.[11]

Blue Shield **[*35]** also suggests the UCL action fails as a matter of law because, apart from any express approval, the Department of Managed Health Care implicitly approved its methodology by not bringing an enforcement action against it or otherwise alerting it that it was not, or had not been, in compliance with the statutory rate caps. Contrary to Blue Shield's contention, the absence of an enforcement action does not immunize its allegedly unlawful pricing activities. A UCL action for violations of the Knox-Keene Act is independent of any enforcement action and may be maintained whether or not an enforcement action has been initiated. (Blue Cross of California, Inc. v. Superior Court (2009) 180 Cal.App.4th 1237, 1251, 102 Cal. Rptr. 3d 615 (*Blue Cross*); cf. Bell v. Blue Cross of California (2005) 131 Cal.App.4th 211, 216-217, 31 Cal. Rptr. 3d 688 [private individual may bring UCL claim for Knox-Keene Act violation even though statute does not expressly authorize private right of action.)[12]

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[9] Evidence Code section 452, subdivision (c), permits judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States."

[10] Even if the document itself may be subject to judicial notice, judicial notice of the truth of the matters stated in the document is improper. **[*33]** (See Mangini v. R. J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 1063, 31 Cal. Rptr. 2d 358, 875 P.2d 73 ["[w]hile courts may notice official acts and public records, 'we do not take judicial notice of the truth of all matters stated therein'"], overruled on another ground in In re Tobacco Cases II (2007) 41 Cal.4th 1257, 1262, 1276, 63 Cal. Rptr. 3d 418, 163 P.3d 106.)

[11] Asked at oral argument about the basis for Blue Shield's contention its rates had been expressly approved by the Department of Managed Health Care, counsel referred only to a July 27, 2010 letter written by an assistant deputy director of the Department's office of legal services to a dissatisfied insured, which states, "Regulators acknowledge that the statute was open to varying interpretations, and that either a 'straight average' or a 'weighted average' would be permissible absent further clarification." Even were this letter properly subject to judicial notice as part of the legislative history of AB 718—a questionable assumption (see, e.g., Quintano v. Mercury Casualty Co. (1995) 11 Cal.4th 1049, 1062, fn. 5, 48 Cal. Rptr. 2d 1, 906 P.2d 1057)—and apart from the hearsay problem discussed above, the author's invocation of the opinion of undefined "regulators" without any further supporting detail or citation cannot, on demurrer, be construed as approval of Blue Shield's allegedly unlawful pricing practices.

[12] MacKay v. Superior Court (2010) 188 Cal.App.4th 1427, 1435, 115 Cal. Rptr. 3d 893, on which Blue Shield relies, is inapposite. *MacKay* held that the Department of Insurance's approval of a rate premium immunized the insurer from a civil action challenging the use of that premium. **[*36]** Citing Insurance Code sections 1860.1 and 1860.2, the Court of Appeal held the Insurance Commissioner has exclusive jurisdiction over issues related to ratemaking; insurance rates could only be challenged under statutes and regulations pertaining to the Insurance Code; and approval of rates by the Department of Insurance means the rate has the "imprimatur" of the Department of Insurance and may not be challenged in a civil action, under the UCL or

c. *Lample adequately alleged a cause of action for an unlawful business practice*

At an even more basic level, and separate from the question whether any ambiguity **[*37]** in the statutory language has been resolved by a properly adopted, long-standing administrative interpretation of *sections 1399.805* and *1399.811*, Lample's claim that Blue Shield has engaged in an unlawful business practice properly survives a demurrer. Even if there is more than one lawful way to set premiums for HIPPA PPO subscribers under *sections 1399.805* and *1399.811*, Lample has alleged the methodology used by Blue Shield violates the statutory mandate (that is, capping its rates at the average premium paid by a similarly situated MRMIP subscriber). Lample's second amended complaint alleges Blue Shield calculates a straight average of the rates charged by the participating plans in each rating cell and employs that average to set its premiums, rather than using the average of the premiums paid by similar subscribers.[13] Whether that is true and, if so, whether "rates charged" and "premiums paid" are functionally synonymous in this context, is impossible to determine without knowing what Blue Shield actually does. Although it certainly might be more efficient for the trial court not "to drag out this case" by accepting Blue Shield's or the Department of Managed Health Care's description **[*38]** of "the procedures which have been employed to date," a demurrer tests the sufficiency of a complaint based only on the facts included in the complaint, those subject to judicial notice and those conceded by the plaintiff. (See *Evans v. City of Berkeley (2006) 38 Cal.4th 1, 20, 40 Cal. Rptr. 3d 205, 129 P.3d 394*.) Any presentation of the details of Blue Shield's computation of HIPPA PPO premiums and the consequent determination whether its methodology violated *sections 1399.805* and *1399.811* must await summary judgment or trial. Accordingly, whether or not Lample is ultimately able to prove her allegations, at this nascent stage of the proceedings, she has sufficiently stated a UCL claim based on an unlawful business practice.

4. *Lample Should* ***[*39]*** *Be Given the Opportunity To Amend Her Complaint To State a Cause of Action for an Unfair Business Practice*

Lample contends the complaint states, or at least can be amended to state, a cause of action for an "unfair" business practice under *Business and Professions Code section 17200*. (*Cel-Tech, supra, 20 Cal.4th at p. 181* [UCL makes actionable practices that are unfair even if not unlawful].) Before the Supreme Court's decision in *Cel-Tech,* appellate courts had broadly construed the term "unfair" within the meaning of the UCL to mean a business practice that offends "an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (*People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal.App.3d 509, 530, 206 Cal. Rptr. 164*.) Determining whether a business practice was unfair required a balancing of "'utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . .'" (*State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1104, 53 Cal. Rptr. 2d 229*.)

In *Cel-Tech, supra, 20 Cal.4th 163*, a case between competitors involving allegations of below-cost sales, the Supreme Court disapproved the broad **[*40]** sweep to the term "unfair" utilized by the Courts of Appeal. The *Cel-Tech* Court explained the definitions articulated were "too amorphous" and provided "too little guidance to courts and businesses." (*Id. at p. 185*; see *ibid.* ["[a]n undefined standard of what is 'unfair' fails to give business adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair," in some cases even leading to the "enjoining or procompetitive conduct and thereby undermin[ing] consumer protection"].) Borrowing from *section 5* of the Federal Trade Commission Act (*15 U.S.C., § 45*), the Court adopted a new definition of "unfair": "[W]hen a plaintiff who claims to have suffered injury

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otherwise. (*MacKay, at pp. 1442-1444*.) Unlike the Department of Insurance, the Department of Managed Health Care is not vested with the authority to determine rates (see *§ 1367* ["[n]othing in this section shall be construed to permit the director to establish the rates charged subscribers and enrollees for contractual health care services"]); and, as we have explained, nothing in the Knox-Keene Act enforcement provisions or any other statute prohibits a private individual from bringing his or her own UCL action for Knox-Keene Act violations (*Blue Cross, supra, 180 Cal.App.4th at p. 1251*).

[13] A simple example illustrates the difference as we understand it. If two providers offer HIPAA PPO plans to eligible individuals in a particular rating cell—one at $100/month; the other at $150/month—the average monthly rate charged by the providers is $125 regardless of the number of subscribers to each plan. If there are 90 subscribers to the $100 plan and 10 subscribers to the $150 plan, however, the average monthly premium paid by a subscriber, using a weighted mean, is $105.

from a direct competitor's 'unfair' act or practice invokes [Business and Professions Code] section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech, at p. 187*.) The Court made **[*41]** clear its holding was limited to harm suffered by a competitor, not by a consumer. (*Id. at p. 187, fn. 12* ["[w]e also express no view" on the application of this test to consumer injuries].)

Since *Cel-Tech,* the Courts of Appeal have been divided on the definition of "unfair" applicable to consumer cases. (See, e.g., *Progressive West Ins. Co. v. Superior Court (2005) 135 Cal.App.4th 263, 286, 37 Cal. Rptr. 3d 434* ["[w]e conclude that the [*pre-Cel-Tech*] balancing test should continue to apply in consumer cases"]; *Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845, 854, 128 Cal. Rptr. 2d 389* [*Cel-Tech* requires a more limited definition of "unfair"; "the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory, or regulatory provisions"]; *Bernardo v. Planned Parenthood Federation of America (2004) 115 Cal.App.4th 322, 353, 9 Cal. Rptr. 3d 197* [same]; see generally *Bardin v. DaimlerChrysler Corp. (2006) 136 Cal.App.4th 1255, 1266-1267, 39 Cal. Rptr. 3d 634* [identifying division in appellate courts over which test to apply after *Cel-Tech*].)

As we recently held in *Klein v. Chevron USA (2012) 202 Cal. App. 4th 1342, 137 Cal. Rptr. 3d 293*, a case decided just this month, the definition of unfair formulated by our Division Eight colleagues **[*42]** in *Camacho v. Automobile Club of So. Calif. (2006) 142 Cal.App.4th 1394, 48 Cal. Rptr. 3d 770* is particularly persuasive. As the *Camacho* court recognized, *pre-Cel-Tech* definitions of "unfair" are amorphous whether the injury involves a competitor or a consumer. (See *Camacho, at p. 1402* ["The question is whether *Cel-Tech*'s definition of 'unfair' overrules appellate court opinions that use other definitions. We think that it does. Definitions that are too amorphous in the context of anticompetitive practices are not converted into satisfactorily precise tests in consumer cases. This squares with the fact that, in disapproving appellate court opinions defining 'unfair' in 'amorphous' terms, the Supreme Court did not hold that the old definitions were appropriate in consumer cases."].) On the other hand, requiring the alleged "unfair" practice to be "tethered" to a specific constitutional, statutory or regulatory provision, as some courts have required after *Cel-Tech* (see, e.g., *Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1367, 108 Cal. Rptr. 3d 682*; *Gregory v. Albertson's, Inc., supra, 104 Cal.App.4th at p. 854*), undermines "the broad scope" of Business and Professions Code section 17200's intent to deal with "the innumerable **[*43]** new schemes that the fertility of man's invention can contrive." (*Camacho, at p. 1403*, citing *Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 112, 101 Cal. Rptr. 745, 496 P.2d 817*.) In fact, such a limited definition of "unfair" would undermine the UCL's intended breadth by "undercut[ting] the ability of the courts to deal with new situations and new abuses." (*Camacho, at pp. 1402-1403*.)

Echoing *Cel-Tech's* reference to section 5 of the Federal Trade Commission Act in UCL competitor cases, the *Camacho* court borrowed that section's definition of "unfair" for use in UCL consumer cases, holding a business practice is unfair under Business and Professions Code section 17200 if: (1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury could not have reasonably been avoided by consumers themselves. (*Camacho, supra, 142 Cal.App.4th at p. 1403*.) The court explained that definition is "on its face geared to consumers and for that reason appropriate in consumer cases. It is also suitably broad and is therefore in keeping with the 'sweeping' nature of [Business and Professions Code] section 17200." (*Ibid.*)

Under this well-reasoned **[*44]** definition of an unfair business practice, the order sustaining the demurrer without leave to amend must be reversed. The complaint alleges Blue Shield disregarded the MRMIP Board's rate cap schedules, which its competitors believed they were required by law to follow, resulting in excessive premiums charged to Blue Shield's HIPAA PPO subscribers. In addition to the allegations previously pleaded, Lample asserts she can amend the complaint to allege the following: Blue Shield's pricing strategy, even if not illegal per se, was intended to drive its HIPAA-eligible consumers to its competitors, thereby reducing Blue Shield's financial losses from providing HIPAA PPO products at prices subject to rate caps. In addition, once the HIPAA eligible person has subscribed to Blue Shield, believing Blue Shield's pricing is subject to the same methodologies as other HIPAA PPO products, he or she is no longer defined as a federally eligible individual and thus must remain with Blue

Shield, foreclosed from obtaining HIPAA PPO coverage from a Blue Shield competitor. Taken together, those allegations are sufficient to plead a substantial injury to both consumers and to competition, one that consumers, **[*45]** unaware of Blue Shield's lack of compliance with MRMIP Board formulas, could not reasonably have avoided.

Blue Shield disputes these allegations, of course; but this only serves to highlight the impropriety of resolving on demurrer whether Blue Shield's conduct was unfair within the meaning of *Business and Professions Code section 17200*. (See *Linear Technology Corp. v. Applied Materials, Inc. (2007) 152 Cal.App.4th 115, 134-135, 61 Cal. Rptr. 3d 221* ["[w]hether a practice is . . . unfair is generally a question of fact which requires 'consideration and weighing of evidence from both sides' and which usually cannot be made on demurrer"]; *McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1472, 1473, 49 Cal. Rptr. 3d 227* [same].)

In sum, while the trial court's failure to consider this claim in the context of Blue Shield's demurrer is understandable—the UCL claim under the "unfair" prong of the statute was not specifically alleged as such—a demurrer cannot be properly sustained without leave to amend if it states, or can be amended to state, a cause of action under any possible legal theory. (*Aubry v. Tri-City Hospital Dist., supra, 2 Cal.4th at p. 967*.) Because the operative second amended complaint can be amended to **[*46]** state a claim for an unfair business practice within the meaning of *Business and Professions Code section 17200*, leave to amend should be granted.[14]

5. *Lample's Fraud Claim Is Insufficient as a Matter of Law*

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

Lample alleges Blue Shield defrauded members of the putative class by failing to disclose in its materials, including rate books supplied to members and prospective members, that its rates were calculated using a methodology different from **[*48]** that utilized by the MRMIP Board and required by the Department of Managed Health Care's gap-filling interpretation of *sections 1399.805* and *1399.811*. The duty to disclose, she asserts, arises under *section 1399.813*, which provides, "In connection with the offering for sale of any plan contract to an individual, each plan shall make a reasonable disclosure as part of its solicitation and sales materials, or all individual contracts."

The fraud claim is without merit. *Section 1399.813* simply requires disclosure of all material terms of the contracts, including rates; Blue Shield made those disclosures. Blue Shield had no duty to disclose to its subscribers the methodology it used to derive its rates or their legal ramifications. (See *Levine v. Blue Shield of California, supra, 189 Cal.App.4th at pp. 1132-1133* [insurers and health care service plans have no duty to disclose to subscriber internal rate making or pricing procedures]; cf. *California Service Station Etc. Assn. v. American Home Assurance*

[14] Blue Shield argues for the first time on appeal the court should exercise its discretion and dismiss this UCL case under the judicial abstention doctrine. (See *Arce v. Kaiser Foundation Health Plan, Inc. (2010) 181 Cal.App.4th 471, 496, 104 Cal. Rptr. 3d 545* ["[a]s a general matter, a trial court may abstain from adjudicating a suit that seeks equitable remedies if 'granting the requested relief would require a trial court to assume the functions of an administrative agency or to interfere with the functions of an administrative agency'"]; *Klein v. Chevron USA, supra, 202 Cal. App. 4th 1342* [same].) Lample argues Blue Shield has forfeited the argument by failing to raise it in the trial court. (*Sea & Sage Audubon Society, Inc. v. Planning Com. (1983) 34 Cal.3d 412, 417, 194 Cal. Rptr. 357, 668 P.2d 664* ["'issues not raised in trial court cannot be raised for first time on appeal'"]; *In re Marriage of Eben-King & King (2000) 80 Cal.App.4th 92, 117, 95 Cal. Rptr. 2d 113* [same].) In light of our reversal of the judgment and remand to the trial court, Blue Shield will have the opportunity to raise, and the trial court **[*47]** will be able to consider, that claim in the first instance. (See *Arce, at p. 482* [decision whether to dismiss case under doctrine of judicial abstention is matter within trial court's discretion].)

Co. (1998) 62 Cal.App.4th 1166, 1173, 73 Cal. Rptr. 2d 182 [insurer has no duty to disclose information concerning internal business operations]; see also *Sweat v. Hollister (1995) 37 Cal.App.4th 603, 608-609, 43 Cal. Rptr. 2d 399* [failure **[*49]** to disclose legal ramification of a fact is not same as failure to disclose material fact; the former does not state a cause of action for fraud], disapproved on another ground in *Santisas v. Goodin (1998) 17 Cal.4th 599, 609, fn. 5, 71 Cal. Rptr. 2d 830, 951 P.2d 399*; *Bledsoe v. Watson (1973) 30 Cal.App.3d 105, 110, 106 Cal. Rptr. 197* ["misrepresentations of law do not amount to actionable fraud"].) Accordingly, the trial court did not err in sustaining the demurrer to this cause of action without leave to amend.[15]

DISPOSITION

The judgment of dismissal is reversed, and the matter is remanded for further proceedings not inconsistent with this opinion. The portion of the order sustaining the demurrer to the fraud claim without leave to amend is affirmed. Lample is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.

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[15] Lample also alleged Blue Shield materially misrepresented to the Department of Managed Health Care that it was in compliance with *sections 1399.805* and *1399.811*. Because the alleged misrepresentation was made to the Department, not to Lample, and she does not allege she relied on it, that allegation cannot support her fraud claim.

Retail Imaging Mgmt. Group, LLC v. Fujifilm N. Am. Corp.

United States District Court for the District of Oregon, Portland Division

January 30, 2012, Decided; January 30, 2012, Filed

Case No.: 3:11-cv-01242-S1

Reporter
841 F. Supp. 2d 1189 *; 2012 U.S. Dist. LEXIS 10456 **; 2012-1 Trade Cas. (CCH) P77,833

RETAIL IMAGING MANAGEMENT GROUP, LLC, an Oregon Limited Liability Company, Plaintiff, v. FUJIFILM NORTH AMERICA CORPORATION, a New York Corporation, Defendant.

Core Terms

minilabs, preliminary injunction, alleges, repair service, print, irreparable injury, replacement, competitor, merits, notice, temporary restraining order, amended complaint, antitrust, variable, bundle, heads, irreparable harm, prices, public interest, monopolization, injunction, nationwide, serious question, circumstances, Memorandum, hardships, compete, sells, tips

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN1[] Injunctions, Temporary Restraining Orders

A court may issue a temporary restraining order without notice to the adverse party only if specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition. Fed. R. Civ. P. 65(b)(1)(A). A temporary restraining order without notice is generally granted only when providing notice to the adverse party would jeopardize the objective of the injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] Injunctions, Preliminary & Temporary Injunctions

A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that a plaintiff is entitled to such relief.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] Injunctions, Preliminary & Temporary Injunctions

A plaintiff seeking a preliminary injunction must show: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Injunctions, Preliminary & Temporary Injunctions**

Serious questions going to the merits and a hardship balance that tips sharply toward a plaintiff can support issuance of an injunction, assuming the other two elements of the preliminary injunction test are also met.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5[] **Injunctions, Preliminary & Temporary Injunctions**

A preliminary injunction may be granted if there is a likelihood of irreparable injury to a plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

HN6[] **Grounds for Injunctions, Irreparable Harm**

Typically, monetary harm does not constitute irreparable harm. Mere financial injury, however, will not constitute irreparable harm if adequate compensatory relief will be available in the course of litigation.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN7[] **Injunctions, Preliminary & Temporary Injunctions**

For purposes of preliminary injunctions, courts should be particularly concerned with threats to the existence of a moving party's business in the area of antitrust. An award of only money damages in lieu of preserving a competitor disserves the public interest.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

HN8[] **Grounds for Injunctions, Irreparable Harm**

The threatened destruction of a business may, under certain circumstances, be sufficient to satisfy the requirement that a movant show a likelihood of irreparable injury.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

HN9[] **Grounds for Injunctions, Likelihood of Success**

As an irreducible minimum, a moving party must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN10[] **Anticompetitive & Predatory Practices, Predatory Pricing**

For purposes of ***antitrust law***, a bundled price is legal if, when the total discount is attributed only to the product that less diversified competitors are trying to sell separately, the resulting price is above the seller's average variable costs for that product.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN11[] **Anticompetitive & Predatory Practices, Predatory Pricing**

Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws are enacted for the protection of competition, not competitors.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

False positive mistaken inferences that chill the very conduct the antitrust laws are designed to protect are especially costly.

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Judges: Michael H. Simon, United States District Judge.

Opinion by: Michael H. Simon

Opinion

[*1190] OPINION AND ORDER

SIMON, District Judge.

Retail Imaging Management Group, LLC ("RIMG") brings a federal antitrust lawsuit against its competitor and supplier, Fujifilm North America Corporation ("FUJI"), alleging unlawful monopolization and attempted monopolization in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. RIMG also asserts claims of negligence and intentional interference with economic relations and contract. Before the court is Plaintiffs Motion for Temporary Restraining Order Without Notice; Alternatively, Motion for Preliminary Injunction With Notice (Doc. 36). For the following reasons, Plaintiffs motion and alternative motion are DENIED.

I. MOTION FOR TRO WITHOUT NOTICE

On January 17, 2012, RIMG requested a Temporary Restraining Order Without Notice against FUJI. RIMG asked the court to enjoin FUJI from performing a **[*1191]** business contract that FUJI recently entered into with **[**2]** a third party, Rite Aid. RIMG alleges that it had been providing certain services to Rite Aid for several years, but will now lose substantial income, and may even go out of business, if FUJI, rather than RIMG, is allowed to perform those services for Rite Aid.

HN1[] A court may issue a temporary restraining order *without notice* to the adverse party only if "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant *before the adverse party can be heard in opposition*." *Fed. R. Civ. P. 65(b)(1)(A)* (emphasis added). A temporary restraining order without notice is generally granted only when providing notice to the adverse party would jeopardize the objective of the injunction. Plaintiffs declarations, testimony, and unverified complaint[1] do not show that immediate and irreparable injury, loss, or damage would result to the movant "before the adverse party can be heard in opposition." Accordingly, Plaintiffs motion for a temporary restraining order without notice is DENIED.

II. ALTERNATIVE MOTION FOR PRELIMINARY INJUNCTION

A. Standard

HN2[] A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*. ***HN3***[] A plaintiff seeking a preliminary injunction must show: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter, 555 U.S. at 20* (rejecting the Ninth Circuit's earlier rule that the mere "possibility" of irreparable harm, as opposed to its likelihood, was sufficient, in some circumstances, to justify a preliminary injunction).

The Supreme Court's decision in *Winter*, however, did not disturb the Ninth Circuit's alternative "serious questions" test. *Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011)* (***HN4***[] "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming **[**4]** the other two elements of the *Winter* test are also met"). Thus, ***HN5***[] a preliminary injunction may be granted "if there is a likelihood of irreparable injury to the plaintiff; there are serious questions

[1] Although Plaintiffs motion and memorandum each recite that it was supported by a "verified Second Amended Complaint," the complaints **[**3]** filed in this matter were not, in fact, "verified."

going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest") M.R. v. Dreyfus, 663 F.3d 1100, 1108 (9th Cir. 2011) (citing *Alliance)*.[2]

[*1192] B. Factual Background

Plaintiffs alternative motion for **[**5]** preliminary injunction was heard by the court with an evidentiary hearing held on January 19, 2012. The following factual background is derived from the evidence received and the allegations stated in the Second Amended Complaint.

A "minilab" is a self-contained machine that converts images, stored either digitally or on film, into finished photographs or other similar products. Defendant, FUJI, manufactures minilabs and sells or leases them in competition with minilabs made by other manufacturers. FUJI also offers minilab repair service to retail users who purchase or lease FUJI-brand minilabs. In addition, FUJI sells, or has sold, replacement parts to independent service organizations ("ISOs") that provide repair service for FUJI-brand minilabs. FUJI also provides, or has provided, technical support to such ISOs. Thus, FUJI both competes with ISOs for the provision of repair service for FUJI-brand minilabs and also supplies, or has supplied, ISOs with replacement parts and other technical support used by ISOs in their repair service business.

Plaintiff, RIMG, began business in 2000. RIMG provides repair service for FUJI-brand minilabs to retail users throughout the U.S in competition **[**6]** with FUJI. RIMG also services minilabs made by other manufacturers. RIMG alleges that it is the only ISO that competes with FUJI on a nationwide basis for repair service of FUJI-brand minilabs. RIMG also alleges that FUJI maintains at least a 70 percent share in what RIMG alleges to be a relevant nationwide market of repair service for FUJI-brand minilabs.

From 2001 through 2010, RIMG developed a business relationship and course of conduct with FUJI under which FUJI provided RIMG with access to FUJI-brand minilab replacement parts and other resources necessary for RIMG to service FUJI-brand minilabs. The business relationship between RIMG and FUJI began with "a handshake." Beginning in 2005 and ending in August 2010, RIMG and FUJI entered into several written contracts. Under these contracts, FUJI provided parts and other resources necessary for RIMG to service FUJI-brand minilabs.

RIMG alleges that in 2006, FUJI acquired a 30 percent ownership interest in CES. Before 2006, CES was not a competitor in the servicing of FUJI-brand minilabs. After the acquisition of this 30 percent interest, RIMG alleges, FUJI terminated its own field service personnel used to service minilabs and other **[**7]** FUJI-brand machines. CES hired many former-FUJI personnel, and FUJI then outsourced its retail user minilab service work to CES, according to RIMG. FUJI directed work to CES for FUJI customers on warranty and other service work.

According to RIMG, the FUJI-CES relationship initially had no effect on the FUJI-RIMG relationship. The FUJI-RIMG service agreements were renewed for two successive two-year terms, then for a one-year term, and remained in effect until August 2010, when the then-current agreement expired. Under these written contracts, FUJI provided RIMG with parts and other resources that RIMG needed to service FUJI-brand minilab machines.

In 2006, Noritsu, a FUJI competitor in the manufacture of minilabs, worked with FUJI jointly to develop a digital mini dry lab. This product was introduced into the U.S. market in 2008 as the FUJI DL400 series mini dry lab. FUJI continued to provide RIMG with needed parts and other resources necessary for RIMG to service **[*1193]** FUJI-brand mini-labs, including the new mini dry lab, the DL400.

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[2] The federal antitrust laws allow injunctive relief for private parties, including preliminary injunctive relief Clayton Act, § 16, 15 U.S.C. § 26 ("Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief.. . against threatened loss or damages by a violation of the antitrust laws .. . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.").

According to RIMG, its reputation as a national service company grew, and RIMG became a competitive threat to FUJI minilab service on a nationwide level. In 2009, **[**8]** Sam's Club (a subsidiary of Walmart) approached RIMG about bidding for its photo finishing equipment service contract, the bulk of which included FUJI-brand minilabs that were then being serviced by FUJI. That led to a contract between RIMG and Sam's Club for certain Sam's Club locations beginning in April 2010, with RIMG taking over from FUJI the servicing of all Sam's Club locations by late 2010.

RIMG alleges that FUJI was unhappy with RIMG's competitive success in the national market for servicing FUJI-brand minilabs and, as a result, FUJI became less cooperative with RIMG. In August 2010, the FUJI-RIMG contract came to an end and was not renewed by FUJI. According to RIMG, FUJI then started withholding from RIMG a "jig kit" that is necessary for RIMG to use in the repair of defective print heads in FUJI's DL400 series minilabs. Without this jig kit, RIMG was forced to sub-contract with, or retain, FUJI to repair defective print heads for RIMG's service customers at a cost to RIMG of approximately $16,000 per print head replacement. FUJI has sent invoices to RIMG for this work, which total more than $500,000. RIMG alleges that when a FUJI service customer requires the replacement **[**9]** of a defective print head, FUJI provides the replacement print head and service without charge.

In October 2011, FUJI took over Rite Aid's "bench work" from RIMG.[3] RIMG alleges that FUJI is performing this work for Rite Aid below FUJI's average variable cost. RIMG also alleges that the loss of the Rite Aid revenue from RIMG's bench work will adversely affect RIMG's cash flow and, hence, its ability to compete with FUJI for FUJI-brand minilab service.

RIMG also alleges that on January 16, 2012, FUJI began the process of taking away from RIMG the photo call center support (also known as "telephone help desk support") for all 4,400 Rite Aid locations nationwide. RIMG's chief executive officer Brad Eamon states that this loss of business will cause RIMG to lose "in excess of 30% of total sales" and cause most of RIMG's 100 Portland-based employees "to lose their jobs on March 1, 2012," if FUJI is allowed to take over the photo call center service business for Rite Aid. Declaration of Brad Eamon in Support of Plaintiffs Motion for Temporary Restraining Order.

RIMG contends that FUJI has the intent to **[**10]** suppress RIMG as a service competitor by raising RIMG's costs of operations, crippling or destroying RIMG's reputation and goodwill, and financially handicapping RIMG's ability to compete with FUJI in the FUJI-brand minilab service market. Based on these allegations, RIMG asserts, among other claims, that FUJI has monopolized or attempted to monopolize the nationwide market for FUJI-brand minilab repair service.[4] In its motion for preliminary injunctive relief, RIMG seeks to enjoin FUJI from **[*1194]** performing under its recently-negotiated minilab repair service contract with Rite Aid.

C. Discussion

1. Likelihood of irreparable injury

HN6[] "Typically, monetary harm does not constitute irreparable harm." *California Pharmacists Association v. Maxwell-Jolly, 563 F.3d 847, 851 (9th Cir. 2009)*; *see also* *Goldie's Bookstore, Inc. v. Superior Court, 739 F.2d 466, 471 (9th Cir. 1984)* ("Mere financial injury, however, will not constitute irreparable harm if adequate compensatory **[**11]** relief will be available in the course of litigation."). RIMG argues, however, that its "[l]oss of revenue and people losing their jobs satisfies the irreparable harm test," *citing SAC and Fox Nation of Missouri v. LaFaver, 905 F. Supp. 904 (D. Kan. 1995)*. Plaintiffs Memorandum at 12.

In addition, during the evidentiary hearing RIMG referred the court to *Foremost International Tours, Inc. v. Qantas Airways, Ltd., 379 F. Supp. 88 (D. Haw. 1974)*, *aff'd* *525 F.2d 281 (9th Cir. 1975)*, for the proposition that putting a company out of business may be sufficient to warrant a preliminary injunction. In *Foremost*, the district court noted:

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[3] "Bench work" is minilab repair work performed off-site from a service customer's location.

[4] It is unclear from the pleadings whether RIMG alleges that "bench work" and "photo call center" services are part of the defined market for FUJI-brand minilab repair service or whether they are separate relevant markets or sub-markets.

> *HN7*[] Courts should be particularly concerned with threats to the existence of a moving party's business in the area of antitrust. An award of only money damages in lieu of preserving a competitor disserves the public interest.

Foremost, 379 F. Supp, at 97.

FUJI responds by citing the case *of Dollar Rent A Car of Washington, Inc. v. Travelers Indem. Co., 774 F.2d 1371, 1375 (9th Cir. 1985)*, which FUJI says supports the conclusion that "an assertion that a moving party would go out of business in the absence of a preliminary injunction is insufficient to show irreparable **[**12]** injury." Defendant's Memorandum at 8. Both sides overstate their legal authorities.

In *SAC and Fox Nation of Missouri*, the district court in Kansas issued a temporary restraining order that challenged the imposition of a motor fuel tax by the Kansas Department of Revenue on sales of gasoline diesel fuel sold on Native American lands. The court found irreparable injury in the fact that the "loss of revenue will result in decreased services and programs to Tribal members and the loss of employment for specific Tribal members" and noted that "such basic services as law enforcement and fire protection may be endangered by this loss of revenue." *SAC and Fox Nation, 905 F. Supp, at 907*. The Tribes also argued that "the loss of revenue in the interim may so devastate the Tribes that the ability to sustain themselves may be irretrievably lost." *Id*. In light of this, the court concluded that "[u]nder normal circumstances, monetary loss may be remedied by an award of compensatory damages, and the risk of such loss is therefore not considered irreparable.. .. Here, however, the court considers the consequences of such losses as extremely serious and potentially devastating to the Tribes. Such **[**13]** loss would indeed meet the irreparable harm test." *Id*. (citation omitted). RIMG's claimed potential losses, while quite serious, do not appear to rise to this level of widespread devastation.

With regard to *Foremost*, as FUJI correctly points out in its post-hearing supplemental memorandum, the district court in that case reviewed a year-to-year financial comparison for three months, April, May, and June 1973 versus 1974, and found that the plaintiff had lost 67%, 89%, and 95% of its monthly business, respectively. *Foremost, 379 F. Supp, at 92*; *see also* Defendant's Post-Hearing Supplemental Memorandum **[*1195]** at 3 n. 2. This is far greater than RIMG's claimed anticipated loss of 30% of its business resulting from Rite Aid's decision to contract with FUJI rather than with RIMG.[5]

On the other hand, the Ninth Circuit decision in *Dollar Rent A Car* left open the possibility that, under some circumstances, the irreparable damage requirement may be satisfied with the threatened destruction of a business. In that case, the Ninth Circuit wrote:

> Viking argued to the district court that it would suffer irreparable injury because all of its income is derived from the Travelers-Dollar program and, in the absence of the preliminary injunction, Viking would go out of business. In support thereof, Viking relies upon *Janmort Leasing, Inc. v. Econo-Car International, Inc., 475 F. Supp. 1282, 1294 (E.D.N.Y. 1979)*. *In Janmort*, however, the ongoing business that was threatened with destruction was an operating car franchise with offices, employees, cars on the road, etc. Viking, on the other hand, is a subsidiary of Dollar located in the Caribbean. No showing was made of the number of Viking employees, its existing good will, or its commitments other than those incurred by the Reinsurance Agreements.

Dollar Rent A Car, 774 F.2d at 1375; **[**15]** *see also Hughes Network Systems, Inc. v. Interdigital Communications Corp., 17 F.3d 691, 694 (4th Cir. 1994)* (in remanding for further consideration, court noted that even if loss can be compensated by money damages, extraordinary circumstances may give rise to irreparable harm required for

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[5] In the present case, the court is appropriately sensitive to the loss of any jobs by RIMG's employees in Oregon, but an inappropriately granted preliminary injunction may wrongfully cause a comparable loss of jobs to FUJI's employees in another state in this nationwide market. Under constitutional law principles derived from the "dormant *commerce clause*" doctrine, a court should not prefer the jobs of employees in one **[**14]** state over the jobs of employees in another state. *See generally* Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 430-461 (4th ed. 2011).

preliminary injunction); *but see* *Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801-802 (3d Cir. 1989)* (harm was not deemed irreparable even though nature of action involved loss of majority of business revenue).

In conclusion, ***HN8***[] the threatened destruction of a business may, under certain circumstances, be sufficient to satisfy the requirement that a movant show a "likelihood of irreparable injury." The evidence that RIMG has presented, however, does not show a likelihood of irreparable injury. Moreover, for the reasons that follow, RIMG's evidence also does not satisfy its burden of establishing the other requirements needed for a preliminary injunction.

2. Serious questions going to the merits

As stated above, in the Ninth Circuit a party seeking a preliminary injunction need not show a likelihood of success on the merits so long as that party can show "'serious questions going to **[**16]** the merits' and a hardship balance that tips sharply toward the plaintiff," assuming that the other two elements (likelihood of irreparable injury and the public interest favors an injunction) are satisfied. *Alliance, 632 F.3d at 1131-32*. The Ninth Circuit has also said that, ***HN9***[] as an "'irreducible minimum,' the moving party must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation." *Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987)*.

[*1196] The gravamen of RIMG's antitrust claim, as stated in its Second Amended Complaint, is that FUJI has willfully maintained (or has attempted to obtain and has come dangerously close to obtaining) "monopoly power in the FUJI-brand minilab service market through exclusionary and anticompetitive conduct." Sec. Am. Comp., ¶ 75. RIMG asserts that FUJI has a continuing duty "to make available to RIMG under reasonable terms all replacement parts and necessary tools and resources in accordance with FUJI's continuing course of conduct." Sec. Am. Comp., ¶ 57. RIMG's motion for a preliminary injunction, however, does not seek an order requiring FUJI to continue to make such parts, tools, and resources **[**17]** available to RIMG, pending a final decision on the merits.

RIMG also alleges that "FUJI sells the replacement print heads at a much higher price than when they are offered and sold as part of a bundle" and that when "FUJI offers the replacement print heads with FUJI/CES labor, the labor required to provide the installation is sold below the average variable cost incurred by FUJI to provide such labor." Sec. Am. Comp., ¶ 60. RIMG's motion for a preliminary injunction, however, does not seek an order requiring FUJI to "unbundle" its sales of replacement print heads and labor, pending a final decision on the merits.

RIMG further alleges price discrimination in the sale of print heads and claims that "FUJI favors certain end user customers by selling print heads below the average variable cost FUJI incurs." Sec. Am. Comp., ¶ 62. RIMG's motion for a preliminary injunction, however, does not seek an order prohibiting FUJI from selling print heads at discriminatory prices or below average variable cost, pending a final decision on the merits.

Instead, RIMG seeks a preliminary injunction to prohibit FUJI "from performing Rite Aid's Photo Call Center business." Plaintiffs Memorandum, at 2. That **[**18]** work, however, is not even mentioned in RIMG's Second Amended Complaint, and it is far from clear whether, and if so how, a photo call center business relates to the market for FUJI-brand minilab service, which is the only market that RIMG alleges in its Second Amended Complaint that FUJI has monopolized or attempted to monopolize.[6]

During the January 19th evidentiary hearing, counsel for RIMG indicated that RIMG would soon be seeking leave to file a Third Amended Complaint. On January 26, 2012, RIMG filed an unopposed motion for leave to file a Third Amended Complaint, which the court allowed on January 27, 2012. In its recently amended pleading, RIMG continues to allege that FUJI possesses "monopoly power in the FUJI-brand minilab service market," Third Am. Comp., ¶ 77, which FUJI allegedly maintains through exclusionary or anticompetitive conduct. *Id*. at ¶ 78.

Also in its Third Amended Complaint, RIMG alleges that "FUJI solicited Rite Aid **[**19]** to include Rite Aid's Call Center Services work as part of a bundle of products and services FUJI would be providing, ultimately taking such

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[6] To the extent that they are separate markets and RIMG is attempting to allege a theory of "monopoly leveraging," that is not a valid antitrust theory in the Ninth Circuit. *See* *John Doe I v. Abbott Laboratories, 571 F.3d 930, 934 (9th Cir. 2009)*.

work in phases beginning January 16, 2012." Third Am. Comp., ¶ 53. RIMG further alleges: "If the discounts, or other form of monetary or in kind allowance, given to Rite Aid on the bundled products and services were applied to the Call Center Services work, FUJI would be doing said work below its **[*1197]** average variable cost." *Id.; see also* Third Am. Comp., ¶ 78(c) ("FUJI has engaged in exclusionary pricing of a bundle product"). This allegation would appear to connect RIMG's antitrust claim to its request for a preliminary injunction to prevent FUJI from commencing performance on its recently agreed-upon contract with Rite Aid. This allegation may also state an antitrust claim of unlawful bundling that is recognized in the Ninth Circuit. *See Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 909-910 (9th Cir. 2008)* **[**20]** (***HN10***[] a bundled price is legal if, when the total discount is attributed only to the product that less diversified competitors are trying to sell separately, the resulting price is above the seller's average variable costs for that product).[7]

Even if the court ignores, however, the unorthodox timing of RIMG's motion and pleadings (moving for a preliminary injunction first based on a theory that is not contained in the then-most current complaint and later moving to file a further amended complaint that attempts to link the substantive allegations to the preliminary relief requested), merely alleging a fact does not make it so. Neither in RIMG's declarations submitted **[**21]** in support of its motion for a preliminary injunction nor in its submissions at the evidentiary hearing did RIMG offer any admissible evidence tending to show that "FUJI has engaged in exclusionary pricing of a bundle product" by offering to perform call center service work below its average variable cost. In his declaration dated January 17, 2012, RIMG's chief executive officer Brad Eamon asserted: "In effect, FUJI offered Rite Aid a below-cost offer for the call center business that Rite Aid could not refuse." Mr. Eamon, however, offered no admissible evidence in support of this conclusion nor any explanation, again with admissible evidence, of how he would know his competitor's average variable cost structure. Moreover, FUJI'S vice president of Field Operations, Steven N. Pagano, submitted a declaration in opposition to RIMG's motion for preliminary injunction, in which Mr. Pagano stated: "The anticipated revenues for Call Center Services exceeded the anticipated costs associated with the provision of those services and provided FUJI with a margin of profit."[8] Given the current state of the factual record, the court cannot conclude that RIMG has met its burden of making a clear **[**22]** showing of "a fair chance of success on the merits, or questions serious enough to require litigation" on the issue of whether FUJI has engaged in unlawful, below-cost bundling in violation of the antitrust laws.

3. The balance of hardships and the public interest

At this stage of the litigation, only one fact appears to be reasonably well established: RIMG and FUJI are currently engaged in significant and vigorous competition with each other to provide various services (consisting of at least on-site minilab repair service, bench work service, and call center service) to businesses that lease or purchase FUJI-brand minilabs. As **[*1198]** stated above, in 2010 RIMG took from FUJI the on-site repair service for Sam's Club locations nationwide. In 2011, FUJI took from RIMG the "bench work" business at Rite Aid. And in 2012, it appears that FUJI now may be taking from RIMG the call center service business for Rite Aid. Insufficient evidence has been presented to the court to determine whether this is anything more than simply the competitive forces of the **[**23]** marketplace at work.

In addition, RIMG asserts that FUJI has cut its prices in order to obtain Rite Aid's business for call center services. The Supreme Court, however, has said that "cutting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Further, ***HN11***[] "[l]ow prices benefit consumers regardless of how those prices are set, and so long

[7] The court will wait for another day to evaluate the question of whether call center service is a "product that less diversified competitors are trying to sell separately," given that both RIMG and FUJI appear to be selling both repair services and call center services to the same customer. Thus, if RIMG offers both services in a bundle, under what circumstances, if any, should the antitrust laws, under *PeaceHealth*, restrict FUJI from doing so? There may be a good answer to that question, but that analysis is for another day.

[8] Mr. Pagano, however, did not explain in his declaration whether he was referring to "average variable costs" or to some other measure of cost.

as they are above predatory levels, they do not threaten competition." *Atlantic Richfield Co., v. USA Petroleum Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

Moreover, it is well established that ***HN12***[] "[t]he antitrust laws .. . were enacted for 'the protection of competition, not competitors.'" *Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. The Supreme Court has also stated that it should "resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition."* *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, 546 U.S. 164, 168, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006)* (emphasis in original). Finally, ***HN13***[] "'false positive' mistaken inferences that chill the very conduct the antitrust **[**24]** laws are designed to protect" are especially costly. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 399-400, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (quoting *Matsushita, 475 U.S. at 594*).

On the basis of the evidence presented, the court cannot conclude that the public interest favors granting the preliminary injunction sought by RIMG. Moreover, the preliminary injunction, if granted, may result in FUJI being in breach its contract with Rite Aid.[9] Thus, the court also cannot conclude that the balance of hardships tips "sharply" in favor of RIMG. Accordingly, based on the evidence presented the court declines, at this preliminary stage of the litigation, to place the substantial power of the federal courts on the side of one competitor against another as they compete for business in the commercial marketplace.

III. CONCLUSION

For the reasons stated above, Plaintiffs motion for temporary restraining order without notice and alternative motion for preliminary injunction (Doc. 36) are **DENIED**.

IT IS **[**25]** SO ORDERED.

Dated this 30th day of January, 2012.

/s/ Michael H. Simon

Michael H. Simon

United States District Judge

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[9] In light of the court's ruling, there is no need to discuss the details of any security that would have been required had a preliminary injunction been ordered. *See* *Fed. R. Civ. P. 65(c)*.

Schatz v. Cellco P'ship

United States District Court for the Southern District of New York

January 31, 2012, Decided; February 3, 2012, Filed

10 Civ. 5414 (RJH)

Reporter

842 F. Supp. 2d 594 *; 2012 U.S. Dist. LEXIS 13551 **; 2012 WL 360284

KRISTEN SCHATZ and PATRICK WITTY, individually and on behalf of all others similarly situated, Plaintiff, -vs- CELLCO PARTNERSHIP d/b/a/ VERIZON WIRELESS, Defendant.

Subsequent History: Motion denied by, Motion granted by, Sanctions disallowed by *Schatz v. Cellco P'ship, 2016 U.S. Dist. LEXIS 56599 (S.D.N.Y., Apr. 28, 2016)*

Core Terms

arbitration, arbitration agreement, injunctive relief, customers, plaintiffs', consumers, parties, injunction, first instance, attorney general, ambiguity, treble damages, class action, vindicate, merger, scope of arbitration, consumer-protection, antitrust, remedies, unenforceable, private right of action, consumer protection, statutory right, damages, courts, enjoin, waived, cases, punitive damages, purports

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN1[ ] **Federal Arbitration Act, Arbitration Agreements**

Section 2 of the Federal Arbitration Act makes agreements to arbitrate valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. *9 U.S.C.S. § 2*. *Section 2* reflects the liberal federal policy favoring arbitration. This policy extends to agreements to arbitrate certain statutory claims. However, by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum. Thus, where the parties have agreed to arbitrate statutory claims, and where Congress has not manifested an intent that such claims should not be arbitrated, the agreement will be enforced, so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Evidence > Burdens of Proof > Allocation

HN2[ ] **Federal Arbitration Act, Arbitration Agreements**

Where a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Evidence > Burdens of Proof > Allocation

HN3[] **Federal Arbitration Act, Arbitration Agreements**

The party resisting arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights bears the burden of showing the likelihood of such interference, and second, that this burden cannot be carried by "mere speculation" about how an arbitrator "might" interpret or apply the agreement.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN4[] **Federal Arbitration Act, Arbitration Agreements**

If a plaintiff can adequately demonstrate that the provisions of an arbitration agreement would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiff, the arbitration agreement may be unenforceable.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN5[] **Arbitration, Arbitrability**

In analyzing a given vindication of statutory rights claim, a court must first decide who the proper decision maker is for such a claim: an arbitrator or a court. Questions of arbitrability are presumptively for the court, not the arbitrator, unless the parties have "clearly and unmistakably" agreed otherwise. Two categories of disputes constitute clear questions of arbitrability. The first category includes disputes about whether the parties are bound by a given arbitration clause. The second category encompasses disagreements about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy. These "questions of arbitrability" are left to the court because they refer to the kind of narrow circumstances where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN6[] **Arbitration, Arbitrability**

Where a plaintiff contends that an arbitration provision prohibits him or her from vindicating statutory rights, the plaintiffs' argument may raise a question of arbitrability for a court to decide, even if the question does not fall into one of the clear questions of arbitrability under Howsam v. Dean Witter Reynolds, Inc.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN7[] **Arbitration, Arbitrability**

When there is an underlying legal ambiguity, an arbitrator must decide the underlying legal question in the first instance so that the federal policy in favor of arbitration is not frustrated.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN8[] **Arbitration, Arbitrability**

The arbitral forum is inadequate only if the conflict between the statutory right and the arbitration agreement is clear. If the conflict is ambiguous (whether because of contractual or legal ambiguity with respect to the specific statutory right, the alleged inadequacy of the arbitral forum (and thus the alleged invalidity of the arbitration agreement) is speculative, and the strong federal policy favoring arbitration requires that the arbitrator resolve the ambiguity in the first instance.

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

HN9[] **Deceptive & Unfair Trade Practices, State Regulation**

See *N.Y. Gen. Bus. Law § 349(h)*.

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

HN10[] **Deceptive & Unfair Trade Practices, State Regulation**

See *N.J. Stat. Ann. § 56:8-19*.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

HN11[] **Contract Interpretation, Ambiguities & Contra Proferentem**

A contract is ambiguous where it could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN12[] **Arbitration, Arbitrability**

Although an arbitration agreement may prohibit a plaintiff from obtaining the relief it desires, that prohibition may not raise a question of arbitrability if the law is ambiguous on the plaintiff's ability to waive the right (if any) to such relief.

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

HN13[] **Contract Conditions & Provisions, Waivers**

Generally and excepting instances where there would be transgressions of public policy, all rights and privileges to which one is legally entitled, Ex contractu or Ex debito justitiae, may be waived. Notably, courts in New York have permitted plaintiffs to waive their right to treble damages under *N.Y. Gen. Bus. Law § 349(h)* in order to allow the plaintiffs to bring their claims as class actions. However, the ability to waive a statutory right is not unlimited. A statutory right conferred on a private party, but affecting the public interest, may not be waived or released if said waiver or release contravenes the statutory policy.

Counsel: [1]** For Kirsten Schatz, Individually and on behalf of all others similarly situated, Patrick Witty, individually and on behalf of all others similarly situated, Plaintiffs: William Robert Weinstein, LEAD ATTORNEY, Law Offices of William R. Weisnstein, White Plains, NY; Kenneth Allan Levy, PRO HAC VICE, Kenneth A. Levy, Esq, Monroe, NY.

For Cellco Partnership, doing business as Verizon Wireless, Defendant: William Harlow Pratt, LEAD ATTORNEY, Kirkland and Ellis LLP, Palo Alto, CA; Joshua B. Simon, Mark Waldemar Rasmussen, Kirkland & Ellis LLP (NYC), New York, NY.

Judges: Richard J. Holwell, United States District Judge.

Opinion by: Richard J. Holwell

Opinion

[*596] **MEMORANDUM OPINION AND ORDER**

Richard J. Holwell, District Judge:

Before the Court is a motion, pursuant to *sections 3* and *4* of the Federal Arbitration Act ("FAA"), *9 U.S.C. §§ 1 et seq.*, by plaintiffs Kristen Schatz ("Schatz") and Patrick Witty ("Witty," and, together, the "plaintiffs") to compel defendant Cellco Partnership d/b/a Verizon Wireless ("Verizon") to arbitrate. The plaintiffs ask the Court (1) to order Verizon to arbitrate a claim, pursuant to the New Jersey Consumer Fraud Act, *N.J.S.A. §§ 56:8-1 et seq*., or, alternatively, the *New York General Business Law § 349*, **[**2]** for "general injunctive relief" benefitting all Verizon customers currently being charged $99.99 per month for Verizon's Nationwide Unlimited Plan ("NUP"), and (2) to declare invalid a provision in the parties' arbitration agreement that purports to limit the arbitrators' power to award such relief. Since the Court already has referred all claims in this action to arbitration, and since the question of the availability of "general injunctive relief" must be left to the arbitrators in the first instance, the plaintiffs' motion is denied without prejudice to plaintiffs' right to move to vacate any future arbitration award.

BACKGROUND

Plaintiff Schatz was a customer of Verizon. (Amended Complaint ("AC") ¶ 27.) Pursuant to a two-year contract with Verizon, Schatz obtained cell-phone service from Verizon under its Nationwide Unlimited Plan ("NUP"). (*Id*.) Schatz paid $99.99 per month for this service. (*Id*.) On January 18, 2010, Verizon lowered the price of its NUP from $99.99 per month to $69.99 per month. (*Id*. ¶ 30.) Verizon, however, did not notify Schatz of this change and did not reduce her monthly payments. (*See id*. ¶¶ 30-31.) In April 2010, when Schatz learned of Verizon's decision to **[**3]** reduce the price of the NUP, she called Verizon and requested that she be charged the lower amount. (*Id*. ¶ 31.) Verizon agreed without objection, but refused to refund Schatz the excess she had paid between the time Verizon enacted the price decrease and the time Schatz requested it. (*Id*.) Schatz alleges that Verizon's conduct amounts to a breach of its obligations under a Customer Agreement to which Schatz agreed as part of her contract with Verizon. (*See id*. ¶ 36.) **[*597]** Schatz represents that the Customer Agreement requires Verizon to notify its customers of any changes in the NUP and that customers agree to the terms of any change by continuing to use the NUP after such notice is given. (*See id*. ¶ 29.) Schatz also alleges that Verizon's conduct violates the New Jersey Consumer Fraud Act, or, alternatively, the *New York General Business Law § 349*. (*See id*. ¶ 42-43.)

In July 2010, Schatz filed this putative class action "on behalf of all Verizon wireless telephone customers with the individual Nationwide Unlimited Plan ('NUP') as of January 18, 2010 who were charged amounts in excess of the $69.99 monthly price that became effective for the NUP on January 18, 2010." (*Id*. ¶ 19.) The plaintiffs **[**4]** sought relief on behalf of the class to require, among other things, "Verizon to specifically perform its Customer Agreement with all customers entitled to but not yet being charged the $69.99 price for their NUP." (*Id*., "Prayer for Relief" ¶ D.) On November 1, 2010, Verizon moved to compel arbitration of Schatz's individual claim based on an arbitration provision in the Customer Agreement that provides,

> You and Verizon Wireless both agree to resolve disputes only by arbitration or in small claims court. There's no judge or jury in arbitration, and the procedures may be different, but an arbitrator can award the same damages and relief, and must honor the same terms in this agreement, as a court would. If the law allows for an award of attorneys' fees, an arbitrator can award them too. We also both agree that:
>
> (1) The Federal Arbitration Act applies to this agreement. Except for small claims court cases that qualify, any dispute that results from this agreement or from the Services you receive from us (or from any advertising for any products or Services) will be resolved by one or more neutral arbitrators before the American Arbitration Association ("AAA") or Better Business Bureau **[**5]** ("BBB").

(Customer Agreement 12-13.[1]) Section 3 of the Customer Agreement's arbitration provision provides, "This agreement doesn't allow class arbitrations even if the AAA or BBB procedures or rules would. The arbitrator may award money or injunctive relief only in favor of the individual party and only to the extent necessary to provide relief warranted by that party's individual claim." (*Id*.) The plaintiffs' current motion seeks to declare invalid the second sentence of section 3.

The plaintiffs originally opposed Verizon's motion on the ground that the provision barring class arbitration (the "class waiver") was unenforceable. Then, on April 27, 2011, the Supreme Court decided *AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*, and held that a California state-law rule that rendered class waivers unenforceable under California's law of unconscionability was preempted by the FAA. *Id. at 1753*. This Court then directed the parties to address the effect of *Concepcion* on Verizon's motion to compel arbitration. In a letter dated May 11, 2011, the plaintiffs informed the Court that they **[**6]** "have determined not to challenge the applicability to Verizon's motion to compel arbitration of the majority's holding in *Concepcion*—that states are preempted under the [FAA] from holding class action waivers in arbitration agreements to be unconscionable and unenforceable." (Letter from William **[*598]** R. Weinstein, May 11, 2011, at 1.[2]) Because the *Concepcion* issue "was the sole focus," (*id*.), of Verizon's motion, the Court granted Verizon's motion to compel arbitration. (*See* Order, May 13, 2011, Docket No. 23.) The Court also granted the plaintiffs' request for leave to file their current motion, which seeks an order (1) compelling Verizon to arbitrate the plaintiffs' claims under the New Jersey Consumer Fraud Act, or, alternatively, the *New York General Business Law § 349*,[3] and (2) declaring invalid the

[1] The Customer Agreement is attached as Ex. 3 to the Affidavit of Tricia Lancaster, Docket No. 15.

[2] The letter may found at Docket No. 22.

[3] The parties dispute whether the New Jersey or the New York consumer protection statute is applicable to the plaintiffs' claims, but neither party asks the Court to decide that issue here.

second sentence of section 3 of the parties' arbitration agreement, which purports to limit the scope of remedies the arbitrators may award.

LEGAL STANDARD

HN1[] *Section 2* of the FAA **[**7]** makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. § 2*. *Section 2* reflects the "'liberal federal policy favoring arbitration.'" *Concepcion, 131 S. Ct. at 1745* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983))*. This policy extends to agreements to arbitrate certain statutory claims. *See, e.g., 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 129 S. Ct. 1456, 1474, 173 L. Ed. 2d 398 (2009)*; *Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 89, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*. However, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum." *Preston v. Ferrer, 552 U.S. 346, 359, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008)* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985))*. Thus, where the parties have agreed to arbitrate statutory claims, and where Congress has not manifested an intent that such claims should not be arbitrated, the agreement will be enforced, "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral **[**8]** forum." *Mitsubishi, 473 U.S. at 637*.

The Supreme Court, in *Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*, addressed an argument that an arbitration agreement would interfere with the plaintiff's ability to vindicate her rights under the federal Truth in Lending Act ("TILA") because the arbitration agreement was silent on the issue of attorneys' fees and costs. The plaintiff argued that the agreement's silence on the issue could render arbitration prohibitively expensive and thus deprive her of the ability to assert her statutory claim. The Supreme Court rejected this argument. It stated that "***HN2***[] where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id. at 92*. For the plaintiff in *Randolph*, "[t]he 'risk' that [she would] be saddled with prohibitive costs [was] too speculative to justify the invalidation of an arbitration agreement." *Id. at 91*.

In *PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401, 123 S. Ct. 1531, 155 L. Ed. 2d 578 (2003)*, the Supreme Court considered an argument that a claim under **[*599]** the Racketeer Influenced and Corrupt Organizations **[**9]** Act ("RICO"), *18 U.S.C. §§ 1961 et seq.*, could not be subject to arbitration because the parties' arbitration agreement prohibited punitive damages, while RICO allowed treble damages. The Court declined to determine in the first instance whether the contract's ban on punitive damages in fact prohibited treble damages. *See id. at 406-07*. The Court held, "[W]e should not, on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved." *Id. at 406-07* (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 541, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995))*. The Court continued, "[S]ince we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. [Accordingly,] the proper course is to compel arbitration." *Id. at 407*.

The Court of Appeals for the District of Columbia Circuit has taken from these cases two propositions:

> [*F*]*irst*, **[**10]** that ***HN3***[] the party resisting arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights bears the burden of showing the likelihood of such interference, and *second*, that this burden cannot be carried by "mere speculation" about how an arbitrator "might" interpret or apply the agreement.

Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 81, 367 U.S. App. D.C. 77 (D.C. Cir. 2005) (emphasis in original).

In addition, the Second Circuit Court of Appeals recently has applied these principles, in the context of an antitrust action, to hold that ***HN4***[] if a plaintiff can "adequately demonstrate[]" that the provisions of an arbitration agreement "would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiff[]," the arbitration agreement may be unenforceable. *See* In re Am. Express Merchant's Litig., 554 F.3d 300, 304 (2d Cir. 2009) ("*Am. Express I*") (finding a class waiver in an arbitration agreement unenforceable where the plaintiffs made a "substantial demonstration" that "they would incur prohibitive costs if compelled to arbitrate under the class action waiver," such that "an inability to pursue arbitration on **[**11]** a class basis would be tantamount to an inability to assert their claims at all"), *vacated sub nom. Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401, 176 L. Ed. 2d 920 (2010)*, *reaff'd*, 634 F.3d. 187 (2d Cir. 2011) ("*Am. Express II*").[4] In the *American Express* cases, the Second Circuit relied on the "federal substantive law of arbitrability," Am. Express II, 634 F.3d at 194, and its reasoning has not been overruled expressly by the Supreme Court's decision in *Concepcion*. Indeed, the Second Circuit reaffirmed the holdings of its *American Express* decisions in light of *Concepcion, see* In re American Express Merchants' Litigation, No. 06-1871-cv, 667 F.3d 204, 2012 U.S. App. LEXIS 1871 (2d Cir. Feb. 1, 2012) ("*Am. Express III*"), and those decisions today remain the law in this Circuit.[5]

[*600] DISCUSSION

In arbitration, the plaintiffs wish to seek what they call "general injunctive relief" under either the New York or New Jersey consumer-protection statute. This means the plaintiffs wish to obtain an injunction requiring Verizon to lower the monthly price of its NUP for *all* customers who still are being charged the higher rate of $99.99 per month. In addition, if the plaintiffs' amended complaint is any indication, in arbitration they **[**13]** also will seek compensatory damages, punitive damages, a declaration that Verizon's conduct violates the consumer protection statutes and the Customer Agreement, and attorneys' fees.

The underlying relief plaintiffs seek in this motion is an order declaring unenforceable the second sentence of section 3 of the arbitration agreement—which limits the relief an arbitrator may award to "money or injunctive relief only in favor of the individual party and only to the extent necessary to provide relief warranted by that party's individual claim" (Customer Agreement at 13)—on the ground that it prevents plaintiffs from vindicating their asserted statutory rights under the applicable consumer-protection statute.

HN5[] "In analyzing a given vindication of statutory rights claim, [the Court] must first decide who the proper decision maker is for such a claim: an arbitrator or a court." Kristian v. Comcast Corp., 446 F.3d 25, 37 (1st Cir. 2006).

In Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002), the Supreme Court reiterated that "question[s] of arbitrability" are presumptively for the court, not the arbitrator, unless the parties have "clearly and unmistakably" agreed otherwise. Id. at 83. The **[**14]** Court in *Howsam* recognized two categories of disputes that constitute clear questions of arbitrability. The first category includes "dispute[s] about whether the parties are bound by a given arbitration clause." Id. at 84. The second category encompasses "disagreement[s] about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Id*. These "question[s] of arbitrability" are left to the court because they refer to

[4] On February 1, 2012, the Second Circuit, after *sua sponte* considering the effect of *Concepcion* on its *American Express* decisions, reaffirmed the holdings of those cases. *See* In re Am. Express Merchants' Litig., No. 06-1871-cv, 2012 U.S. App. LEXIS 1871 (2d Cir. Feb. 1, 2012) ("*Am. Express III*"). *American Express III* does not alter the analysis of this Memorandum Opinion and Order.

[5] In light of Concepcion, there is some reason to question the applicability of this framework to claims, **[**12]** like plaintiffs', that are based on state, rather than federal, law because *Concepcion* itself "involved the vindication of state, not federal, rights." Raniere v. Citigroup, Inc., 827 F. Supp. 2d 294, 310, 2011 U.S. Dist. LEXIS 135393, 2011 WL 5881926, at * 13 (S.D.N.Y. 2011). Accordingly, it is possible to read Concepcion "broadly to acquiesce to the enforcement of an arbitral agreement that as a practical matter would prevent the vindication of state rights in the name of furthering the strong federal policy favoring arbitration." *Id*. (dicta). However, because, as discussed below, the question of the availability of "general injunctive relief" must be left to the arbitrators in the first instance, the Court need not address the question here.

> the kind of narrow circumstance[s] where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Id. at 83-84.

The parties here agree that this dispute does not fall into *Howsam*'s first category of "question[s] of arbitrability"—whether the parties are bound by a given arbitration clause. Both parties agree that they are bound, in the sense that the Customer Agreement, which includes the arbitration agreement, "establishes **[**15]** a valid contractual **[*601]** relationship between [Verizon] and each of its subscribers," *Kristian, 446 F.3d at 42*. There is some dispute, however, over whether the plaintiffs' motion involves the question of whether a particular dispute falls within the scope of a given arbitration clause. The answer to this question turns largely on how one defines the parties' underlying dispute.

As relevant to this motion, that dispute involves two questions: (1) whether Verizon has committed a deceptive business practice in violation of the applicable consumer-protection statute by failing to lower the price of the NUP for existing customers, and (2) if so, whether plaintiffs, proceeding on an individual basis, may obtain in arbitration an award requiring Verizon to lower the price to all customers still being charged the higher rate. Plaintiffs contend that these two issues together constitute the "claim," and that the Court must decide whether it falls within or outside the scope of the parties' arbitration agreement. In other words, plaintiffs characterize the issue as whether their claim for "general injunctive relief" falls within the scope of the arbitration clause. On the merits of that issue, plaintiffs **[**16]** contend that their "general injunctive relief" claim falls outside the scope of the arbitration agreement because while the arbitration agreement provides that "any dispute that results from this agreement or from Services you receive from us . . . will be resolved by one or more neutral arbitrators," it also limits the relief an arbitrator may award to "money or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim."[6] (Customer Agreement at 13.)

Verizon, on the other hand, contends that the only "question[] of arbitrability" for the Court to decide is whether the first issue—i.e. whether Verizon violated the consumer-protection statute—falls within the scope of the arbitration agreement. The second issue—i.e. the availability of general injunctive relief—says Verizon, should be left to the arbitrators to decide in the event plaintiffs prevail on the first issue. With regard to the first issue, both parties agree that **[**18]** a consumer protection claim falls within the scope of the arbitration agreement in the sense that the arbitration agreement is broad enough to encompass claims for alleged violations of the consumer-protection statutes.

Plaintiffs seek support for their position in a recent line of cases arising out of the proposed merger between AT&T Mobility (ATTM) and T-Mobile USA, Inc. *See* *AT&T Mobility LLC v. Fisher, 11 **[*602]** Civ. 2245, 2011 U.S. Dist. LEXIS 124839, 2011 WL 5169349 (D. Md. Oct. 28, 2011)*; *AT&T Mobility LLC v. Bernardi, 11 Civ. 03992, 11 Civ. 04412, 2011 U.S. Dist. LEXIS 124084, 2011 WL 5079549 (N.D. Cal. Oct. 26, 2011)*; *AT&T Mobility LLC v. Gonnello, 11 Civ. 5636, 2011 U.S. Dist. LEXIS 116420, 2011 WL 4716617 (S.D.N.Y. Oct. 7, 2011)*; *AT&T Mobility*

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[6] It seems rather odd that plaintiffs, as the party seeking to compel arbitration, argue that their claim falls outside the scope of the arbitration agreement. One ordinarily would expect that the party opposing arbitration would argue that the dispute falls outside the arbitration agreement. The plaintiffs, however, appear to make the following argument: A claim for general injunctive relief falls outside the scope of the arbitration agreement because the agreement only permits the arbitrator to award relief in favor of an individual, and general injunctive relief does not qualify as such. The arbitration agreement, however, also requires **[**17]** that all claims between the parties be submitted to arbitration. Therefore, the arbitration agreement purports to require an individual to waive any claims for general injunctive relief he or she might have. The applicable consumer-protection statute, however, provides an individual with the right to seek general injunctive relief. Accordingly, the argument continues, because an individual cannot be compelled to waive his or her statutory rights through an arbitration agreement, the provision limiting the scope of relief an arbitrator may award is unenforceable. Plaintiffs then presumably would argue that the offending provision is severable and that the remainder of the arbitration agreement should be enforced.

LLC v. Smith, 11 Civ. 5157, 2011 U.S. Dist. LEXIS 125367, 2011 WL 5924460 (E.D. Pa. Oct. 7, 2011); AT&T Mobility LLC v. Bushman, 11 Civ. 80922, 2011 U.S. Dist. LEXIS 139113, 2011 WL 5924666, at *3 (S.D. Fla. Sept. 23, 2011). After the merger was announced, over one thousand individual customers of ATTM (all represented by the same law firm) filed separate arbitration demands seeking to enjoin the merger pursuant to section 16 of the Clayton Act, or, alternatively, to impose a variety of conditions on the merger's completion. *See, e.g.,* Smith, 2011 U.S. Dist. LEXIS 125367, 2011 WL 5924460, at *1. In response, ATTM filed **[**19]** various actions in United States District Courts throughout the country seeking to preliminarily enjoin those arbitrations on the ground that the customers' claims fell outside the scope of the arbitration agreement. ATTM's arbitration agreement is similar to the arbitration agreement here. It provides,

> The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.

E.g., 2011 U.S. Dist. LEXIS 125367, [WL] at *3. ATTM's arbitration agreement also provides, "AT&T and you agree to arbitrate all disputes and claims between us. This agreement is intended to be broadly interpreted." *Id*.

In the ATTM cases, the parties purported to agree that the issue of the scope of the arbitration agreement was a question for the courts to decide.[7] However, "the parties differ[ed] on what constitutes a 'scope' determination." Fisher, 2011 U.S. Dist. LEXIS 124839, 2011 WL 5169349, at *2. The customers argued, like Verizon does here, **[**20]** that the "scope" determination was limited to the question of whether a Clayton Act claim fell within the scope of the broad arbitration clause. 2011 U.S. Dist. LEXIS 124839, [WL] at *2-3; Bernardi, 2011 U.S. Dist. LEXIS 124084, 2011 WL 5079549, at *4-5, *9. The question of the relief available under the agreement, the customers argued, was a question for the arbitrator to decide in the first instance. Two courts expressly disagreed. In *Bernardi*, the U.S. District Court for the Northern District of California described the customers' argument as "too narrow a reading of the Court's power." Bernardi, 2011 U.S. Dist. LEXIS 124084, 2011 WL 5079549, at *4. The scope question was "not simply limited to whether the Clayton Act claim is arbitrable on its face, but looks to the 'dispute' as a whole to determine if it is arbitrable." 2011 U.S. Dist. LEXIS 124084, [WL] at *5. Thus, since "the only relief sought by the individual defendants [i.e. an injunction against the merger or the imposition of conditions upon it] is relief that is foreclosed by the language of the arbitration provision, the demand for arbitration is beyond the scope of disputes that the parties have contractually agreed to arbitrate." 2011 U.S. Dist. LEXIS 124084, [WL] at *9. The District Court for the District of Maryland agreed. *See* Fisher, 2011 U.S. Dist. LEXIS 124839, 2011 WL 5169349, at *3 & n.4; **[**21]** *see also* Gonnello, 2011 U.S. Dist. LEXIS 116420, 2011 WL 4716617, at *4.

A third court took a different view. The U.S. District Court for the Eastern District **[*603]** of Pennsylvania read ATTM's arbitration agreement to mean that "claims brought in an 'individual capacity' are arbitrable, while claims brought in any 'class or representative proceeding' are prohibited." Smith, 2011 U.S. Dist. LEXIS 125367, 2011 WL 5924460, at *4. With respect to the clause in the arbitration agreement that limited the arbitrator's remedial powers, the court stated,

> Fairly read, this clause addresses the remedies an arbitrator may award, not whether a particular dispute may be properly arbitrated in the first instance. Stated differently, the aforementioned clause, by its terms, does not constrain the nature of relief an individual party may seek, but rather limits what relief an arbitrator ultimately awards.
>
> Here, Smith's arbitration seeks to enjoin the AT&T/T-Mobile merger or, in the alternative, seeks divestitures and other remedies **[**22]** as may be appropriate to preserve competition in the relevant markets. (Doc. No. 28, at 14). The arbitration agreement does not prohibit Smith from *seeking* such remedies (assuming, of

[7] Indeed, ATTM's arbitration agreement provided, "All issues are for the arbitrator to decide, expect that issues relating to the scope and enforceability of the arbitration provision are for the court to decide." Smith, 2011 U.S. Dist. LEXIS 125367, 2011 WL 5924460, at *3.

> course, she brought the action in her "individual capacity" and not as part of any "class or representative proceeding"), although the agreement may prohibit the arbitrator from *awarding* the requested relief. This is not a "question of arbitrability" properly before the court at this time, so we do not resolve it.

Id. The court in *Smith* went on to find that the customers' claims nonetheless fell outside the scope of the arbitration clause because they amounted, in substance, to claims brought in a "class or representative proceeding." *2011 U.S. Dist. LEXIS 125367, [WL] at *6-7*. The court in *Smith*, as well as the other ATTM courts, found that the consumers' arbitrations bore "all the hallmarks of 'class arbitration' laid out in *Concepcion*." *2011 U.S. Dist. LEXIS 125367, [WL] at *7*; *see* *Bushman, 2011 U.S. Dist. LEXIS 139113, 2011 WL 5924666, at *2*; *Bernardi, 2011 U.S. Dist. LEXIS 124084, 2011 WL 5079549, at *4*. First, each consumer represented "but one of over 1,000 people who, represented by the same firm, filed essentially identical arbitration demands, all seeking the same, non-individualized relief." *Smith, 2011 U.S. Dist. LEXIS 125367, 2011 WL 5924460, at *6*. **[**23]** Second, "the multiple, functionally identical arbitrations . . . would likely result in 'procedural morass,' not 'final judgment," and so would "sacrifice the principal advantage of arbitration—its informality." *Id*. (quoting *Concepcion, 131 S. Ct. at 1751*). Third, the consumers' arbitrations may not have provided adequate protection to absent third parties, such as T-Mobile, cellular technology companies, public interest groups, and "the numerous government bodies that are also evaluating the merger." *Id*. Finally, the arbitrations implicated the concern that arbitration is poorly suited to the "higher stakes of class litigation." *2011 U.S. Dist. LEXIS 125367, [WL] at *7* ("The immense magnitude of the risk, i.e., the fate of a $39 billion merger, may pressure ATTM to settle claims that it believes to be meritless."). The consumers' arbitration demands thus implicated the precise concerns about class arbitration that at least in part animated the *Concepcion* decision. This led all of the ATTM courts to conclude that the consumers were seeking to arbitrate on a "class or representative" basis and that ATTM therefore was "likely to succeed on the merits" of its claim that the customers' arbitration demands fell outside **[**24]** the scope of the arbitration clause. *2011 U.S. Dist. LEXIS 125367, [WL] at *5-7*; *see* *Bushman, 2011 U.S. Dist. LEXIS 139113, 2011 WL 5924666, at *2-3*; *Gonnello, 2011 U.S. Dist. LEXIS 116420, 2011 WL 4716617, at *4*; *Bernardi, 2011 U.S. Dist. LEXIS 124084, 2011 WL 5079549, at *4*; *Fisher, 2011 U.S. Dist. LEXIS 124839, 2011 WL 5169349, at *7*.

The situation here is in some ways similar. Most significantly, like the consumers in the ATTM cases, the plaintiffs here seek broad injunctive relief under a statute, and the arbitration agreement purports to prohibit the arbitrator **[*604]** from awarding any relief that extends beyond the individual plaintiffs. But unlike the consumers (and like ATTM), the plaintiffs argue that the "dispute" sought to be arbitrated—and thus the question for the Court at this stage—*includes* the question of whether the particular relief sought is permitted under the agreement. In this regard, *Smith*'s reading of the remedial limitation provision is most persuasive: "Fairly read, this clause addresses the remedies an arbitrator may award, not whether a particular dispute may be properly arbitrated in the first instance. . . . This is not a 'question of arbitrability' properly before the court at this time." *Smith, 2011 U.S. Dist. LEXIS 125367, 2011 WL 5924460, at *4*. Accordingly, the fact that the arbitration agreement purports to limit the type of relief **[**25]** an arbitrator may award is not enough to warrant the conclusion that plaintiffs' consumer-protection act claims fall outside the scope of the arbitration agreement. This is especially true here given that the plaintiffs are likely to seek a variety of relief in arbitration, and neither party has argued that such relief (aside from "general injunctive relief") is prohibited by the agreement. Thus, the situation here is different than in the ATTM cases, where the *only* relief the consumers sought was barred by the arbitration agreement. *See* *Gonnello, 2011 U.S. Dist. LEXIS 116420, 2011 WL 4716617, at *3* (consumers were seeking "as [their] sole relief an injunction against the announced merger or, alternatively, a host of conditions on the merger—none of which are tailored to the individual claimant. . . . Thus, there is nothing to arbitrate which is not foreclosed by the contractual limitation on the relief that may be awarded."). Looking at the parties' dispute and the agreement as a whole, it reasonably appears that the parties intended to arbitrate plaintiffs' consumer-protection claims, even though the agreement may prohibit a type of relief plaintiffs desire.

In addition, unlike the consumers' arbitrations in the **[**26]** ATTM cases, plaintiffs' claims do not fall outside the scope of the arbitration clause as de facto "class arbitrations." To be sure, plaintiffs seek general injunctive relief on behalf of other Verizon customers, but their claim for such relief does not "bear[] all the hallmarks of 'class arbitration' laid out in *Concepcion*," *Smith, 2011 U.S. Dist. LEXIS 125367, 2011 WL 5924460, at *7*. First, there is no indication that plaintiffs plan to file multiple, identical arbitrations. Thus, there is little reason to believe that the plaintiffs' claims will result in "'procedural morass,' not 'final judgment,'" *id*. (quoting Concepcion, 131 S. Ct. at 1751)). Second, absent parties are unlikely to be inadequately protected. The only absent parties that potentially would be affected by plaintiffs' claim for general injunctive relief are existing Verizon customers still being charged the higher monthly rate for the NUP, and their interests with respect to the "general injunctive relief" claim are straightforward and directly in line with the plaintiffs' interests. *Compare* 2011 U.S. Dist. LEXIS 125367, [WL] at *6 (noting that in an individual arbitration to enjoin the ATTM merger, T-Mobile, cellular technology consumers, public interest groups, and government **[**27]** bodies that both oppose and support the merger would lack protection). Moreover, as the complaint indicates, Verizon willingly lowers the price of the NUP upon a customer's request. Thus, even an adverse decision on plaintiffs' "general injunctive relief" claim would not appear to preclude the absent customers' from obtaining the lower price on the NUP.[8] Accordingly, there **[*605]** is little risk that the absent customers' interests may be prejudiced by plaintiffs' seeking "general injunctive relief" on their behalf. Finally, given that Verizon willingly lowers the price charged to a customer upon the customer's request, there seems little risk of plaintiffs pressuring Verizon to settle claims it believes are meritless. *See id*.

Accordingly, the question of whether a particular form of relief is available under the parties' arbitration agreement is not, under these circumstances, a question of whether a particular **[**29]** dispute falls within the scope of the parties' arbitration agreement. Thus, the plaintiffs' motion does not present one of Howsam's "clear questions of arbitrability" for the Court to decide. *See* Kristian, 446 F.3d at 42 (where plaintiffs claimed that an arbitration agreement prevented them from vindicating their statutory rights (by, for example, prohibiting punitive damages), plaintiffs' argument did not involve the question of whether their claims fell within the scope of the arbitration provision, but rather the question of whether "arbitration subject to the provisions at issue shields [the defendant] from antitrust liability, and hence conflicts with the statutes providing for such liability"); *see also* Am. Express I, 554 F.3d at 309 (vindication-of-statutory-rights claim did not involve question of whether arbitration agreement was broad enough to cover plaintiffs' antitrust claims).

This does not mean, however, that the plaintiffs' motion necessarily fails to raise a question of arbitrability at all. Indeed, ***HN6***[] where a plaintiff contends that an arbitration provision prohibits him or her from vindicating statutory rights, the plaintiffs' argument may raise a question of arbitrability **[**30]** for a court to decide, even if the question does not fall into one of *Howsam*'s "clear questions of arbitrability." Kristian, 446 F.3d at 42. For example, in *Randolph*, the Supreme Court "assume[d] that the issue of arbitration costs raises a question of arbitrability." Kristian, 446 F.3d at 51; *accord* Am. Express II, 634 F.3d at 197.

The Supreme Court's decision in *PacifiCare* is particularly relevant here. In *PacifiCare*, the Supreme Court declined to decide in the first instance whether an arbitration provision that prohibited punitive damages was unenforceable on the ground that it prevented a plaintiff from obtaining statutorily authorized treble damages. PacifiCare, 538 U.S. at 407. The Court found ambiguity in the issue of whether the agreement's prohibition on punitive damages in fact prohibited **[*606]** treble damages and stated, "[S]ince we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or

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[8] While a prior arbitration may serve under certain circumstances as a basis to foreclose later proceedings, *see* Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998) ("[C]ollateral estoppel can be predicated on arbitration proceedings"), the absent Verizon customers, as non-parties to an individual arbitration, are unlikely to be precluded by the plaintiffs' arbitration from later asserting their own claims against Verizon. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) **[**28]** ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving *the same parties* or their privies based on the same cause of action." (emphasis added)); *see also* Taylor v. Sturgell, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) ("A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit."). It is true that in certain circumstances a nonparty to a prior suit may be precluded from litigating issues decided in the prior suit where the nonparty was "'adequately represented by someone with the same interests'" who was a party, Taylor, 553 U.S. at 894 (quoting Richards v. Jefferson County, 517 U.S. 793, 798, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996)), but even if that were the case here with respect to plaintiffs' claim for "general injunctive relief," the complaint suggests that Verizon still would prospectively lower the price for the absent customers upon their request, even if plaintiffs' claim for "general injunctive relief" failed.

arbitrators to decide enforceability in the first instance are unusually abstract. [Accordingly,] the proper course is to compel arbitration." *Id. at 407*.

"Implicit in the *PacifiCare* **[**31]** analysis is the proposition that if the remedies limitation in the arbitration agreement posed a *clear* conflict with the remedies available in the RICO statute, that clear conflict would pose a question of **[*607]** arbitrability." *Kristian, 446 F.3d at 46* (emphasis added). In *Kristian*, the Court of Appeals for the First Circuit found such a clear conflict. There, the parties' arbitration agreement explicitly prohibited treble damages,[9] while both the federal and Massachusetts antitrust laws under which the plaintiffs brought suit provided for them. *Id. at 44-45*. That alone, however, did not necessarily indicate a "clear conflict" between the statutory remedies and the arbitration agreement because, if the right to obtain treble damages under the statutes could be waived, the conflict would be resolved. *See id. at 46-50*. Thus, before determining whether the ostensible conflict posed a question of arbitrability for the court, the First Circuit examined the waiver issue.

With **[**32]** respect to the right to treble damages under the federal antitrust laws, the court found the right unwaivable. The court noted,

> There is no Supreme Court precedent that speaks directly to the question of whether treble damages under federal ***antitrust law*** may be waived by contract. However, in *Mitsubishi*, the Court noted in dicta that if provisions in the arbitration agreement at issue had operated "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."

Id. at 47 (quoting *Mitsubishi, 473 U.S. at 637 n.19*). Accordingly, the First Circuit found the question of whether the ban on treble damages rendered the arbitration agreement unenforceable to be a question of arbitrability for the court to decide. *Id*.[10]

With respect to the state **[**33]** antitrust claims (which were brought by different plaintiffs in a separate complaint), the First Circuit found ambiguity on the waiver issue, and, relying on *PacifiCare*, left the question of enforceability to the arbitrators in the first instance. *See id. at 50*. The court read a case from the Supreme Judicial Court of Massachusetts as "hinting that waiver of statutory remedies will not be allowed in situations involving a consumer plaintiff and/or antitrust claims." *Id*. And because the plaintiffs in *Kristian* were consumers asserting antitrust claims, the First Circuit found the waiver issue "ambiguous at best." *Id*. Accordingly, "Plaintiffs' vindication of statutory rights claim, based on the conflict between the arbitration agreements and Massachusetts ***antitrust law***, does *not* raise a question of arbitrability." *Id*. (emphasis in original) ("***HN7***[] When there is an underlying legal ambiguity, . . . an arbitrator must decide the underlying legal question in the first instance so that the federal policy in favor of arbitration is not frustrated.").

The *Kristian* court's application of *PacifiCare* is persuasive, and the Court is aware of no Second Circuit decision that similarly addresses the analysis **[**34]** to be undertaken when a plaintiff challenges the validity of a remedial limitation contained in an arbitration agreement.[11] *Cf. Disc. Trophy & Co. v. Plastic Dress-Up Co., 03 Civ. 2167,*

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[9] The arbitration agreement in *Kristian* provided, "IN NO EVENT SHALL WE OR OUR EMPLOYEES OR AGENTS HAVE ANY LIABILITY FOR PUNITIVE, TREBLE, EXEMPLARY, SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES." *Kristian, 446 F.3d at 44*.

[10] The court found that the damages waiver did not render the arbitration agreement unenforceable because of a "savings clause" that provided in substance, "If the law does not permit waiver of a remedy, a plaintiff will still have that remedy, the [arbitration agreement's] liability limitation notwithstanding." *Kristian, 446 F.3d at 48*.

[11] The question of who should decide the enforceability of a class waiver—which the Second Circuit has held to be a question for the court, *see Am. Express II, 634 F.3d at 191*; **[**35]** *accord Kristian, 446 F.3d at 55*—is not the same. Questions of arbitrability are those "'challeng[ing] specifically the validity of the agreement to arbitrate.'" *Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2778, 177 L. Ed. 2d 403 (2010)* (quoting *Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006))*. And an arbitration agreement may be invalid if some term or terms in it renders the arbitral forum

2004 U.S. Dist. LEXIS 2659, 2004 WL 350477, at *6-7 (D. Conn. Feb. 19, 2004) (offering a similar interpretation of *PacifiCare*). Thus, the Court will apply the principles of PacifiCare (as interpreted by *Kristian*) to the plaintiffs' motion. In that regard, a number of issues require attention. To conclude that this dispute presents a question of arbitrability, the Court must find a clear conflict between the parties' arbitration agreement and the statutorily authorized remedies. In this context, that means (1) the consumer protection statutes must authorize the "general injunctive relief" the plaintiffs seek, (2) the arbitration agreement must prohibit it, and (3) the right to obtain such relief under the statute must not be subject to waiver. Ambiguity in those issues will render the question of the clause's enforceability for the arbitrators to resolve in the first instance.

A. The Consumer Protection Statutes

The private right of action under New York General Business Law § 349(h) provides:

> ***HN9***[] In addition to the right of action granted to the attorney **[**37]** general pursuant to this section, any person who has been injured **[*608]** by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

N.Y. Gen. Bus. Law § 349(h). Similarly, the private right of action under the New Jersey Consumer Fraud Act provides:

> ***HN10***[] Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act . . . may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all **[**38]** actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

N.J. Stat. Ann. § 56:8-19.

Plaintiffs concede that their arbitrations may not proceed on a class basis. Nonetheless, plaintiffs contend that under these statutes an individual may obtain injunctive relief effectively on behalf of others, even if a class device

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inadequate by preventing a plaintiff from effectively vindicating his or her statutory rights. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). Here, plaintiffs contest the validity of the arbitration agreement's remedial limitation on the ground that it renders the arbitral forum inadequate by preventing plaintiffs from obtaining a specific statutory right (i.e. "general injunctive relief"). Implicit in this argument is the notion that ***HN8***[] the arbitral forum is inadequate only if the conflict between the statutory right and the arbitration agreement is clear. If the conflict is ambiguous (whether because of contractual or legal ambiguity with respect to the specific statutory right, *see* Kristian, 446 F.3d at 46 n.15, 50), the alleged inadequacy of the **[**36]** arbitral forum (and thus the alleged invalidity of the arbitration agreement) is speculative, and the strong federal policy favoring arbitration requires that the arbitrator resolve the ambiguity in the first instance. That is the crux of *PacifiCare*.

By contrast, a class action/arbitration ban, if clear, implicates the adequacy of the arbitral forum (and thus the validity of the arbitration agreement) from the outset because it affects the manner in which a plaintiff may pursue his or her statutory rights in the first instance. As such, the adequacy of the arbitral forum (and thus the validity of the arbitration agreement) is implicated whenever there is a question of whether an inability to pursue statutory claims as a class amounts to an inability to pursue statutory claims at all. *See* Kristian, 446 F.3d at 54-55. This is a question for the court because, if left to the arbitrators in the first instance, it may never be addressed if indeed the class waiver effectively prevents the plaintiff from arbitrating at all.

is not used. Verizon, on the other hand, argues that a class proceeding is necessary to obtain the relief that the plaintiffs desire.

The starting point for this analysis is the language of the statutes. The New York consumer-protection statute provides, "In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice." *N.Y. Gen. Bus. Law § 349(h)*. The right of action granted to the attorney general similarly provides, "[The attorney general] may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices." *Id*. *§ 349(b)*. **[**39]** On one hand, the language contained in the attorney general's right of action ("in the name and on behalf of the people") provides at least some suggestion that the injunctive relief the attorney general may obtain is broader than the injunctive relief available to an individual suing "in his own name" (and not "on behalf of" anybody). The language also may suggest that in order for an individual suing in his own name to obtain the same scope of injunctive relief as the attorney general, the individual must act "on behalf of" others, which plaintiffs here acknowledge they cannot do (at least in terms of proceeding as a class).

On the other hand, both the attorney general's right of action and the private right of action permit the plaintiff "to enjoin such unlawful act[s] or practice[s]." Nothing in the private right of action purports to limit the scope of injunctive relief an individual suing "in his own name" may obtain, as long as the individual "has been injured by reason of any violation of this section." In addition, the language at the beginning of the private right of action ("In addition to the right of action granted to the attorney general") suggests some level of equivalence **[**40]** between the scope of injunctive relief obtainable by an individual suing in his own name and that obtainable by the attorney general on behalf of the **[*609]** people of New York. Indeed, one of the purposes of the act is "to supplement the activities of the New York State Attorney General in prosecuting consumer fraud complaints." *McDonald v. North Shore Yacht Sales, Inc., 134 Misc. 2d 910, 513 N.Y.S.2d 590, 594 (Sup. Ct. 1987)*. Thus, the statute itself does not provide a clear answer to the question whether plaintiffs would be entitled to obtain their "general injunctive relief" absent a class proceeding.[12]

Verizon contends that plaintiffs' position is meritless because all of the cases plaintiffs cite for the proposition that an individual may obtain "general injunctive **[**41]** relief" are either class actions or suits by individual parties seeking relief that benefits only themselves. *See* *Weinberg v. Sprint Corp., 173 N.J. 233, 801 A.2d 281, 291 (N.J. 2002)* (class action); *Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995)* (pension funds brought suit on their own behalf); *Goldman v. Simon Property Group, Inc., 58 A.D.3d 208, 869 N.Y.S.2d 125 (N.Y. 2d Dep't 2008)* (class action). For example, plaintiff relies on *Goldman v. Simon Property Group, Inc., 58 A.D.3d 208 (N.Y. 2d Dep't 2008)*. In *Goldman*, the plaintiff sued the defendant under the New York consumer-protection statute for selling gift cards that were subject to a "dormancy fee" of $2.50 per month after seven months, without proper notice to the purchasers or cardholders. *Id. at 211*. The plaintiff sought an injunction against the practice, including an order prohibiting the defendant from continuing to deduct the fee from certain cards that remained outstanding. *See* *id. at 212, 218*. The New York Supreme Court, Appellate Division, held that the trial court should not have dismissed plaintiff's claim for injunctive relief. *Id. at 218*. The plaintiffs here contend that *Goldman* was brought by an individual **[**42]** and not as a class action. But *Goldman* clearly states, "The plaintiff filed an amended class action complaint." *Id. at 212*. Accordingly, *Goldman* does little to help plaintiffs.

[12] The language of the New Jersey Consumer Fraud Act is similarly unclear on the issue. With respect to remedies available, the statute states that a court must award treble damages and attorneys' fees, and may award "any other appropriate legal or equitable relief." *N.J. Stat. Ann. § 56:8-19*. There is little in the statutory language to determine whether "appropriate" equitable relief for an individual may include relief on behalf of absent parties.

The Court, however, has identified at least one case in which an individual plaintiff was able to obtain a preliminary injunction against false advertising under *New York General Business Law § § 350-e*.[13] In *McDonald v. North Shore Yacht Sales, Inc., 134 Misc. 2d 910, 513 N.Y.S.2d 590 (Sup. Ct. 1987)*, the plaintiff (acting only individually) sought a preliminary injunction against advertising by a yacht manufacturer that did not make clear that certain representations in its ads were subject to change without notice. *See id. at 592-94*. The court granted the preliminary injunction, which prohibited the yacht manufacturer from conducting "any advertising in New York State which fails to state that the equipment and/or accessories on Hunter Boats may be subject to change by Hunter without notice." *Id. at 595*. With **[*610]** respect to the irreparable harm prong of the preliminary injunction analysis, the court held:

> Given the aforecited purpose of the statute, to encourage private enforcement of consumer protection, to strongly deter deceptive **[**43]** business practices, and to supplement the activities of the New York State Attorney General in prosecuting consumer fraud complaints, I hold that the Legislature intended the irreparable injury at issue to be irreparable injury to the public at large, not just to one consumer.

Id. at 593-94. The court made no mention of the fact that the plaintiff had brought suit individually, and not as a class action. Thus, there is authority to support the plaintiffs' position that an individual may seek an injunction for the benefit of the public under New York's consumer-protection statutes.

An injunction against false advertising, however, more clearly amounts to relief sought to benefit the "public at large," *id. at 594*, than would an order directing Verizon to lower the price of its NUP for a definable class **[**44]** of existing customers. A false advertisement potentially may impact any member of the public that utilizes the channels of communication through which the advertisement is broadcast. By contrast, the alleged illegal conduct that plaintiffs seek to enjoin impacts only a distinct group of existing customers. In that sense, plaintiffs' claim for "general injunctive relief" is less like an injunction in favor of "the public at large," *id*., and more like a claim simply asserting the rights of others to receive lower prices. So viewed, plaintiffs' general injunctive relief claim would contravene the notion that "one does not, as a general rule, have standing to assert claims on behalf of another." *Caprer v. Nussbaum, 36 A.D.3d 176, 825 N.Y.S.2d 55, 62 (App. Div. 2d Dep't 2006)* (citing *Soc'y of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991)*; *Matter of Hebel v. West, 25 A.D.3d 172, 803 N.Y.S.2d 242 (App. Div. 3d Dep't 2005))*; *see also Jersey Shore Med. Ctr.-Fitkin Hosp. v. Baum's Estate, 84 N.J. 137, 417 A.2d 1003, 1007 (N.J. 1980)* ("Ordinarily, a litigant may not claim standing to assert the rights of a third party.").

Of course, there is a sensible public policy argument supporting the ability of an individual consumer **[**45]** to seek an injunction against a defendant's allegedly fraudulent consumer practices. To the extent the consumer protection acts authorize individuals to act as private attorneys general, it is sensible to interpret the acts to permit an individual to obtain broad injunctive relief. Moreover, as a practical matter, it would make little sense to require thousands of individual consumers to bring individual consumer protection act claims to stop a practice after one consumer has succeeded in showing that the practice is fraudulent. Without resolving the conflicting policies, the Court simply points out that the language of the statute is open to varying interpretations, which suggests that the issue should be left to the arbitrators to decide in the first instance.

B. The Arbitration Agreement

The parties' arbitration agreement provides, on the one hand, that the arbitrators may "award the same damages and relief . . . as a court would." (Customer Agreement 12.) This presumably would include the "general injunctive relief" the plaintiffs here seek, provided such relief in fact were available to an individual plaintiff under the consumer protection statutes. On the other hand, the arbitration **[**46]** agreement purports to limit the arbitrators'

[13] *Section 350-e* contains a private right of action materially identical to the private right of action in *section 349(h)*. *Section 350-e* provides, "Any person who has been injured by reason of any violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in his or her own name to enjoin such unlawful act or practice." *N.Y. Gen. Bus. Law § 350-e*.

remedial powers. The agreement provides, "[T]he arbitrator may award money or injunctive relief only in favor of the individual party **[*611]** seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." (*Id*. at 13.) This clause would seem to prohibit the arbitrator from ordering Verizon to lower the prices being charged to a group of customers based on the claim of an individual customer.

While these provisions at first glance might suggest that there is some ambiguity in the agreement, a closer inspection reveals otherwise. ***HN11***[] A contract is ambiguous where it "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Bank of N.Y. v. First Millennium, Inc., 607 F.3d 905, 914 (2d Cir. 2010)* (internal quotation marks omitted).

Here, the provision stating that an arbitrator may award the same relief as a court is contained in a sentence that provides in full, "There's no judge **[**47]** or jury in arbitration, and the procedures may be different, but an arbitrator can award the same damages and relief, and must honor the same terms in this agreement, as a court would." (Customer Agreement at 12.) This provision is best considered a "description of the arbitration process and how it operates." *Gonnello, 2011 U.S. Dist. LEXIS 116420, 2011 WL 4716617, at * 4*. As such, it "does not supplant the specific limitations . . . regarding the type of declaratory or injunctive relief that may be awarded." *Id*.; *see* *Bushman, 2011 U.S. Dist. LEXIS 139113, 2011 WL 5924666, at *3 (S.D. Fla. Sept. 23, 2011)* (construing a materially similar arbitration clause); *see also* *County of Suffolk v. Alcorn, 266 F.3d 131, 139 (2d Cir. 2001)* ("It is axiomatic that courts construing contracts must give 'specific terms and exact terms . . . greater weight than general language.'" (quoting *Aramony v. United Way, 254 F.3d 403, 413 (2d Cir. 2001))*). Accordingly, it is clear that the arbitration agreement would prohibit an arbitrator from awarding the "general injunctive relief" that the plaintiffs desire.

C. Waiver

HN12[] Although the arbitration agreement may prohibit plaintiffs from obtaining the relief they desire, that prohibition may not raise a question of arbitrability **[**48]** if the law is ambiguous on the plaintiffs' ability to waive the right (if any) to such relief. *See* *Kristian, 446 F.3d at 49-50* (where arbitration agreement prohibited treble damages, and where state statute permitted them, no question of arbitrability was raised where the waiver issue was ambiguous). In that regard, the New York Court of Appeals has held, "***HN13***[] Generally and excepting instances where there would be transgressions of public policy, all rights and privileges to which one is legally entitled, Ex contractu or Ex debito justitiae, may be waived." *Hadden v. Consol. Edison Co. of N.Y., Inc., 45 N.Y.2d 466, 382 N.E.2d 1136, 1138, 410 N.Y.S.2d 274 (N.Y. 1978)*; *see also* *Midland Funding, L.L.C. v. Giambanco, 422 N.J. Super. 301, 28 A.3d 831, 837 (N.J. Super. Ct. App. Div. 2011)* ("We first begin our discussion by reiterating the well-settled principle that parties, by agreement, may waive statutory and constitutional rights." (citations omitted)). Notably, courts in New York have permitted plaintiffs to waive their right to treble damages under *New York General Business Law section 349(h)* in order to allow the plaintiffs to bring their claims as class actions. *See* *Leider v. Ralfe, 387 F. Supp. 2d 283, 292-93 (S.D.N.Y. 2005)*; *Super Glue Corp. v. Avis Rent A Car Sys., Inc., 132 A.D.2d 604, 517 N.Y.S.2d 764, 767* **[*612]** *(App. Div. 2d Dep't 1987)*.[14] **[**49]** However, the ability to waive a statutory right is not unlimited. *See* *Berkovich v. Mostovaya, 22 Misc. 3d 91, 875 N.Y.S.2d 741, 744 (App. Term 2009)* ("'[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if said waiver or release contravenes the statutory policy.'" (quoting *Estro Chem. Co. v. Falk, 303 N.Y. 83, 100 N.E.2d 146, 148 (N.Y. 1951))*).

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[14] Such a waiver is necessary to allow a class action under *section 349(h)* because *N.Y. C.P.L.R. section 901(b)*, which sets out the prerequisites for a class action suit, prohibits a plaintiff from bringing a class action "to recover a penalty or minimum measure of recovery created or imposed by statute," unless the statute "specifically authorizes the recovery thereof in a class action." Because *section 349(h)* does not specifically authorize class actions and because under New York law treble damages are considered a penalty, *see* *Leider, 387 F. Supp. 2d at 288*, the waiver allows plaintiffs to comply with *C.P.L.R. section 901(b)*.

There is a credible argument, then, that a waiver of an individual's right to seek an injunction to protect the public at large contravenes the statutory policy behind *section 349(h)*. **[**50]** Indeed, in discussing the statute, the New York Court of Appeals has noted, "'The power to obtain injunctions against any and all deceptive and fraudulent practices will be an important new weapon in New York State's long standing efforts to protect people from consumer frauds.'" *Oswego Laborers' Local 214, 85 N.Y.2d at 25* (quoting Mem. of Governor Rockefeller, 1970 N.Y. Legis. Ann., at 472). But the "new weapon" referred to by the Court of Appeals was the right of action afforded to the attorney general. And, of course, an "arbitration agreement[] [in a consumer contract] will not preclude the [attorney general] from bringing actions seeking class-wide and equitable relief." *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*.[15] But whether an arbitration agreement permissibly may preclude a private action seeking "general injunctive relief" is less clear. Thus, the purpose of the private right of action under the New York statute appears to be just as much about allowing individual consumers to address individual wrongs as it is about permitting an individual to obtain injunctive relief that benefits both himself and others.[16] *See Watts v. Jackson Hewitt **[*613]** Tax Serv. Inc., 579 F. Supp. 2d 334, 346 (E.D.N.Y. 2008)* **[**51]** ("*Section 349* is 'meant to empower consumers,' especially 'the disadvantaged' and to even the playing field of their disputes with better funded and superiorly situated fraudulent businesses.").

The same is true with respect to the New Jersey statute. The New Jersey Supreme Court, in discussing the purposes of the private right of action under the consumer-protection law, noted that the private right of action

> created an efficient mechanism to: (1) compensate the victim for his or her actual **[**54]** loss; (2) punish the wrongdoer through the award of treble damages; and (3) attract competent counsel to counteract the "community scourge" of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual.

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[15] The Court of Appeals for the Second Circuit has rejected reading *Gilmer* essentially as an endorsement that class action waivers are not a ground for refusing to enforce an arbitration agreement when the plaintiff contends that the waiver interferes with his vindication of statutory rights. *See Am Express II, 634 F.3d at 194-96*. But this disfavored reading of *Gilmer* is not squarely implicated in this Court's suggestion that the attorney general's ability to seek relief that plaintiffs cannot is at least relevant in assessing whether New York law would permit plaintiffs to waive the right to seek that relief in the first instance.

[16] In that regard, the consumer-protection statutes at issue here are somewhat different from statutes like California's Private Attorneys General Act (PAGA), "the purpose of which 'is not to recover damages or restitution, but to create a means of "deputizing" citizens as private attorneys general to enforce the Labor Code.'" *Nelson v. AT&T Mobility, Inc., 2011 U.S. Dist. LEXIS 92290, 2011 WL 3651153, at *3 (N.D. Cal. Aug. 18, 2011)* **[**52]** (quoting *Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 489, 128 Cal. Rptr. 3d 854, 2011 WL 2685959, at *6 (Cal. Ct. App. 2011))*. PAGA permits "representative" actions (which need not meet class action requirements), in which an individual sues on behalf of himself and other similarly situated employees seeking civil penalties against the employer for violations of the California Labor Code. *Urbino v. Orkin Servs. of Calif., Inc., __ F. Supp. 2d __, __, 2011 U.S. Dist. LEXIS 114746, 2011 WL 4595249, at *3-4 (C.D. Cal. Oct. 5, 2011)*. "Under PAGA, of the civil penalties recovered by the aggrieved employees, 75 percent is allotted to the Labor and Workforce Development Agency ('LWDA') while 25 percent goes to the aggrieved employees." *2011 U.S. Dist. LEXIS 114746, [WL] at *3*. Accordingly, a waiver of the ability to proceed collectively under a statute like PAGA would seem more disruptive to the underlying public purpose of the statute than would a waiver of the right to obtain injunctive relief on behalf of others pursuant to a statute like *New York General Business Law section 349(h)* or the New Jersey Consumer Fraud Act, whose underlying purpose is both to provide relief to aggrieved individual consumers, as well as to provide a mechanism to stop consumer fraud. **[**53]** It bears noting that in light of *Concepcion*, a number of federal district courts in California have enforced arbitration agreements with class and representative action waivers even though those waivers would prevent an individual from asserting representative PAGA claims. *See Grabowski v. Robinson, 817 F. Supp. 2d 1159, 1180, 2011 U.S. Dist. LEXIS 105680, 2011 WL 4353998, at *19-20 (S.D. Cal. 2011)*; *Quevedo v. Macy's, Inc., 798 F. Supp. 2d 1122, 2011 WL 3135052, at *17 (C.D. Cal. 2011)* ("[T]he Court concludes that Quevedo's PAGA claim is arbitrable, and that the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable."). *But see Urbino, 2011 U.S. Dist. LEXIS 114746, 2011 WL 4595249, at *11* ("Because the PAGA arbitration waiver in the Agreement is unconscionable, and the waiver taints the entirety of the Agreement with illegality, the Court deems the Agreement unenforceable.").

Weinberg, 801 A.2d at 291. The court said little about the need to allow an individual plaintiff to obtain an injunction in favor of a group of individuals in order to vindicate the private right of action provided in the statute. Thus, it is not clear that the remedial limitation in the parties' arbitration agreement would not amount to a lawful waiver of their right to seek injunctive relief on behalf of others.

D. Conclusion

In sum, although the arbitration agreement prohibits the plaintiffs from obtaining "general injunctive relief," it is not clear whether (1) the state consumer statutes would authorize an individual to obtain such relief in the absence of a class action, and (2) even if such relief were available under the statutes, whether it lawfully could be waived. "In the presence of this ambiguity, *PacifiCare* is dispositive. When there is an underlying legal ambiguity, . . . an arbitrator must decide the underlying legal question **[**55]** in the first instance so that the federal policy in favor of arbitration is not frustrated." *Kristian, 446 F.3d at 50*. Accordingly, plaintiffs' motion does not raise a question of arbitrability, and the arbitrators must decide in the first instance whether plaintiffs are entitled to "general injunctive relief."

In any event, even if the issue posed a question of arbitrability for the Court, under these circumstances the Court would be hard-pressed to say that the plaintiffs' inability to obtain "general injunctive relief" on behalf of others would render the arbitral forum inadequate such that plaintiffs no longer "effectively may vindicate [their] statutory cause of action in the arbitral forum." *Mitsubishi, 473 U.S. at 637*. Plaintiffs have already **[*614]** received the relief they wish to seek on behalf of others (i.e. the lower price on Verizon's NUP), and they still may obtain actual damages, punitive damages, declaratory relief, and attorneys' fees in arbitration. Plaintiffs may make (but have not) an argument that given the small size of any individual monetary recovery in this case (approximately $97 in actual losses for plaintiff Schatz plus at most three times that amount in punitive **[**56]** damages), the deterrent effect of the consumer protection statutes will be diminished significantly if plaintiffs are denied the ability to obtain injunctive relief on behalf of other customers. But any force that argument otherwise might have is substantially weakened in light of the uncertainty about whether an individual properly may obtain injunctive relief of this sort in the absence of a class action or class arbitration proceeding. Given this uncertainty, along with the other remedies available to plaintiffs, plaintiffs have not made a "substantial demonstration," *Am Express I, 554 F.3d at 304*, that the remedial limitation renders the arbitral forum inadequate such that the consumer protection statutes will fail "to serve both [their] remedial and deterrent function." *Mitsubishi, 473 U.S. at 637*; *see* *DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459, 466 (S.D.N.Y. 1997)* (finding, even in light of the "unavailability of injunctive relief under the Smith Barney Arbitration Policy," that plaintiff "could still 'effectively . . . vindicate' her Title VII claims through arbitration, even though the arbitral forum might not 'afford [her] the full panoply of remedies otherwise available **[**57]** in a court of law'" (alteration in original)).

CONCLUSION

For the reasons stated above, plaintiffs' motion to compel arbitration [24] is DENIED to the extent it seeks a declaration that a clause of the arbitration agreement is invalid. To the extent it seeks an order compelling arbitration of the plaintiffs' statutory claims, it is DENIED as moot because the Court already has ordered the parties to proceed with arbitration. (*See* Order, May 13, 2011. Docket No. 23.)

SO ORDERED.

Dated: New York, New York

January 31, 2012

/s/ Richard J. Holwell

Richard J. Holwell

United States District Judge

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Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.)

United States Court of Appeals for the Second Circuit

December 10, 2007, Argued; February 1, 2012, Decided

Docket No. 06-1871-cv

Reporter

667 F.3d 204 *; 2012 U.S. App. LEXIS 1871 **; 2012-2 Trade Cas. (CCH) P78,125; 2012 WL 284518

IN RE: AMERICAN EXPRESS MERCHANTS' LITIGATION, ITALIAN COLORS RESTAURANT, on or behalf of itself and all similarly situated persons, NATIONAL SUPERMARKETS ASSOCIATION, 492 SUPERMARKET CORP., BUNDA STARR CORP., PHOUNG CORP., Plaintiffs-Appellants, v. AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, AMERICAN EXPRESS COMPANY, Defendants-Appellees.[1]

Subsequent History: As Amended February 21, 2012.

Rehearing denied by, Rehearing, en banc, denied by *Nat'l Supermarkets Ass'n v. Am. Express Travel Servs. Co. (In re Am. Express Merchants' Litig.), 681 F.3d 139, 2012 U.S. App. LEXIS 10815, 2012 WL 1918412 (2d Cir., May 29, 2012)*

US Supreme Court certiorari granted by *Am. Express Co. v. Italian Colors Rest., 568 U.S. 1006, 133 S. Ct. 594, 184 L. Ed. 2d 390, 2012 U.S. LEXIS 8697 (Nov. 9, 2012)*

Reversed by *Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417, 2013 U.S. LEXIS 4700 (June 20, 2013)*

Prior History: [1]** This case returned to us from the Supreme Court, with our judgment vacated and the case remanded for reconsideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)*. Shortly after we issued our decision in *In re American Express Merchants' Litigation, 634 F.3d 187 (2d Cir. 2011)*, the Supreme Court addressed the issue of class-action waivers in *AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*. As we find neither Stolt-Nielsen nor Concepcion counsels us to alter our original analysis, we again conclude that (1) the question of the enforceability of the class action waiver provision is properly decided by the court and (2) the class action waiver provision is unenforceable under the Federal Arbitration Act. See *In re Am. Express Merchs. Litig., 554 F.3d 300 (2d Cir. 2009)*.

In re Am. Express Merchants' Litig., 2006 U.S. Dist. LEXIS 11742 (S.D.N.Y., Mar. 15, 2006)
Nat'l Supermarkets Assoc. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.), 634 F.3d 187, 2011 U.S. App. LEXIS 4507 (2d Cir., Mar. 8, 2011)

Disposition: REVERSED AND REMANDED.

Core Terms

[1] The Clerk of the Court is directed to amend the official caption as shown above.

arbitration, class action, Card, vindicating, merchant, costs, statutory right, district court, antitrust, parties, plaintiffs', arbitration agreement, anti trust law, waivers, damages, rights, arbitration clause, charge card, unenforceable, credit card, federal statute, statutory claim, class-action, enforcing, consumer, cases, demonstrates, mandatory, volume, bears

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN1[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In a definition that has become classic, the U.S. Supreme Court has defined a tying arrangement as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. A tying arrangement will violate *15 U.S.C.S. § 1* of the Sherman Act if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN2[] **Federal Arbitration Act, Arbitration Agreements**

Under Green Tree, when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN3[] **Federal Arbitration Act, Arbitration Agreements**

Arbitration is simply a matter of contract between the parties. A party may not be compelled under the Federal Arbitration Act, *9 U.S.C.S. § 1 et seq.*, to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN4[] **Federal Arbitration Act, Arbitration Agreements**

There is a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN5[] **Arbitration, Federal Arbitration Act**

States cannot require a procedure that is inconsistent with the Federal Arbitration Act, *9 U.S.C.S. § 1 et seq.*, even if it is desirable for unrelated reasons.

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

HN6[] **Arbitration, Federal Arbitration Act**

Concepcion plainly offers a path for analyzing whether a state contract law is preempted by the Federal Arbitration Act, *9 U.S.C.S. § 1 et seq.*

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN7[] **Arbitration, Federal Arbitration Act**

Concepcion and Stolt-Nielsen, taken together, stand squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration. Class arbitration, to the extent it is manufactured by state law rather than consensual, is inconsistent with the Federal Arbitration Act (FAA), *9 U.S.C.S. § 1 et seq.* A party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. A court cannot order the parties to participate in class arbitration.

Governments > Legislation > Interpretation

HN8[] **Legislation, Interpretation**

The U.S. Supreme Court has on numerous occasions held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > Special Proceedings > Class Actions > General Overview

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN9[] **Arbitration, Arbitrability**

What Stolt-Nielsen and Concepcion do not do is require that all class-action waivers be deemed per se enforceable.

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN10[] **Special Proceedings, Class Actions**

Class action lawsuits are suitable as a vehicle for vindicating statutory rights. U.S. Supreme Court precedent recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action.

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN11[] **Special Proceedings, Class Actions**

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.

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

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

HN12[] **Regulated Practices, Private Actions**

Arbitration is recognized as an effective vehicle for vindicating statutory rights, but only so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum. Indeed, in dicta the Mitsubishi Court noted that should clauses in a contract operate as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, courts would have little hesitation in condemning the agreement as against public policy. While dicta, it is dicta based on a firm principle of ***antitrust law*** that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the U.S. Supreme Court stated that in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action, an agreement which confers even a partial immunity from civil liability for future violations of the antitrust laws is inconsistent with the public interest.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN13[] **Arbitration, Arbitrability**

Because it is by now clear that statutory claims may be the subject of an arbitration agreement, an arbitration clause is enforceable unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN14[] **Arbitration, Federal Arbitration Act**

Arbitrators do have the power to fashion equitable relief.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN15[] **Arbitration, Arbitrability**

The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. The United States Court of Appeals for the Second Circuit has held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. Similarly, where a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN16[] **Arbitration, Federal Arbitration Act**

Gilmer reaffirms the presumption in favor of enforcing agreements to arbitrate in the Federal Arbitration Act (FAA), *9 U.S.C.S. § 1 et seq.*, even where those agreements cover statutory claims. This presumption is not without limits. Arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN17[] **Federal Arbitration Act, Arbitration Agreements**

The United States Court of Appeals for the Second Circuit does not read Gilmer as mandating enforcement of all mandatory agreements to arbitrate statutory claims; rather it reads Gilmer as requiring the enforcement of arbitration agreements that do not undermine the relevant statutory scheme.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN18[] **Arbitration, Arbitrability**

When a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Governments > Courts > Judicial Precedent

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN19[] **Arbitration, Arbitrability**

When a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Since there is no indication in Stolt-Nielsen or Concepcion that the U.S. Supreme Court intended to overturn either Green Tree or Mitsubishi, both cases retain their binding authority.

Governments > Courts > Judicial Precedent

HN20[] **Courts, Judicial Precedent**

If U.S. Supreme Court precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.

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

HN21[] **Regulated Practices, Monopolies & Monopolization**

Private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN22[] **Federal Arbitration Act, Arbitration Agreements**

Each class action waiver in an arbitration agreement must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the Federal Arbitration Act (FAA), *9 U.S.C.S. § 1 et seq.*, is a congressional declaration of a liberal federal policy favoring arbitration agreements.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > Special Proceedings > Class Actions > General Overview

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN23[] **Arbitration, Arbitrability**

Stolt-Nielsen plainly precludes any court from compelling the parties to submit to class-wide arbitration where the arbitration clause is silent as to class-wide arbitration.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN24[] **Arbitration, Arbitrability**

A party does not agree to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.

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Judges: POOLER and SACK, Circuit Judges.[2]

Opinion by: POOLER

Opinion

[*206] POOLER, *Circuit Judge*:

We turn to this case for the third time, as the Supreme Court released its latest views on class arbitration waivers in *AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*, just weeks after we issued our decision in *In re American Express Merchants' Litigation, 634 F.3d 187 (2d Cir. 2011)* ("*Amex II*"). *Amex II* returned to us from the Supreme Court, after defendants American Express Company and American Express Travel Related Services Co. (together, "Amex") sought review from the Supreme Court following our decision in *In re American Express Merchants Litigation, 554 F.3d 300 (2d Cir. 2009)* ("*Amex I*"). In *Amex I*, we considered the enforcement of a mandatory arbitration clause in a commercial **[**3]** contract also containing a "class action waiver," that is, a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum. We found the class action waiver unenforceable, "because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." *Amex I, 554 F.3d at 304*.

The Supreme Court granted Amex's petition for a writ for certiorari, then vacated and remanded for reconsideration in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)*. Finding our original analysis unaffected by *Stolt-Nielsen*, we again reversed the district court's decision and remanded for further proceedings. *Amex II, 634 F.3d at 199-200*. On April 11, 2011, we placed a hold on the mandate in *Amex II* in order for Amex to file a petition seeking a writ of certiorari. While the mandate was on hold, the Supreme Court issued its decision in *Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*. The *Concepcion* Court held that the Federal Arbitration Act preempted a California law barring the enforcement of class action waivers in consumer contracts. *Id. at 1750-51*. **[**4]** The parties submitted supplemental briefing discussing the impact, if any, of *Concepcion* on our previous decisions, and we find oral argument unnecessary. As discussed below, *Concepcion* does not alter our analysis, and we again reverse the district court's decision and remand for further proceedings.

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[2] The Honorable Sonia M. Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8, 2009. The remaining two panel members, who are in agreement, have determined the matter. See 28 U.S.C. § 46(d); Second Circuit IOP E(b), available at *http://www.ca2.uscourts.gov/clerk/Rules/IOP/IOP_E.htm;* United States v. DeSimone, 140 F.3d 457, 458-59 (2d Cir. 1998).

[*207] BACKGROUND

Because the only issue before us is the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced, we provide but a brief recitation of the facts.

A. Procedural Posture.

The plaintiffs appealed from the March 20, 2006 judgment of the United States District Court for the Southern District of New York, which granted Amex's motion to compel arbitration pursuant to the Federal Arbitration Act ("FAA") and *Federal Rule of Civil Procedure 12(b)*. *See* *In re Am. Express Merchs. Litig., No. 03 CV 9592, 2006 U.S. Dist. LEXIS 11742, 2006 WL 662341 (S.D.N.Y. Mar. 16, 2006)* (Daniels, *J.*).

B. The Parties.

The amended complaint alleges that Amex "is the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to merchants." The **[**5]** named plaintiffs are: (1) California and New York corporations which operate businesses which have contracted with Amex and (2) the National Supermarkets` Association, Inc. ("NSA"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets."

The named plaintiffs seek to represent the following class:

> all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States. . . .

C. The Plaintiffs' Substantive Claims.

The plaintiffs' dispute with Amex rests upon the distinction between "charge cards" and "credit cards."[3] The district court explained the distinction:

> A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle. A credit card, by contrast, allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges. In plain terms, the credit card is a means of financing purchases, the charge **[**6]** card is a method of payment.

*In re Am. Express Merchs., 2006 U.S. Dist. LEXIS 11742, 2006 WL 662341, at * 1, n. 6*.

According to the plaintiffs, Amex had until recent years centered its business on the issuance of corporate and personal charge cards to corporate clients and affluent consumers. The plaintiffs further assert that "[h]olders of charge cards are more affluent than credit cardholders, and a vastly higher percentage of charge cards than credit cards are held by businesses and used for business travel and other corporate purposes." In fact, the plaintiffs allege that Amex itself contends that "the average purchase on an American Express card is 17% higher than the average purchase made on a credit card." Thus, the holder of a charge card is likely to be "a higher class of customer" and, as such, is particularly attractive to merchants such as the plaintiffs.

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[3] Plaintiffs bring claims pursuant to both the Sherman and Clayton Acts, *15 U.S.C. § 1 et seq.*, which bar certain anticompetitive conduct in trade.

[*208] As a result of this distinction, Amex has traditionally been able to charge high "merchant discount fees," which are the fees a card issuer withholds as a percentage of each purchase made with its card at the **[**7]** merchant's establishment. These fees, the plaintiffs aver, "are at least 35% higher than competitive rates" applicable to mass-market credit cards such as Visa, MasterCard, and Discover. Over the last decade, the plaintiffs allege, Amex's "business in the markets for credit card issuance and credit card services has grown dramatically." By leveraging its market power in corporate and personal charge cards, however, plaintiffs allege that American Express was able to compel merchants to accept "its new revolving credit card product[s] at the same elevated discount rate, which vastly exceeded the rate for comparable Visa, MasterCard or Discover products."

According to the plaintiffs, the vehicle of this compulsion is the "Honor All Cards" provision contained in the Card Acceptance Agreement. Under the Agreement, a merchant does not contract to accept any one Amex product as a form of payment. Rather, the Agreement applies:

> to your acceptance of American Express(C) Cards . . . . American Express Card(s)... shall mean any card or other account access device issued by American Express Travel Related Services Company, Inc., or its subsidiaries or affiliates or its or their licensees bearing **[**8]** the American Express name or an American Express trademark, service mark or logo.

The plaintiffs assert that, by means of the "Honor All Cards" provision, merchants are faced with the choice of paying supracompetitive merchant discount fees (i.e., fees above competitive levels) on Amex's new mass-market products or "inevitably los[ing] a significant portion of the sales they receive from businesses, travelers, affluent consumers, and others" who are the traditional users of Amex charge cards. This, the plaintiffs claim, amounts to an illegal "tying arrangement," in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*.[4]

D. The Card Acceptance Agreement.

The basic contractual relationship between Amex and the plaintiffs was set forth in an affidavit of an Amex executive:

> American Express issues card products to its cardmembers, which cardmembers then use in making purchases from participating merchants. Participating merchants with annual charge volume expected to be less than $10 million agree that, by submitting charges for payment by American Express, their relationship will be governed by the "Terms and Conditions for American Express(C) Card Acceptance" ("the Card Acceptance Agreement").

The Card Acceptance Agreement is a standard form contract issued by Amex. It may be terminated by either party "at any time by sending written notice to the other party." Further, Amex reserves the right:

> **[*209]** to change this Agreement at any time. We will notify you of any change in writing at least ten (10) calendar days in advance. If the changes are unacceptable to you, you may terminate this Agreement as described in the section entitled "TERMINATING THIS AGREEMENT."

According to Amex, the Card **[**10]** Acceptance Agreement has "expressly permitted amendments upon notice" for more than twenty-five years. The Card Acceptance Agreement also contains a choice of law provision designating New York law as governing and, as Amex states, there is no dispute that the agreement "has always" contained this provision.

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[4] ***HN1***[] In a definition that has become classic, the Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. A tying arrangement will violate *Section 1* of the Sherman Act if "the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce **[**9]** in the tied market." *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (internal quotation marks omitted).

By contrast, it is only since 1999 that the Card Acceptance Agreement has contained a mandatory arbitration clause:

> For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement. Claim includes claims of every kind and nature including, but not limited to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.
>
> . . .
>
> Any Claim shall be resolved upon the election by you or us, by arbitration pursuant **[**11]** to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (NAF), JAMS/Endispute (JAMS), or the American Arbitration Association (AAA), as selected by the party electing to use arbitration. If a selection by us of one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

At the heart of the instant appeal is the following provision contained in the Agreement:

> IF **[**12]** ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM. . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.
>
> There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), **[*210]** unless otherwise agreed to in writing by all parties.

(emphasis in the original). The Card Acceptance Agreement thus not only precludes a merchant from bringing a class action lawsuit, it **[**13]** also precludes the signatory from having any claim arbitrated on anything other than an individual basis.

E. The District Court's Decision.

Amex moved to compel arbitration pursuant to the terms of the Card Acceptance Agreement. In its March 16, 2006 opinion, the district court granted Amex's motion, first holding that the arbitration clause in the Agreement was "a paradigmatically broad clause" which was certainly applicable to the dispute between the parties. *In re Am. Express Merchs. Litig., 2006 U.S. Dist. LEXIS 11742, 2006 WL 662341, at *4*. The district court also held that "[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established." *2006 U.S. Dist. LEXIS 11742, [WL] at *6*. Thus, the district court concluded that all of the plaintiffs' substantive antitrust claims, as well the question of whether or not the class action waivers were enforceable, were subject to arbitration. Having so decided, the district court dismissed plaintiffs' cases against Amex. *2006 U.S. Dist. LEXIS 11742, [WL] at *10*.

F. Our Original Decision, *Amex I*.

The plaintiffs filed a timely appeal. We first decided that the issue **[**14]** of the class action waiver's enforceability was a matter for the court, not the arbitrator. *Amex I, 554 F.3d at 310*. Neither party takes issue with that holding, which we find survives *Stolt-Nielsen* and *Concepion*.

Turning to the question of whether the class action waiver in the Card Acceptance Agreement was enforceable, we found that *Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*, controlled our analysis:

> ***HN2***[] to the extent that [*Green Tree*] holds that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *531 U.S. at 92, 121 S. Ct. 513*. We find that the district court erred in ruling that the plaintiffs had failed to bear this burden because they had "ignore[d] the statutory protections provided by the Clayton Act." *In re American Express Merchants Litigation, 2006 U.S. Dist. LEXIS 11742, 2006 WL 662341, at *5*. On the contrary, the record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver. The Card Acceptance Agreement therefore entails more than a speculative **[**15]** risk that enforcement of the ban will deprive them of substantive rights under the federal antitrust statutes.

Amex I, 554 F.3d at 315-16. Based in part on plaintiffs' submission of an affidavit from an economist detailing the fiscal impracticality of pursuing individual claims, we concluded that:

> [since] Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration, we find ourselves in agreement with the plaintiffs' contention that enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." The effective negation of a private suit under the antitrust laws is troubling because such "private suits provide a significant supplement **[*211]** to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp., 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)*.

Id. at 319. Thus, we held that:

> the class action waiver in the Card Acceptance Agreement cannot be **[**16]** enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery. As already set forth, *Section 2* of the [Federal Arbitration Act], *9 U.S.C. § 2*, provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Given that we believe that a valid ground exists for the revocation of the class action waiver, it cannot be enforced under the FAA.

Id. at 320. Amex timely filed a petition for a writ of certiorari. *Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401, 176 L. Ed. 2d 920 (2010)*. The Supreme Court granted Amex's petition, vacated our original decision, and remanded for further consideration in light of its holding in *Stolt-Nielsen*.

G. The *Stolt-Nielsen* Decision.

In *Stolt-Nielsen*, petitioners were shipping companies. *See 130 S. Ct. at 1764*. The charter party — a maritime contract governing the relationship between the parties — provided, in relevant part

> Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner **[**17]** and Charterer each appointing an arbitrator, who shall be a merchant,

> broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [i.e., the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.

Id. at 1765. Respondent AnimalFeeds, along with other charterers, sued Stolt-Nielsen, alleging price fixing, and eventually served a demand for class arbitration. *Id*. The parties agreed to have an arbitration panel decide the threshold issue of whether the charter party permitted class arbitration, and stipulated before the panel that the arbitration clause was silent on the issue of class arbitration. *Id. at 1765-66*. The panel concluded that the expert testimony offered did not demonstrate an "inten[t] to preclude class arbitration." *Id*. (alteration in original). After finding that the issue was controlled by the Supreme Court's decision in *Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414, (2003)*, the panel concluded *Bazzle* and policy **[**18]** considerations dictated finding the clause permitted class arbitration. *Id*.

The Supreme Court found that the arbitration panel "imposed its own policy choice," rather than "identifying and applying a rule of decision derived from the FAA or either maritime or New York law," and "thus exceeded its powers." *130 S. Ct. at 1770*. Tackling the issue itself, the Court found the FAA controlling, *id. at 1773*, and reaffirmed that ***HN3***[] "arbitration is simply a matter of contract between the parties." *Id. at 1774* (alterations omitted). The Court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id. at 1775* (emphasis in the original).

[*212] H. Our Decision in *Amex II*.

On remand from the Supreme Court, we found *Stolt-Nielsen* did not require us to depart from our original analysis. The key issue, we concluded, was whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex. *In re American Express Merchants' Litigation, 634 F.3d 187, 196 (2d Cir. 2011)*. **[**19]** We concluded enforcement of the class action waiver would indeed bar plaintiffs from pursuing their statutory claims because the "record evidence before us establishe[d], as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id. at 197-98*.

We relied on detailed testimony from Gary L. French, Ph.D., an economist associated with Nathan Associates Inc., a financial consulting firm retained by the plaintiffs. Dr. French submitted a detailed affidavit to the district court, in which he opined, inter alia, that "[i]n my experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million . . . . after reviewing the complaint and doing some preliminary research in this case, it is my opinion that . . . the cost for this case will fall in the middle of the range . . . ." (Joint Appendix at p. 362-63, ¶ 4). Dr. French then opined that it was not economically rational to pursue an individual action against Amex in light of these substantial expert witness **[**20]** costs. (Joint Appendix at p. 365, ¶10-11). *Amex II, 634 F.3d at 198*. We found that "Dr. French's affidavit demonstrates that the only economically feasible means for enforcing their statutory rights is via a class action," and remanded the case to the district court. *Id*.

ANALYSIS

Shortly after we issued our opinion in *Amex II*, the Supreme Court handed down its opinion in *Concepcion, 131 S.Ct. at 1740*. In *Concepcion*, the Supreme Court held that the FAA preempted California common law deeming most class-action arbitration waivers in consumer contracts unconscionable. *Id. at 1746*. Amex argues that *Concepcion* applies a fortiori here, requiring reversal of our holding in *Amex II*. It is tempting to give both *Concepcion* and *Stolt-Nielsen* such a facile reading, and find that the cases render class action arbitration waivers per se enforceable. But a careful reading of the cases demonstrates that neither one addresses the issue presented here: whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights.

The specific preemption **[**21]** question addressed by the Supreme Court in *Concepcion* was "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id. at 1744*. Under California's common law, class action waivers contained in arbitration clauses were regularly found unconscionable, especially in consumer contracts. *Id. at 1746*. The Supreme Court began its analysis by reaffirming the ***HN4***[] "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id. at 1749* (internal quotation marks). By requiring **[*213]** the "availability of classwide arbitration," the Court held, the California rule "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id. at 1748*. In response to the dissent's discussion of the benefits of class-arbitration as a means of addressing multiple small claims, the majority concluded that ***HN5***[] "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id. at 1753*.

HN6[] *Concepcion* plainly offers a path for analyzing whether a state **[**22]** contract law is preempted by the FAA. Here, however, our holding rests squarely on "a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability." *Amex I, 554 F.3d at 320*; *see also* *Kristian v. Comcast Corp., 446 F.3d 25, 47-48 (1st Cir. 2006)* (severing as unenforceable provision of arbitration agreement limiting availability of treble damages under antitrust statute); *Hadnot v. Bay, Ltd., 344 F.3d 474, 478 n.14 (5th Cir. 2003)* (severing restriction on available remedies from arbitration agreement after finding that "ban on punitive and exemplary damages is unenforceable in a *Title VII* case"); *Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998)* (holding that "[w]hen an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable" and language insulating employer from damages and equitable relief rendered clause unenforceable).

HN7[] *Concepcion* and *Stolt-Nielsen*, taken together, stand squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration. *Concepcion, 131 S.Ct. at 1750-51* **[**23]** ("class arbitration, to the extent it is manufactured by [state law] rather than consensual, is inconsistent with the FAA")[5]; *Stolt-Nielsen, 130 S.Ct. at 1775* ("a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."). We plainly acknowledged in *Amex II* that we could not, and thus were not, ordering the parties to participate in class arbitration. *634 F.3d at 200* ("*Stolt-Nielsen* plainly precludes us from ordering class-wide arbitration.").

[*214] ***HN9***[] What *Stolt-Nielsen* and *Concepcion* do not do is require that all class-action waivers be deemed per se enforceable. That leaves open the question presented on this appeal: whether a mandatory class action

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[5] In *Compucredit Corp. v. Greenwood, 132 S.Ct. 665, 181 L. Ed. 2d 586, 2012 WL 43517 (2012)*, the Supreme Court addressed whether the Credit Repair Organizations Act, *15 U.S.C. § 1679, et seq.*, precluded enforcement of an arbitration agreement. The Court concluded that because the Act is silent on whether claims brought under the Act can be arbitrated, the FAA requires that the arbitration agreement be enforced according to its terms. *181 L. Ed. 2d 586, Id. at *4 -* 6*. To support its analysis, the Court cited to a number of statutes that "restrict[] the use of arbitration. *Id*. Plaintiffs here do not allege that the Sherman Act expressly precludes arbitration or that it **[**24]** expressly provides a right to bring collective or class actions, but instead argue that enforcement of the class arbitration waiver would effectively deprive them of their ability to vindicate their statutory rights.

As aptly noted by Justice Sotomayor's concurrence in *Compucredit*, the majority's opinion does not "hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims." *181 L. Ed. 2d 586, Id. at *8*. Indeed, ***HN8***[] the Supreme Court has "on numerous occasions . . . held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question." *181 L. Ed. 2d 586, Id. at *8*. Although the Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court, forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute.

[25]** waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims. While we cannot rely on *Concepcion* or *Stolt-Nielsen* to answer the question before us, we continue to find useful guidance in other Supreme Court decisions addressing the issue of vindicating federal statutory rights via arbitration.

We begin our analysis with the well-settled rule that ***HN10***[] class action lawsuits are suitable as a vehicle for vindicating statutory rights. Supreme Court precedent recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action. The Court made the point forcefully more than thirty years ago in the context of an antitrust action:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates **[**26]** that petitioner's suit proceed as a class action or not at all.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). As the Court later opined***HN11***[] , "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (quoting *Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))*; *see also* *Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)* ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise . . . [,thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.") (footnote omitted); *Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)* ("[T]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (emphasis omitted)).

HN12[] Arbitration is also recognized as an effective vehicle **[**27]** for vindicating statutory rights, but only "so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)* (emphasis added). Indeed, in dicta the *Mitsubishi* Court noted that should clauses in a contract operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id. at 637, n.19*. As we observed in *Amex II*:

> While dicta, it is dicta based on a firm principle of ***antitrust law*** that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the **[*215]** private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" of the antitrust laws is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 329, 75 S. Ct. 865, 99 L. Ed. 1122 (1955)*; **[**28]** *see also* *Minnesota Mining and Mfg. Co. v. Graham-Field, Inc., No. 96 cv 3839, 1997 U.S. Dist. LEXIS 4457, 1997 WL 166497, at *3 (S.D.N.Y. Apr. 9, 1997)* ("GFI could not have waived [its antitrust] claim in the releases because a prospective waiver of an antitrust claim violates public policy.").

634 F.3d at 197.

Applying its rule regarding the arbitrability of federal statutory claims from *Mitsubishi*, in *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*, the Supreme Court permitted the arbitration, rather than litigation, of a plaintiff's Age Discrimination in Employment Act claim. *Id. at 28* (quoting *Mitsubishi Motors, 473 U.S. at 637*). In *Gilmer*, the Court concluded that the plaintiff in that case could effectively vindicate his asserted rights in the arbitral forum. The plaintiff, a manager at a brokerage firm, asserted that he had been terminated by the firm in violation of the ADEA. *Id. at 23*. After the plaintiff filed suit in federal district court, the defendant firm moved to compel arbitration pursuant to a mandatory arbitration provision contained in the rule of the New York Stock Exchange ("NYSE"), to which the plaintiff had agreed to be bound when he became a registered securities representative. **[**29]** *Id. at 23-24*. The *Gilmer* Court held that ***HN13***[] because "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," the arbitration clause was enforceable "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id. at 26* (quoting *Mitsubishi, 473 U.S. at 628*).

The Court rejected plaintiff's contention that "arbitration procedures cannot further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." *Id. at 32*. Rather, the Court found that:

> ***HN14***[] arbitrators do have the power to fashion equitable relief. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." The NYSE rules also provide for collective proceedings. But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

Id. (citations, internal quotation marks, and brackets omitted).[6]

Gilmer's conclusion that where the plaintiff's statutory rights could effectively be vindicated through arbitration does not affect the case before us, because here plaintiffs have demonstrated that their statutory rights cannot be vindicated **[*216]** through individual arbitrations. Nearly a decade after *Gilmer*, in *Green Tree Financial Corp.-Alabama v. Randolph*, the Supreme Court acknowledged in dicta "that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*. Among the costs **[**31]** at issue were "payment of filing fees, arbitrators' costs, and other arbitration expenses." *Id. at 84*. In the end, the *Green Tree* Court found plaintiff failed to submit sufficient evidence to demonstrate the costs of arbitration would effectively prohibit her from vindicating her statutory rights, dooming her attempt to have the arbitration clause declared unenforceable:

> It would also conflict with our prior holdings that ***HN15***[] the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden. How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor **[**32]** when the case was presented on the merits was there any timely showing at all on the point.

Id. at 91-92.

As the Tenth Circuit explained:

> Thus, ***HN16***[] *Gilmer* reaffirmed the Arbitration Act's presumption in favor of enforcing agreements to arbitrate-even where those agreements cover statutory claims. While we recognize this presumption, we conclude that it is not without limits. As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.

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[6] The **[**30]** Amex plaintiffs do not proffer the argument rejected in *Gilmer* — namely, that the class action waiver in the Card Acceptance Agreement is enforceable because the relevant statute allows class actions. "Rather, the conundrum presented by the instant appeal is more nuanced: whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity." *Amex II, 634 F.3d at 196*.

Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234 (10th Cir. 1990) (citations omitted); *see also* Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1060 (11th Cir. 1998) (holding that arbitration agreement which proscribed award of Title VII damages was unenforceable because it was fundamentally at odds with the purposes of Title VII); Cole v. Burns Int'l Sec. Servs.,105 F.3d 1465, 1468, 323 U.S. App. D.C. 133 (D.C. Cir. 1997) (**HN17**[] "We **[**33]** do not read *Gilmer* as mandating enforcement of all mandatory agreements to arbitrate statutory claims; rather we read *Gilmer* as requiring the enforcement of arbitration agreements that do not undermine the relevant statutory scheme.")

Neither *Stolt-Nielsen* nor *Concepcion* overrules *Mitsubishi*, and neither makes mention of *Green Tree*. We continue to find Green Tree "controlling here to the extent that it holds that **HN18**[] when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" Amex II, 634 F.3d at 197 (quoting Green Tree, 531 U.S. at 92). Other Circuits permit **[*217]** plaintiffs to challenge class-action waivers on the grounds that prosecuting such claims on an individual basis would be a cost prohibitive method of enforcing a statutory right. *See, e.g.,* In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 285 (4th Cir. 2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.") (citation omitted); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003) **[**34]** ("In the present case, the [plaintiffs] have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs . . . ."); Adkins v. Labor Ready, Inc., 303 F.3d 496, 503 (4th Cir. 2002) ("[Lead plaintiff] makes no showing of the specific financial status of any of the plaintiffs at the time this action was brought. He provides no basis for a serious estimation of how much money is at stake for each individual plaintiff."). In each of these cases, plaintiffs' attempts to avoid the waiver clause failed because plaintiffs were unable to demonstrate the class-action waivers barred them from vindicating their statutory rights. Their failures speak to the quality of the evidence presented, not the viability of the legal theory. The fact that plaintiffs so often fail in their attempts to overturn such waivers demonstrates that the evidentiary record necessary to avoid a class-action arbitration waiver is not easily assembled, and that the courts are capable of the scrutiny such arguments require.

Thus, we continue to find *Green Tree* "controlling here to the extent **[**35]** that it holds that **HN19**[] when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" Amex I, 554 F.3d at 315 (quoting Green Tree, 531 U.S. at 92). Since there is no indication in *Stolt-Nielsen* or *Concepcion* that the Supreme Court intended to overturn either *Green Tree* or *Mitsubishi*, both cases retain their binding authority. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (**HN20**[] "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

The evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws. Dr. French stated that the purpose of his affidavit was "to provide an expert opinion concerning the likely costs and **[**36]** complexity of an expert economic study concerning the liability and damages" relating to this action, and to "provide my opinion as to whether it would be economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding." (Joint Appendix, at p. 362, ¶ 4)

Dr. French continued:

> In summary, the cost of [Nathan Associates'] expert assistance in individual plaintiff antitrust cases has ranged from about $300 thousand to more than $2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that . . . the cost for this case will fall in the middle of the range of [Nathan Associates'] experience.

[*218] (Joint Appendix at p. 362-63, ¶ 4) Dr. French then considered the economic rationality of bringing an individual action against Amex in light of these substantial expert witness costs:

> The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $5,252 when trebled.... The largest volume **[**37]** named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled.
>
> In my opinion as a professional economist ... it would not be worthwhile for an individual plaintiff ... to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million.

(Joint Appendix at p. 365, ¶ 10-11)

Dr. French's affidavit demonstrates that the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action. As discussed in our earlier opinion, the district court did not directly address Dr. French's affidavit, focusing instead on the damages provision of the Clayton Act, *15 U.S.C. § 15(a)*. *See* *Amex I, 554 F.3d at 317*. We found that while the Clayton Act does provide for treble awards along with the recovery of attorneys' fees and expenses, that was unlikely to assist plaintiffs where, as here, "the trebling of a small individual damages award is not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual **[**38]** plaintiff's case." *Id*. We also found the Clayton Act's fee-shifting provisions inadequate to alleviate our concerns given the low expert witness reimbursement rate. *Id. at 318*. "Even with respect to reasonable attorney's fees, which are shifted under *Section 4* of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." *Id*.

We again find "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." *Amex I, 554 F.3d at 319*. The "enforcement of the class action waiver in the Card Acceptance Agreement 'flatly ensures that no small merchant may challenge American Express[s tying arrangements under the federal antitrust laws.'" *Id*. Eradicating the private enforcement component from our ***antitrust law*** scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes. *See* *Reiter v. Sonotone Corp., 442 U.S. 330, 344, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)* (***HN21***[] "[P]rivate suits provide a significant supplement to the limited resources available **[**39]** to the Department of Justice for enforcing the antitrust laws and deterring violations."); *see also* Dando B. Cellini, *An Overview of Antitrust Class Actions*, 49 Antitrust L.J. 1501, 1506 (1980) (discussing private, class action antitrust lawsuits and observing that "it is obvious from the experience over the last fifteen years since the 1966 amendments to *Rule 23* were adopted that linking an antitrust claim with a class action allegation can be devastatingly effective.").

Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable. We again emphasize our holding comes with caveats. *See* *Amex I, 554 F.3d at 320* ("We emphasize two important limitations upon our **[*219]** holding.") Our decision in no way relies upon the status of plaintiffs as "small" merchants. We rely instead on the need for plaintiffs to have the opportunity to vindicate their statutory rights. *See, e.g.,* *Raniere v. Citigroup, Inc., No. 11 Civ. 2448, 827 F. Supp. 2d 294, 2011 U.S. Dist. LEXIS 135393, 2011 WL 5881926, at *13 (S.D.N.Y. Nov. 22, 2011)* ("even if *AT & T* is read broadly to acquiesce to the enforcement of an arbitral agreement that as a practical matter would prevent the vindication **[**40]** of state rights in the name of furthering the strong federal policy favoring arbitration, that would not alter the validity of the federal statutory rights analysis articulated in *Mitsubishi, Green Tree* [and] *American Express*"); *Chen-Oster v. Goldman, Sachs & Co., No. 10 CIV 6950, 2011 U.S. Dist. LEXIS 73200, 2011 WL 2671813, at *2-5 (S.D.N.Y. July 7, 2011)* (declining to apply *Concepcion* where the question before the court involved the plaintiff's ability to vindicate a federal statutory right); *Sutherland v. Ernst & Young, LLP, 768 F. Supp. 2d 547, 550-54 (S.D.N.Y. 2011)*(finding *Amex I* "retains its persuasive force" following *Stolt-Nielsen*).

We do not hold today that class action waivers in arbitration agreements are per se unenforceable, or even that they are per se unenforceable in the context of antitrust actions. Rather, as demonstrated by the different outcomes in our sister Circuits, we hold that ***HN22***[] each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp., 460 U.S. at 24*.

Our earlier opinion refrained from ordering **[**41]** the parties to submit to class arbitration, instead permitting Amex the choice between arbitration and litigation. *Amex I, 554 F.3d at 321*. ***HN23***[] *Stolt-Nielsen* plainly precludes any court from compelling the parties to submit to class-wide arbitration where the arbitration clause is silent as to class-wide arbitration. *130 S.Ct. at 1775* (***HN24***[] a party does not agree "to submit to class arbitration unless there is a contractual basis for concluding that a party agreed to do so").

Which leads to the issue of how to proceed from here. As detailed above, we are persuaded by the record before us that if plaintiffs cannot pursue their allegations of ***antitrust law*** violations as a class, it is financially impossible for the plaintiffs to seek to vindicate their federal statutory rights. Since the plaintiffs cannot pursue these claims as class arbitration, either they can pursue them as judicial class action or not at all. If they are not permitted to proceed in a judicial class action, then, they will have been effectively deprived of the protection of the federal ***antitrust-law***. The defendant will thus have immunized itself against all such antitrust liability by the expedient of including in its contracts **[**42]** of adhesion an arbitration clause that does not permit class arbitration, irrespective of whether or not the provision explicitly prohibits class arbitration.

Therefore, in light of the fact that the arbitration provision at issue here does not allow for class arbitration, under *Stolt-Nielsen* and by its terms, if the provision were enforced it would strip the plaintiffs of rights accorded them by statute. We conclude that this arbitration clause is unenforceable. We remand to the district court with the instruction to deny the defendant's motion to compel arbitration.

CONCLUSION

For the reasons given above, the decision of the district court is reversed. We **[*220]** remand to the district court for further proceedings consistent with this opinion.

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In re Delta/AirTran Baggage Fee Antitrust Litig.

United States District Court for the Northern District of Georgia, Atlanta Division

February 3, 2012, Decided; February 3, 2012, Filed

CIVIL ACTION FILE NUMBER 1:09-md-2089-TCB

Reporter

846 F. Supp. 2d 1335 *; 2012 U.S. Dist. LEXIS 13462 **; 2012-1 Trade Cas. (CCH) P77,817

IN RE DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION

Subsequent History: Modified by *In re Delta/Airtran Baggage Fee Antitrust Litig., 2012 U.S. Dist. LEXIS 198174 (N.D. Ga., July 18, 2012)*

Prior History: *In re Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 2010 U.S. Dist. LEXIS 85844 (N.D. Ga., Aug. 2, 2010)*

Core Terms

documents, Plaintiffs', discovery, tapes, back-up, sanctions, emails, hard drive, communications, spoliation, bag, expenses, requests, files, reopened, collected, first-bag, deadline, contends, bag-fee, new document, searched, missing, correspondence, newly, production of documents, disclosure, parties, locker, representations

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure > General Overview

HN1[] **Civil Procedure, Discovery & Disclosure**

Fed. R. Civ. P. 26(g)(1) requires an attorney of record to sign every discovery request, response or objection. By signing, an attorney certifies that to the best of his knowledge, information, and belief formed after a reasonable inquiry that a discovery request, response or objection is: (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. *Fed. R. Civ. P. 26(g)(1)(B)*. The comments to subsection (g)(1) clarify that *Rule 26(g)* broadly imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of *Rules 26 through 37*. This broad duty is satisfied when an attorney makes a reasonable inquiry into the factual basis of his response, request, or objection. Specifically, the attorney's investigation and conclusions drawn therefrom must be reasonable under the circumstances.

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

HN2[] Disclosure, Sanctions

See *Fed. R. Civ. P. 26(g)(3)*.

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

HN3[] Disclosure, Sanctions

See *Fed. R. Civ. P. 37(b)(2)*.

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

HN4[] Disclosure, Sanctions

See *Fed. R. Civ. P. 37(c)(1)*.

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

HN5[] Disclosure, Mandatory Disclosures

See *Fed. R. Civ. P. 26(e)*.

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

HN6[] Disclosure, Mandatory Disclosures

Fed. R. Civ. P. 26(e) does not forgive a party's failure to timely conduct an adequate and complete search for responsive documents. Even though *Rule 26(e)(1)(A)* requires a party to supplement incorrect or incomplete information, it does not grant the party a right to produce information in a belated fashion.

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

HN7[] Disclosure, Mandatory Disclosures

Under *Fed. R. Civ. P. 37(c)(1)*, a party who fails to provide information as required by *Fed. R. Civ. P. 26(e)* is not allowed to use that information unless its failure was substantially justified or is harmless. An individual's discovery conduct should be found substantially justified under *Rule 37* if it is a response to a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action. A discovery mistake is harmless if it is honest, and is coupled with the other party having sufficient knowledge that the material has not been produced. Exclusion, however, is not mandatory. *Rule 37(c)(1)* provides that in addition to or instead of excluding the late-produced information, the court may order a party to pay the reasonable expenses caused by its failure; inform the jury of the party's failure; or impose other appropriate sanctions, including those listed in *Rule 37(b)(2)(A)(i)-(iv)*.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Discovery & Disclosure > General Overview

HN8[] **Judges, Discretionary Powers**

A district court has broad discretion in all discovery matters.

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

Civil Procedure > Discovery & Disclosure > General Overview

HN9[] **Regulated Practices, Private Actions**

In general, where the proof is largely in the hands of alleged conspirators, antitrust plaintiffs must be given ample opportunity for discovery.

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

HN10[] **US Department of Justice Actions, Investigations**

In the Antitrust Civil Process Act, *15 U.S.C.S. § 1311 et seq.*, *15 U.S.C.S. § 1313(c)* is the only restriction on the production of documents obtained in response to a civil investigative demand and *§ 1313(c)* restricts disclosure only by the officer to whom the report is made.

Civil Procedure > Discovery & Disclosure > General Overview

HN11[] **Civil Procedure, Discovery & Disclosure**

Fed. R. Civ. P. 26(b)(2) delineates the limits on the frequency and extent of discovery requests.

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For Avery Insurance Group, Inc., Plaintiff: Andrew Hoyt Rowell, James L. Ward, Jr., Robert S. Wood, LEAD ATTORNEYS, PRO HAC VICE, Richardson, Patrick, Westbrook & Brickman, LLC, Mt. Pleasant, SC; Cale Howard Conley, Richard A. Griggs, LEAD ATTORNEYS, Conley Griggs LLP- Atl., Atlanta, GA; Daniel Low, LEAD ATTORNEY, PRO **[**4]** HAC VICE, Kotchen & Low LLP, Washington, DC; David H. Flint, LEAD ATTORNEY, Schreeder Wheeler & Flint, LLP, Atlanta, GA; R. Bryant McCulley, LEAD ATTORNEY, PRO HAC VICE, McCulley McCluer PLLC-FL, Jacksonville, FL; Stuart H. McCluer, LEAD ATTORNEY, PRO HAC VICE, McCulley McCluer PLLC, Oxford, MS; Daniel Kotchen, Robert A. Klinck, Kotchen & Low LLP, Washington, DC; Elizabeth Louise Fite, Kutak Rock-ATL, Atlanta, GA.

For Delta Air Lines, Inc., Defendant: Gregory B. Mauldin, LEAD ATTORNEY, Alston & Bird, LLP-GA, Atlanta, GA; James P. Denvir, Michael S. Mitchell, Scott E. Gant, LEAD ATTORNEYS, PRO HAC VICE, Boies Schiller & Flexner-DC, Washington, DC; Nowell D. Berreth, Randall Lee Allen, LEAD ATTORNEYS, Alston & Bird, Atlanta, GA.

For AirTran Holdings, Inc., AirTran Airways, Inc., Defendants: Alden L. Atkins, LEAD ATTORNEY, PRO HAC VICE, Vinson & Elkins, LLP-DC, Washington, DC; Bert W. Rein, LEAD ATTORNEY, PRO HAC VICE, Wiley Rein LLP, Washington, DC; Joshua A. Hartman, Michael V. Sachdev, Roger W. Fones, LEAD ATTORNEYS, PRO HAC VICE, Morrison & Foerster, LLP-DC, Washington, DC; Thomas Willard Rhodes, William Parker Sanders, LEAD ATTORNEYS, Smith Gambrell & Russell, Atlanta, GA.

Judges: Timothy C. Batten, Sr **[**5]** ., United States District Judge.

Opinion by: Timothy C. Batten, Sr.

Opinion

[*1337] **ORDER**

The case is before the Court on Plaintiffs' motion to reopen discovery and for a new case schedule as to Defendants Delta Air Lines and AirTran Holdings, Inc., and for sanctions against Delta [294]. [1]

I. The Gist of the Case

On December 5, 2008, Delta and AirTran started charging passengers $15 to **[*1338]** check their first bag. Within six months lawsuits were filed across the country asserting that the two airlines had conspired to impose the first-bag fee, which would be a violation of *§ 1 of the Sherman Act*. [2] A total of thirteen cases have been filed, and they have been consolidated into this multi-district litigation.

In addition to this litigation, on February 2, 2009, the United States Department of Justice Antitrust Division (the "DOJ") served a Civil Investigative Demand ("CID") upon Delta, seeking information regarding its decision to adopt the first-bag fee. The CID required Delta to produce documents relating to any actual or contemplated changes in Delta's policies or practices relating to fees charged for checked baggage.

II. The Subject Matter of the Current Motion: Delta's Document Production

On February 9, 2010, the Plaintiffs served document requests upon both Defendants, seeking all documents related to their decisions to impose a first-bag fee. In a brief May 13, 2010 telephone conference, the Court ordered that all such documents be produced to Plaintiffs by June 30, 2010.

On November 8, 2010, Plaintiffs filed a motion for spoliation sanctions against Delta relating to Delta's noncompliance with the DOJ's bag-fee CID. To understand the basis for this motion, it is necessary to explain Delta's email retention policy.

Delta creates and maintains daily and monthly back-up tapes for disaster-recovery **[**7]** purposes. It contracts with IBM to perform these backup services.

With respect to the daily tapes, every day the data on each of Delta's exchange servers, which contain data such as employees' emails, calendar entries and contacts, is copied on a series of seven rotating tapes. When the last tape is full, the first tape in the set is reused. This process provides two weeks of daily backup tapes for each server.

With respect to the monthly tapes, on or about the first Saturday of each month, a back-up tape is created for each server. Each such tape contains a "snap-shot" of the data on the server on the particular date upon which it is backed up. Monthly back-up tapes are retained for three months and then reused, similar to the reusing of the weekly back-up tapes. Thus, at the time Delta received the CID on February 2, 2009, it should have had monthly back-up tapes for at least November and December 2008 and January 2009 for each server.

Delta also has an email policy that manages employees' emails. Copies of outgoing emails are stored in a sent-items folder. If an employee reads an email but does not manually delete or move it to another folder, after sixty days the email is automatically **[**8]** moved to a deleted-items folder, and approximately sixty days thereafter it is permanently deleted. An employee who wants to retain a copy of an email for a longer period of time can do so by moving the email to a personal folder, where the email is retained until the employee chooses to delete it. Under

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[1] As directed in the Court's Instructions to Parties and Counsel [49], on July 25, 2011, Plaintiffs emailed the Court a letter explaining the matters in dispute. Both Delta and AirTran responded via email letters. The letters (without exhibits) were filed on February 3, 2012 [294-301]. The Court notes that although the parties have stamped every document associated with this case "Confidential," there is nothing truly confidential about the contents of counsel's letters to the Court.

[2] For more details about Plaintiffs' **[**6]** claims, see *In re Delta/AirTran Baggage Fee Antitrust Litigation, 733 F. Supp. 2d 1348 (N.D. Ga. 2010)*.

Delta's document-retention policy, users are instructed to create custom personal folders for emails and other electronic files when there is a business need to retain them.

Delta received the CID on February 2, 2009. It imposed two important implicit if not explicit requirements upon Delta. First, Delta was to identify each person **[*1339]** responsible for analyzing, recommending or approving changes in its policies relating to fees for checked baggage. Second, Delta was to produce all documents relating to any actual or contemplated changes in its policies or practices related to bag fees. Based on Delta's response to the CID, it is apparent that Delta interpreted the CID's instructions as requiring it to copy all files on the computers of its employees that might contain any of the requested documents and suspend its standard electronic-document-destruction policy, i.e., Delta knew that it **[**9]** needed to cease and desist its practice of overwriting both daily and monthly back-up tapes.

Consequently, on February 3, Scott McClain, Delta's assistant general counsel, emailed a document-preservation and litigation-hold notice to each of the twenty-two persons ("custodians") whose computers Delta believed might contain documents responsive to the CID. McClain's notice was also sent to the administrative assistants for each member of Delta's corporate leadership team.

Pursuant to McClain's notice, each recipient was informed that the DOJ had requested all documents related to any actual or contemplated changes in the checked-bag-fee policies of Delta or any other airline at any time since January 1, 2008. The notice also directed each recipient to search for, preserve and refrain from deleting or destroying any potentially responsive documents, including emails, other electronic documents, and paper documents. Over the course of the next few weeks, Delta collected paper and electronic documents, including emails, from the custodians and produced them to the DOJ. Thus, Delta did take steps to preserve responsive documents.

However, the problem (as perceived at the time Plaintiffs filed **[**10]** their spoliation motion) was not that Delta had failed to comply with the CID, but rather that it had waited several months before complying completely. Specifically, although Delta received the CID on February 2, 2009, it waited over three months—until May 13, 2009—to copy all files on the custodians' computers and suspend the employee email-destruction policy. Moreover, Delta waited even longer—until sometime between May 19 and June 5, 2009—to instruct IBM to stop overwriting its daily and monthly back-up tapes. As a result, Plaintiffs contended, voluminous, highly relevant emails and documents going back to the crucial time period of July through November 2008, when Delta and AirTran announced that they would impose the first-bag fees, were lost. [3]

On February 22, 2011, the Court denied Plaintiffs' motion for spoliation **[**11]** sanctions, for three reasons. First, the Court rejected Plaintiffs' contention that Delta owed *Plaintiffs*—and not just the DOJ—a duty to comply with the CID and that Delta could therefore be sanctioned in *this* case for failing to comply with the CID. Second, Plaintiffs had not shown prejudice, i.e., that critical evidence existed and was destroyed, or that Delta had acted in bad faith. Finally, the Court was influenced by Delta's myriad emphatic and unqualified assurances that it had produced absolutely every document in its possession, custody or control that Plaintiffs had requested. It is worth pausing at this point **[*1340]** to consider the nature and number of those important assurances:

During the November 8, 2010 status conference, Delta's counsel stated:

> So, there's no reason to think that we didn't do a good job. We did a good job in collecting the documents. And as the record would indicate, all of the documents that we had that covered the bag fee issues have been produced. (Tr. at 57.)
>
> . . . .
>
> So I think, Your Honor, when you peel away the onion on this, what you'll see is we undertook certainly reasonable steps to preserve the evidence at the time we received the CID. (Tr. at 58.)

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[3] As discussed in the February 22 order on Plaintiffs' motion for spoliation sanctions, if Delta had imposed a litigation hold the day it received the DOJ's bag fee CID (February 2, 2009), the oldest back-up tape in its possession would have been from November 2008. *See* *In re Delta/AirTran Baggage Fee Antitrust Litigation, 770 F. Supp. 2d 1299, 1306 (N.D. Ga. 2011)*.

> . **[**12]** . . .
> So, the—all of the decisions that we're talking about, all the discussions and the analysis we're talking about, took place at Delta. We've produced everything that we have with regard to that. So, there is nothing with regard to the adoption of a bag fee between Delta and Northwest. (Tr. at 66.)

In its brief in opposition to Plaintiffs' motion for spoliation sanctions, Delta stated:

> There is no evidence that any document regarding Delta's decision to adopt a first bag fee in 2008 has not been produced by Delta to Plaintiffs. (Br. at 16.)
> . . . .
> Again, there are no missing or destroyed documents. (Br. at 24.)
> . . . .
> There is no basis to believe, much less evidence to suggest, that there are missing documents. (Br. at 24.)
> . . . .
> Plaintiffs also claim that relevant emails from Gail Grimmett have been lost or destroyed. This ignores her testimony on that subject . . . . Thus, there is no reason to believe that any relevant emails still existed in February 2009. (Br. at 27 n.22.)

In its surreply brief in opposition to Plaintiffs' motion for spoliation sanctions, Delta stated:

> Delta established in its original response . . . that the steps it took to preserve documents in response to the **[**13]** CID were reasonable, that there is no evidence any material documents have been lost. (Br. at 2.)
> . . . .
> There is thus no basis for speculation about lost or destroyed emails, much less about any emails material to Delta's decision to adopt a first bag fee. (Br. at 4.)
> . . . .
> The same is true with respect to allegedly 'missing' emails from Gail Grimmett. In light of Ms. Grimmett's personal email retention practices, there is still no basis for believing any relevant emails from her files existed in February 2009. (Br. at 4 n.2.)

Finally, during the January 27, 2011 hearing on the motion for spoliation sanctions, Delta's counsel stated:

> And as the Court is keenly aware, all of those documents have been preserved and indeed presented to the plaintiff. (Tr. at 41.)
> . . . .
> Well, all of the emails and electronic information that we're aware of that related to Delta's consideration of the adoption of the first bag fee were preserved and were produced in this case. (Tr. at 42-43.)
> . . . .
>
> I want to walk you through that decision-making process for you and what documents do exist and why the documents that do exist give you—give the **[*1341]** Court, should give the plaintiffs, no reason to worry that some **[**14]** documents—some documents were misplaced. (Tr. at 45.)
> . . . .
> There's no reason to believe that any documents relevant to this decision-making process were lost or destroyed. (Tr. at 45.)
> . . . .
> They don't reflect any—there's nothing in them to indicate or to insinuate that there's some missing piece in Delta's documents. (Tr. at 48.)
> . . . .
> I don't think there's any suggestion that there were notes taken that are lost. (Tr. at 61.)
> . . . .
> So, there's no reason to think that in February of 2009, there was any document on backup tapes or otherwise of Ms. Grimmett's to find. (Tr. at 62.)
> . . . .
> One more thing about the—the—the files that we do have and what we do know and what ought to give comfort that the plaintiffs have a full and complete record. (Tr. at 63.)

> . . . .
> There's nothing in those documents to suggest there's something missing somewhere else. It gives—it gives a full and complete and, frankly, I think, hopefully to the Court comforting view that everything exactly as I just walked you through, everything is there, there is no collection of documents missing. (Tr. at 64.)

Basically, it would be impossible for Delta to have been more forceful in its assurances that it had fully complied **[**15]** with Plaintiffs' document requests and the DOJ's CID.

III. Delta's Failure to Produce 60,000 Pages of Responsive Documents

A. Recently Discovered Hard Drives

While the DOJ's bag-fee investigation was pending, the DOJ was also conducting an unrelated investigation of Delta regarding its proposed swap of airport landing slots with U.S. Airways at Washington and New York area airports. In connection with that investigation, the DOJ received from Delta several documents relevant to the DOJ's *bag-fee* investigation that Delta had not produced in response to the bag-fee CID. On February 17, 2011, the DOJ sent Delta a letter asking why Delta had failed to produce those documents in response to the CID issued in the bag-fee investigation.

On March 1, Delta's counsel informed the Court that it had recently become aware of additional "potential issues" with its document production in this case.

By letters dated March 8, 2011, Delta explained to both the DOJ and Plaintiffs that the slots-swap investigation documents were collected and produced by a different law firm not involved in the bag-fee investigation or this case, meaning that the slots-swap investigation documents were not readily available **[**16]** to Delta's counsel in this case. Delta then stated that a preliminary review of the slots-swap investigation documents— approximately two terabytes of data—showed that these documents contained some "additional documents responsive to Plaintiffs' discovery requests in this case." Delta promised that it would search the slots-swap investigation documents and produce all such additional documents.

As of March 8, 2011, Delta still did not know how relevant documents could have been produced in the slots-swap investigation but not in response to the DOJ's bag-fee CID or Plaintiffs' discovery requests. **[*1342]** However, Delta's investigation would show that it failed to (1) upload all of the data from the relevant custodians' hard drives and (2) discover additional back-up tapes containing documents relevant to this case.

On March 17, 2011, Delta informed the Court that it had retained PricewaterhouseCoopers LLP ("PwC") to investigate what happened, and as a result of that investigation Delta discovered the existence of about 60,000 pages of documents responsive to Plaintiffs' document requests that had not been produced. The 60,000 pages included (1) documents found on the previously un-checked individual **[**17]** hard drives, and (2) documents located on recently discovered back-up tapes, which are discussed infra at 15-17.

Delta offers the following explanation of how it could have been as wrong as it was dogmatic in its assertions that it had fully complied with the DOJ's CID and Plaintiffs' document requests.

Delta uses a computer software program called Clearwell to help manage its electronically stored information. Clearwell enables Delta to search its computer files, such as emails, letters, and memoranda, using key terms or phrases (e.g., "bag fee"). Files containing the key terms or phrases can then be copied to other computer storage media and/or printed.

In May 2009, Delta copied and saved data from numerous hard drives of various custodians as part of its efforts to respond to the DOJ's bag-fee CID. However, the contents of some of the hard drives were not uploaded to Clearwell, but Delta's legal team did not discover this fact until nearly two years later, in March 2011. Consequently, when Delta searched its electronic documents in 2009, only Delta's active email servers or shared network servers were searched; files located on the custodians' hard drives, including archived emails **[**18]** on the hard drives but not on the shared servers, were not searched and thus not produced. Apparently, at some point the data on those hard drives *was* uploaded to Clearwell in connection with the slots-swap investigation. As a result, Delta produced documents to the DOJ in connection with the slots-swap investigation. The DOJ noticed that some of those documents were responsive to the DOJ's bag-fee CID, yet were not produced by Delta in response to the bag-fee CID. As previously indicated, on February 17, 2011, the DOJ sent Delta a letter asking why the documents responsive to both CIDs were not produced in response to the bag-fee CID.

Delta's explanation is that it failed to upload all of the data on the hard drives to Clearwell for the bag-fee investigation due to a misunderstanding between its counsel in this case and its internal technology department, CSIRT. [4] Back on May 13, 2009, Delta's counsel instructed CSIRT to copy and save the hard drives and shared server files of the relevant custodians. Nine days later CSIRT informed counsel that it had almost finished copying and saving the data on the custodians' hard drives, and it needed to know whether all of that data should be **[**19]** uploaded to Delta's then-new search tool, Clearwell. Delta's in-house counsel replied in the affirmative. Two weeks later counsel followed-up to make sure that all of the data collected from the custodians' individual hard drives had been uploaded to Clearwell. Nevertheless (according to PwC in March 2011), CSIRT had not in fact uploaded to Clearwell all of the data from the custodians' hard drives. Significantly, Delta offers no explanation for this failure.

[*1343] B. Recently Discovered Back-Up Tapes

In addition to discovering that it failed to produce documents because it did not search several individual hard drives for documents as required, Delta also discovered in March 2011 the existence of additional back-up tapes in a CSIRT evidence locker. [5] Delta offers the following explanation for why it did not discover and could not have discovered these tapes before March 2011.

As stated above, sometime between May 19 and June 5, 2009, Delta instructed IBM to suspend the **[**20]** overwriting of Delta's daily and monthly back-up tapes. Based on conversations at that time between Delta's counsel and both CSIRT and IBM, Delta then believed that (1) its oldest back-up tapes were from April 2009, and (2) those tapes were stored by CSIRT in CSIRT's "evidence locker." Delta contends that CSIRT stores only those back-up tapes that have been collected in connection with litigation or investigations, whereas IBM is the custodian of Delta's other, routine backup tapes.

In August 2010, Delta's counsel contacted CSIRT to confirm that the April 2009 back-up tapes were being stored, which CSIRT confirmed. CSIRT also informed Delta's counsel that it was storing a set of back-up tapes delivered by IBM to CSIRT sometime in September or October 2009. [6] CSIRT did not mention that it was also storing a set of back-up tapes predating April 2009—the "recently discovered back-up tapes."

Not until March 2011, when Delta's counsel met with representatives of CSIRT and PwC at CSIRT's offices, were the recently discovered back-up tapes found. **[**21]** At that time, Delta's counsel asked to see the April 2009 back-up tapes, and for the first time CSIRT showed counsel an unmarked box of back-up tapes. Nothing on the tapes indicated why they were being stored, and CSIRT could not explain what the tapes were or why they were being preserved. Neither CSIRT nor IBM has been able to determine who requested that the tapes be preserved and stored in the evidence locker. After the tapes were discovered in March 2011, Delta had a vendor perform a forensic scan of the tapes to determine their age and relevance and promptly informed Plaintiffs of their existence

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[4] Delta's IT group is called the "Computer Security and Investigative Response Team," or "CSIRT." It is housed in a separate building from Delta's counsel, approximately one mile away.

[5] Apparently, that's really what it's called.

[6] IBM delivered these tapes to CSIRT pursuant to a preservation instruction from Delta's law department in connection with the slots-swap investigation.

upon determining their relevance. The scan showed that the tapes, which pre-dated the April 2009 back-up tapes that Delta thought were the oldest tapes available, contained documents responsive to Plaintiffs' document requests. Delta produced these documents to Plaintiffs in April and May 2011; they are included among the 60,000 pages of documents produced to Plaintiffs.

IV. Plaintiffs' July 25 Letter and Delta's Responses Thereto

None of this sat too well with Plaintiffs, who had suspected as early as 2009—when Delta admittedly destroyed documents when it delayed in instructing IBM to **[**22]** stop overwriting the back-up tapes (albeit inadvertently, if one were inclined to take Delta at its word)—that Delta's production was woefully incomplete, suggesting that Delta had destroyed or intentionally withheld evidence. On July 25, 2011, Plaintiffs' counsel wrote the Court an eighteen-page letter accompanied by 47 exhibits totaling 361 pages, expressing Plaintiffs' ire. Plaintiffs seek four things: (1) a re-opening **[*1344]** of the discovery period; (2) a proposed case schedule; (3) sanctions against Delta; and (4) an order compelling Delta and AirTran to produce ongoing correspondence with the DOJ related to its bag-fee investigation.

By letter dated August 2, Delta responded to Plaintiffs' letter indicating that it (1) did not object to a limited reopening of discovery; (2) would respond to the motion for sanctions within the time allowed under the Federal Rules of Civil Procedure; (3) objected to producing additional correspondence between it and the DOJ; and (4) commented generally on the nature of the recently produced documents. Delta's letter did not dispute that Delta (1) failed to search and produce responsive documents from the hard drives collected in May 2009 from the relevant **[**23]** bag-fee custodians, and (2) located after the close of discovery the recently discovered back-up tapes containing emails from certain custodians. It characterized these blunders as "inadvertent mistakes."

On August 11, Delta sent a letter to the Court responding to Plaintiffs' request for sanctions. The details of this letter are addressed below.

V. The Evidentiary Significance of the Newly Produced Documents

Before addressing Plaintiffs' requested sanctions and Delta's response thereto, it is necessary to consider both sides' evaluations of the approximately 60,000 pages of documents [7] that Delta produced to Plaintiffs in April and May of 2011. Plaintiffs have two main issues with the newly produced documents.

Plaintiffs first contend that a number of the newly produced documents contradict the deposition testimony of Delta witnesses as to when Delta adopted a first-bag fee and that the contradictions as to the timing of Delta's decision "help demonstrate that Defendants imposed a first bag fee as the result of a conspiracy." Second, Plaintiffs argue that Delta **[**24]** should be sanctioned for its late production because the existence of these newly produced documents (1) refutes Delta's numerous representations that it had provided a full and complete record of events, and (2) suggests that even more documents remain missing or were destroyed.

The Court addresses each contention in turn.

A. The Deposition Testimony of Delta's Witnesses and Evidence of a Conspiracy

Plaintiffs contend that Delta's witnesses previously testified that its two divisions responsible for making a recommendation about the first-bag fee—Revenue Management ("RM") and Airport Customer Service ("ACS")—were divided on whether Delta should impose the fee. Generally speaking, Delta's witnesses testified that ACS favored a first-bag fee long before AirTran's October 23, 2008 earnings call and that RM always opposed the fee.

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[7] Prior to the close of discovery on December 15, 2010, Delta had produced to Plaintiffs approximately 103,000 pages of documents.

Plaintiffs contend that the newly produced documents show that ACS was actually opposed to the fee in the months prior to AirTran's earnings call, but that Delta changed its position after the call. Thus, Plaintiffs assert that Delta decided to adopt the first-bag fee as a direct result of AirTran's earnings call.

Plaintiffs also contend that the new documents "impeach **[**25]** other aspects of the testimony of Delta witnesses." However, Plaintiffs compare the new documents to the testimony of only one witness—Delta's executive vice president Steve Gorman. **[*1345]** Plaintiffs assert that Gorman testified that Delta knew that three other carriers did not have a first-bag fee but that this did not enter into Delta's consideration. Plaintiffs claim that the new documents refute this testimony and make clear that AirTran's position was indeed a factor taken into consideration by Delta and Gorman. Thus, to summarize, Plaintiffs contend that the timing of Delta's decision about the first-bag fee, as evidenced by the newly produced documents, shows that Delta's adoption of the fee was a direct result of AirTran's October 23, 2008 earnings call, and that this evidence supports their conspiracy claim.

Delta offers three responses to Plaintiffs' assertions about the alleged inconsistencies between the depositions and documents. Delta first responds that the alleged inconsistencies are trivial and that Plaintiffs inaccurately represent the contents of the new documents. More importantly, Delta contends that "what is noticeably absent from Plaintiffs' letter [is] *any* evidence, **[**26]** in the newly produced documents or otherwise, supporting [Plaintiffs'] allegations that Delta entered into an *agreement* with AirTran to adopt the first bag fee." [8] Finally, Delta asserts that the documents actually confirm its defense because they show that (1) its two most senior executives and the ultimate decisionmakers—CEO Richard Anderson and president Ed Bastian—decided that Delta should adopt the fee in advance of AirTran's earnings call; (2) the leaders of ACS decided that Delta should adopt the fee and advocated its decision long before AirTran's call; (3) RM, led by Glen Hauenstein, was implacably opposed to the fee both before and after AirTran's call; and (4) information provided by Northwest to Delta after the merger and before Delta's final decision about the fee confirmed the substantial profitability of the fee. Thus, to summarize Delta's position, it contends that the new documents show only that it made a unilateral decision to adopt a first-bag fee and that AirTran's earnings call had no effect on that decision, contrary to Plaintiffs' theory of the case—that Defendants conspired to adopt the first-bag fee and used AirTran's October 2008 earnings call to cover their **[**27]** actions.

On August 26, 2011, Plaintiffs responded to Delta's arguments in both its August 2 and 11 letters. Noticeably absent from Plaintiffs' August 26 letter to the Court is a complete response to Delta's contention that there is not "*any* evidence, in the newly produced documents or otherwise, supporting their allegations that Delta entered into an *agreement* with AirTran to adopt the first bag fee." In reply to such a strong assertion, Plaintiffs state only,

> [A]lmost all of the relevant documents in the new production **[**28]** undermine Delta's arguments and support Plaintiffs' allegations of conspiracy. *See* Pls.' Ltr. to J. Batten at 4-8 (July 25, 2011). In stark contrast to the numerous e-mails and documents that support Plaintiffs' allegations, Delta cites several ambiguous emails as support for its defense. For example, Delta argues that an October 21, 2008 e-mail about the need to schedule a meeting about post-merger fees, including a first bag fee, demonstrates **[*1346]** that Delta CEO Richard Anderson had reached a decision about first bag fees by October 21, 2008. But Mr. Anderson testified that he did not reach a decision on first bag fees until October 29, 2008, contrary to Delta's strained interpretation of the e-mail.

This argument is buried on page nineteen of Plaintiffs' twenty-one-page letter. By contrast, Plaintiffs' first letter to the Court (dated July 25) addressed the impact of the new documents beginning on page four and continued for over four pages. Thus, if Plaintiffs had better examples of how the new documents show that Defendants conspired to impose a first-bag fee, surely they would have said so in their August 26 letter.

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[8] AirTran made a similar statement in its August 2 letter to the Court. It stated that "[n]one of the newly produced documents [Plaintiffs] attach to their submission establishes, directly or indirectly, any communication between AirTran and Delta. Nor do they show any interaction at all between AirTran and Delta." AirTran contends that the documents upon which Plaintiffs rely show that Delta, acting independently, was aware of (1) what other airlines had done, and (2) AirTran's public statements, and that those were among the many factors Delta considered after its merger with Northwest. Thus, AirTran asserts that these parallel actions by Delta are completely lawful.

Plaintiffs also offer no additional or direct evidence of a conspiracy **[**29]** between Defendants in their August 26 letter. Indeed, in their letter Plaintiffs offer only one example of how the recently produced documents allegedly undermine Delta's arguments and support theirs. That example is the alleged contradiction between the first-bag-fee emails sent by Delta's CEO Richard Anderson and his testimony about when he made his decision to adopt a first-bag fee. This example is tepid support for Plaintiffs' contention that "[t]he timing of Delta's change in position regarding first bag fee as evidenced by the newly produced documents provides evidence that the first bag fee was imposed as a direct result of AirTran's October 23, 2008 earnings call."

B. Delta's Representations That It Had Provided a Full and Complete Record of Events, and Plaintiffs' Contention that Relevant Documents Are Still Missing

Plaintiffs also take issue with Delta's representations that it had produced everything, in light of the existence of these new documents. Plaintiffs also argue that additional documents remain missing.

Plaintiffs first contend that the "[n]ewly produced documents . . . undermine representations made by Delta in connection with Delta's opposition to Plaintiffs' spoliation **[**30]** motion about the completeness of its production." For example, Delta previously stated that all of Gail Grimmett's (the head of its bag-fee team) emails regarding first-bag fees had been permanently deleted on November 1, 2008, whereas, the recently produced documents contain a number of Grimmett's first-bag-fee emails.

Indeed, as discussed above in Part II, Delta made several representations about its complete production, and some of these representations pertained to Grimmett's emails. For example, during the hearing on Plaintiffs' spoliation motion, Delta's counsel stated, "It was [Grimmett's] normal practice in 2008 to delete her emails on a regular basis and for her deleted email box to clear every time she exited the computer. So there's no reason to think that in February of 2009, there was any document on back-up tapes or otherwise of Ms. Grimmett's to find." Despite this assurance, the newly produced documents include additional Grimmett emails.

In response, Delta acknowledges that it dropped the ball by failing to timely produce 60,000 pages of responsive documents. However, it insists that these documents are of little, if any, evidentiary significance to the case; in fact, **[**31]** as stated above, Delta contends that the documents actually support its defense, not Plaintiffs' conspiracy claim. Significantly, Delta points out that of the almost 10,000 responsive documents [9] located on the imaged **[*1347]** hard drives and back-up tapes, the majority of those documents did not relate to bag fees.

Plaintiffs also contend that not only do the newly produced documents show that Delta failed to produce inculpatory documents, but that these new documents suggest that additional documents—presumably inculpatory as well—have still not been produced. In their July 25 letter, Plaintiffs state:

> While the newly produced documents provide evidence of Defendants' conspiracy, additional evidence remains missing. The backup tapes recently located by Delta are only a partial record of the e-mails and backup tapes that existed on February 2, 2009, when Delta received the DOJ CID. Delta did not suspend auto-deletion of e-mails until mid-May **[**32]** 2009, and allowed IBM to destroy five monthly backup tapes in IBM's possession between February 7, 2009 and June 6, 2009. . . . Delta apparently made no effort to locate or preserve relevant backup tapes in its own possession until March 9, 2011 (well over a month *after* this Court's hearing on Plaintiffs' spoliation motion), when it asked its IT staff where Delta kept its backup tapes. "Neither Delta's IT group nor Delta's outside vendor . . . (IBM) possessed a log of the tapes or a record explaining why and when the tapes were set aside." Letter from Delta to DOJ (Apr. 27, 2011), Ex. 9. Thus, for over two years—from February 2, 2009 to March 9, 2011—a number of additional backup tapes may have also been destroyed, and Delta has no log or record of such destruction.

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[9] Plaintiffs state that they received 60,000 pages of documents and Delta contends that only 10,000 documents were produced. It is unclear whether the 10,000 documents produced by Delta are the same documents as the 60,000 pages Plaintiffs contend they received.

Delta's two letters to the Court do not address this contention. However, Plaintiffs offer nothing more than speculation to support their theory that documents have been destroyed or that additional documents remain missing.

VI. Reopening Discovery

Plaintiffs contend that discovery should be reopened on a limited basis to allow them to explore issues raised by the newly produced documents. Plaintiffs propose that:

> (1) Discovery **[**33]** be reopened on a limited basis;
> (2) Two weeks after discovery is reopened and as necessary thereafter, Delta and AirTran [10] supplement their discovery responses pursuant to *Fed. R. Civ. P. 26(e)*;
> (3) Four months after Delta and AirTran complete their document production, discovery closes;
> (4) Three weeks after discovery closes, the parties file summary judgment briefs and Plaintiffs file their supplemental brief regarding class certification; [11]
> (5) Briefs in opposition to the motion for summary judgment be filed four weeks after the summary judgment motions are filed; and
> (6) Reply briefs be filed three weeks after the opposition briefs are filed.

Delta agrees that discovery should be reopened; however, it believes that Plaintiffs' proposed open-ended schedule is not helpful. Delta contends that the Court should either issue a clear instruction on **[*1348]** the purpose and scope of any new discovery (e.g., the order Delta proposed with its August 2 letter to the Court) or order Plaintiffs to identify **[**34]** what additional discovery needs to be conducted during the new discovery period. Delta also argues that point (3) is superfluous, as Delta completed its document production months ago and is now attempting to compromise with Plaintiffs on their new document requests.

As to the start time of the new discovery period, Delta believes that its document production is complete, and thus the four months of additional discovery, as proposed by Plaintiffs, should commence immediately. However, Delta also acknowledges that it is producing documents as a result of new document requests by Plaintiffs.

Because Delta agrees that discovery should be reopened, the Court will grant Plaintiffs' request to reopen discovery. However, discovery will be limited to the matters related to the documents produced by Delta after the close of the original discovery period, which includes but is not limited to the recently produced documents on the hard drives and back-up tapes produced by Delta in recent months. Discovery will reopen immediately and end four months from the date of this Order.

VII. Plaintiffs' Request for Sanctions

In addition to reopening discovery, Plaintiffs contend that Delta should be sanctioned **[**35]** for not locating the recently produced documents sooner. Specifically, Plaintiffs contend that Delta should be sanctioned pursuant to *Fed. R. Civ. P. 26(g)* and *37* because it failed to produce responsive documents prior to the close of discovery; failed to conduct a reasonable inquiry into the existence and location of its back-up tapes; and misrepresented that it did not possess the recently located back-up tapes. As for the type of sanctions, Plaintiffs seek reimbursement of their fees and expenses associated with (1) their motion for spoliation sanctions; (2) their request for sanctions, and (3) the extended discovery period. They also urge the Court to enter an order barring Delta from using any of the late-produced documents at any stage of the litigation.

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[10] Plaintiffs' discovery issues with AirTran are discussed at the end of this order.

[11] Delta and AirTran object to the supplemental class certification brief. This, too, is addressed at the end of the order.

Delta responds that there is no basis for sanctions under *Rule 26(g)* or *Rule 37*. It contends that its failure to timely search its individual custodians' hard drives was the inadvertent result of a misunderstanding by Delta's IT department of instructions from Delta's counsel. Delta further contends that its failure to locate the recently discovered back-up tapes was equally inadvertent, i.e., the result of the tapes' storage **[**36]** in an unexpected location: the evidence locker. Thus, Delta asserts that its in-house and outside counsel reasonably believed that all requested hard drives had been searched and that the oldest available back-up tapes had been produced. Consequently, it argues that its responses are not sanctionable now just because in hindsight its discovery responses may have been incomplete or incorrect.

Additionally, Delta asserts that it was obligated to, and did, provide in a timely manner the additional or corrective information once it became aware of the relevant but unproduced documents. It also argues that it has been in constant communication with Plaintiffs and the Court about the additional discovery and has offered to cover the fees and expenses related to the additional discovery but that Plaintiffs have refused to identify what discovery they think is needed.

Despite its arguments against the propriety of sanctions, Delta does not dispute that it (1) neglected to search and produce responsive documents from the hard drives collected in May 2009 from the relevant bag fee custodians; and (2) located and identified additional back-up tapes **[*1349]** containing emails from relevant custodians after **[**37]** the close of discovery.

It is also undisputed that prior to the discovery of these documents, Delta represented to the Court approximately twenty times [12] that it had produced every document responsive to Plaintiffs' discovery requests that it had in its possession. Delta's representations are best summarized by its counsel's statement to the Court during the hearing on Plaintiffs' motion for spoliation sanctions. During that hearing, Delta's counsel stated, "There's nothing in those documents to suggest there's something missing somewhere else. It gives—it gives a full and complete and, frankly, I think, hopefully to the Court comforting view that everything exactly as I just walked you through, everything is there, there is no collection of documents missing."

However, although Delta clearly failed **[**38]** to comply with its obligation to produce documents—and misrepresented through counsel that it had not so failed—the 60,000 pages of documents that Delta recently produced do not appear to contain "smoking gun" evidence of a conspiracy between Delta and AirTran to impose the first-bag fee. This, of course, does not excuse Delta's discovery failures and misrepresentations to the Court. But it does affect the Court's analysis of the relief that Plaintiffs seek.

The Court now addresses whether Delta should be sanctioned under *Rule 26(g)*, *Rule 37* or both, and what sanctions, if any, are appropriate.

A. *Rule 26(g)*

Plaintiffs contend that Delta violated *Rule 26(g)(1)*, which states that a signing attorney certifies discovery responses are complete and correct to the best of his knowledge, information and belief *after a reasonable inquiry*, and that Delta's counsel failed to take reasonable steps to comply with this obligation. Specifically, Plaintiffs assert that Delta inexcusably failed to ensure that all sources of discoverable information (i.e., its custodians' hard drives) were identified and searched, did not determine the actual implementation of its e-discovery retention policy, and did **[**39]** not search the storage area where its internal technology department stored back-up tapes until March 9, 2011.

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[12] These representations can be found on (1) pages 16, 24 and 27 of Delta's brief in response to Plaintiffs' spoliation motion [210]; (2) pages 2 and 4 of Delta's surreply brief to Plaintiffs' spoliation motion [272]; (3) pages 57, 58 and 66 of the November 8, 2010 status conference transcript [200]; and pages 41, 42, 48, 61, 63, 64 and 66 of the spoliation motion hearing transcript [264].

Delta responds that sanctions pursuant to *Rule 26(g)* as a result of recently produced documents are limited in scope to the elements delineated in *subsection (g)(1)(B)*. This subsection requires a signing attorney to certify after a reasonable inquiry that his client's discovery responses are (1) consistent with the Federal Rules of Civil Procedure and warranted by existing law or by nonfrivolous arguments for changing the existing law; (2) not interposed for any improper purpose; and (3) neither unreasonable nor unduly burdensome or expensive. Thus, Delta contends that *Rule 26(g)* only requires a reasonable inquiry limited to these three elements and that Plaintiffs have not shown that its conduct violated any of these elements. However, the comments to *Rule 26(g)* show that the rule is not as limited in scope as Delta contends.

HN1[] *Rule 26(g)(1)* requires an attorney of record to sign every discovery request, response or objection. By signing, an attorney certifies that to the best of his knowledge, information, and belief formed **[*1350]** after a reasonable inquiry that a discovery request, **[**40]** response or objection is:

> (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
>
> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
>
> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

FED. R. CIV. P. 26(g)(1)(B). The comments to *subsection (g)(1)* clarify that *Rule 26(g)* broadly "imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of *Rules 26 through 37*." *FED. R. CIV. P. 26(g)* advisory committee's note. This broad duty is satisfied when an attorney makes "a reasonable inquiry into the factual basis of his response, request, or objection." *Id.* Specifically, the attorney's investigation and conclusions drawn therefrom must be reasonable under the circumstances. *Id.* Thus, the comments make clear that *Rule 26(g)* is broader than Delta portrays it. The **[**41]** Court now determines whether Delta has in fact violated *subsection (g)*.

Delta admits that it belatedly produced relevant documents; however, it contends that its conduct does not run afoul of *subsection (g)* because its counsel made reasonable inquiries prior to signing the certifications. It asserts that "each response was given only after Delta counsel had engaged in several conversations with Delta's CSIRT department and/or IBM to verify the relevant back-up tapes Delta had in its possession."

Plaintiffs assert that Delta did not conduct a reasonable inquiry into the factual basis for its implicit representations that (1) all of the relevant hard drives had been processed through Clearwell, and (2) there were no missing back-up tapes. They argue that Delta should have ensured that all sources of discoverable information were identified and searched and searched in (where else?) the evidence locker, where CSIRT typically keeps back-up tapes. Consequently, Plaintiffs contend, Delta falsely certified that its discovery responses were correct and complete. Plaintiffs argue that as a result, the case has been unnecessarily delayed and its costs unnecessarily increased, and the fact that **[**42]** Delta is now producing these documents is immaterial. The Court agrees. *See Kipperman v. Onex Corp., 260 F.R.D. 682, 698 (N.D. Ga. 2009)* (imposing sanctions under *Rule 26(g)* for defendant's misrepresentations about its e-discovery and rejecting defendant's arguments it had finally complied with discovery orders and plaintiff was not prejudiced); *R&R Sails Inc. v. Ins. Co. of State of Pa., 251 F.R.D. 520, 524-25 (S.D. Cal. 2008)* (imposing *Rule 26(g)* sanctions where defendant without substantial justification belatedly produced electronic information despite certifications to court and plaintiff that its discovery production was complete); *see also* 8A CHARLES WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2052 (3d ed. 2010) (collecting cases where parties asserted opponent neglected to produce all electronically stored information and sanctions appropriate under *Rule 26(g)*).

The Court finds that Delta did not conduct a reasonable inquiry. With respect to the collected but unsearched hard drives, Delta has not substantially justified its failure to ensure the drives were run through Clearwell and searched back in **[*1351]** 2009. While its counsel did email CSIRT a **[**43]** list of custodians whose hard drives should have been loaded onto Clearwell, CSIRT did not respond with confirmation that each listed person's drive was on the system; CSIRT only stated that files were identified by "user employee id, not by name." Delta has not shown that it ever confirmed with CSIRT that each hard drive that was supposed to be run through Clearwell actually had been.

This oversight is a huge hole in Delta's electronic discovery process, and Delta has not adequately explained why it did not ensure in 2009 that every collected hard drive was actually processed through Clearwell and searched. *See Bernal v. All Am. Inv. Realty, Inc., 479 F. Supp. 2d 1291, 1334 (S.D. Fla. 2007)* (finding *Rule 26(g)* violated where attorney relied on client's assurances in drafting discovery responses without confirming assurances by reviewing financial records).

As for the back-up tapes, Delta has not tried to explain why counsel did not check CSIRT's evidence locker. Again, Delta relied on email and phone communications, but given the extensive questioning of Delta about back-up tapes upon receipt of the bag-fee CID, counsel should have inspected the evidence locker in 2009, and certainly **[**44]** should have done so as soon as issues with the back-up tapes arose. *See id.* (attorney did not "make a reasonable investigation to assure that his clients had provided all available responsive information"). Delta tries to justify its failure by explaining that back-up tapes are not typically located in this locker; however, it also explicitly states that tapes are routinely stored in the CSIRT evidence locker once they are collected for litigation or internal or external investigations. Consequently, Delta's counsel should have inspected the tapes in this locker, as it stores only the tapes that are collected for litigation and investigations, and Delta has not substantially justified its failure to do so.

Compounding the problem are Delta's repeated representations that it had produced everything. The unequivocal nature of those representations is best illustrated by Delta's counsel's statement during the January 27, 2011 hearing on Plaintiffs' motion for spoliation sanctions: "There's nothing in those documents to suggest there's something missing somewhere else. It gives—it gives a full and complete and, frankly, I think, hopefully to the Court comforting view that everything exactly **[**45]** as I just walked you through, everything is there, there is no collection of documents missing."

Also, Delta did not promptly correct its factual misrepresentations to the Court regarding its supposedly complete production of the requested documents. To the contrary, on February 22, 2011 (five days after the DOJ informed Delta of its discovery of additional documents), Delta's counsel submitted another letter to the Court insisting that spoliation sanctions should not be imposed. Delta waited until March 1—one week after the Court denied Plaintiffs' spoliation motion—to notify the Court of the issues raised by the DOJ.

Thus, sanctions under *Rule 26(g)* are appropriate for Delta's failure to ensure that all collected hard drives were actually searched and to locate the back-up tapes in the evidence locker and for its myriad inaccurate representations that it had done both. *See Legault v. Zambarano, 105 F.3d 24, 28 (1st Cir. 1997)* (finding *Rule 26(g)* violated where documents defendants failed to produce were in their possession and would have been located if defendants had conducted a reasonable search).

With respect to the type of sanctions, *subsection (g)(3)* provides that

> **[*1352]** ***HN2***[] If a certification **[**46]** violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Through this subsection, *Rule 26(g)* "curb[s] discovery abuse by explicitly encouraging the imposition of sanctions." *Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1545 (11th Cir. 1993)* (quoting *FED. R. CIV. P. 26(g)* advisory committee's note). However, while the Court "must impose" a sanction, the rule also clarifies that the sanction must be "an appropriate sanction." Thus, the Court evaluates the circumstances surrounding Delta's behavior both before and after the discovery of the documents.

Since becoming aware of its deficient document production, Delta has diligently worked to address the situation. It collected the two terabytes of data produced in the DOJ slots investigation and searched it for documents relevant to this case; processed the newly discovered back-up tapes and produced relevant documents; employed electronic search terms to accommodate Plaintiffs' requests; **[**47]** added additional custodians to the search list; searched material collected in another unrelated DOJ investigation; and agreed to numerous additional discovery requests made by Plaintiffs. Its initial delay in informing the Court aside, Delta has been forthcoming with the Court and Plaintiffs about its progress, agrees that discovery should be reopened, and acknowledges that it should be required to pay at least a portion of the expense of the additional discovery that will now be necessary because of Delta's mistakes. Delta also asserts that the majority of the recently produced documents do not relate to bag fees, and the ones that are so related do not show that Delta conspired with AirTran. Finally, and significantly, Delta produced the documents prior to motions for summary judgment and well before trial.

In light of these facts, the Court finds *SCADIF, S.A. v. First Union Nat'l Bank, 208 F. Supp. 2d 1352, 1378-79 (S.D. Fla. 2002)*, *aff'd*, *344 F.3d 1123 (11th Cir. 2003)*, instructive. There, First Union, like Delta, admitted that it had failed to make a complete production due to an unintentional omission, and it accepted responsibility for its mistake. The court rejected First Union's **[**48]** excuses for failing to produce certain documents and found its "failure to timely produce known, requested and discoverable documents . . . a serious procedural and ethical violation . . . one that cannot be dismissed lightly, even where the failure is the result of mere carelessness."

Nevertheless, the court determined that the prejudice from First Union's untimely disclosure was minimized by the fact that "(1) the documents were produced before trial (though barely); (2) SCADIF used the documents to examine and cross-examine witnesses in the trial; and (3) the documents are of minimal relevance." *Id. at 1379*. Particularly persuasive to the court's finding that First Union's failure was a "good faith error" was the fact that "[t]here were no 'smoking guns'" in the belatedly produced documents. *Id.* As a result, the court limited its sanction to a written reprimand. *See also* *Guimaraes v. NORS, 366 F. App'x 51, 54 (11th Cir. 2010)* (affirming district court's denial of motion for sanctions in part because untimely produced documents were "of minimal relevance"); *cf.* *BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1051 (11th Cir. 1994)* (finding sanctions appropriate where **[**49]** late documents **[*1353]** were discovered on "eve of trial" and were relevant and material).

While this Court does not believe a written reprimand suffices, [13] Delta's response after it learned that it had relevant but unproduced documents, the timing of its production (pre-trial and pre-motions for summary judgment), and the lack of a "smoking gun" support lesser sanctions. Pursuant to *Rule 26(g)*, the Court finds it appropriate to require Delta to pay reasonable expenses, including attorneys' fees, caused by its violation. Additional details about determining this amount are below.

B. *Rule 37*

Plaintiffs also contend that Delta is subject to sanctions under *Rule 37(b)(2)* & *(c)(1)*.

1. Subsection (b)(2)

Plaintiffs assert that *subsection (b)(2)* applies because "Delta's failure to produce these documents prior to the deadline set by the Court amounts **[**50]** to a failure to comply with this Court's discovery Orders." Delta disagrees, arguing that it has not willfully disobeyed a discovery order compelling production of specific materials or information.

Subsection (b)(2) provides,

> ***HN3***[] (A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—*fails to obey an order to provide or permit discovery*,

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[13] As made clear throughout this Order, issues with document production have hounded Delta from the beginning of this litigation and since it received the DOJ's bag-fee CID. Nevertheless, Delta repeatedly represented to the Court and Plaintiffs that it had produced "a full and complete record." Time has proved those representations to be woefully inaccurate.

> including an order under *Rule 26(f)*, *35*, or *37(a)*, the court where the action is pending may issue further just orders. They may include the following:
>
> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
> (iii) striking pleadings in whole or in part;
> (iv) staying further proceedings until the order is obeyed;
> (v) dismissing the action or proceeding in whole or in part;
> (vi) rendering a default judgment against the disobedient party; or
>
> (vii) treating as contempt of court the failure to obey any order except **[**51]** an order to submit to a physical or mental examination.
>
> . . . .
>
> (C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(Emphasis added.) The key phrase in this subsection is "fails to obey an order to provide or permit discovery." Plaintiffs contend that Defendants violated (1) the Court's May 13, 2010 order that required Defendants to complete their production in response to Plaintiffs' first document requests **[*1354]** on or before June 30, 2010, and (2) the initial case management order that set forth a December 15, 2010 deadline for document production by all parties.

Delta responds that general discovery orders like the ones mentioned above are not sufficient to trigger application of *subsection (b)(2)*, especially where a party, like it, has complied in part with the general directives.

The parties have provided neither persuasive nor binding authority as to whether an order setting a deadline for a party to **[**52]** respond to a discovery request or a scheduling order qualifies as an order providing for or permitting discovery under *subsection (b)(2)*. [14] Indeed, based on the Court's own research, the facts of this case are not similar to the facts in most cases addressing *subsection (b)(2)*. Here, Delta was producing documents in response to Plaintiffs' first document requests, and the parties' counsel were engaged in continuing discussions regarding the scope of the requests. Thus, unlike the orders in most of the cases within the Eleventh Circuit interpreting *subsection (b)(2)*, the May 13 order in this case was not issued as a result of a party's refusal to produce documents or respond to a discovery request. *See* *Brooks v. United States, 837 F.2d 958, 961 (11th Cir. 1988)* (stating in dicta that *Rule 37(b)(2)* did not support sanctions where "there had been no failure to cooperate following an order to compel and failure to comply"); *BankAtlantic, 12 F.3d 1045, 1052 (11th Cir. 1994)* (imposing sanctions under *Rule 37(b)(2)* where court issued an order compelling defendant to produce documents and defendant failed to comply with that order); *SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., Civil Action File No. 1:04-cv-641-JEC, 2008 U.S. Dist. LEXIS 5490, 2008 WL 228032, at *1 (N.D. Ga. Jan. 25, 2008)* **[**53]** (imposing sanctions under *(b)(2)* where defendant failed to obey court's order compelling defendant to produce certain documents). In contrast to those three cases, the May 13 order in this case was issued to address Plaintiffs' concern that production would take too long and that they would not have sufficient time to analyze all of the documents before the discovery period closed. Thus, the Court set the June 30 deadline to ensure that Defendants timely produced the documents in response to Plaintiffs' document requests. Such an order more closely resembles a scheduling order than an

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[14] Delta relies on *R.W. International Corp. v. Welch Foods, Inc., 937 F.2d 11, 16 (1st Cir. 1991)*, for the proposition that a district court's scheduling order is not a discovery order for purposes of *subsection (b)(2)*. While the First Circuit did reject the defendants' argument that the general scheduling order qualified as an order providing for or permitting discovery, its decision was strongly influenced by the fact that the district court dismissed the case pursuant to *subsection (b)(2)*. The sanction of dismissal is considered an extremely harsh sanction, and it is not one that Plaintiffs seek in this case. Consequently, the Court finds *R.W. International* inapposite.

order "to provide or permit discovery." [15] Additionally, the initial case management order only sets a deadline for the **[*1355]** discovery period, which is also more like a scheduling order than an order providing for or permitting discovery. In light of the generic nature of these orders and the Court's conclusion that sanctions are appropriate under *Rule 37(c)(1)*, which incorporates the *Rule 37(b)(2)* sanctions, it is unnecessary to resolve whether the initial case management order and May 13 order qualify as orders providing for or permitting **[**54]** discovery and whether *subsection (b)(2)* applies.

2. Subsection (c)(1)

As with their *Rule 26(g)* arguments, Plaintiffs contend that Delta's conduct violated *Rule 37(c)(1)*, which incorporates obligations imposed under *Rule 26(e)*, because Delta failed to act reasonably under the circumstances, i.e., its failure to produce the documents was not substantially justified. Specifically, Plaintiffs assert that under *Rule 26(e)(1)(B)*, sanctions are appropriate because Delta failed to produce responsive documents as ordered by the Court.

Delta responds that Plaintiffs have failed to show that *Rule 37(c)(1)* sanctions are appropriate because they have neither (1) identified the information that it failed to provide in keeping with *Rule 26(e)*, nor (2) shown that it did not act in accordance with the rule. Specifically, Delta asserts that *Rule 26(e)(1)(A)* requires it to correct or supplement responses "in a timely manner," and that it did this **[**56]** when it immediately notified Plaintiffs and the Court of the recently discovered documents and immediately began producing those documents.

Turning to *subsection (c)(1)*, it provides,

> ***HN4***[] (1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by *Rule 26(a)* or *(e)*, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions, including any of the orders listed in *Rule 37(b)(2)(A)(i)-(vi)*.

Rule 26(a) addresses Delta's obligations with respect to initial disclosures, and *Rule 26(e)* addresses Delta's obligations to supplement disclosures and discovery responses, including its responses to Plaintiffs' document requests. Plaintiffs believe that *Rule 37(c)(1)* applies because Delta has violated its obligations under *Rule 26(e)*, **[**57]** which states in pertinent part,

> ***HN5***[] (1) *In General.* A party who has made a disclosure under *Rule 26(a)*—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:
> (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
> (B) as ordered by the court.

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[15] Review of *Fed. R. Civ. P. 16(f)* and supporting case law suggests that *Rule 16(f)* is a more appropriate vehicle for seeking sanctions where a party has violated a scheduling order. *See* *Guimaraes, 366 F. App'x at 54* ("Under *Rule 16(f)*, a court may impose sanctions if a party or its attorney violates a scheduling order or other pretrial order, including a discovery order."). However, the Court will not address *Rule 16(f)* sanctions, even though it could sua sponte, since **[**55]** that subsection permits sanctions substantially similar to those permitted by *Rule 37(c)*, which the Court finds applicable below. *See* *Brooks, 837 F.2d at 961* (stating that *Rule 16(f)* authorizes district court on motion or sua sponte to impose sanctions for failure to comply with scheduling or pretrial order).

Thus, Delta was required to supplement its discovery responses in a timely manner when it learned that its previous document production was incomplete or when ordered by the Court to supplement or correct its responses. Failure to do either can result in sanctions under *Rule 37(c)(1)*.

[*1356] Plaintiffs argue that if Delta had conducted a reasonable investigation into the location of the hard drives and back-up tapes within its control, it would have discovered the existence of these new documents prior to the DOJ's February 2011 letter. Plaintiffs assert that a reasonable investigation would have involved Delta's ensuring prior to the close of discovery **[**58]** that it had (1) run all of the captured hard drives through Clearwell, and (2) searched the CSIRT evidence locker for additional back-up tapes. Plaintiffs contend that by not doing these things, Delta's production of the recently discovered documents was not timely under *Rule 26(e)(1)(A)*, and consequently sanctions under *Rule 37(c)(1)* are appropriate.

Plaintiffs also assert that the Court's May 13 order setting the June 30 production deadline qualifies as an order by the Court to supplement disclosure under *Rule 26(e)(1)(B)*, and that Delta failed to comply with that order when it failed to produce the recently discovered documents, which have always been in its possession. Thus, Plaintiffs contend that Delta violated *subsection (B)* and sanctions under *Rule 37(c)(1)* are appropriate. The Court finds that this argument distorts the nature of the May 2010 order that established a deadline, but did not order Delta to supplement its responses. Thus, the Court will evaluate this argument and the above arguments under *subsection (A)*.

Finally, Plaintiffs assert that Delta's discovery failures are particularly egregious in light of the "repeated inquiries from the DOJ and Plaintiffs about the **[**59]** dearth of its production and the existence of backup tapes." The Court agrees. In response to these numerous inquiries, Delta unwaveringly but incorrectly maintained that "there is no collection of documents missing," and that reasonable inquiries would have prevented this entire quagmire.

Turning to whether Delta's conduct violated *Rule 26(e)(1)(A)*, neither side has provided, and the Court cannot find, case law applying *subsection (A)* to facts similar to the facts of this case. However, several cases have addressed *subsection (A)* where a party belatedly supplemented an expert report, and the Court finds the reasoning in those cases, particularly *Cochran v. Brinkmann Corp., Civil Action File No. 1:08-cv-1790-WSD, 2009 U.S. Dist. LEXIS 114895, 2009 WL 4823858, at *5 (N.D. Ga. Dec. 9, 2009)*, persuasive.

In *Cochran*, the defendant challenged the plaintiffs' disclosure of additional testing by their expert after the Court's deadline and asserted that it had been harmed by its inability to pursue discovery as a result of the plaintiffs' untimely disclosure. The plaintiffs contended that their expert had discovered shortcomings in his report, and thus they had recently learned that in some material respects his report was **[**60]** incomplete or inaccurate. Consequently, they argued that they were entitled to supplement his report under *Rule 26(e)(1)(A)*.

The Court rejected the plaintiffs' argument, characterizing it as a "tortured and self-serving" interpretation of the rule in order to introduce evidence foreclosed by the Court's orders. The Court reasoned that the purpose of the report requirement and the Court's deadlines was to "end discovery and fix for the parties the evidence and opinions with which they would have to contend at trial so a trial could be fairly and efficiently conducted." *2009 U.S. Dist. LEXIS 114895, 2009 WL 4823858, at *5*. The Court found that allowing the plaintiffs' tortured interpretation of *Rule 26(e)* would "hopelessly and unfairly frustrate[]" the rule's purpose and the Court's efforts. *Id.* The Court determined that although the plaintiffs' expert had been retained months in advance of the deadline, the expert failed to conduct testing to formulate his report prior **[*1357]** to the deadlines. *2009 U.S. Dist. LEXIS 114895, [WL] at 6*. As a result, the Court found that *Rule 26(e)(1)(A)* precluded the plaintiffs' belated supplementation, as doing so would have allowed the plaintiffs to circumvent the Court's deadlines. *Id.*

The *Cochran* Court also determined **[**61]** that the plaintiffs' failure to conduct the testing and to offer the opinions based thereon before the deadline was not substantially justified, and the late testing and disclosures were not harmless. Accordingly, the Court found sanctions appropriate under *Rule 37(c)(1)*. *2009 U.S. Dist. LEXIS 114895, [WL] at 7*.

Like the *Cochran* plaintiffs, Delta tortures the meaning and purpose of *Rule 26(e)* by suggesting that it timely produced the recently discovered documents (always in its possession) after the Court's deadline. Just like the discovery deadlines in *Cochran* and made clear to Delta by the Court, the June 30 deadline established by the May 13 order was important to moving the case forward. Furthermore, there were extensive conversations between the parties and the Court about Delta's document production and the existence of back-up tapes. And in response to every inquiry and challenge, Delta represented that it had produced every requested document in its possession. Indeed, in its brief in opposition to Plaintiffs' motion for spoliation sanctions, Delta represented, "There is no evidence that *any* document regarding Delta's decision to adopt a first bag fee in 2008 has not been produced by Delta to Plaintiffs."

Now, **[**62]** Delta asks the Court and Plaintiffs to believe that it was unaware of the existence of the new documents in its possession the entire time. Even if true, it is only because Delta was not diligent in ensuring that the relevant hard drives were searched. Delta's counsel did resend to CSIRT the list of custodians' hard drives that should have been run through Clearwell for CSIRT to confirm that those hard drives were uploaded. However, CSIRT's reply email does not actually confirm that each identified person's hard drive was run through Clearwell. Delta has not identified other steps it took to ensure that all of the hard drives were in fact uploaded for processing through Clearwell, nor has it shown that it was impossible or unduly burdensome for it to determine which hard drives were and were not passed through Clearwell. Thus, as with the expert in *Cochran* who was retained months in advance but not diligent about conducting testing before the deadline, Delta was always in possession of the recently produced documents on the hard drives and back-up tapes, but it was not diligent in locating them.

Delta was also dilatory in determining the existence of additional back-up tapes. Given **[**63]** the extensive discussions about the back-up tapes, Delta's counsel should have inspected the evidence locker prior to March 2011 and ceased to rely solely on CSIRT's representations that there were no other back-up tapes. *See Martinez v. Rycars Constr., LLC, No. CV410-049, 2010 U.S. Dist. LEXIS 142998, 2010 WL 6592942, at *2 (S.D. Ga. December 2, 2010)* ("An incomplete report cannot be cured by the use of supplementation . . . . Supplementation of an expert report pursuant *Rule 26(e)* does not cover failures of omission because the expert did an inadequate or incomplete preparation.") (alteration in original).

Thus, as found in *Cochran*, ***HN6***[] *Rule 26(e)* does not forgive Delta's failure to timely conduct an adequate and complete search for responsive documents. Even though *subsection (A)* required Delta to supplement incorrect or incomplete information, it does not grant Delta a "right to produce information in a belated fashion." *3M Innovative Props. Co. v. Dupont Dow Elastomers, LLC, Civil No. 03-3364 (MJD/JGL), 2005 U.S. Dist. LEXIS 47972, 2005 WL 6007042, at *4* ***[*1358]*** *(D. Minn. Aug. 29, 2005)*. In short, *Rule 26(e)* does not provide Delta a "safe harbor for [its] lack of diligence." *Id.* (Internal quotations omitted.) Consequently, Delta's recent and belated **[**64]** document production violated this Court's deadlines, was not timely, and runs afoul of *Rule 26(e)*. Consequently, the Court must determine whether sanctions are appropriate under *Rule 37(c)(1)*.

As sanctions, Plaintiffs request an award of their fees and expenses incurred in connection with (1) this motion, (2) the portion of the discovery period that must now be extended, and (3) Plaintiffs' motion for spoliation sanctions. They also contend that Delta should be barred from using any of the recently produced documents as evidence during any proceeding.

The Court first addresses whether Delta can use the recently produced documents as evidence in connection with any motion or at trial. ***HN7***[] Under *Rule 37(c)(1)*, a party who fails to provide information as required by *Rule 26(e)* is not allowed to use that information unless its failure was substantially justified or is harmless. "[A]n individual's discovery conduct should be found 'substantially justified' under *Rule 37* if it is a response to a 'genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.'" *Devaney v. Cont'l Am. Ins. Co., 989 F.2d 1154, 1163 (11th Cir. 1993)* (quoting *Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988))*. **[**65]** "A discovery mistake is harmless if it is honest, and is coupled with the other party having sufficient knowledge that the material has not been produced." *Go Med. Indus. Pty, Ltd. v. Inmed Corp., 300 F. Supp. 2d 1297, 1308 (N.D. Ga. 2003)*.

Exclusion, however, is not mandatory. *See* Bearint ex rel. Bearint v. Dorell Juvenile Grp., Inc., 389 F.3d 1339, 1348 (11th Cir. 2004) (Rule 37(c)(1) gives district courts "discretion to exclude untimely submissions."). Rule 37(c)(1) provides that in addition to or instead of excluding the late-produced information, the Court may order a party to pay the reasonable expenses caused by its failure; inform the jury of the party's failure; or impose other appropriate sanctions, including those listed in Rule 37(b)(2)(A)(i)-(iv).

The facts of this case do not warrant a sanction precluding Delta's use of the recently produced documents. Even though Delta was dilatory in locating these documents, Delta immediately informed the Court and Plaintiffs about its discovery of the additional documents and asked the Court to suspend the case schedule, which the Court did. In addition, the prejudice to Plaintiffs is mitigated by the revised case schedule, which includes **[**66]** additional discovery time and adjusted summary judgment deadlines, established in this Order. *Cf.* SCQuARE, 2008 U.S. Dist. LEXIS 5490, 2008 WL 228032, at *3 (finding preclusion appropriate in part because undisclosed documents would have changed court's decision with respect to motions for summary judgment). Furthermore, there is no evidence that Delta willfully withheld production of these documents, and there is no smoking gun of which the Court is aware at this point contained within the new documents. Consequently, a sanction preventing Delta from using these documents is not appropriate. *See* BFI Waste Sys. of N. Am. v. DeKalb Cnty., Ga., 303 F. Supp. 2d 1335, 1344-45 (N.D. Ga. 2004) (permitting plaintiff to use late-produced expert report where plaintiff produced report as soon as plaintiff received it and defendants had not shown they were prejudiced).

The Court finds that a more appropriate sanction would be to require Delta to pay Plaintiffs' reasonable expenses and attorneys' fees caused by Delta's failure, which includes Plaintiffs' request for fees and expenses related to this motion, the **[*1359]** extended discovery period, and its motion for spoliation sanctions. Delta made myriad misrepresentations to the **[**67]** Court and Plaintiffs that its document production was complete, and it waited almost two weeks to inform the Court of the problems with its document production. Conveniently for Delta, the Court issued its order denying Plaintiffs' motion for spoliation sanctions on February 22, 2011, which was after Delta received the DOJ's letter but before Delta's March 1 letter to the Court. Moreover, Delta emailed the Court a letter on February 22, after it had received the DOJ's letter, in further support of its opposition to Plaintiffs' motion for spoliation sanctions, and this letter is silent as to the document-production problem. Indeed, the letter states that Delta "agrees with Plaintiffs that further discovery on [spoliation] issues is not necessary." Thus, the Court finds the above sanction amply warranted by the facts.

As for determining the amount of fees and expenses [16] owed to Plaintiffs by Delta, the Court strongly expects Plaintiffs and Delta to confer and agree on a reasonable amount for Plaintiffs' expenses and fees incurred in connection with (1) the motion for spoliation sanctions, and (2) this motion. If Plaintiffs and Delta cannot agree on a reasonable amount for these expenses **[**68]** and fees, then on or before February 17 Plaintiffs shall file a brief in support of their claim for expenses and fees, accompanied by the affidavit of Plaintiffs' lead counsel attesting to the requested amount and reasonableness thereof; on or before March 3, Delta shall file a brief in opposition to Plaintiffs' request for expenses and fees; and on or before March 17 Plaintiffs may file a reply brief in support of their claim for expenses and fees. The parties are cautioned that any such submissions should be succinct, and not voluminous.

At the conclusion of the extended discovery period, the Court strongly expects Plaintiffs and Delta to confer and agree on a reasonable amount for Plaintiffs' expenses and fees incurred in connection with the extended discovery period. If Plaintiffs and Delta cannot agree on a reasonable amount for these expenses and fees, then within fourteen days of the close of the extended discovery period Plaintiffs shall file a brief in support of their claim for expenses **[**69]** and fees, accompanied by the affidavit of Plaintiffs' lead counsel attesting to the requested amount and reasonableness thereof; fourteen days after Plaintiffs' filing, Delta shall file a brief in opposition to Plaintiffs' request for expenses and fees; and fourteen days after Delta's filing Plaintiffs may file a reply brief in support of their claim for expenses and fees. Again, the parties are cautioned that any such submissions should be succinct, and not voluminous.

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[16] To be clear, the Court is awarding expenses and fees for (1) this motion, (2) the portion of the discovery period that must now be extended, and (3) Plaintiffs' motion for spoliation sanctions.

VIII. Plaintiffs' Issues with AirTran

As if the foregoing were not enough to wade through and resolve, Plaintiffs also have issues with AirTran's document production. In its first letter to the Court, Plaintiffs do not mention AirTran. Thus, by letter dated August 2, AirTran informed the Court that its review of Plaintiffs' letter indicated to it that the reopened discovery would only apply to Delta, and that to the extent Plaintiffs also sought its communications with the DOJ, it would not produce future correspondence. It also expressed its opinion that the newly produced documents failed to show that Delta and AirTran colluded on the first-bag fee.

[*1360] However, by letter dated August 5, Plaintiffs informed the Court that **[**70]** AirTran had belatedly produced several of its communications with the DOJ related to the first-bag-fee investigation (125 pages of documents) and thus the following was necessary: (1) reopening discovery as to AirTran limited to the 125 pages; (2) ordering AirTran to search the files of two custodians, Fred Cannon and June Ritter, whose relevance to Plaintiffs' claims was revealed in the new documents; and (3) ordering AirTran to produce ongoing communications with the DOJ related to the first-bag-fee investigation. Plaintiffs have not provided a separate case schedule for AirTran, and their proposed case schedule only mentions Delta. Thus, the Court presumes Plaintiffs want the same schedule it proposed for Delta to apply to AirTran.

On August 23, AirTran responded to Plaintiffs' August 5 letter, and on August 30, Plaintiffs addressed AirTran's response. Their respective arguments are discussed below.

A. AirTran's DOJ Documents

AirTran objects to discovery being reopened for Plaintiffs to pursue discovery related to the 125 pages of documents it produced in May 2011. It contends that Plaintiffs had agreed with it that communications between its attorneys and the DOJ were not included **[**71]** in Plaintiffs' document requests, and that it was not until May 2011, after discovery closed, that Plaintiffs "pressed AirTran for all its prior communications with the DOJ." [17] AirTran asserts that rather than object to Plaintiffs' request, it chose to produce the documents and avoid involving the Court in another discovery dispute. Thus, it contends that these documents were not "belatedly" produced.

AirTran's argument is meritless. In their first document request, Plaintiffs asked for:

> Since January 1, 2009, documents relating to any investigation by a government agency (including the Department of Justice) that relates to any allegation in Plaintiffs' Consolidated Amended Complaint, *including documents provided to or received from the agency*, documents reflecting testimony, and communications with third parties (including, but not limited to, Delta).

(Emphasis **[**72]** added.) On its face, this request includes communications between AirTran's counsel and the DOJ. Moreover, as discussed below, any ambiguity was resolved by the parties' subsequent communications.

On March 11, 2010, AirTran's response/objection to the above request for production was:

> AirTran will produce the documents and privilege log it produced to the [DOJ] in connection with its checked baggage fee investigation and documents reflecting testimony of its employees in that investigation. AirTran objects to the remainder of this request as overbroad and unduly burdensome to the extent it requires AirTran to speculate on what documents not produced to the [DOJ] in connection with its checked baggage fee investigation might be deemed to relate to that investigation.

Noticeably absent from this response/objection is any objection to the production of AirTran's correspondence with the DOJ. Nonetheless, in its August 23 letter to the Court, AirTran incorrectly claims that it "produced the

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[17] As for Plaintiffs' "pressing," on May 12, 2011 Plaintiffs asked, "Has AirTran produced to Plaintiffs all of its correspondence with the DOJ?"

documents and transcripts it had produced to the DOJ and objected to producing other materials submitted to **[*1361]** the DOJ." AirTran also claims in its August 23 letter that "Plaintiffs did not challenge that **[**73]** objection and instead reached an agreement on the scope of the request that did not include counsel's correspondence to the DOJ." Review of the parties' emails, though, shows this statement to be false.

On March 24, 2010, Plaintiffs' counsel emailed to AirTran's counsel a summary of their discussion about AirTran's responses to Plaintiffs' first document requests. Plaintiffs' counsel wrote, "AirTran will produce responsive non-privileged communications to other entities and will [reflect] any privileged communications on a privilege log. AirTran will also produce documents received from the DOJ Antitrust Division." In its March 26 email response, AirTran added only the following to Plaintiffs' summary: "AirTran understands 'documents received from the DOJ Antitrust Division' to mean the CID and any other documents it received from the Division in connection with the bag fee investigation." Nothing in these communications excludes from production correspondence between AirTran and the DOJ.

Yet in its August 23 letter to the Court, AirTran contends that this "modified scope . . . did not call for AirTran to produce its counsel's submissions to the DOJ, just the documents AirTran had received **[**74]** from the DOJ" because "the phrase 'other entities' refers to entities other than the DOJ." The actual words of Plaintiffs' summary and AirTran's initial response/objection belie AirTran's new-found interpretation of the scope. As for the meaning of "other entities," AirTran's initial response/objection only mentions the DOJ, so it hardly makes sense that a clarification of the scope of the request, only two weeks after AirTran's response, would exclude the DOJ. As for Plaintiffs' summary, it explicitly mentions communications and does not exclude counsel's communications, and AirTran has not raised a privilege argument of which the Court is aware with respect to any of the communications. Thus, AirTran's August 23 interpretation is flawed.

Regardless of how Plaintiffs' summary is interpreted, any remaining doubt as to the scope of Plaintiffs' first document request was eliminated a few months later. On November 26, 2010, prior to the close of discovery, Plaintiffs' counsel emailed the following to AirTran: "Can you please confirm that AirTran has produced to Plaintiffs all of its communications with the DOJ regarding the DOJ's bag fee investigation, including but not limited to any **[**75]** communications between AirTran's attorneys [18] and the DOJ regarding document preservation[?]" This email explicitly asks AirTran for all DOJ documents, including attorney communications. Nothing in Plaintiffs' question suggests, as AirTran does in its August 23 letter, that the parties "reached an agreement on the scope of the request that did not include [AirTran's] counsel's correspondence to the DOJ."

Consequently, AirTran's November 30, 2010 response to Plaintiffs' question—"AirTran has no communications with the DOJ in its files regarding the DOJ's bag fee investigation that have not already been produced to the Plaintiffs"—is incorrect. Furthermore, AirTran's August 23 explanation that "[b]ecause the DOJ has never raised document preservation issues with AirTran, and because AirTran had produced all DOJ correspondence within the modified scope of Plaintiffs' Requests **[**76]** No. **[*1362]** 1 and 2, AirTran told Plaintiffs that AirTran had already produced all responsive DOJ communications" is meritless. AirTran's November 30 response unequivocally stated that it had *no communications* with the DOJ that had not already been produced; AirTran did not hedge, as it does in its August 23 letter, which states that AirTran produced all *responsive* DOJ communications. Quite simply, AirTran should have produced these documents earlier, but did not. Consequently, Plaintiffs have shown good cause for reopening discovery as to AirTran.

B. Files of Cannon and Ritter

AirTran also objects to searching the files of Cannon and Ritter because it contends that these individuals' involvement was apparent in other discovery responses, and thus Plaintiffs should have requested their files

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[18] Nothing in Plaintiffs' document request or in this statement limits Plaintiffs' document request to correspondence with AirTran's in-house counsel. Thus, AirTran's contention in its August 23 letter that it "had no obligation to produce to Plaintiffs its outside counsel's correspondence to the DOJ" is without merit.

sooner. AirTran primarily relies on emails already produced to Plaintiffs showing that Cannon and Ritter were invited and accepted the invitation to the bag-fee-decision meeting. AirTran also contends that even if Cannon's and Ritter's files are relevant, the estimated cost of searching those files (in excess of $50,000) outweighs the likely evidentiary value of any documents ultimately produced.

Plaintiffs **[**77]** disagree and contend that the recently produced documents "more strongly suggest the relevance of these two custodians than previously produced documents, and AirTran should be ordered to search their files." They assert that not everyone invited to the meeting attended, and it was not until they received the new documents that they confirmed that Cannon and Ritter had attended. Plaintiffs also assert that their request is not burdensome because they initially "agreed to the original limited custodian list based on AirTran's agreement to add additional relevant custodians upon Plaintiffs' request." The Court is persuaded by Plaintiffs' arguments and will order AirTran to search Cannon's and Ritter's files. *See* *Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1576 (11th Cir. 1985)* (***HN8***[] "district court has broad discretion in all discovery matters" (internal quotations omitted)); *Nat'l Indep. Theater Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602, 609 (11th Cir. 1984)* ("A trial judge has broad discretion to control the course of discovery, especially in a complex antitrust case such as this one . . . .").

C. Additional Discovery

The Court will grant Plaintiffs' request to **[**78]** reopen discovery, limited to the documents produced by AirTran after the close of original discovery. This includes but is not limited to the 125 pages produced in May 2011. The Court will also order AirTran to search the files of Cannon and Ritter. Neither Plaintiffs nor AirTran has addressed how long the new discovery period as to AirTran should last, but the Court finds that it should be less than four months. Plaintiffs seek four months as to Delta, which produced 60,000 documents, whereas AirTran belatedly produced significantly fewer documents and is being ordered to search the files of only two additional custodians. Therefore, a shorter discovery period is appropriate.

However, Plaintiffs' additional discovery requests should be narrowly targeted to avoid duplicating discovery that was or could have been conducted during the original discovery period. Discovery will reopen immediately and end three months from the date of this Order. Additional details are set forth below.

IX. Defendants' Correspondence with the DOJ

Plaintiffs also seek from Defendants all future correspondence with the DOJ related to the DOJ's first-bag-fee investigation. Plaintiffs contend that Defendants **[*1363]** should **[**79]** produce these documents because their request is narrowly tailored and seeks relevant evidence. Specifically, Plaintiffs state that their request is limited to the DOJ's first-bag-fee investigation, and prior productions have already shown that the request is reasonably calculated to lead to the discovery of admissible evidence.

Both Delta and AirTran contend that the DOJ's bag-fee investigation is confidential pursuant to *15 U.S.C. § 1313(c)*. AirTran argues that this confidentiality statute means that Plaintiffs must make a particularized showing of relevance and need before the statutory confidentiality is breached. Relying on *In re Urethane Antitrust Litigation, No. 04-md-1616-JWL, 2010 U.S. Dist. LEXIS 134110, 2010 WL 5287675, at *7 (D. Kan. Dec. 17, 2010)*, in which the court denied the defendants' motion to compel because they did not show that the federal government's investigation into a possible conspiracy by plaintiffs was relevant, Delta argues that Plaintiffs seek its communications with the DOJ solely to gain some tactical advantage, which is both unfair and abusive.

Defendants also argue that they have already provided to Plaintiffs the documents and testimony that they provided to the DOJ for its first-bag-fee **[**80]** investigations, and thus Plaintiffs have complete access to the factual evidence surrounding Delta's and AirTran's decisions to adopt a first-bag fee. So, they conclude that it would be unfair to permit Plaintiffs to go beyond factual discovery and pry into communications between Defendants' counsel and the DOJ.

In addition, Defendants assert that Plaintiffs are in regular contact with the DOJ, and AirTran argues that Plaintiffs have "never treated lawyer-to-lawyer communications with the DOJ to be responsive to requests directed to the parties." Thus, AirTran contends that it is inconsistent to permit Plaintiffs to see Defendants' communications with the DOJ when Plaintiffs have not produced their own communications with the DOJ. [19]

Plaintiffs respond that Defendants have not articulated any defense or privilege **[**81]** that justifies their withholding future correspondence with the DOJ. Plaintiffs also argue, relying on *In re Domestic Air Transportation Antitrust Litigation, 141 F.R.D. 556, 559-60 (N.D. Ga. 1992)*, that there is in fact no defense or privilege that supports Defendants' position.

HN9[] In general, "'where the proof is largely in the hands of alleged conspirators,' antitrust plaintiffs must be given 'ample opportunity' for discovery." *In re NASDAQ Market-Makers Antitrust Litig., 929 F. Supp. 723, 725 (S.D.N.Y. 1996)* (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976))*. In *Domestic Air, 141 F.R.D. at 559-60*, the antitrust plaintiffs' document request sought

> All documents received from or produced by you to any governmental entity relating to civil investigative demands . . . . Included within this request are any civil investigative demands, . . . and document requests themselves, any correspondence or other documents concerning the scope of the production under such demands . . . and any indices of the documents requested, gathered, produced to the government in response to any such investigatory request.

[*1364] The defendants in *Domestic Air* refused to produce copies of any government **[**82]** CIDs, CID interrogatories, and their answers to the interrogatories on the grounds that such information was confidential. The court rejected their argument, finding that ***HN10***[] in the Antitrust Civil Process Act ("ACPA"), *15 U.S.C. § 1311 et seq.*, *section 1313(c)* was the only restriction on the production of documents obtained in response to a CID and that *§ 1313(c)* restricted disclosure "only by the officer to whom the report is made," i.e., the DOJ. Thus, the court determined that there was no provision of the ACPA that restricted production of the copies retained by the reporter, i.e., the defendants. Consequently, the court granted the antitrust plaintiffs' motion to compel the defendants to produce the requested documents.

Similarly, in *NASDAQ, 929 F. Supp. at 725-26*, the court determined that the ACPA did not prevent the antitrust defendants (the producing parties) from producing CID materials or the CIDs themselves to the plaintiffs. It also noted that the few cases that have addressed this issue have come down squarely in favor of compelling the production of CID materials in the hands of defendants.

Thus, it is clear from *NASDAQ* and *Domestic Air* that the ACPA and *§ 1313(c)* do not **[**83]** protect Defendants' CID correspondence with the DOJ about the first-bag-fee investigation.

Disclosure of CID materials, though, has its limits. The *NASDAQ* court held that the ACPA did not mandate the disclosure of all CID materials. Rather, their discovery was permissible only where they would otherwise be discoverable under the *929 F. Supp. at 726*. As in this case, the defendants in *NASDAQ* challenged the Federal Rules of Civil Procedure. relevancy of the CID materials under *Rule 26*, and the court determined that the CID materials were relevant to "liability and damages and potential impeachment material and [could] lead to the discovery of other admissible evidence." *Id. at 725*. Consequently, the *NASDAQ* court held that the requested CID materials were discoverable because they were relevant and not privileged.

Here, Plaintiffs assert that the requested CID materials are relevant pursuant to *Rule 26(b)*, as they have already led, and will likely again lead, to the discovery of admissible evidence. AirTran summarily asserts in one sentence that Plaintiffs must make a "particularized showing of relevance and need"; however, other courts that have

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[19] The current letters before the Court do not indicate whether Delta or AirTran has specifically asked for Plaintiffs' communications with the DOJ, and only AirTran discusses the fact that Plaintiffs allegedly have not produced their own communications with the DOJ. Thus, neither side has addressed whether the rules permit or require Plaintiffs to produce these communications.

addressed this issue have rejected arguments **[**84]** that a showing of "particularized need" is necessary to obtain CID materials. *See* *NASDAQ, 929 F. Supp. at 726* (citing *In re Domestic Air Transp. Antitrust Litig. (Domestic Air II), 142 F.R.D. 354, 356 (N.D. Ga. 1992)*, and *In re Air Passenger Computer Reservation Sys. Antitrust Litig., 116 F.R.D. 390, 393 (C.D. Cal. 1986))*.

Delta contends that Plaintiffs want its communications with the DOJ solely to gain a tactical advantage, which is unfair and abusive. Presumably, its objection invokes the protection afforded by ***HN11***[] *Rule 26(b)(2)*, which delineates the limits on the frequency and extent of discovery requests. In support of its contention, Delta relies on the antitrust case, *Urethane, 2010 U.S. Dist. LEXIS 134110, 2010 WL 5287675, at *7*; however, *Urethane* is inapposite. There, the defendants (not plaintiffs) sought an order from the court compelling the plaintiffs to respond to their broad request for any documents that the plaintiffs had provided to any government agency related to any investigation into violations of ***antitrust law*** by the plaintiffs. In denying the defendants' motion, the court did not find their broad document request to be unfair and abusive, as Delta asserts. Rather, the court determined **[*1365]** that the **[**85]** defendants failed to show how their request was relevant to a claim or defense. Here, Plaintiffs' request, which is limited to the DOJ and its first-bag-fee investigations, is significantly narrower than the request in *Urethane*. Moreover, Plaintiffs have shown that their request is relevant, and Delta makes no argument that the request is irrelevant. Thus, *Urethane* is not on point.

Defendants have not shown that any other Federal Rule of Civil Procedure prevents disclosure of their CID correspondence with the DOJ about the first-bag-fee investigations. Accordingly, the Court will grant Plaintiffs' request for all CID materials related to the first-bag fee investigation produced by Defendants to the DOJ, including correspondence, subject to the Federal Rules of Civil Procedure.

X. Supplemental Class Certification Brief

Finally, in their proposed case schedule, Plaintiffs provide for themselves the opportunity to file a supplemental class certification brief. Their letters to the Court do not address why this supplemental brief is necessary, nor do they address why their proposed schedule does not permit Defendants to file responses to the supplemental brief.

Delta and AirTran object to **[**86]** Plaintiffs' request for a supplemental class certification brief. AirTran contends that if Plaintiffs determine at the close of the new discovery period that supplementation is necessary, they should confer with Defendants to determine an appropriate course of action.

The Court does not take issue with Plaintiffs' request to file a supplemental brief. However, if Plaintiffs choose to file one, Defendants will be permitted to file a response to the brief as provided below in the new case schedule.

XI. Conclusion

The Court GRANTS Plaintiffs' requests (1) to reopen discovery on a limited basis and (2) that Defendants be required to continue to produce CID materials related to the DOJ's first-bag-fee investigation. The Court also GRANTS, as sanctions pursuant to *Rules 26(g)* & *37(c)(1)*, Plaintiffs' request for reasonable expenses and fees incurred in connection with this motion, their motion for spoliation sanctions, and the extended discovery period. The Court also ORDERS AirTran to search the files of custodians Cannon and Ritter if it has not already done so, and to promptly produce to Plaintiffs all documents encompassed within Plaintiffs' document requests.

The case schedule is changed **[**87]** as follows:

(1) Discovery reopens as of the date of this Order;

(2) Ten days from the date of this Order, Plaintiffs will provide to the Court their proposed discovery as to both Defendants for this period, unless the parties can agree among themselves on the scope of Plaintiffs' additional discovery;

(3) Fourteen days from the date of this Order and as necessary thereafter, Delta and AirTran must supplement their discovery responses pursuant to *Fed. R. Civ. P. 26(e)*;

(4) On or before February 17, if Plaintiffs and Delta cannot agree on all or a portion of Plaintiffs' reasonable expenses and fees for this motion and their motion for spoliation sanctions, Plaintiffs shall file their brief and supporting documents as to the expenses and fees they and Delta cannot agree on;

(5) On or before March 3, if necessary, Delta shall file its supporting documents and brief in opposition to **[*1366]** Plaintiffs' expenses and fees for this motion and their motion for spoliation sanctions;
(6) On or before March 17, if necessary, Plaintiffs shall file their reply brief in support of their expenses and fees for this motion and their motion for spoliation sanctions;

(7) Three months from the date of this Order, discovery **[**88]** as to AirTran will close;
(8) Four months from the date of this Order, discovery as to Delta will close;
(9) Fourteen days after the close of discovery as to Delta, if Plaintiffs and Delta cannot agree on all or a portion of Plaintiffs' reasonable expenses and fees for the extended discovery period, Plaintiffs shall file their brief and supporting documents as to the expenses and fees they and Delta cannot agree on for the extended discovery period;
(10) Fourteen days after Plaintiffs' filing, if necessary, Delta shall file its supporting documents and brief in opposition to Plaintiffs' requested expenses and fees for the extended discovery period;
(11) Fourteen days after Delta's filing, if necessary, Plaintiffs shall file their reply brief and supporting documents in support of their requested expenses and fees for the extended discovery period;
(12) Three weeks after close of discovery as to Delta, summary judgment briefs and Plaintiffs' supplemental brief regarding class certification will be due;
(13) Four weeks after summary judgment briefs, opposition briefs and Defendants' briefs in response to Plaintiffs' supplemental class certification brief will be due; and

(14) Three weeks after **[**89]** opposition briefs, reply briefs will be due.

IT IS SO ORDERED this 3rd day of February, 2012.

/s/ Timothy C. Batten, Sr.

Timothy C. Batten, Sr.

United States District Judge

End of Document

In re Photochromic Lens Antitrust Litig.

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

February 7, 2012, Decided; February 7, 2012, Filed

MDL Case No.: 8:10-MD-2173-T-27EAJ

Reporter
279 F.R.D. 620 *; 2012 U.S. Dist. LEXIS 28971 **

IN RE: PHOTOCHROMIC LENS ANTITRUST LITIGATION

Subsequent History: Reconsideration denied by *In re Photochromic Lens Antitrust Litig., 2012 U.S. Dist. LEXIS 196714 (M.D. Fla., Nov. 19, 2012)*

Prior History: *In re Photochromic Lens Antitrust Litig., 2011 U.S. Dist. LEXIS 162772 (M.D. Fla., June 7, 2011)*

Core Terms

Purchaser, discovery, downstream, lenses, photochromic, products, Plaintiffs', overcharges, Indirect, Defendants', sales, wholesale, damages, records, laboratories, buying power, benefitted, ophthalmic, retailers, profits, prices, sunglasses, customer, anticompetitive conduct, class certification, class member, collects, casters

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN1[] **Discovery, Undue Burdens in Discovery**

A court must limit the scope of discovery if finds that: (1) the discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; or (2) the burden of the proposed discovery outweighs the likely benefits considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the discovery in resolving the issues. *Fed. R. Civ. P. 26(b)(2)(C)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN2[] **Vertical Restraints, Price Fixing**

Downstream discovery may include, among other things, information concerning the plaintiffs' use, manufacture, sale, marketing, distribution or supply of a product to entities and individuals lower in the distribution chain. In general, discovery of downstream information is not appropriate when a potential class of antitrust plaintiffs is seeking damages for overcharges. Price-fixing claims may not be defended by proving that the plaintiffs did not suffer damages because they were able to pass overcharges on to their downstream customers. Downstream information may be discoverable if the plaintiffs are attempting to recover damages for lost profits, or if there is a fundamental conflict of interest among class members. A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN3[] **Relevant Market, Product Market Definition**

Defining the relevant market is primarily a process of describing those groups of producers that have the ability to take significant amounts of business away from each other because of the similarity of their products. The outer boundaries of a product market are defined by the reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes. Courts should consider how the product is used by consumers in general.

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Judges: ELIZABETH A. JENKINS, United States Magistrate Judge.

Opinion by: ELIZABETH A. JENKINS

Opinion

[*621] **ORDER**

Before the court are Defendants Transitions Optical, Inc., Essilor of America, Inc., and Essilor Laboratories of America, Inc.'s **Motion to Compel** (Dkt. 209) and the Direct Purchaser Plaintiffs' **Amended Opposition** (Dkt. 220 Ex. 1). The court heard oral argument on the motion on January 25, 2012. For the reasons explained below, Defendants' motion to compel is **GRANTED** in part and **DENIED** in part.

Background

Transitions Optical, Inc. ("Transitions") purchases prescription eyeglass lenses ("ophthalmic lenses") from lens casters and applies a photochromic treatment that causes the lenses to darken when exposed to sunlight and fade back to clear when removed from sunlight ("photochromic lenses"). Transitions then sells the photochromic lenses back to lens casters, and lens casters sell the photochromic lenses to downstream markets, such as wholesale laboratories and retailers.

The Direct Purchaser **[**9]** Plaintiffs represent a potential class of wholesale laboratories and retailers that purchased Transitions products from entities owned or controlled by one of the Essilor Defendants, Essilor of America, Inc. and Essilor Laboratories of America, Inc. The Indirect Purchaser Plaintiffs represent a potential class of individuals who purchased Transitions photochromic lenses from downstream entities, such as retailers and eye-care practitioners.

The Direct and Indirect Purchaser Plaintiffs allege that they paid inflated prices for photochromic lenses as a result of Transitions's anticompetitive conduct. Transitions allegedly entered into exclusive dealing arrangements with wholesale laboratories, retailers, and lens casters and refused to deal with lens casters that sold or promoted competing products. The Essilor Defendants own or control wholesale laboratories that sell photochromic lenses. The Essilor Defendants allegedly conspired with Transitions to monopolize the relevant market and restrain trade.

The Direct Purchaser Plaintiffs assert five counts against Defendants for violation of the Sherman Act, as amended, *15 U.S.C. § 1 et seq.* The Indirect Purchaser Plaintiffs assert four counts **[**10]** against Transitions for violations of state ***antitrust law***, state unfair trade practices law, and unjust enrichment.

Discussion

The parties are currently engaged in class-certification discovery. Defendants seek to compel the Direct Purchaser Plaintiffs to produce information regarding: (1) the relationship between the Direct Purchaser Plaintiffs and purchasers lower in the distribution chain ("downstream discovery"); and (2) products other than photochromic lenses ("market discovery"). [1] The court will first **[*622]** address the Direct Purchaser Plaintiffs' general objections to Defendants' discovery requests before turning to the parties' arguments regarding downstream and market discovery.

1. The Direct Purchaser Plaintiffs' General Objections

HN1[] A court must limit the scope of discovery if finds that: (1) the discovery sought is unreasonably cumulative or duplicative or can be obtained from **[**11]** some other source that is more convenient, less burdensome, or less expensive; or (2) the burden of the proposed discovery outweighs the likely benefits considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the discovery in resolving the issues. *Fed. R. Civ. P. 26(b)(2)(C)*.

The Direct Purchaser Plaintiffs object to Defendants' discovery requests as unduly burdensome. The Direct Purchaser Plaintiffs' response includes an affidavit from Scott Clarke, O.D. ("Dr. Clarke"), a principal for Central Illinois Vision Associates, Ltd. ("CIVA"), one of the Direct Purchaser Plaintiffs (Dkt. 220 Ex. 2 at 9-10). Dr. Clarke avers that information regarding CIVA's purchases and sales are contained in patient records that are kept only in paper format. CIVA must review its records prior to production to redact protected patient information. And because tinted lenses and sunwear comprise only fifteen percent of CIVA's business, CIVA's burden would increase by a factor of seven if it were required to produce information relating to its purchases and sales of non-photochromic products, according to Dr. Clarke.

As **[**12]** discussed below, the Direct Purchaser Plaintiffs agree to produce information regarding their photochromic lens purchases. Such production will require the Direct Purchaser Plaintiffs to search their records. Dr. Clarke's affidavit does not reveal whether searching for records relating to non-photochromic products will significantly increase the burden of the search. Dr. Clarke does indicate that the burden of redacting and producing records may increase by as much as a factor of seven if non-photochromic products are included. However, there is no indication as to the number of records that might be involved or how long production might take. Even assuming that Dr. Clarke's affidavit represents the burden faced by a typical direct purchaser, the Direct Purchaser Plaintiffs have not demonstrated that their burden of production outweighs the likely benefits of discovery (discussed below) considering the importance of the issues at stake, the amount in controversy, and the parties' resources.

The Direct Purchaser Plaintiffs also contend that the information sought by Defendants can be obtained from other sources, including industry trade associations and Transitions itself. For example, **[**13]** the Direct Purchaser Plaintiffs state that The Vision Council, an industry trade association of which Defendants are members, routinely collects transactional data from multiple levels of the distribution chain and conducts comprehensive market research that it makes available to its members for free. The Direct Purchaser Plaintiffs also assert that Transitions collects sales data from many of its downstream retail and wholesale laboratory purchasers (see id. at 12-16).

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[1] A summary of the disputed discovery requests is attached as an exhibit to the declaration of Defendants' counsel, Mr. Jeffrey C. Bank (Dkt. 210 Ex. 1). The Direct Purchaser Plaintiffs dispute the accuracy of this summary and filed their own summary of the disputed discovery requests (Dkt. 220 Ex. 2 at 4-7).

There has been no showing that any industry trade association data is sufficient to permit the parties to conduct the market analyses required to address class certification or the merits of the Direct Purchaser Plaintiffs' claims. Certainly, at this stage of discovery, it is possible that an individualized inquiry will be necessary to determine whether potential class members share common questions of law or fact and whether the named Direct Purchaser Plaintiffs' claims are typical of those of other class members.

As to the customer data collected by Transitions, a review of Transitions's customer agreements indicates that Transitions collects information relating to the total number of lenses its customers sell each **[**14]** month (id.). **[*623]** The agreements do not indicate that Transitions collects pricing data or information regarding the dollar amount of its customers' sales (Dkt. 221). As a result, neither the trade association data nor Transitions's customer data justify limiting the scope of discovery from the Direct Purchaser Plaintiffs.

2. Downstream Discovery

HN2[] Downstream discovery may include, among other things, information concerning the plaintiffs' use, manufacture, sale, marketing, distribution or supply of a product to entities and individuals lower in the distribution chain. See *In re Vitamins Antitrust Litig., 198 F.R.D. 296, 297 (D.D.C. 2000)*. In general, discovery of downstream information is not appropriate when a potential class of antitrust plaintiffs is seeking damages for overcharges. See *In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2010 U.S. Dist. LEXIS 125623, 2010 WL 4916723, at *2 (E.D.N.Y. Nov. 24, 2010)*; *In re Vitamins, 198 F.R.D. at 300-01*. This rule stems from Supreme Court decisions holding that price-fixing claims may not be defended by proving that the plaintiffs did not suffer damages because they were able to pass overcharges on to their downstream customers. *In re Air Cargo, 2010 U.S. Dist. LEXIS 125623, 2010 WL 4916723, at *2* **[**15]** (citing *Ill. Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* and *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968))*. One consideration underlying the Supreme Court's decision to bar the "pass-on" defense was an unwillingness to complicate cases with attempts to trace the effect of overcharges on the plaintiffs' prices, sales, costs, and profits. See id. (citing *Ill. Brick Co., 431 U.S. at 725*).

Downstream information may be discoverable if the plaintiffs are attempting to recover damages for lost profits, see *In re Air Cargo, 2010 U.S. Dist. LEXIS 125623, 2010 WL 4916723, at *4* (citing Air Tech Equip., Ltd. v. Humidity Ventilation Sys., Inc., No. 05-CV-77 CPS, 2006 U.S. Dist. LEXIS 80198, 2006 WL 3193720, at *2 (E.D.N.Y. Nov. 2, 2006)), or if there is a fundamental conflict of interest among class members, see *Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1192-93 (11th Cir. 2003)*. "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." *Id. at 1189*.

Defendants argue that downstream discovery should be allowed because a conflict of interest may exist among potential direct purchaser class members. According to Defendants, some direct **[**16]** purchasers might have benefitted from Defendants' alleged anticompetitive conduct by receiving discounts pursuant to the exclusive agreements. However, the Direct Purchaser Plaintiffs aver that none of the named Plaintiffs — the entities from which downstream discovery is sought — benefitted from Defendants' anticompetitive conduct because none of the named Plaintiffs entered into the exclusive agreements that are the source of the alleged benefit.

In seeking downstream discovery, Defendants rely on Valley Drug where the Eleventh Circuit allowed the defendants to take downstream discovery to determine whether the most significant plaintiffs, including three wholesalers whose transactions accounted for over fifty percent of the plaintiffs' total claims, received a net benefit from the defendants' anticompetitive conduct. *Id. at 1188, 1190*. The plaintiffs in Valley Drug were wholesalers that purchased pharmaceuticals directly from one of the defendants. *Id. at 1186*. The plaintiffs alleged that the defendants entered into unlawful market-allocation agreements that kept less expensive generic pharmaceuticals off the market. Id. The net-benefit theory stemmed from the fact that some of the **[**17]** plaintiffs sold their products on a cost-plus basis, which allowed them to charge the same percentage mark-up as their acquisition costs. *Id. at 1190*. Thus, some of the plaintiffs arguably benefitted from the higher acquisition cost of brand-named pharmaceuticals. *Id. at 1190-91*. In justifying downstream discovery, the appellate court noted that cost-plus sales alone would be insufficient to prove a conflict if it were not for the specific nature of the product and industry involved. *Id. at 1191*.

Here, Defendants have not identified any direct purchasers that benefitted from Defendants' conduct or provided any information **[*624]** regarding the extent of the alleged benefit. And Defendants do not identify any factors specific to the nature of the product or industry that support the existence of a conflict of interest. Defendants assert that downstream discovery might reveal a conflict of interest between the named and unnamed Direct Purchaser Plaintiffs. However, this assertion, without more, does not support the existence of a potential conflict of interest that justifies downstream discovery.

Defendants also submit that some unnamed class members might benefit from a lost profits theory of **[**18]** damages, which would depend entirely on downstream discovery. The Direct Purchaser Plaintiffs respond that they are seeking damages based on overcharges, not lost profits, because overcharges are the standard measure of damages in cases such as this one. See *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 374 (3d Cir. 2005)*. As the Direct Purchaser Plaintiffs are seeking to recover for overcharges, downstream discovery is not relevant to the issue of damages. The mere possibility that some unnamed plaintiffs could benefit from a lost profits theory of damages does not justify the discovery sought. See *In re Air Cargo, 2010 U.S. Dist. LEXIS 125623, 2010 WL 4916723, at *4*; *In re Vitamins, 198 F.R.D. at 301*.

Defendants also maintain that downstream discovery is necessary to determine the buying power of the Direct Purchaser Plaintiffs, a factor relevant to both class certification and the merits of the Direct Purchaser Plaintiffs' claims. According to Defendants, differences in buying power between Direct Purchaser Plaintiffs at different levels of the distribution chain could highlight differences in their claims. Additionally, Defendants contend that the Direct Purchaser Plaintiffs, in conjunction **[**19]** with certain managed care companies, have enough buying power to constrain the prices that Transitions can charge for its photochromic lenses. Defendants also seek discovery of any agreements or communications between managed care companies and the Direct Purchaser Plaintiffs.

The Direct Purchaser Plaintiffs respond that downstream discovery is not relevant to class certification because differences in purchasing patterns or diversity in the types of businesses that make up the class do not render the class representatives' claims atypical or inadequate. Further, the Direct Purchaser Plaintiffs assert that they are small companies whose sales could not affect or inform an analysis of the downstream market. And in any event, the Direct Purchaser Plaintiffs claim that their buying power would be reflected in their purchasing records, which they have agreed to produce. The Direct Purchaser Plaintiffs also have agreed to produce a broad range of materials relating to managed care companies.

For these reasons, Defendants have not demonstrated the relevance of downstream discovery to class certification. The common issues to be resolved, if any, are not in the downstream market, but in the **[**20]** direct-purchaser market where Plaintiffs allege that they were overcharged. See *In re Air Cargo, 2010 U.S. Dist. LEXIS 125623, 2010 WL 4916723, at *3*. And although Defendants claim that differences in buying power will highlight the need for individualized inquiries concerning damages, Defendants do not explain how differences in buying power affect whether the Direct Purchaser Plaintiffs' injuries are susceptible to common proof. See *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 106 (2d Cir. 2007)*. In any event, to the extent that differences in buying power exist among the Direct Purchaser Plaintiffs, such differences will be reflected in the purchasing records that the Direct Purchaser Plaintiffs have agreed to produce. See *In re Vitamins, 198 F.R.D. at 301* (quoting *In re Folding Carton Antitrust Litig., No. MDL 250, 1978 U.S. Dist. LEXIS 20409 (N.D. Ill. May 5, 1978)*) ("[B]uyers' leverage is not determined by profits, but by volume of purchases.").

Defendants also have not demonstrated the relevance of downstream discovery to the merits of the Direct Purchaser Plaintiffs' claims. If overcharges exist, the amount of the overcharges will be determined by examining prices in the direct-purchaser market, not the **[**21]** downstream market. *Id. at 300*. Allowing downstream discovery risks unnecessarily complicating the case with attempts **[*625]** to trace the effect of the alleged overcharges on the Direct Purchaser Plaintiffs' prices, sales, costs, and profits. See *Ill. Brick Co., 431 U.S. at 725*. And in view of the Direct Purchaser Plaintiffs' representation that they will produce materials relating to managed care companies, Defendants request for production of agreements or communications between such companies and the Direct Purchaser Plaintiffs is denied.

Lastly, Defendants contend that downstream discovery is relevant to class certification for the Indirect Purchaser Plaintiffs and the merits of their claims. Defendants claim that downstream discovery will allow them to determine whether wholesalers and retailers passed overcharges on to indirect purchasers and whether Defendants' conduct had any pro-competitive effects that lowered prices for some indirect purchasers. The Direct Purchaser Plaintiffs dispute the relevance of downstream discovery to the indirect purchaser action and submit that any discounts that indirect purchasers may have received would be better reflected in discovery from the Indirect **[**22]** Purchaser Plaintiffs. Further, the Direct Purchaser Plaintiffs argue that as third parties to the indirect purchaser action, they are protected from such burdensome discovery under *Rule 45, Fed. R. Civ. P.*

Defendants do not explain why discovery from the Indirect Purchaser Plaintiffs is insufficient to address the claims raised in that action. Defendants have not demonstrated that the relevance of downstream discovery to the indirect purchaser action justifies subjecting the Direct Purchaser Plaintiffs to the burden of such discovery.

3. Market Discovery

HN3[] Defining the relevant market is primarily a process of describing those groups of producers that have the ability to take significant amounts of business away from each other because of the similarity of their products. *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995 (11th Cir. 1993)* (citing *Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 805 (8th Cir. 1987))*. The outer boundaries of a product market are defined by the reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes. [2] Id. (citing *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. Courts should **[**23]** consider how the product is used by consumers in general. *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1337 (11th Cir. 2010)*.

Defendants seek, among other things, discovery of documents relating to the cost, purchasing, and sales of non-photochromic products. Defendants argue that such discovery is necessary for the parties to fully understand the relevant market and analyze the impact of the alleged anticompetitive conduct. The Direct Purchaser Plaintiffs respond that non-sunwear products are not functional substitutes for photochromic lenses and should not be considered in defining the relevant market.

As discussed above, Transitions creates photochromic lenses by applying a photochromic treatment to ophthalmic lenses. The treatment causes the ophthalmic lenses to darken when exposed to sunlight and fade back to clear when removed from sunlight. The resulting photochromic lenses serve two purposes: vision correction and ultraviolet-light protection. Consequently, **[**24]** photochromic lenses can be considered functional substitutes for clear ophthalmic lenses as well as ultraviolet-protection products.

Documents produced by Transitions confirm that its photochromic lenses are intended to serve as a consumer's primary pair of corrective lenses (Dkt. 220 Ex. 2 at 39-41; Dkt. 222 Ex. 2 at 1-2). However, Transitions does not view its photochromic lenses as a replacement for sunglasses. According to Transitions, sunglasses are better suited for sustained outdoor use (Dkt. 220 Ex. 2 at 41) and may function in some settings where photochromic lenses do not, such as in a car. Nonetheless, photochromic lenses, like sunglasses, provide ultraviolet-light protection **[*626]** (Dkt. 222 Ex. 2 at 1). And sales of photochromic lenses may be linked to the sales of sunglasses (Dkt. 220 Ex. 2 at 44; Dkt. 222 Ex. 1 at 3), which presents the possibility that a cross-elasticity of demand exists between the two products. Therefore, discovery related to clear ophthalmic lenses and ultraviolet-protection products is relevant to defining the market at issue.

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[2] "The cross-elasticity of demand measures the change in the quantity demanded by consumers of one product relative to the change in price of another." *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1338 n.13 (11th Cir. 2010)*.

The Direct Purchaser Plaintiffs shall produce information relating to clear ophthalmic lenses and ultraviolet-protection products, **[**25]** such as sunglasses or clip-on sunglass attachments. However, the Direct Purchaser Plaintiffs do not need to produce information regarding frames, lens treatments, anti-reflective coatings, scratch-resistant coatings, or other products that do not correct vision or provide ultraviolet-light protection. The Direct Purchaser Plaintiffs need only produce information concerning these products as it relates to the direct-purchaser market, where the alleged overcharges occurred. This includes, for example, purchasing records from wholesale laboratories and retailers. However, information relating to clear ophthalmic lenses and ultraviolet-protection products is not relevant to the extent it constitutes downstream discovery.

Conclusion

Accordingly, and upon consideration, it is **ORDERED** and **ADJUDGED** that Defendants' **Motion to Compel** (Dkt. 209) is **GRANTED** in part and **DENIED** consistent with this order.

DONE AND ORDERED in Tampa, Florida on this 7th day of February, 2012.

/s/ Elizabeth A. Jenkins

ELIZABETH A JENKINS

United States Magistrate Judge

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Stroh Ranch Dev., LLC v. Cherry Creek S. Metro. Dist. No. 2

United States District Court for the District of Colorado

February 7, 2012, Decided; February 7, 2012, Filed

Civil Action No. 10-cv-02216-WJM-KLM

Reporter

2012 U.S. Dist. LEXIS 14229 *; 2012 WL 385519

STROH RANCH DEVELOPMENT, LLC, a Colorado limited liability company, Plaintiff, v. CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 2, CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 3, CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 4, CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 5, CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 6, CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 7, CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 8, CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 9, CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 10, CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 11, THE PIVOTAL GROUP, INC., PIVOTAL PARKER INVESTMENTS, LLC, a Delaware limited liability company a/k/a Parker Investments 2009, LLC, PIVOTAL COLORADO II, LLC, NORTH PARKER INVESTMENTS, LLC, KURT WOLTER, KIMBERLY JENSEN, GREG MCILVAIN, MARK EAMES, GREG EPP, BILLY HARRIS, and JOHN DOES 1 through 8, Defendants.

Prior History: *Stroh Ranch Dev., LLC v. Cherry Creek S. Metro. Dist. No. 2, 2012 U.S. Dist. LEXIS 31633 (D. Colo., Feb. 2, 2012)*

Core Terms

amend, deadline, futile, propose an amendment, discovery, argues, undue delay, good cause, prejudiced, unduly

Counsel: **[*1]** For Stroh Ranch Development, LLC, a Colorado limited liability company, Plaintiff: Joe L. Silver, Kelly Ann Murphy, Martin Dean Beier, Nicholas Ethan Mitchell, Ruba M. Forno, Silver & DeBoskey, P.C., Denver, CO.

For Cherry Creek South Metropolitan District No. 2, Cherry Creek South Metropolitan District No. 3, Cherry Creek South Metropolitan District No. 4, Cherry Creek South Metropolitan District No. 5, Cherry Creek South Metropolitan District No. 6, Cherry Creek South Metropolitan District No. 7, Cherry Creek South Metropolitan District No. 8, Cherry Creek South Metropolitan District No. 9, Cherry Creek South Metropolitan District No. 10, Cherry Creek South Metropolitan District No. 11, Defendants: Eric Michael Ziporin, Senter Goldfarb & Rice, LLC, Denver, CO; Sarah Elizabeth McCutcheon, Senter Goldfarb & Rice, LLC, Denver, CO.

For Pivotal Group, Inc., (actually named as The Pivotal Group, Inc.), Denfendant: Edwin Packard Aro, James E. Scarboro, Paul Wayne Rodney, Arnold & Porter LLP-Denver, Denver, CO.

For Pivotal Parker Investments, LLC, a Delaware limited liability company also known as Parker Investments 2009, LLC, Defendant: Jeffrey E. Erb, Gordon & Rees, LLP-Denver, Denver, CO; **[*2]** Karen Vannoy Reutzel, Reutzel & Associates, LLC, Littleton, CO; Kim J. Seter, Seter & Vander Wall, P.C., Greenwood Village, CO.

For Gimshaw & Herring PC, Matthew R. Dalton, Professional Community Management, Inc., Interested Parties: Jamie N. Cotter, Grimshaw & Harring, P.C., Denver, CO.

For Pivotal Colorado II, LLC, North Parker Investments, LLC, Defendants: Bill E. Kyriagis, Brad Wayne Schacht, Otten, Johnson, Robinson, Neff & Ragonetti, P.C., Denver, CO.

For Kurt Wolter, Kimberly Jensen, Greg McIlvain, Mark Eames, Greg Epp, Billy Harris, and John Does 1 through 8, Defendants: Eric Michael Ziporin, Senter Goldfarb & Rice, LLC, Denver, CO; Sarah Elizabeth McCutcheon, Senter Goldfarb & Rice, LLC, Denver, CO.

Judges: Kristen L. Mix, United States Magistrate Judge.

Opinion by: Kristen L. Mix

Opinion

ORDER

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on Defendants Pivotal Colorado II, LLC ("PCII") and North Parker Investments, LLC's ("North Parker") **Motion to Amend Answer** [Docket No. 100; Filed November 23, 2011] ("PCII's Motion"). Plaintiff filed a Response in opposition to PCII's Motion on December 19, 2011 [#114]. On January 5, 2012, Defendants PCII and North Parker filed a Reply [#126]. **[*3]** The Motion is ripe for resolution.

This matter pertains to the Metro Defendants' alleged failure to honor agreements with Plaintiff with respect to "the construction and maintenance of certain public infrastructure." *See Scheduling Order* [#23] at 3. Plaintiff alleges that Defendant PCII petitioned the Metro Defendants' Boards of Directors to exclude certain property from the boundaries of the Metro Districts. Plaintiff further alleges that the reconfiguration of the Metro Districts' size reduced the number of tax-paying individuals within each "and rendered them incapable of discharging the indebtedness [to Plaintiff]." *See Am. Compl*. [#38] at 5.

Pursuant to PCII's Motion, PCII and North Parker seek to amend their Answer [#62] to add one additional affirmative defense: "One or more of Plaintiff's claims are barred by applicable privilege[ ]." *Motion* [#100] at 3. Specifically, they aver that "Plaintiff's interference claim may be barred, in whole or in part, by applicable constitutional privileges under the Noerr-Pennington doctrine."[1] *Id*.

As a preliminary matter, the pleading amendment deadline expired on January 3, 2011. *See Minute Order* [#23]. The present Motion was filed on November 23, 2011, and, therefore, is untimely. Accordingly, Defendants PCII and North Parker must provide good cause for their failure to timely move for amendment pursuant to *Fed. R. Civ. P. 16(b)(4)*. If good cause is shown, the Court next considers any arguments raised by the parties related to whether justice would be served by amendment. Specifically, the Court should grant leave to amend "freely . . . when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. Leave to amend need not be given, however, when the moving party unduly delayed, failed to amend despite ample opportunity to do so, the nonmoving party would be unduly prejudiced, or amendment would be futile. *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*.

A. Good Cause to Modify the Pleading Amendment Deadline

Defendants PCII and North Parker have met the good-cause **[*5]** standard to modify the pleading amendment deadline pursuant to *Fed. R. Civ. P. 16(b)(4)*, because filing an amended Answer prior to that deadline was not possible. As noted, the pleading amendment deadline expired on January 3, 2011. *See Minute Order* [#23]. On

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[1] In general, "the *Noerr-Pennington* doctrine stems from *federal* ***antitrust law*** and exempts from antitrust liability 'the conduct of private individuals **[*4]** in seeking anticompetitive action from the government.'" *Coll v. First Am. Title Ins. Co., 642 F.3d 876, 894 (10th Cir. 2011)* (emphasis in original) (quoting *City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379-80, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991))*.

February 7, 2011, Plaintiff filed an Amended Complaint [#38] adding Defendants PCII and North Parker to the lawsuit. Defendants PCII and North Parker waived service on February 10, 2011. *See Waiver of Service* [#50]. They filed their Answer [#62] on May 2, 2011.

Defendants PCII and North Parker must "show that [they were] diligent in attempting to meet the [pleading amendment] deadline," but this standard can be met by the provision of "an adequate explanation for any delay." *Minter v. Prime Equip. Co., 451 F3d 1196, 1205 & n.4 (10th Cir. 2006)* (explaining that lateness itself does not justify denial of a motion to amend, but "undue" lateness does). Here, Defendants PCII and North Parker could not have met an amendment deadline that passed before they were parties to the case. Thus, the Court finds that they have provided good cause for requesting leave to amend outside of the pleading amendment deadline.

B. *Rule 15(a)* [*6] Requirements

The Court next turns to *Rule 15(a)* and whether justice would be served by permitting amendment. As already noted, in situations where the request falls outside the pleading amendment deadline and assuming good cause is shown, leave should generally be permitted unless the moving party unduly delayed or failed to cure, the opposing party would be unduly prejudiced, or the proposed amendment would be futile. *Foman, 371 U.S. at 182*. Plaintiff raises three of these arguments against Defendants PCII and North Parker's proposed amendment: undue delay, prejudice, and futility. *See Response* [#114] at 2, 6-7.

On February 7, 2011, Plaintiff filed an Amended Complaint [#38], adding Defendants PCII and North Parker to the lawsuit which was originally filed in state court on August 10, 2010. *See Verified Notice of Removal* [#1] at 2. In the Amended Complaint, Plaintiff alleged that, "[O]n April 13, 2009, upon petition by [PCII] the Boards approved by resolution further exclusions of property from the Metro Districts." *Am. Compl*. [#38] at 5. Plaintiff also asserted that PCII "by **[*7]** words or conduct, or both, intentionally caused the Metro Districts to breach their contracts with [Plaintiff]." *Id*. at 9. On May 2, 2011, Defendants PCII and North Parker filed their Answer [#62]. In their Answer, they denied Plaintiff's contention that they intentionally caused the Metro Defendants to breach their contracts with Plaintiff. *See Answer* [#62] at 8.

On June 28, 2011, Plaintiff responded to Defendant Pivotal Group, Inc's First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents. *See Ex. B* [#126-2]. In that response, Plaintiff included a detailed recitation of the facts and argument underlying its claim for interference with contractual relations. *See id*. at 4-5. Defendants PCII and North Parker aver that this response, "in part, helped lead [them] to conclude that the alleged petitioning activity was likely the only 'words or conduct, or both' of PCII that could possibly qualify as improper interference. It is this petitioning activity that PCII and North Parker now claim is privileged pursuant to the *Noerr-Pennington* doctrine/*First Amendment* petitioning immunity." *Reply* [#126] at 5.

1. Undue Delay

Turning to Plaintiff's first argument, **[*8]** the Court may deny a motion to amend based on undue delay. *See Minter, 451 F.3d at 1205*. "The important inquiry is not simply whether Plaintiff has delayed, but whether such delay is undue." *Id. at 1206*. The Tenth Circuit "focuses primarily on the reason for the delay." *Id.* A motion to amend is untimely if, among other reasons, the moving party has made the complaint a "moving target," is trying to "salvage a lost case by untimely suggesting new theories of recovery," is trying to present more theories to avoid dismissal, or is knowingly waiting until the eve of trial to assert new claims. *Id. at 1206* (citations omitted). Other common reasons for finding undue delay include lack of adequate explanation for the delay or when a moving party knows or should have known of the facts in the proposed amendment but did not include them in the original complaint or any prior attempts to amend. *Id*. (citations omitted).

Both parties erroneously conflate their *Fed. R. Civ. P. 16(b)* diligence arguments with their *Fed. R. Civ. P. 15(a)* undue-delay arguments. Defendants PCII and North Parker filed their Answer [#62] on May 2, 2011. They contend that they first learned of the applicability of the privilege **[*9]** upon examination of Plaintiff's discovery responses received on June 28, 2011. They first conferred with opposing counsel about the present Motion on November 10, 2011. *See Reply* [#126] at 8. They filed this Motion shortly thereafter, on November 23, 2011. The parties do not specifically address the delay between receipt of the relevant discovery material and conferral on the Motion. Defendants PCII and North Parker do note that they spent that time "investigating the underlying facts at issue in this case," that they "retained an expert witness and have had an opportunity to review the pleadings and discovery conducted to date, "and that they were then able to review "legal research on potential defenses to the claims asserted against them." *Motion* [#100] at 2-3.

The Court notes that Defendants PCII and North Parker conferred with Plaintiff about assertion of the additional defense more than three months before expiration of the discovery deadline. Moreover, as Plaintiff notes, the addition of a privilege defense was not a surprise to Plaintiff, because other Defendants had already raised this defense. *See, e.g., Answer of Defendant Pivotal Group, Inc*. [#48] at 20. Further, during **[*10]** the delay, Defendant PCII and North Parker were attempting to obtain evidence related to the defense. Although Defendants clearly delayed, the Court does not find that this history evidences undue delay.

2. Undue Prejudice

Plaintiff next briefly argues that it would be prejudiced at this stage of the proceeding if Defendants PCII and North Parker were permitted to add a new defense. As previously noted, the Court may deny a motion to amend based on undue prejudice to the nonmoving party. *See Minter, 451 F.3d at 1205*. Plaintiff states that it would be prejudiced because: (1) the deadline for expert disclosures has passed without Plaintiff's expert's consideration of the new defense; and (2) Plaintiff has not propounded any written discovery regarding Defendants PCII and North Parker's defenses because it decided that there was no need to do so based on the defenses listed in their current Answer. *Response* [#114] at 6-7. The Court notes that, according to Defendants PCII and North Parker, Plaintiff had not propounded any written discovery, on any issue, to Defendants PCII and North Parker as of January 5, 2012. *See Reply* [#126] at 9. The Court also notes that, according to Defendants PCII **[*11]** and North Parker, Plaintiff has not disclosed any experts with respect to the defense of privilege raised by any other Defendant in this lawsuit.

All things considered, under these circumstances the Court finds that Plaintiff has not demonstrated that undue prejudice will result from assertion of the new defense. *See Foman, 371 U.S. at 182* (stating that the opposing party must be unduly prejudiced by the proposed amendment).[2]

3. Futility

Finally, Plaintiff argues that the proposed amendment is futile because the *Noerr-Pennington* doctrine does not apply to the facts of this litigation. *Response* [#114] at 7. More specifically, Plaintiff asserts that the doctrine "does not apply outside the antitrust context where the fact pattern involves illegal activity by the 'petitioner,' and it does not apply where the party invoking immunity has contractually agree to give up its petitioning rights." *Id*. at 10.

The Court may deny leave to amend on the basis of futility if the proposed amendment "would be subject to dismissal for any reason." *Watson v. Beckel, 242 F.3d 1237, 1239-40 (10th Cir. 2001)*. **[*12]** The appropriate standard for determining the viability of an affirmative defense is found in *Fed. R. Civ. P. 12(f)*. *See Layne Christensen Co. v. Bro-Tech Corp., No. 09-cv-2381-JWL-GLR, 2011 U.S. Dist. LEXIS 96368, 2011 WL 3847076, at *6 (D. Kan. Aug. 29, 2011)*. Pursuant to *Fed. R. Civ. P. 12(f)*, the Court "may strike from a pleading an insufficient defense . . . ." "An affirmative defense is insufficient if, as a matter of law, the defense cannot succeed under any circumstance." *Unger v. U.S. West, Inc., 889 F. Supp. 419, 422 (D. Colo. 1995)*.

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[2] The parties are warned that any request to extend the discovery deadline in light of the new defense must be made promptly and with a showing of good cause.

As noted earlier, the *Noerr-Pennington* doctrine exempts from antitrust liability "the conduct of private individuals in seeking anticompetitive action from the government." *City of Columbia, 499 U.S. at 379-80*. However, the Tenth Circuit has held that this doctrine may be used outside of the antitrust context, but only on the basis of the *First Amendment* right to petition. *See* *Cardtoons, L.C. v. Major League Baseball Players Assoc., 208 F.3d 885, 889 (10th Cir. 2000)*.

At this stage of the litigation, Plaintiff asserts that Defendants PCII and North Parker are responsible for the alleged breach of contract by the Metro Defendants because Defendant PCII petitioned the Metro Defendants **[*13]** to exclude certain property from their boundaries. *See Reply* [#126] at 10; *Am. Compl*. [#38] at 5. Plaintiff first argues that the Noerr-Pennington doctrine does not apply "where the fact pattern involves illegal activity by the 'petitioner.'" *Response* [#114] at 10. Plaintiff contends that Kurt Wolter was "a self-described 'independent contractor of [PCII],' [who] was elected to the Board of Directors for Metro Districts 2 through 11, while retaining his various positions with PCII and other Pivotal-related entities." *Id*. at 8. Plaintiff argues that the *Noerr-Pennington* defense would not apply "if [Plaintiff] were to prove Mr. Wolter engaged in illegal action by aiding and abetting a breach of fiduciary duty by his fellow directors . . . ." *Id*. at 9.

Plaintiff also argues that the *Noerr-Pennington* doctrine does not apply "where the party invoking immunity has contractually agreed to give up its petition rights." *Id*. at 10. Plaintiff argues that:

> [Plaintiff] will seek to prove [that] Mr. Wolter was elected to be a director on the Metro District Boards and thereby [became] subject to statutory fiduciary and other duties . . . and that PCII employed him to use his influence to get the Boards **[*14]** to ignore the Reimbursement Agreements. Because PCII employed an agent who was already statutorily and legally obligated to act in the best interests of the Metro Districts, it implicitly agreed he could not 'petition' the Boards on its behalf in any manner which would violate the District's previous contractual obligations.

Id.

Plaintiff's arguments rely on providing proof of a number of facts in support of certain legal positions, neither of which are fully formed at this juncture. Moreover, Plaintiff has not addressed application of the *Noerr-Pennington* doctrine in the absence of proof of Mr. Wolter's alleged dual role. Thus, Plaintiff has failed to demonstrate that "the defense cannot succeed under any circumstance." *Unger, 889 F. Supp. at 422*. Without taking a position as to whether the defense will succeed, the Court finds that adding it may not be futile under the circumstances of this case. Accordingly,

IT IS HEREBY **ORDERED** that the Motion [#100] is **GRANTED**.

IT IS FURTHER **ORDERED** that the Court accepts Defendants PCII and North Parker's Answer [#100-1] for filing as of the date of this Order.

Dated: February 7, 2012

BY THE COURT:

/s/ Kristen L. Mix

Kristen L. Mix

United States Magistrate **[*15]** Judge.

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GMA Cover Corp. v. Saab Barracuda LLC

United States District Court for the Eastern District of Michigan, Southern Division

February 8, 2012, Decided; February 8, 2012, Filed

CASE NO. 4:10-CV-12060

Reporter
2012 U.S. Dist. LEXIS 25543 *; 2012-1 Trade Cas. (CCH) P77,813; 2012 WL 642739

GMA COVER CORP., Plaintiff, v. SAAB BARRACUDA LLC, a Delaware Limited Liability Corporation, Defendant.

Subsequent History: Accepted by, Adopted by, Dismissed by *GMA Cover Corp. v. Saab Barracuda, LLC, 2012 U.S. Dist. LEXIS 25542 (E.D. Mich., Feb. 28, 2012)*

Core Terms

pricing, predatory, recoupment, allegations, monopolization, bid, antitrust, tortious interference, amended complaint, supracompetitive, probability, losses, ceiling price, contracting, delivery, monopoly, argues, buyer, total cost, complaints, predation, baseless, variable, parties, courts, fails, anti trust law, monopoly power, below-cost, motion to dismiss

Counsel: **[*1]** For GMA Cover Corp., Plaintiff: William L. Fealko, III, Fletcher, Fealko, Port Huron, MI.

For Saab Barracuda LLC, Defendant: Howard B. Iwrey, Dykema Gossett, Bloomfield Hills, MI.

Judges: PAUL J. KOMIVES, UNITED STATES MAGISTRATE JUDGE. JUDGE MARK A. GOLDSMITH.

Opinion by: PAUL J. KOMIVES

Opinion

REPORT AND RECOMMENDATION

D. *Conclusion*

III. NOTICE TO PARTIES REGARDING OBJECTIONS

* * * * *

I. RECOMMENDATION: The Court should grant defendant's motion to dismiss.

II. REPORT:

A. *Background*

Plaintiff GMA Cover Corp. ("GMA" or "plaintiff"), Michigan corporation, commenced this action on May 21, 2010, against defendant Saab Barracuda LLC ("SBLLC" or "defendant"), a Delaware limited liability corporation. Plaintiff filed an amended complaint on March 9, 2011. Taking as true, for purposes of this motion to dismiss, the well-pleaded allegations set forth in the amended complaint, the facts are as follows.

Both GMA and SBLLC manufacture Ultra Lightweight Camouflage Net Systems **[*2]** ("ULCANS"), which are used by the United States Army to camouflage vehicles by masking visual, thermal, near infra-red, and broadband radar signatures of the vehicles. *See* Amended Compl., ¶¶ 1-3. The ULCANS used by the Army come in several types. Woodland-styles are used in green and wooded environments, while desert-styles are used in desert environments. Each style can be a radar scattering type—which uses radar scattering technology to inhibit the passage, reflection, and return of a radar signal—or radar transparent type, which have limited combat use and are used primarily for radar stations. *See id.*, ¶ 10. [1] Military equipment, including ULCANS, is procured through the Army Material Command ("AMC"), operating through Program Executive Offices ("PEO") responsible for certain particular items of military equipment. ULCANS are the responsibility of the PEO Combat Support and Combat Service Support ("PEO CS & CSS") located in the Army's TACOM Life Cycle Management Command in Warren, Michigan. *See id.*, ¶¶ 11-13.

As relevant here the Army, through its Communications-Electronics Command ("CECOM"), issued a Solicitation Notice on March 25, 2003, indicating that it would award a single, five-year indefinite delivery/indefinite quantity ("IDIQ") contract for WRS and DRS ULCANS. Bidders had to submit exemplar ULCANS of each type and testing date, and CECOM conducted independent testing. GMA submitted a bid, including exemplars and other required documentation, in response to this Notice. However, CECOM determined that GMA's exemplars did not meet the Army's technical standards, and thus GMA was not considered a qualified bidder for the 2003 solicitation. This left SBLLC as the only qualified bidder. SBLLC was awarded the contract for WRS and DRS production for a five-year period, with a contractual maximum of $240 million. *See id.*, ¶¶ 25-31. However, in 2004, as a result of military operations in Iraq, the Army experienced an increased demand for DRS ULCANS, in volumes that exceeded the contractual commitments under the 2003 contract **[*4]** with SBLLC. In 2005, the contractual maximum under the 2003 contract having been reached, CECOM issued another Notice of Solicitation, this one soliciting bids for a five year, multiple award IDIQ contract with five one-year options, and a maximum contractual value of $1.763 billion. Both GMA and SBLLC submitted bids in response to the 2005 Notice, and were the only companies to do so. Both companies were awarded IDIQ contracts, which were executed in 2006. *See id.*, ¶¶ 32-38. GMA was advised by CECOM that, given its substantially lower bid price, it would receive the bulk of delivery awards and therefore needed to double its existing production capacity. *See id.*, ¶ 39.

Pursuant to the 2006 contracts, CECOM guaranteed both SBLLC and GMA an initial production run of $20 million, at an established ceiling price (the highest price that could be charged by a particular supplier under the contract). GMA had a ceiling price for WRS ULCANS of $850.92 per kit and a ceiling price for DRS ULCANS of $1,042.71 per kit. GMA was awarded an initial production run of 11,705 WRS kits and 9,522 DRS kits on June 7, 2006. SBLLC's ceiling prices for the WRS and DRS kits under the 2006 contract were approximately **[*5]** $1,109.00 and $1,360.00 per kit, respectively. These prices were higher than the prices charged by SBLLC in 2005 under the previous

[1] The **[*3]** parties refer to the various ULCANS as WRS (Woodland Radar Scattering), WRT (Woodland Radar Transparant), DRS (Desert Radar Scattering), and DRT (Desert Radar Transparent).

contract, which were $786.13 and $878.24 per kit, respectively. SBLLC was awarded an initial production run of 8,555 WRS kits and 7,874 DRS kits. *See id.*, ¶¶ 41-44. Following the initial production run, CECOM would order additional ULCANS through Requests for Quotes ("RFQs"), pursuant to which SBLLC and GMA could submit a bid identifying the price at which it would provide the quantity sought in the RFQ. *See id.*, ¶ 45. The bids submitted in response to the RFQs issued under the 2006 contract form the basis of GMA's claims.

The first RFQ was issued in February 2007, and the delivery award was given to SBLLC, as were the awards issued pursuant to numerous subsequent RFQs. GMA alleges that SBLLC's bids in response to these RFQs were part of a course of predatory conduct designed to drive GMA out of the ULCANS market, and that each bid was below SBLLC's average total cost and average variable cost. *See id.*, ¶ 46. Specifically, GMA alleges that SBLLC made the following below cost bids:

- In response to a February 2007 RFQ, SBLLC bid for delivery of 29,531 WRS **[*6]** kits at a price of $749.62 per kit, below SBLLC's average total cost of $829.09 and average variable cost of $785.04. *See id.*, ¶¶ 47-48, 93.

- In March 2007, SBLLC bid for deliver of Case Carry Screen Systems for DRS ULCANS at a price of $9.45 per unit, an 84% reduction in the price it charged in 2004, and well below even the raw material costs incurred by GMA in producing the Case Carry Screen Systems. *See id.*, ¶¶ 50-52.

- In response to a December 2008 RFQ for delivery of 6,576 DRS ULCANS, SBLLC offered a bid price of $749.69 per kit, below its average total cost of $907.29 and average variable cost of $798.42. *See id.*, ¶¶ 57, 96.

- In response to a March 2009 RFQ for delivery of 4,232 DRS ULCANS, SBLLC submitted a bid price of $704.39 per kit, above its average variable cost of $666.50 but below its average total cost of $757.38. *See id.*, ¶¶ 60, 98.

- In response to June 2009 RFQ for delivery of 13,100 WRS ULCANS, SBLLC submitted a bid price of $684.47 per kit, slightly above its average variable cost of $684.10 but below its average total cost of $777.38. *See id.*, ¶¶ 62, 97.

- In response to a July 2009 RFQ for 7,986 DRS ULCANS, SBLLC bid a price of $689.19 per kit, above its average **[*7]** variable cost of $666.50 but below its average total cost of $757.38. *See id.*, ¶¶ 64, 98.

- In response to an August 2009 RFQ for 12,700 WRS ULCANS, SBLLC submitted a bid of $646.38 per kit, below its average variable cost of $684.10 and its average total cost of $777.38. *See id.*, ¶¶ 66, 97.

- In response to an August 2009 RFQ for 6,575 DRS ULCANS, SBLLC offered a bid of $676.52 per kit, above its average variable cost of $666.50 but below its average total cost of $757.38. *See id.*, ¶¶ 68, 98.

- In response to an August 2009 RFQ for 9,082 WRS ULCANS, SBLLC submitted a bid estimated to be $632.14 per kit, below its average variable cost of $684.10 and its average total cost of $777.38. *See id.*, ¶¶ 70, 97.

- In response to an October 2009 RFQ for 9,845 DRS ULCANS, SBLLC submitted a bid of $648.80 per kit, below average variable cost of $666.50 and its average total cost of $757.38. *See id.*, ¶¶ 72, 98. [2]

In each instance, SBLLC's bid was lower than that of GMA and SBLLC was awarded the order. GMA alleges, however, that had SBLLC bid at or above its costs, GMA would have won the order. GMA further alleges that Ken

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[2] The cost figures alleged by GMA are based on its analysis of financial documents obtained from the "Barracuda Business Unit" of Saab AB, audited financial documents of Saab Barracuda AB obtained from the Swedish government, and publicly available data about SBLLC's sales to CECOM, the United States Marine Corps, and other governmental entities. *See* Amended Compl., ¶¶ 86-88.

Oscar, Chairman of SBLLC, told GMA representatives in March 2007 that because **[*8]** SBLLC had made a significant amount of money on its prior ULCANS contracts which was in a United States holding company, SBLLC could simply drop its prices and drive GMA out of business. *See id.*, ¶ 49. In addition, in response to SBLLC's inability to meet its delivery requirements, GMA requested that CECOM issue split delivery orders. CECOM advised GMA that split awards were not permitted by the 2006 contract, and that fact had been communicated to SBLLC. *See id.*, ¶ 53-55, 59. GMA alleges that by 2009, SBLLC had captured 72.3% of the market for WRS and DRS ULCANS kits through its predatory pricing, and that had SBLLC not engaged in this conduct it would have received approximately $69 million in delivery orders, resulting in $22.7 million for overhead and profit. *See id.*, ¶¶ 75-76.

GMA filed its complaint on May **[*9]** 21, 2010, asserting claims for monopolization and attempted monopolization (Count II) under *§ 2* of the Sherman Antitrust Act, *15 U.S.C. § 2*. GMA filed its amended complaint on March 9, 2011, adding substantially more factual allegations. GMA has also refined its legal claims, dropping its monopolization claim and asserting only attempted monopolization under *§ 2* (Count I), as well as a state law claim for tortious interference with a business relationship or expectancy (Count II). The matter is currently before the Court on SBLLC's motion to dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, filed on April 22, 2011. SBLLC argues that GMA's attempted monopolization claim fails as a matter of law because GMA has failed to state a plausible claim for relief by alleging sufficient facts to show that (a) SBLLC possesses a dangerous probability of attaining monopoly power; (b) SBLLC had a reasonable expectation of recouping its past investment in below cost bids by charging monopoly prices to the U.S. Army; or (c) GMA suffered an antitrust injury. With respect to the tortious interference claim, SBLLC argues that the claim fails as a matter of law because (a) GMA has made no allegations **[*10]** of malice, (b) the allegations of fraudulent conduct fail to satisfy the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*, and *(c)* the allegations of illegality fail because the antitrust claims (upon which the illegality allegations are based) fail. Finally, SBLLC argues that GMA's allegations that SBLLC made baseless complaints to government entitles that GMA violated securities or procurement laws fail to support either an attempted monopolization or tortious interference claim, because such activities are not actionable under the *Noerr-Pennington* doctrine. GMA filed its response on May 27, 2011. It argues that, accepting the allegations of the amended complaint as true, it has sufficiently alleged that SBLLC had a dangerous probability of attaining monopoly power, SBLLC could recoup its loses, that it suffered antitrust injury, and the elements of a tortious interference claim. SBLLC filed a reply on June 17, 2011.

B. *Legal Standard*

A motion to dismiss for failure to state a claim upon which relief can be granted is provided for in *Fed. R. Civ. P. 12(b)(6)*. In order for a court to dismiss a complaint for failure to state a claim, it must appear beyond doubt that the party **[*11]** asserting the claim can prove no set of facts supporting his claim that would entitle him to relief. *See Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. The party asserting the claim is not required to specifically set out the facts upon which he or she bases his claim. *Id. at 47*. Rather, "a short and plain statement of the claim" pursuant to *Fed. R. Civ. P. 8(a)(2)* gives the opposing party fair notice of the claim and the grounds upon which it rests. *See Conley, 355 U.S. at 47*. However, as the Supreme Court has recently explained, bare legal conclusions need not be accepted by the Court, and a pleading must contain sufficient factual allegations to show that the allegations are plausible:

> Under *Federal Rule of Civil Procedure 8(a)(2)*, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in [*Bell Atlantic Corp. v.] Twombly , 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 [(2007)]*, the pleading standard *Rule 8* announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id., at 555* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. A pleading that offers "labels **[*12]** and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *550 U.S., at 555*. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id., at 557*.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id., at 570*. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged. Id., at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id., at 557 (brackets omitted).

Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the **[*13]** elements of a cause of action, supported by mere conclusory statements, do not suffice. Id., at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Id., at 556. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying **[*14]** pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009) (parallel citations omitted). [3]

To the extent that GMA's claims are premised upon, or require a showing of, fraudulent conduct on the part of SBLLC, such allegations must satisfy the heightened pleading requirement of Rule 9(b), which provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). To satisfy Rule 9(b), a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Frank v. Dana Corp., 547 F.3d 564, 569-70 (6th Cir. 2008) **[*16]** (internal quotation omitted).

C. *Attempted Monopolization Claim*

1. *Attempted Monopolization under* Section 2 *Generally*

"Section 2 of the Sherman Act makes it unlawful to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.'" Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 447, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009) (quoting 15 U.S.C. § 2). Liability under § 2 is not premised merely on the existence

[3] A court can only decide a Rule 12(b)(6) motion on the basis of the pleadings; if the court considers matters outside the pleadings, the court must convert the motion into one for summary judgment under Rule 56. *See* Kostrzewa v. City of Troy, 247 F.3d 633, 643-44 (6th Cir. 2001); Weiner v. Klais & Co., 108 F.3d 86, 88 (6th Cir. 1997). Although the parties have attached some matters outside the pleadings, the parties both argue the matter solely as one relating to the sufficiency of plaintiff's amended complaint, not to the existence or lack thereof of any genuine issues of material fact. Thus, in the analysis which follows I consider only the allegations of the complaint under the Rule 12(b)(6) standard, and do not consider the **[*15]** documents submitted by the parties. Accordingly, the Court need not consider defendants' motion as one for summary judgment under Rule 56. *See* Hayden v. County of Nassau, 180 F.3d 42, 54 (2d Cir. 1999) ("Where . . . the court simply refers to supplementary material [in its recitation of the factual background of the case], but does not rely on them or use them as a basis for its decision, the 12(b)(6) motion is not converted into a motion for summary judgment."); *cf.* Little Gem Life Servs., LLC v. Orphan Medical, Inc., 537 F.3d 913, 916 (8th Cir. 2008).

of monopoly power. As the Court explained in *Pacific Bell*, "[s]imply possessing monopoly power and charging monopoly prices does not violate *§ 2*; rather, the statute targets 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Id. at 447-48* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*; *see also, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Thus, to establish a claim of attempted monopolization under *§ 2*, a plaintiff must allege and prove "(1) that the defendant **[*17]** has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

One way in which an antitrust plaintiff may establish the first element is by showing that the defendant engaged in a practice of predatory pricing, that is, offering "Below-cost prices that drive rivals out of the market and allow the monopolist to raise its prices later and recoup its losses." *Pacific Bell, 555 U.S. at 448*. "In a typical predatory-pricing scheme, the predator reduces the sale price of its product (its output) to below cost, hoping to drive competitors out of business. Then, with competition vanquished, the predator raises output prices to a supracompetitive level." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 318, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584-85 n.8, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*. In order for a predatory pricing "scheme to make economic sense, the losses suffered from pricing goods below cost must be recouped (with interest) during the supracompetitive-pricing stage of the scheme." *Id.* Thus, the Supreme **[*18]** Court has "established two prerequisites to recovery on claims of predatory pricing." *Id.* "'First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*. This showing is required, the Court explained, because "'as a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control,'" and because courts must be "particularly wary of allowing recovery for above-cost price cutting" which would "perversely, 'chill legitimate price cutting' which directly benefits consumers." *Id. at 319* (quoting *Brooke Group, 509 U.S. at 223-24*). Second, to establish a predatory pricing claim, "a plaintiff must demonstrate that 'the competitor had . . . a dangerous probabilit[y] of recouping its investment in below-cost prices.'" *Id. at 318-19* (quoting *Brooke Group, 509 U.S. at 224*) (alteration **[*19]** by Court). This element is necessary, the Court explained, because "without a dangerous probability or recoupment, it is highly unlikely that a firm would engage in predatory pricing." *Id.* The Supreme Court has described these two prerequisites to a predatory pricing claim as "'essential components of real market injury' that [are] 'not easy to establish.'" *Id. at 320* (quoting *Brooke Group, 509 U.S. at 226*). The Court has also cautioned courts to analyze predatory pricing claims rigorously, explaining that "the costs of erroneous findings of predatory-pricing liability [are] quite high because 'the mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition,' and, therefore, mistaken findings of liability would 'chill the very conduct the antitrust laws are designed to protect.'" *Id.* (quoting *Brooke Group, 509 U.S. at 226*) (in turn quoting *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 122 n.17, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986))*.

Finally, because "[t]the antitrust laws are intended to protect competition, not competitors," *Conwood Co., L.P. v. United States Tobacco Co., 290 F.3d 768, 788 (6th Cir. 2002)*; *see also, Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, **[*20]** to recover damages an antitrust plaintiff "'must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" *Conwood Co., 290 F.3d at 788* (quoting *Valley Prods. Co., Inc. v. Landmark, a Division of Hospitality Franchise Sys., Inc., 128 F.3d 398, 402 (6th Cir. 1997))*. More specifically, "to recover damages, an 'antitrust plaintiff must show (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions.'" *Id.* (quoting *Valley Prods. Co., 128 F.3d at 402*); *see also, Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, 588 F.3d 908, 920 (6th Cir. 2009)* (citing *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*.

2. *Analysis*

a. Predatory Pricing

SBLLC argues that the amended complaint fails to state an attempted monopolization claim for two reasons. First, SBLLC argues that with respect to its alleged predatory conduct **[*21]** under the first element, the complaint fails to allege sufficient facts to establish the second prerequisite of a predatory pricing claim—that it reasonably expected to recoup its costs through supracompetitive pricing. Second, SBLLC argues that the amended complaint fails to allege sufficient facts to establish the third element of an attempted monopolization claim—that there was a dangerous probability of SBLLC achieving monopoly power. Finally, SBLLC argues that plaintiff's complaint fails to sufficiently allege antitrust injury. Because the facts alleged by plaintiff fail make a plausible showing of a dangerous probability of recoupment through supracompetitive pricing under *Twombly*, the Court should grant defendant's motion to dismiss.

As the allegations of the amended complaint establish, the market for ULCANS is a single-buyer market. The federal government is essentially a monopsonist—the buyer-side mirror image of a monopolist. The parties have not cited, nor have I found, any cases addressing predatory pricing claims in which the market for the predatorily priced products consists of a single monopsony buyer. Nor have the commentators appeared to address this unique situation. **[*22]** As the Supreme Court explained in *Brooke Group*, however, it is not enough to merely show that the predatory scheme would drive the plaintiff out of business, or that prices would rise following the plaintiff's exit from the market. Rather,

> [t]he plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. As we have observed on a prior occasion, "[i]n order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices."

Brooke Group, 509 U.S. at 225-26 (quoting *Matsushita, 475 U.S. at 590-91*); *see also, id. at 231-32* ("[T]he success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain."). "Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a **[*23]** close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." *Id. at 226*. Although the courts have not considered the precise circumstances present here, several facts about the structure and conditions of the ULCANS market compel the conclusion that the facts alleged in the complaint fail to make a plausible claim that there was a dangerous probability that SBLLC could recoup its losses from the predatory pricing by later charging supracompetitive prices over a sufficiently long period of time. [4]

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[4] At the outset, I note that GMA is wrong in suggesting that it need only allege that SBLLC "had 'a reasonable expectation of recovery in the form of later monopoly profits, more than the losses suffered' to defeat the motion." Pl.'s Br. in Supp. of Resp., at 11 (quoting *Spirit Airlines v. Northwest Airlines, Inc., 431 F.3d 917, 948 (6th Cir. 2005))*. The Sixth Circuit's quotation, however, is merely in its general description of the prerequisites for a predatory pricing claim, which may be brought either under the Robinson-Patman Act (alleging primary line price discrimination) or under *§ 2* of the Sherman Act (alleging monopolization or **[*24]** attempted monopolization). The former is governed by the "reasonable possibility" standard, while the latter is governed by the "dangerous probability standard," a point the Court made clear in *Brooke Group* and reiterated in subsequent cases. *See Pacific Bell, 555 U.S. at 451*; *Weyerhaeuser Co., 549 U.S. at 319*; *Brooke Group, 509 U.S. at 222* (quotations omitted) ("There are, to be sure, differences between the two statutes. For example, we interpret *§ 2* of the Sherman Act to condemn predatory pricing when it poses a dangerous probability of actual monopolization, whereas the Robinson-Patman Act requires only that there be a reasonable possibility of substantial injury to competition before its protections are triggered."); *id. at 224* ("The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under *§ 2* of the Sherman Act, a dangerous probability, of recouping its investment in

First, because the market for ULCANS **[*25]** consists of a single purchaser—the United States Army—there is not a dangerous probability that SBLLC will be able to charge a supracompetitive price. Even assuming that SBLLC achieved monopoly power, it would result in the market for ULCANS being a bilateral monopoly—a monopoly supplier dealing with a monopsony purchaser. In such a situation, neither the monopoly supplier nor the monopsony purchaser can exercise monopoly power to set prices, because the other party can simply walk away from the transaction. The resulting price depends upon the bargaining power of the parties, and although generally it is above the perfectly competitive equilibrium price, it is well below the monopoly equilibrium price. *See* Laura Alexander, Note, *Monopsony & the Consumer Harm Standard*, 95 Geo. L.J. 1611, 1620 (2007) (citing ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY 113-16 (1993)). This may create an antitrust problem when the monopsony buyer is not the ultimate consumer—the monopsony buyer in such a case is likely a monopoly supplier in the downstream market, the customers of whom end up paying a price higher than the competitive equilibrium price. In a case such as this, however, where the buyer **[*26]** is the ultimate consumer, the monopoly supplier will not be able to extract a supracompetitive price to recoup its investment in the below-cost pricing. *Cf.* Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stanford L. Rev. 253, 283-84 (2003) (explaining that predatory pricing works only in markets with multiple, intermediate buyers who are not the ultimate consumers, because "[i]f there were only one buyer who was the ultimate consumer of the monopoly product, that buyer wouldn't agree to buy from a firm that engaged in such exclusionary tactics. Such a unitary consumer would compare the same short-term benefits and long-term costs that the monopolist is considering in reverse, and say 'no thanks.'"); Roger D. Blair & Jill Boylston Herndon, *Physician Cooperative Bargaining Ventures: An Economic Analysis*, 71 ANTITRUST L.J. 989, 1006 (2004) (in a bilateral monopoly, "the buyer and seller cannot simultaneously try to exploit their respective market power."). This is particularly so where, as here, the buyer has substantial bargaining power. *Cf.* Federal Trade Commission v. Tenet Health Care Corp., 186 F.3d 1045, 1054 (8th Cir. 1999) (noting, in another antitrust context, that **[*27]** "large, sophisticated . . . buyers can and do resist price increases).

Second, the terms of the 2006 contract support the conclusion that SBLLC would not be able to charge a supracompetitive price. As the amended complaint alleges, the ULCANS sold under the 2006 contract are subject to a ceiling price, limiting the price that SBLLC could charge even in the absence of any competition on specific bids from GMA. GMA argues that this ceiling price is what makes recoupment possible, because SBLLC's ceiling price is substantially above its costs. This, however, is not the relevant inquiry. The pertinent question is whether the ceiling price is a supracompetitive price. The amended complaint makes no allegations suggesting that the ceiling price is a supracompetitive price; on the contrary, it was the price submitted by SBLLC and accepted by the Army in a competitive bidding process. "The gravamen of predation is not the recoupment of losses from increased market sales at competitive prices, it is the recoupment of losses from monopoly prices. . . . [T]here is nothing predatory about recouping from increased market sales or competitive prices." *Indiana Grocery Co., Inc. v. Super Valu Stores, Inc., 684 F. Supp. 561, 569 (S.D. Ind. 1988)*, **[*28]** *aff'd* 864 F.2d 1409 (7th Cir. 1989); *see also*, IIIA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** ¶ 727a, at 82 (3d ed. 2008) ("Any predatory pricing strategy that involves immediate prices below cost requires a post-predation period of monopoly or oligopoly prices."); *cf.* *National Reporting Co. v. Alderson Reporting Co., Inc., 763 F.2d 1020, 1023 (8th Cir. 1985)* (no probability of recoupment where predatory bidder's ability to extend contract beyond initial year depended on its willingness to perform services at same price as bid, and thus it did not have unilateral power to increase prices); *Kirk-Mayer, Inc. v. Pac Ord, Inc., 626 F. Supp. 1168, (C.D. Cal. 1986)* (even if bidder on fixed price contract for definite term priced below cost, because the price was fixed there was no possibility of recoupment). Although *National Reporting* and *Kirk-Mayer* involved fixed-price contracts, their reasoning is applicable here. In this case, the ceiling price effectively fixes the extent to which SBLLC can recoup, and if that ceiling price is not a supracompetitive price, then recoupment within the meaning of *Brooke Group* cannot occur. In the absence of any allegations making a plausible **[*29]** showing that the ceiling price represents a supracompetitive price, the fact that a ceiling price exists

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below-cost prices."). Because plaintiff brings its predatory pricing claim under *§ 2* of the Sherman Act, the claim must meet the "dangerous probability" test.

leads to the conclusion that SBLLC will not be able to recoup its predatory losses through supracompetitive pricing. [5]

Third, in addition to the Army's significant bargaining power as a monopsony buyer and the ceiling price, both of which limit SBLLC's ability to charge a monopoly price, unlike an ordinary purchaser the Army has significant regulatory tools at its disposal to limit the price that SBLLC can charge. The Federal Acquisition Regulation (FAR) does not prohibit "buying-in," that is, submitting a below cost bid. *See* *48 C.F.R. § 3.501-1*; *IBM Corp., B-299504, 2008 Comp. Gen. Proc. Dec. ¶ 64, 2007 WL 5118382 (Comp. Gen. June 4, 2007)*. It does require, however, that contracting officers "take appropriate action to ensure buying-in losses [losses **[*30]** incurred by a contractor offering a below cost bid] are not recovered by the contractor through the pricing of (1) change orders or (2) follow-on contracts subject to cost analysis." *48 C.F.R. § 3.501-2*. A contracting officer must also determine that the contractor will be a "responsible source" and that the supplies or services are offered at "fair and reasonable prices." *Id.* *§§ 9.103(b)*, *15.402(a)*. In making the determination of a fair and reasonable price, contracting officers are required to provide, and contracting officers are required to obtain, certified cost data. *See id.* *§§ 15.402(a)*, *15.403-4*; *10 U.S.C. § 2306a*. Further, both the FAR and federal statutes create civil and criminal penalties for submission of false or inaccurate cost data. *See* *18 U.S.C. § 1001*; *31 U.S.C. § 3729*; *48 C.F.R. §§ 9.406-2*, *9.407-2*. A contracting officer need not award the contract to the lowest bidder if other factors, such as a determination that the lowest bidder is not a responsible source, make an award inappropriate. *See* *48 C.F.R. § 9.103(c)*. In particular, the contracting officer may take into account the below-cost nature of a bid in determining whether a bidding contractor is a responsible **[*31]** source. *See* *Parker Shane Mfg., B-220273, 85-2 Comp. Gen. Proc. Dec. ¶ 367, 1985 WL 53258 (Comp. Gen. Sept. 30, 1985)*. Finally, both statute and the FAR require a contracting officer to report suspected antitrust activity to the Attorney General. *See* *41 U.S.C. § 3707*; *48 C.F.R. § 3.303*. These statutes and regulations make the possibility of recoupment through the charging of supracompetitive prices even less likely in the case of this market consisting of the federal government as the single purchaser in the market.

Fourth, a predatory pricing scheme cannot create a dangerous probability of recoupment where the firm engaging in the predatory pricing lacks the ability or capacity to absorb the competitor's market share. As the Supreme Court has explained, "[i]n order to succeed in a sustained campaign of predatory pricing, a predator must be able to absorb the market shares of its rivals once prices have been cut. If it cannot do so, its attempt at predation will presumably fail, because there will remain in the market sufficient demand for the competitors' goods at a higher price, and the competitors will not be driven out of business." *Cargill, 479 U.S. at 119 n.15*; *see also,* *Brooke Group, 509 U.S. at 226* **[*32]** (noting relevance to recoupment analysis of, *inter alia*, capacity of defendant to absorb market shares of rivals). Here, the amended complaint establishes that SBLLC did not have the capacity to absorb GMA's market share. The amended complaint alleges that, during the allegedly predatory period, SBLLC was unable to meet its delivery requirements. *See* Amended Compl., ¶ 53. GMA requested that CECOM issue split delivery orders, a request which CECOM initially denied, but later implemented. *See id.*, ¶¶ 54-55, 77.

Fifth, as alleged in the amended complaint the predatory scheme by SBLLC neither drove GMA from the market nor resulted in SBLLC being able to charge monopoly prices. On the contrary, the amended complaint alleges that CECOM issued split awards beginning in 2010 and, as of the time of the amended complaint, CECOM had made one split award for which GMA was awarded a delivery order of 980 WRS ULCANS compared to a delivery order of only 420 WRS ULCANS awarded to SBLLC. *See* Amended Compl., ¶¶ 77-78. Although the actual effect of the predatory scheme is not relevant to determining whether that scheme was an impermissible exclusionary practice, and is not by itself sufficient to support **[*33]** a finding of no dangerous probability of success, it is relevant to

[5] The fact that SBLLC raised its prices in subsequent bids is not sufficient to show recoupment or a dangerous probability of recoupment in the absence of any allegations that the increased price was supracompetitive. *See* *Brooke Group, 509 U.S. at 237* ("[A] price increase does not in itself permit a rational inference of . . . supracompetitive pricing.").

"whether that exclusionary practice entailed a 'dangerous probability of success.'" Taylor Pub. Co. v. Jostens, Inc., 216 F.3d 465, 482 (5th Cir. 2000). [6]

GMA makes much of statements allegedly made by SBLLC officers that SBLLC had the financial wherewithal to simply drop its prices and wait for GMA to go out of business. In the absence of objective allegations that there was a dangerous probability of recoupment through the charging of supracompetitive prices, however, SBLLC's subjective intent does not make out a predatory pricing claim. "Subjective evidence of alleged intent to recoup is insufficient where objective evidence fails to indicate the dangerous probability of recoupment. Such subjective evidence in *Brooke Group*—internal comments by **[*35]** the defendant's executives anticipating eventual profits—was rejected by the Supreme Court as a basis for finding defendant would likely recoup its losses, since there was 'no objective evidence . . . it had any real prospect of actually recouping.'" United States v. AMR Corp., 140 F. Supp. 2d 1141, 1209 (D. Kan. 2001) (quoting Brooke Group, 509 U.S. at 241), *aff'd*, 335 F.3d 1109 (10th Cir. 2003). Likewise, "[w]hether or not [SBLLC] ha[s] the means to sustain substantial losses . . . over a long period of time, [it] ha[s] no motive to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off." Matsushita, 475 U.S. at 593 (emphasis in original).

In short, *Brooke Group* requires a plaintiff asserting predatory pricing to show that, at the time of the predatory pricing, there was a "dangerous probability" that SBLLC could recoup its losses by charging supracompetitive prices after GMA was driven from the market. *See* Brooke Group, 509 U.S. at 224. This prerequisite to relief is "not easy to establish," id. at 226, "[i]f market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged **[*36]** would likely result in sustained supracompetitive pricing, the plaintiff's case has failed." *Id.* To defeat SBLLC's motion, *Twombly* requires GMA to allege sufficient facts to show that the dangerous probability of recoupment is "plausible on its face." Twombly, 550 U.S. at 570. Here, for the reasons explained above, "the anticompetitive scheme [GMA] alleged, when judged against the realities of the market, does not provide an adequate basis for a finding of liability." Brooke Group, 509 U.S. at 230. That GMA may have alleged that SBLLC priced its goods below cost for the purpose of harming GMA does not compel a different conclusion. "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." Id. at 226 (internal quotation omitted). Because the structure of the market alleged by GMA does not make a plausible showing from which a jury could conclude that SBLLC's alleged scheme created a dangerous probability or recoupment through the charging **[*37]** of supracompetitive prices, SBLLC is entitled to dismissal of the attempted monopolization claim. [7]

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[6] GMA argues that the court may not rely on this post-predation evidence, relying on the Fifth Circuit's statement in a prior case that in evaluating whether an attempt to monopolize had a dangerous probability of success the court may "not rely on hindsight but [must] examine the probability of success at the time the acts occur." United States v. American Airlines, Inc., 743 F.2d 1114, 1118 (5th Cir. 1984). *American Airlines* and the Fifth Circuit's subsequent decision in *Taylor Publ'g* are not difficult to harmonize. *American Airlines* merely states the unremarkable proposition that a dangerous probability of success is measured as of the time of the predatory practice, and thus the fact that the scheme was unsuccessful alone does not defeat an attempted monopolization claim. *Taylor Publ'g*, however, recognizes that such evidence may be relevant, considered with other factors, to show that there was no dangerous probability of success at the time the predatory scheme **[*34]** occurred. *Cf.* Brooke Group, 509 U.S. at 233-38 (as part of inquiry into whether there was a reasonable possibility of recoupment, examining whether the conduct alleged "in fact produced supracompetitive prices."). In other words, evidence that SBLLC was not in fact able to charge a supracompetitive price does not by itself mean that there was not a dangerous probability that it would be able to do so at the time of the predatory pricing, but it does have the "tendency to make the existence of" that dangerous probability "less probable than it would be without the evidence." Fed. R. Evid. 401.

[7] The parties devote significant attention to SBLLC's market share and barriers to entry in the ULCANS market. Although these factors are generally important in predatory pricing cases because they bear on the defendant's ability to secure a monopoly and thus charge a supracompetitive price, given the unique circumstances of this market the Court need not consider these factors. For the reasons explained above, even if SBLLC's market share and the barriers to entry in the market created a dangerous probability that SBLLC would achieve a monopoly, the fact that the market consisted of a single, monopsony buyer with

b. Objectively Baseless Complaints

GMA also argues that SBLLC attempted to monopolize the ULCANS market by "[m]aking objectively baseless complaints to governmental entities that GMA had violated security and procurement laws and such complaints were done for the **[*38]** specific purpose of interfering with GMA's business and driving up GMA's costs." Amended Compl., ¶ 101(K). SBLLC argues that this claim is barred by the *Noerr-Pennington* doctrine. Under this doctrine, which is premised on the *First Amendment* right to petition the government for a redress of grievances, "genuine attempts to influence passage or enforcement of laws are immune from antitrust scrutiny, regardless of the anticompetitive purpose behind such attempts." *Westmac, Inc. v. Smith, 797 F.2d 313, 315 (6th Cir. 1986)* (citing *United Mine Workers v. Pennington, 381 U.S. 657, 669-71, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-39, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961))*. GMA responds that the activity alleged falls within the "sham" exception to *Noerr-Pennington* immunity. As explained by the Supreme Court, "[t]he 'sham' exception to *Noerr* encompasses situations in which persons use the governmental process-as opposed to the outcome of that process-as an anticompetitive weapon. . . . A 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, **[*39]** but does so through improper means." *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* (citations and quotations omitted). To meet the sham exception, the plaintiff must show that the petitioning conduct was (1) objectively baseless, and (2) concealed an attempt to interfere with the plaintiff's business relationships. *See* *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*

The Court need not resolve this issue here, however, because the allegations of the amended complaint are, on their face, insufficient to allege a plausible claim of attempted monopolization based on the filing of frivolous complaints. The paragraph of the amended complaint quoted above is the only mention of objectively baseless complaints in the amended complaint. Nowhere in the complaint does GMA allege any particular complaints made, to what agencies they were made, when they were made, or how they were objectively baseless. Because the *Noerr-Pennington* doctrine is designed to protect *First Amendment* rights, and because an improper application of the sham exception could chill the exercise of such rights, a plaintiff alleging that conduct **[*40]** otherwise covered by the *Noerr-Pennington* doctrine falls within the sham exception must comply with *Rule 9(b)* by pleading with particularity "the 'who, what, where, when and how' of the misconduct," as well as plead "allegations regarding the specific activities which bring the defendant's conduct into one of the *Noerr-Pennington* exceptions." *Meridian Project Sys. v. Hardin Constr. Co., 404 F. Supp. 2d 1214, 1221 (E.D. Cal. 2005)*; *see also,* *Rockbit Indus. U.S.A., Inc. v. Baker Hughes, Inc., 802 F. Supp. 1544, 1552 (S.D. Tex. 1991)*; *Spanish Int'l Commc'ns Corp., Sin, Inc. v. Leibowitz, 608 F. Supp. 178, 182-84 (S.D. Fla. 1985)* (discussing cases). GMA's conclusory allegation that SBLLC made unspecified baseless complaints to unnamed administrative bodies over a two year period fails to adequately allege the applicability of the sham exception under the *Noerr-Pennington* doctrine, particularly in light of *Twombly*. *See* *Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056, 1063 (9th Cir. 1998)*; *Simon Property Group, Inc. v. Palombaro, 682 F. Supp. 2d 508, 511 (W.D. Pa. 2010)*; *Spanish Int'l, 608 F. Supp. at 184*; *Reaemco, Inc. v. Allegheny Airlines, 496 F. Supp. 546, 558 n.10 (S.D.N.Y. 1980)*. Accordingly, **[*41]** the Court should conclude that SBLLC is entitled to dismissal of this attempted monopolization claim.

3. *Tortious Interference Claim*

GMA also asserts that SBLLC's conduct amounted to tortious interference with a business expectancy under Michigan law. The Court should grant defendant's motion to dismiss this claim.

a. Choice of Law

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significant bargaining power as well as regulatory control over the market would make it unable to exercise monopoly power and recoup its investment in below-cost prices through the charging of supracompetitive prices.

Before addressing the merits of plaintiff's claim and defendant's motion, the Court must first determine the applicable governing law. The parties proceed on the assumption that plaintiff's state law claim is governed by Michigan law. This assumption is correct.

In resolving the parties' state law claims, the Court must apply the substantive law of the state. 28 U.S.C. § 1652 ("The laws of the several states . . . shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply."); *see also,* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In determining the appropriate source of law, the Court applies the choice of law rules of Michigan, the state in which this Court sits. *See* Klaxon v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) ("The conflict of laws rules to be applied by the federal court in **[*42]** Delaware must conform to those prevailing in Delaware's state courts."); International Ins. Co. v. Stonewall Ins. Co., 86 F.3d 601, 604 (6th Cir. 1996) ("A federal court exercising diversity jurisdiction must apply the choice of law rules of the forum state."); Security Ins. Co. v. Kevin Tucker & Assocs., Inc., 64 F.3d 1001, 1005 (6th Cir. 1995) (same). Under Michigan choice of law rules, a court "will apply Michigan law unless a 'rational reason' to do otherwise exists. In determining whether a rational reason to displace Michigan law exists, we undertake a two-step analysis. First, we must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests." Sutherland v. Kennington Truck Serv., Ltd., 454 Mich. 274, 286, 562 N.W.2d 466, 471 (1997). In an early manifestation of this approach, the court in Sexton v. Ryder Truck Rental, Inc., 413 Mich. 406, 320 N.W.2d 843 (1982), held that "where Michigan **[*43]** residents or corporations doing business in Michigan are involved in accidents in another state and appear as plaintiffs and defendants in Michigan courts, the courts will apply the *lex fori* [law of the forum], not the *lex loci delicti* [law of the place of injury]." Id. at 433, 320 N.W.2d at 854. Here, there is no question that plaintiff is a resident of Michigan. Likewise there is no question that defendant was doing business in Michigan. Thus, under Michigan's *lex fori* rule, Michigan law applies to plaintiff's claim. *See* Hollister v. Dayton Hudson Corp., 5 F. Supp. 2d 530, 533 (E.D. Mich. 1998) (Feikens, J.), *aff'd in part, rev'd in part on other grounds*, 201 F.3d 731 (6th Cir. 2000). Further, no party suggests that another jurisdiction has any interest in having its own law applied.

Additionally, choice of law issues do not involve a court's subject matter jurisdiction, and may be stipulated to by parties as a matter of contract. For these reasons, there is substantial authority for the proposition that parties may stipulate during litigation the source of law governing their dispute. *See* Cates v. Morgan Portable Bldg. Corp., 780 F.2d 683, 687 (7th Cir. 1985); Doe v. Nevada Crossing, Inc., 920 F. Supp. 164, 167 (D. Utah 1996); **[*44]** Van Deurzen v. Yamaha Motor Corp. USA, 2004 WI App 194, 276 Wis. 2d 815, 688 N.W.2d 777, 781-82 (Wis. Ct. App. 2004). [8] By arguing solely in terms of Michigan law, the parties have implicitly stipulated that Michigan law is controlling. *See* In re Apex Automotive Warehouse, L.P., No. 96 B 04594, 1999 Bankr. LEXIS 209, 1999 WL 132849, at *3 (Bankr. N.D. Ill. Mar. 9, 1999); *cf.* Golumbia v. Prudential Ins. Co., No. 96-1521, 1997 U.S. App. LEXIS 15323, 1997 WL 345728, at *2 (6th Cir. June 20, 1997) (party waived right to challenge applicability of Michigan law, notwithstanding contractual choice-of-law provision selecting New York law, where party argued merits in district court under Michigan law and failed to raise the contractual choice-of-law provision). *See generally,* Cates, 780 F.2d at 687 ("[T]he parties to a lawsuit can, within broad limits, stipulate to the law governing their dispute; and an implied stipulation is good enough."). Stated another way, "[w]here neither party argues that the forum state's choice of law rules require the court to apply the substantive law of another state, the court should apply the forum state's substantive law." ECHO, Inc. v. Whitson Co., 52 F.3d 702, 707 (7th Cir. 1995); *see also,* BBSerCo, Inc. v. Metrix Co., 324 F.3d 955, 960 n.3 (8th Cir. 2003); **[*45]** *Carbonic Prods. Co. v. Welding & Cutting*

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[8] A number of cases also note that the parties stipulated to the governing law and assume that the stipulation is controlling, without discussing the matter in detail. *See, e.g.,* National Union Fire Ins. Co. v. Emhart Corp., 11 F.3d 1524, 1528-29 (10th Cir. 1993); Wagenheim v. Natural Science Indus., Ltd., No. 1:04CV0239, 2006 U.S. Dist. LEXIS 73363, 2006 WL 2794790, at *3 (N.D. Ohio Sept. 27, 2006); Ethicon, Inc. v. Aetna Cas. & Surety Co., 805 F. Supp. 203, 204 n.1 (S.D.N.Y. 1992), *aff'd*, ***993 F.2d 1532 (2d Cir. 1993)***; Mariculture Prods. Ltd. v. Those Certain Underwriters at Lloyd's of London Individually Subscribing to Certificate No. 1395/91, 84 Conn. App. 688, 854 A.2d 1100, 1103 n.2 (Conn. Ct. App. 2004)

*Supply Co., 823 F.2d 553, 1987 WL 38061, at *1 (6th Cir. 1987)* (per curiam); *Wilkes Assocs. v. Hollander Indus. Corp., 144 F. Supp. 2d 944, 949 n.4 (S.D. Ohio 2001)*. Here, neither party argues that another state's law applies, and thus the Court should apply Michigan law.

b. Analysis

To establish a claim of tortious interference with a business expectancy under Michigan law, "a plaintiff must prove (1) the existence of a valid business expectancy, (2) knowledge of the expectancy **[*46]** on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a termination of the expectancy, and (4) resultant damage to the plaintiff." *Cedroni Assocs. v. Tomblinson, Harburn Assocs., 290 Mich. App. 577, 585, 802 N.W.2d 682, 687 (2010)*; *see also, Dalley v. Dykema Gossett, 287 Mich. App. 296, 323, 788 N.W.2d 679, 696 (2010)*. SBLLC argues that GMA has failed to sufficiently allege the third element of its tortious interference claim. To establish this element, GMA must plead and prove either that SBLLC committed a *per se* wrongful act—that is, an act that is inherently wrongful or illegal—or committed a lawful act with malice and without justification. *See Power Tools & Supply, Inc. v. Cooper Power Tools, Inc., 543 F. Supp. 2d 749, 763 (E.D. Mich. 2008)* (Roberts, J.). As the Michigan Court of Appeals explained in *Dalley*,

> To fulfill the third element, intentional interference inducing or causing a breach of a business relationship, a plaintiff must demonstrate that the defendant acted both intentionally and either improperly or without justification. To establish that a defendant's conduct lacked justification and showed malice, the plaintiff must **[*47]** demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.

Dalley, 287 Mich. App. at 323-24, 788 N.W.2d at 696.

Here, GMA cannot establish the third element of its tortious interference claim for the same reason that it cannot establish its antitrust claim. Although there is no Michigan caselaw directly on point, where a plaintiff "fails to allege any tortious activity other than precisely the same 'anticompetitive' behavior alleged in its antitrust claim[], . . . the ***antitrust law*** provides the best available barometer—indeed the only available barometer—of whether or not [the defendant's] conduct can be found to be 'wrongful' or 'illegitimate'—and, hence, tortious." *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I., 883 F.2d 1101, 1114 (1st Cir. 1989)*. Thus, the courts that have considered the issue have uniformly concluded that below-cost pricing that does not amount to predatory pricing under the antitrust laws does not constitute improper conduct sufficient **[*48]** to state a tortious interference claim. *See Bailey v. Allgas, Inc., 284 F.3d 1237, 1257 (11th Cir. 2002)* (Alabama law); *United States Anchor Mfg., Inc. v. Rule Indus., Inc., 264 Ga. 295, 443 S.E.2d 833, 836 (Ga. 1994)*; *McBride Consulting Serv., LLC v. Waste Mgmt. of Miss., Inc., 949 So. 2d 52, 56 (Miss. Ct. App. 2006)*; *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 659 A.2d 904, 935-36 (N.J. Super. Ct. App. Div. 1995)*; *cf. ACT, Inc. v. Sylvan Learning Sys., Inc., 296 F.3d 657, 668 (8th Cir. 2002)* (Iowa law). Similarly, the courts have uniformly and more generally held that "where the tort is grounded in precisely the same 'anticompetitive' behavior alleged in the failed antitrust claim, it cannot as a matter of law constitute tortious interference with a business relationship." *Metzler v. Bear Automotive Serv. Equip. Co., 19 F. Supp. 2d 1345, 1364 (S.D. Fla. 1998)* (applying Florida law and citing federal cases applying California and Illinois law); *see also, Rome Ambulatory Surgical Ctr., LLC v. Rome Mem'l Hosp., Inc., 349 F. Supp. 2d 389, 423-24 (N.D.N.Y. 2004)*.

The Michigan Court of Appeals's decision in *Michigan Podiatric Medical Ass'n v. National Foot Care Program, Inc., 175 Mich. App. 723, 438 N.W.2d 349 (1989)*, **[*49]** is instructive and provides compelling evidence that Michigan follows this general approach. In that case, the plaintiff alleged, *inter alia*, that the defendant had both engaged in anticompetitive behavior by violating a Michigan statute prohibiting below-cost pricing of certain health insurance contracts and had tortiously interfered with its prospective business through this pricing. The statute at issue (which has since been repealed), provided that "'[t]he rates charged by an organization for coverage under contracts issued under this section shall not be unreasonably lower than what is necessary to meet the expenses of the organization for providing this coverage and shall not have an anticompetitive effect or result in predatory pricing in relation to prudent purchaser agreement coverages offered by other organizations.'" *Id. at 734, 438 N.W.2d at 354* (quoting *Mich. Comp. Laws § 333.21054(3)* (repealed by 2000 Mich. Pub. Acts 252, § 1 (June 29, 2000))). After concluding that the plaintiff could not succeed on a claim under this statute, the court of appeals likewise rejected the plaintiff's tortious interference claim, reasoning that its "prior conclusion that these claims of **[*50]** 'illegal' activity are not sustainable compels a conclusion that plaintiffs will be unable to establish either that defendant's conduct was wrongful per se or undertaken illegally and without justification." *Id. at 736-37, 438 N.W.2d at 355*. Although *Michigan Podiatric* involved a predatory pricing claim under a state insurance state rather than under the antitrust laws, there is no reason to believe that the Michigan courts would view the matter differently in the antitrust context, particular in light of the uniform law from other jurisdictions discussed above. In short, because below-cost pricing is not in itself illegal or wrongful conduct, and because GMA has failed to sufficiently allege that the below-cost pricing was illegal under the antitrust laws, it follows that GMA has failed to sufficiently allege tortious interference under Michigan law.

Likewise, to the extent GMA basis its tortious interference claim on SBLLC's alleged filing of baseless complaints with regulatory agencies, the claim fails under the *Noerr*-*Pennington* doctrine. Although originally developed in the antitrust context, the *Noerr-Pennington* doctrine is one that protects *First Amendment* activity under the *Petition Clause*. For **[*51]** this reason, the doctrine has been extended beyond the antitrust context to provide immunity from a wide variety of claims. Specifically, as relevant here, the doctrine is applicable to tortious interference claims under Michigan law. *See* *Melea, Ltd. v. Quality Models, Ltd., 345 F. Supp. 2d 743, 758 (E.D. Mich. 2004)* (Feikens, J.); *Aurora Cable Commc'ns, Inc. v. Jones Intercable, Inc., 720 F. Supp. 600, 603 (W.D. Mich. 1989)* (citing *Trepel v. Pontiac Osteopathic Hosp., 135 Mich. App. 361, 354 N.W.2d 341 (1984))*. *See generally, Azzar v. Primebank, FSB, 198 Mich. App. 512, 517, 499 N.W.2d 793, 796 (1993)* (the Noerr-Pennington doctrine "bars litigation arising from injuries received as a consequence of the *First Amendment* petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs."). Accordingly, SBLLC is entitled to dismissal of GMA's tortious interference claim.

D. *Conclusion*

In view of the foregoing, the Court should conclude that GMA's amended complaint fails to allege sufficient facts to make a plausible showing that SBLLC engaged in predatory pricing under *§ 2* of the Sherman Act or made objectively baseless complaints not protected by the *Noerr-Pennington* **[*52]** doctrine. Accordingly, the Court should conclude that SBLLC is entitled to dismissal of GMA's attempted monopolization and tortious interference claims, and the Court should grant SBLLC's motion to dismiss.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of a copy hereof as provided for in *Fed. R. Civ. P. 72(b)*. Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Howard v. Secretary of Health & Human Servs., 932 F.2d 505 (6th Cir. 1991)*; *United States v. Walters, 638 F.2d 947 (6th Cir. 1981)*. Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sullivan, 931 F.2d 390, 401 (6th Cir. 1991)*; *Smith v. Detroit Federation of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987)*. Pursuant to *E.D. Mich. LR 72.1(d)(2)*, a copy of any objections is to be served upon this Magistrate Judge.

Within fourteen (14) days of **[*53]** service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

/s/ Paul J. Komives

PAUL J. KOMIVES

UNITED STATES MAGISTRATE JUDGE

Dated: 2/8/12

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Ross v. Bank of Am., N.A. (USA) (In re Currency Conversion Fee Antitrust Litig.)

United States District Court for the Southern District of New York

February 8, 2012, Decided; February 8, 2012, Filed

05 Civ. 7116 (WHP)

Reporter
2012 U.S. Dist. LEXIS 19760 *; 2012 WL 401113

IN RE CURRENCY CONVERSION FEE ANTITRUST LITIGATION;THIS DOCUMENT RELATES TO ROBERT ROSS, et al., Plaintiffs, -against- BANK OF AMERICA, N.A. (USA), et al., Defendants.

Prior History: *Currency Conversion Antitrust Litig. v. Bank of Am., N.A., 2010 U.S. Dist. LEXIS 117008 (S.D.N.Y., Nov. 3, 2010)*

Disposition: Cardholders were granted summary judgment as to an affirmative defense involving a settlement agreement; summary judgment otherwise denied.

Core Terms

arbitration clause, arbitration, Plaintiffs', meetings, Defendants', conspiracy, attended, summary judgment, summary judgment motion, competitors, settlement, antitrust, consumers, parties, motive, conspirators, cardholder, cards, affirmative defense, alleged conspiracy, trier of fact, unilateral, attendees, partial summary judgment, genuine issue, class action, Sherman Act, pro-competitive, undisputed, quotation

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment should be rendered if the record shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*.

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

HN2[] **Burdens of Proof, Movant Persuasion & Proof**

The burden of demonstrating the absence of any genuine dispute as to a material fact rests with the party moving for summary judgment.

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

HN3[] Burdens of Proof, Nonmovant Persuasion & Proof

Once the party moving for summary judgment has made an initial showing that there is no genuine dispute of material fact, the nonmoving party cannot rely on the mere existence of a scintilla of evidence to defeat summary judgment but must set forth specific facts showing that there is a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4[] Entitlement as Matter of Law, Genuine Disputes

A dispute about a genuine issue exists for summary judgment purposes where the evidence is such that a reasonable trier of fact could decide in the nonmovant's favor. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN5[] Summary Judgment, Evidentiary Considerations

On a summary judgment motion, the court resolves all factual ambiguities and draws all inferences in favor of the nonmoving party.

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN6[] Sherman Act, Scope

Antitrust law limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case. Accordingly, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Thus, to survive a motion for summary judgment, a plaintiff alleging a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Further, if the plaintiff's theory is economically senseless, no reasonable trier of fact could find in its favor, and summary judgment should be granted.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN7[] Sherman Act, Scope

15 U.S.C.S. § 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. To prevail on a *§ 1* claim, a plaintiff must demonstrate (1) an agreement or concerted action among the defendants in the (2) unreasonable restraint of trade. Accordingly, to survive summary judgment, a plaintiff must proffer direct or circumstantial evidence that reasonably tends to prove the defendant had a conscious commitment to a common scheme designed to achieve an unlawful objective. At a minimum, the circumstances must be such as to warrant a trier of fact in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN8[] **Sherman Act, Scope**

In the context of a restraint of trade claim under *15 U.S.C.S. § 1*, evidence of parallel conduct is probative of an antitrust conspiracy, but such evidence alone cannot suffice. Rather, a plaintiff relying on parallel conduct as evidence of an antitrust conspiracy must also demonstrate the existence of so-called plus factors. These plus factors include: (1) evidence of conduct that is contrary to the defendants' independent self-interest; (2) the presence or absence of a strong motive to enter into the alleged conspiracy; (3) the artificial standardization of products; and (4) a high level of inter-firm communications. Once a conspiracy is shown, only slight evidence is needed to link another defendant with it. Nevertheless, plaintiffs must provide evidence pertaining to each defendant to demonstrate that the defendant participated in the conspiracy.

Contracts Law > Contract Interpretation > General Overview

HN9[] **Contracts Law, Contract Interpretation**

The court should read the integrated contract as a whole to ensure that undue emphasis is not placed upon particular words and phrases.

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

HN10[] **Sherman Act, Scope**

Without more, parallel conduct does not suggest conspiracy under *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN11[] **Cartels & Horizontal Restraints, Price Fixing**

In a traditional price-fixing conspiracy, the conspirators are motivated by the goal of raising prices without losing their competitive position.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN12[] **Sherman Act, Scope**

It is well settled that a high level of inter-firm communications is probative of a *15 U.S.C.S. § 1* conspiracy in instances of parallel conduct among competitors. But a showing of frequent meetings among competitors is insufficient to defeat summary judgment. Rather, plaintiffs must provide either direct or circumstantial evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN13[] **Summary Judgment, Evidentiary Considerations**

On a summary judgment motion, a court must accord plaintiffs the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.

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

HN14[] **Per Se Rule & Rule of Reason, Sherman Act**

In a Sherman Act rule of reason case, defendants bear the burden of justifying their conduct only if Plaintiffs first prove the existence of an anticompetitive conspiracy.

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Judges: WILLIAM H. PAULEY III, United States District Judge.

Opinion by: WILLIAM H. PAULEY III

Opinion

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs bring this antitrust class action alleging that certain credit card issuers[1] conspired to include mandatory arbitration clauses in cardholder agreements in violation of the Sherman Act, *15 U.S.C. §1*. Plaintiffs further allege

[1] Plaintiffs initially brought their claims against Bank of America, N.A. (USA) ("Bank of America"), Capital One Bank, Capital One, F.S.B. (together with Capital One Bank, "Capital One"), J.P. Morgan Chase (prior to its merger with Bank One Corporation, which previously acquired First USA, Inc., "Chase"), Chase Bank USA, N.A., Citigroup, Inc., Citibank (South Dakota) N.A., Citibank USA, N.A., Universal Bank, N.A., Universal Financial Corp., Citicorp Diners Club, Inc. (the Citigroup, Citibank, Universal, and Citicorp entities are collectively referred to as "Citigroup"), HSBC Finance Corp., HSBC Bank, Nevada, N.A. (together with HSBC Finance Corp. and its predecessor Household International Inc., "Household"), MBNA America Bank, N.A., MBNA America (Delaware), N.A. (together with MBNA America Bank, N.A., "MBNA"), Providian Financial Corp., and Providian National Bank (together with Providian Financial Corp., "Providian") (collectively, the "Bank Defendants") and Novus Credit

that Defendants participated in a group boycott by refusing to issue cards to individuals who did not agree to arbitration. The remaining Defendants—Citigroup and Discover—move for summary judgment dismissing Plaintiffs' claims. Plaintiffs move for summary judgment dismissing Citigroup's sixth affirmative defense, which challenges Plaintiffs' ability to use certain evidence in this proceeding. **[*2]** Plaintiffs also move for partial summary judgment against Discover on the ground that Discover has failed to provide any pro-competitive justification for its conduct.

For the following reasons, Plaintiffs' motion for summary judgment as to Citigroup's sixth affirmative defense is granted. Defendants' motions for summary judgment are denied. Finally, Plaintiffs' motion for partial summary judgment as to the absence of pro-competitive justification is denied.[2]

BACKGROUND

Plaintiffs hold credit or charge cards issued by one or more of the Defendants. (Defendants' Joint Statement of Undisputed Material Facts in Support of their Motions for Summary Judgment, dated May 11, 2011 ("Def. Stmt.") ¶¶ 1-2; Plaintiffs' Statement Pursuant to *Local Civil Rule 56.1(b)*, dated July 12, 2011 ("Pl. Stmt.") ¶¶ 1-2.) They claim that Defendants conspired with American Express ("Amex") and Wells Fargo to impose mandatory arbitration **[*4]** clauses in their cardholder agreements to eliminate class action lawsuits and other litigation.

From 1999 through 2003, Defendants, Wells Fargo, and Amex met several times and discussed arbitration. (Def. Stmt, ¶¶ 152,197; Pl. Stmt, ¶¶ 152e, 197.) On May 25, 1999, First USA, Amex, Citigroup, and Sears Roebuck & Co. co-sponsored a meeting of in-house counsel for credit card companies at the Washington D.C. office of the firm now known as Wilmer Cutler Pickering Hale and Dorr LLP ("Wilmer"). (Def. Stmt. ¶ 235; Pl. Stmt, ¶¶ 235a-c.) Representatives of Capital One, Chase, Citigroup, First USA, Household, Providian, and Amex attended. (Def. Stmt. ¶ 235; Pl. Stmt. ¶ 235a.) While the parties dispute whether the attendees actually discussed arbitration, the meeting's agenda suggests that they may have, and this Court construes the evidence in Plaintiffs' favor. (Def. Stmt. 1240; Pl. Stmt, ¶ 235f.) At that time, only First USA and Amex had implemented arbitration clauses in their cardholder agreements or announced their intent to do so. (Pl. Stmt. ¶ 152a; Declaration of Kevin C. Aldridge in Support of Plaintiffs' Memorandum of Law in Opposition to the Motions for Summary Judgment of the Citi **[*5]** and Discover Defendants, dated July 12, 2011 ("Aldridge Decl.") Exs. 149, 195,215-16.)

On July 28, 1999, Defendants' representatives attended another meeting at Wilmer, which Plaintiffs characterize as the first meeting of the "Arbitration Coalition." (Def. Stmt. ¶ 170; Pl. Stmt. ¶¶ 170-171.) Defendants do not dispute that the attendees discussed the subject of arbitration. (Def. Stmt. ¶ 186.) A meeting organizer requested that attendees "send me the arbitration clauses used by your company . . . and any answers to FAQs or other explanations of the clause." (Pl. Stmt. ¶ 152i; Aldridge Decl. Ex. 254.) At the meeting, Joan Warrington ("Warrington"), an attorney at Citigroup, met Wendy Hufford ("Hufford"), an attorney at General Electric Capital Corporation. (Def. Stmt. ¶ 186; Pl. Stmt. 186.) Two days later, Warrington e-mailed Julie Nelson ("Nelson"), another attorney at Citigroup, and recommended that she "compare notes" with Hufford. (Def. Stmt. ¶ 186; Pl. Stmt. ¶ 186.)[3]

Representatives of the "Arbitration Coalition" met again **[*6]** on September 29, 1999. (Def. Stmt. ¶ 184; Pl. Stmt. ¶ 184.) In a draft agenda, First USA consultant Duncan MacDonald recommended that the attendees discuss such topics as "how to set up an arbitration program," "plain language vs. fine print & overkill," "recent litigation," and "challenges ... to adoption of arbitration clauses." (Pl. Stmt. ¶ 152j; Aldridge Decl. Ex. 174.) At the meeting, Citigroup's Warrington informed Gail Siegel ("Siegel"), an attorney at Chase, that Citigroup was taking a "wait and

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Services, Inc., Discover Financial Services and **[*3]** Discover Bank (collectively, "Discover" and together with the Bank Defendants and the National Arbitration Forum, Inc., the "Defendants"). All of the Defendants except Citigroup and Discover have settled.

[2] This Court denies Defendants' application to strike certain portions of Plaintiffs' Statement Pursuant to *Local Civil Rule 56.1(b)*. In resolving these motions, the Court does not consider Defendants' Joint Reply to Plaintiffs' 56.1(b) Response.

[3] In the interest of brevity, this Court does not summarize every piece of evidence offered by Plaintiffs. This Court has considered all of Plaintiffs' submissions.

see" approach towards adopting an arbitration clause. (Def. Stmt. ¶ 190; Pl. Stmt. ¶ 190a.) Thereafter, Defendants' employees attended many more Wilmer-sponsored meetings at which they discussed arbitration. (Def. Stmt. ¶¶ 171, 174, 197, 201; Pl. Stmt, ¶¶ 171a, 174, 197, 201.)

On February 14, 2001, Citigroup's Nelson attended a Washington, D.C. meeting of the so-called "Class Action Working Group," where representatives of a diverse group of businesses discussed strategies to reduce "class action abuse." (Def. Stmt. ¶¶ 215, 218; Pl. Stmt. ¶¶ 215, 218.) Also in 2001, a Capital One attorney organized periodic telephone conferences with other in-house attorneys. (Def. Stmt. ¶¶ 226, 227, **[*7]** 231; Pl. Stmt. ¶¶ 226, 227, 231.) Discover did not participate in these calls. (Def. Stmt, ¶ 234; Pl. Stmt. ¶ 234.)

The parties dispute precisely how many meetings Citigroup representatives attended. (Def. Stmt, ¶¶ 197, 201; Pl. Stmt. ¶¶ 197, 201.) But it is undisputed that Citigroup employees attended at least three of the "Arbitration Coalition" meetings before Citigroup adopted an arbitration clause. (Def. Stmt. ¶¶ 118, 183, 235; Pl. Stmt. ¶¶ 118a, 183, 235a.) Discover employees attended at least five such meetings. (Def. Stmt. ¶¶ 171, 174; Pl. Stmt. ¶¶ 171a, 174.) The parties dispute whether a Discover representative attended any of the meetings prior to Discover's adoption of an arbitration clause. (Def. Stmt, ¶¶ 39, 238; Pl. Stmt. ¶¶ 39, 238.)

Plaintiffs offer evidence that, viewed in their favor, indicates Citigroup and Discover accelerated their decision-making process regarding arbitration in tandem with their attendance at the meetings. (Pl. Stmt. ¶¶ 32, 69,113.) While the parties contest the details of Citigroup's decision-making process, it is undisputed that Steve Freiberg ("Freiberg"), the Chief Executive Officer of Citi Cards, made the final decision to adopt arbitration **[*8]** clauses in cardmember agreements in September or October of 2000. (Def. Stmt. ¶¶ 118-119; Pl. Stmt. ¶¶ 118-119.) Freiberg testified that, when he made his decision, he had no knowledge of the "Coalition" meetings, or whether Citigroup's competitors had adopted arbitration clauses. (Def. Stmt. ¶ 126; Pl. Stmt. ¶ 126.) Citigroup mailed its first arbitration change-in-terms notice in May or June 2001 and then completed a larger mailing later that year. (Def Stmt. ¶ 150; Pl. Stmt. ¶ 150.) Arbitration change-in-terms notices were mailed to Diners Club cardholders shortly thereafter. (Def. Stmt. ¶ 151; Pl. Stmt. ¶ 151.)

The parties also dispute the chronology of Discover's implementation of an arbitration clause. While Discover claims it decided to adopt a clause no later than April 1, 1999, Plaintiffs contend that the date was after June of that year. (Def. Stmt. ¶ 39; Pl. Stmt. ¶ 32k.) Drawing all reasonable inferences in Plaintiffs' favor, the later date is credited for the purpose of these motions. Nevertheless, Joe Yob ("Yob"), Discover's Executive Vice President of Cardholder Operations, testified that he made the final decision to add an arbitration provision to Discover's cardholder **[*9]** agreement. (Def. Stmt. ¶¶ 36, 27; Pl. Stmt. ¶ 32n.) Like his counterpart at Citigroup, Yob had no knowledge of the Wilmer meetings when he made his decision. (Def. Stmt. ¶ 42; Pl. Stmt. ¶ 42.) In late 2002, Discover decided to amend its arbitration clause to permit customers to "opt out" of arbitration without sacrificing any contractual rights. (Def. Stmt. ¶¶ 49-52; Pl. Stmt. ¶¶ 49, 52a.)

DISCUSSION

I. Legal Standard

A. Summary Judgment Standard

HN1[] Summary judgment should be rendered if the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; see also *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. ***HN2***[] The burden of demonstrating the absence of any genuine dispute as to a material fact rests with the moving party. See *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*. ***HN3***[] Once the moving party has made an initial showing that there is no genuine dispute of material fact, the non-moving party cannot rely on the "mere existence of a scintilla of evidence" to defeat summary judgment but must set forth "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* **[*10]** (emphasis in original); see also *Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 175 (2d Cir. 2003)* (citation omitted). ***HN4***[] "A dispute about a 'genuine issue* exists for summary judgment purposes where the evidence is such that a reasonable [trier of fact] could decide in the non-movant's favor." *Beyer v. Cnty. of Nassau, 524 F.3d 160, 163 (2d Cir. 2008)* (quoting *Guilbert v. Gardner, 480 F.3d 140, 145 (2d Cir. 2007))*. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)* (citing *Matsushita, 475 U.S. at 586-87*). ***HN5***[] The Court resolves all factual ambiguities and draws all inferences in favor of the non-moving party. See *Liberty Lobby. 477 U.S. at 255*; see also *Jeffreys v. City of New York, 426 F.3d 549, 553 (2d Cir. 2005)*.

Importantly, ***HN6***[] "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita, 475 U.S. at 588*. Accordingly, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588*. **[*11]** Thus, "[t]o survive a motion for summary judgment... a plaintiff [alleging] a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita, 475 U.S. at 588*. Further, "[i]f the plaintiffs theory is economically senseless, no reasonable [trier of fact] could find in its favor, and summary judgment should be granted." *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468-69, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

B. Sherman Act Claims

HN7[] *Section 1* of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce[.]" *15 U.S.C. § 1*. To prevail on a § 1 claim, Plaintiff must demonstrate (1) an agreement or concerted action among the defendants in the (2) unreasonable restraint of trade. See *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993)*. Accordingly, to survive summary judgment, Plaintiffs must proffer "direct or circumstantial evidence that reasonably tends to prove the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* **[*12]** (internal quotation omitted). "[A]t a minimum, the circumstances must be such as to warrant a [trier of fact] in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir. 1987)* (internal quotations and modifications omitted).

HN8[] "Evidence of parallel conduct is probative of an antitrust conspiracy, but such evidence 'alone cannot suffice.'" *In re Currency Conversion Fee Antitrust Litis, ("Amex"), 773 F. Supp. 2d 351, 366 (S.D.N.Y. 2011)* (quoting *Apex Oil, 822 F.2d at 252*). Rather, "a plaintiff relying on parallel conduct as evidence of an antitrust conspiracy must also demonstrate the existence of so-called 'plus factors.'" *Amex, 773 F. Supp. 2d at 366* (quoting *Apex Oil, 822 F.2d at 252*). "These plus factors include: (1) evidence of conduct that is contrary to the defendants' independent self-interest; (2) the presence or absence of a strong motive to enter into the alleged conspiracy; (3) the artificial standardization of products; and (4) a high level of inter-firm communications." *Amex, 773 F. Supp. 2d at 366* (quoting *In re Med. X-Ray Film Antitrust Litig., 946 F. Supp. 209, 218 (E.D.N.Y. 1996))* **[*13]** (internal modification omitted). "[O]nce a conspiracy is shown, only slight evidence is needed to link another defendant with it." *Apex Oil, 822 F.2d at 257*. Nevertheless, Plaintiffs must provide evidence "pertaining to each defendant" to demonstrate that the defendant participated in the conspiracy. *AD/SAT v. Associated Press, 181 F.3d 216, 234 (2d Cir. 1999)*.

II. Citigroup's Sixth Affirmative Defense

As a preliminary matter, Plaintiffs are entitled to summary judgment dismissing Citigroup's sixth affirmative defense. According to Citigroup, the release in the settlement of a related matter, In re Currency Conversion Fee Antitrust Litigation ("CCF"), MDL No. 1409, Master File No. M 21-95, limits the evidence on which Plaintiffs may now rely. Specifically, Citigroup maintains that Plaintiffs released not only all claims related to foreign transaction fee ("FX fee") conduct, but also any right to present evidence connected with that conduct.

But Citigroup misreads the CCF settlement agreement. In that agreement, the parties acknowledged that the release "does not release or discharge ... the claims currently asserted in the [Bank of America] **[*14]** Class Action

Complaint filed on August 11, 2005." (Declaration of Kevin C. Aldridge in Support of Plaintiffs' Motion for Summary Judgment on the Citi Defendants' Sixth Defense, dated May 9, 2011 Ex. 1: Stipulation and Agreement of Settlement in In re Currency Conversion Fee Antitrust Litigation, dated July 20, 2006 ("CCF Settlement") at ¶ 2(kk).) Because the settlement agreement expressly preserved Plaintiffs' arbitration-related claims, it makes little sense to read the agreement to preclude Plaintiffs from relying on the evidence needed to prove those claims. Indeed, the settlement agreement expressly requires the preservation of FX fee evidence until this matter is resolved. (CCF Settlement at ¶ 19(a).)

Citigroup's effort to stretch the meaning of the term "claims" to encompass use of FX fee evidence in this action is unpersuasive. The settlement agreement defines "claims" to include "contentions, allegations, and assertions of wrongdoing" relating to an alleged FX fee conspiracy. (CCF Settlement at ¶¶ 2(i), 2(kk).) But the agreement, read as a whole, plainly releases Defendants from liability arising from FX fee conduct, rather than prohibiting the use of FX fee evidence in this **[*15]** proceeding. See *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 468 (2d Cir. 2010)* (***HN9***[] "The court should read the integrated contract as a whole to ensure that undue emphasis is not placed upon particular words and phrases[.]") (internal citations omitted). Accordingly, Plaintiffs may rely on FX fee evidence, and their motion for summary judgment dismissing Citigroup's sixth affirmative defense is granted.

III. Sherman Act Claims

A. Parallel Conduct

The parties dispute the extent to which Defendants' adoption of arbitration clauses was "parallel." For example, while First USA and Discover implemented their arbitration clauses in 1998 and 1999, respectively, Providian and Citigroup did not promulgate their clauses until 2001. (Def. Stmt. ¶ 150; Pl. Stmt. ¶ 150; Aldridge Decl. Exs. 215, 216, 295, 296.) And Discover decided to adopt an "opt-out" provision in 2002. (Def. Stmt, ¶¶ 49-52; Pl. Stmt. ¶¶ 49, 52a.) Nevertheless, it is undisputed that Defendants' adoption of arbitration clauses roughly coincided with their attendance at the "Arbitration Coalition" meetings. Given the temporal proximity between the meetings and the adoption of arbitration clauses, this parallel **[*16]** conduct is probative of an antitrust conspiracy.

HN10[] "Without more, parallel conduct does not suggest conspiracy[.]" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. And Plaintiffs identify no direct evidence that Defendants participated in a conspiracy. Cf. *In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010)* (Posner, J.) ("What is missing, as the defendants point out, is the smoking gun in a price-fixing case: direct evidence, which would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price."). Accordingly, this Court evaluates the so-called "plus factors." *Apex Oil, 822 F.2d at 252*.

B. Plus Factors

1. Conduct Contrary to Defendants' Self-interest

While each Defendant had a compelling independent justification for its decision to adopt arbitration, the record—viewed in Plaintiffs' favor—reveals conduct against Defendants' self-interest.

To be sure, the undisputed record indicates that Defendants believed resolving disputes through arbitration—and barring class arbitration—would reduce defense and settlement costs, and would help **[*17]** minimize exposure to class action litigation. (Def. Stmt. ¶¶ 36-38, 114-115; Pl. Stmt. ¶¶ 114, 115d, 123a, 129b, 178a.) Nevertheless, the record also reveals conduct that a reasonable trier of fact could view as contrary to each Defendants' unilateral interest. Defendants arguably acted against their unilateral interests by attending numerous meetings with their competitors and—at least in the case of Citigroup—providing competitors with certain sensitive business information. Of course, competitors have the right to organize and engage in joint lobbying and legal efforts. See *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; see also *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. But there are genuine factual disputes regarding the extent to which Defendants shared strategic information. Viewed in the light most favorable to Plaintiffs, the evidence supports an inference that Defendants used the meetings to coordinate their decision-making on arbitration. Such coordination would be contrary to each Defendant's unilateral interest, and a trial is required to determine what actually happened at the meetings.

Further, Warrington **[*18]** may have acted against Citigroup's unilateral interest when she shared information about its arbitration plans with Siegel. (Def. Stmt. ¶ 190; Pl. Stmt. ¶ 190a.) According to Defendants, Warrington contradicted the notion that any conspiracy existed when she informed Siegel that Citigroup was taking a "wait and see" attitude. (Def Stmt. ¶ 190; Pl. Stmt. ¶ 190a.) But the record also supports a contrary interpretation. Specifically, a reasonable trier of fact could view Warrington's willingness to share sensitive information with a competitor as a tacit invitation to collude. While Plaintiffs' reading of Warrington's statement seems improbable, this factual dispute is inappropriate for resolution on summary judgment.

2. Motive

Defendants contend that the lack of evidence of a rational motive to engage in the purported conspiracy and group boycott undermines Plaintiffs' allegations. See *AD/SAT, 181 F.3d at 233* (quoting *Matsushita, 475 U.S. at 588*) (internal quotation marks omitted) ("[T]he absence of a rational motive to engage in the alleged conspiracy is highly relevant to whether a genuine issue for trial exists[.]"). ***HN11***[] In a traditional price-fixing conspiracy, the conspirators are motivated **[*19]** by the goal of raising prices without losing their competitive position. See *Amex, 773 F. Supp. 2d at 368* ("The evidence demonstrates that Amex wanted to raise its FX Fee but was constrained by . . . its disinclination to be a market-leader on pricing."). Here, by contrast, there is little evidence indicating that adoption of an arbitration clause threatened any Defendant's competitive posture.

Nonetheless, a conspiracy to adopt arbitration clauses would not be entirely irrational. While Plaintiffs surmise that Defendants colluded in order to foreclose a "renegade Bank campaign" in which certain issuers would advertise their lack of an arbitration clause, the Court need not engage in such speculation. The deposition testimony of Wendy Kleinbaum ("Kleinbaum"), an attorney at Citigroup, reveals that Defendants may have been concerned that consumers would cancel their cards if Citigroup unilaterally adopted an arbitration clause. (Pl. Stmt, ¶ 69e.) While Kleinbaum testified that she flagged several potential concerns about adopting an arbitration clause, she also explained that she did not believe moving to arbitration would have a deleterious effect on Citigroup's business. (Aldridge **[*20]** Decl. Ex. 189: Dep. Tr. of Wendy Kleinbaum, dated March 5, 2010, at 102.) Although Defendants' interpretation of Kleinbaum's testimony may be correct, the significance of the testimony is a contested issue of fact for trial.

In arguing that they had no motive to conspire, Defendants observe that Plaintiffs' own expert, Dr. Oren Bar-Gill, opined that the presence or absence of arbitration clauses does not impact consumer choice. (Def. Stmt. ¶ 136; Pl. Stmt. ¶ 136.) Indeed, Dr. Bar-Gill explained that consumers typically have no idea that arbitration clauses exist, or do not understand them. (Def. Stmt. ¶ 137; Pl. Stmt. ¶ 137.) But Dr. Bar-Gill did not claim that consumers would never care about arbitration. To the contrary, he explained that what consumers view as "salient" may change over time. (Aldridge Decl. Ex. 102, ¶ 6.) Thus, while Defendants identify potentially fruitful grounds for cross-examination of Plaintiffs' expert, they fail to establish that there was no rational motive to conspire.

As further evidence of motive, Plaintiffs postulate that because early adopters of arbitration clauses faced an onslaught of litigation targeting those clauses, Defendants conspired to lighten **[*21]** their proportionate share of the litigation burden. Specifically, Plaintiffs cite a draft e-mail authored by attorney Alan Kaplinsky of the law firm Ballard Spahr Andrews & Ingersoll LLP encouraging attendees of the July 28, 1999 meeting to be "well networked" because "the plaintiffs' bar is engaged in a 'take no prisoners assault' on consumer arbitration programs." (Aldridge Decl. Ex. 251.) While Defendants deny that attendees of the July 28 meeting shared this motive, or even received Kaplinsky's e-mail, the facts are disputed. Similarly, Defendants may be correct that issuers that adopted their clauses relatively late—such as Citigroup—would have no motive to enter the fray and shoulder part of their competitors' litigation costs. But this Court will not weigh competing inferences in resolving Defendants' summary judgment motions, and must view the facts in Plaintiffs' favor.

3. Standardization

The parties dispute whether Defendants' respective arbitration clauses reflect "artificial standardization." See *Amex, 773 F. Supp. 2d at 366*. Unlike setting prices or FX fees, the decision to adopt an arbitration clause is binary—a business either implements one, or it does not. A comparison **[*22]** with Defendants' FX fee conduct in *Amex, 773 F. Supp. 2d at 371-72*, illustrates the point. In that case, most Defendants fixed their respective FX fees at precisely the same level. See *Amex, 773 F. Supp. 2d at 371-72*. Here, by contrast, Defendants merely decided to adopt arbitration clauses. The degree of uniformity that this Court found probative in Amex is absent, notwithstanding Plaintiffs' allegation that the two purported conspiracies are "integrally intertwined." *Amex, 773 F. Supp. 2d at 364*.

Nevertheless, the presence of class action waivers in Defendants' arbitration clauses could support an inference of collusion. To be sure, the Supreme Court has recognized that "[a]rbitration is poorly suited to the higher stakes of class litigation." *AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1752, 179 L. Ed. 2d 742(2011)*. And Discover's decision in 2002 to add an "opt-out" provision to its arbitration clause when others did not undercuts any claimed "standardization." But each Defendant's decision to adopt an arbitration clause that roughly mirrored those used by its competitors is probative, particularly when the evidence is considered in Plaintiffs' favor.

4. Inter-Firm Communications

Plaintiffs place **[*23]** great weight on the fact that Defendants' representatives attended many meetings where arbitration was discussed. Specifically, Plaintiffs argue that these frequent meetings suggest a conspiracy because Defendants used them to coordinate the adoption of arbitration clauses. ***HN12***[] It is well settled that "a high level of inter[-]firm communications" is probative of a conspiracy in instances of parallel conduct among competitors. *Apex Oil, 822 F.2d at 254*. But a showing of frequent meetings among competitors is insufficient to defeat summary judgment. See *H.L. Moore Drug Exch. v. Eli Lilly and Co., 662 F.2d 935, 941 (2d Cir. 1981)* ("[A] mere showing of close relations or frequent meetings between the alleged conspirators . . . will not sustain a plaintiffs burden absent evidence which would permit the inference that these close ties led to an illegal agreement."). Rather, Plaintiffs must provide either direct or circumstantial evidence that "tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita, 475 U.S. at 588*.

Defendants' frequent attendance at the meetings is certainly noteworthy, and the voluminous record in this case—viewed in the light most favorable **[*24]** to Plaintiffs—could suggest that Defendants used the meetings to concoct a conspiracy to adopt arbitration clauses and boycott customers who rejected them. The Court recognizes that the ultimate decision-makers at Citigroup and Discover—Freiberg and Yob—had no knowledge of the meetings. (Def. Stmt, ¶¶ 42, 126; Pl. Stmt. ¶¶ 42, 126.) But the in-house counsel who attended the "Coalition" meetings were not "low level employees" engaged in mere "shop talk." *Amex, 773 F. Supp. 2d at 370* (quoting *In re Baby Food Antitrust Litig., 166 F.3d 112, 125 (3d Cir. 1999))* (internal quotation marks omitted). And disputed issues of fact remain regarding whether "the exchanges of information had an impact on [arbitration] decisions." *Amex, 773 F. Supp.2d at 370* (quoting *In re Flat Glass Antitrust Litig., 385 F.3d 350, 369 (3d Cir. 2004))* (internal quotation marks omitted). Accordingly, summary judgment is unwarranted.

At oral argument, Plaintiffs acknowledged that there is an "extreme paucity of documents" supporting their theory of the case. (Hr'g Tr. dated Nov. 7, 2011, at 61.) And while Plaintiffs attribute this evidentiary deficiency to Defendants' redactions for privilege, this Court does not draw **[*25]** an adverse inference from Defendants' privilege determinations. See *Nabisco. Inc. v. PF Brands, Inc., 191 F.3d 208, 226 (2d Cir. 1999)* ("If refusal to produce [a document] based on claim of the [attorney-client] privilege supported an adverse inference, persons would be discouraged from seeking opinions, or lawyers would be discouraged from giving honest opinions."), abrogated on other grounds, *Moseley v. V Secret Catalogue. Inc., 537 U.S. 418, 123 S. Ct. 1115, 155 L. Ed. 2d 1 (2003)*. However, the high degree of inter-firm communications in this case—considered with the record as a whole—precludes an award of summary judgment. See *H.L. Hayden Co. of N.Y. v. Siemens Med. Svs., Inc., 879 F.2d 1005, 1012 (2d Cir. 1989)* (***HN13***[] "[A court] must accord plaintiffs 'the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.'") (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962))*.

C. "Economic Sense"

Viewed in Plaintiffs' favor, the record in this case shows that Plaintiffs' conspiracy allegations may make "economic sense." *Matsushita, 475 U.S. at 587*. While Dr. Bar-Gill opined that consumers do not consider the presence **[*26]** of arbitration clauses when choosing among credit cards, consumer preferences are not static. As such, Defendants could have colluded to foreclose the possibility that arbitration would ever become important to cardholders. Of course, the unilateral benefits of arbitration to each Defendant are great. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775, 176 L. Ed. 2d 605 (2010)* (describing the benefits of arbitration as "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"). Yet, Defendants arguably acted against their respective self-interest by attending numerous meetings with direct competitors where at least some sensitive business information was shared. A careful weighing of the evidence could refute Plaintiffs' insinuations of conspiratorial conduct. But the factual disputes in this case must be resolved at trial.

IV. Remaining Issues

A. Antitrust Standing and Irreparable Harm

This Court has already considered and rejected an antitrust standing argument indistinguishable from the one Discover now advances. See *Amex, 773 F. Supp. 2d at 373* (rejecting the argument as "absurd"). Discover's standing argument fails **[*27]** for the same reasons. The impact, if any, of Discover's "opt-out" provision may be addressed at trial.

Discover's contention that Plaintiffs cannot demonstrate irreparable harm is similarly meritless. The fact that some of the alleged co-conspirators have settled and agreed to remove their arbitration clauses for thee and a half years does not prevent Plaintiffs from demonstrating injury as a result of reduced choice and "a diminution in the overall quality of credit services offered to consumers." *Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 221 (2d Cir. 2008)*.

B. Pro-Competitive Justifications

Finally, Plaintiffs' motion for partial summary judgment against Discover regarding the absence of pro-competitive justifications is premature. ***HN14***[] In a Sherman Act "rule of reason" case, Defendants bear the burden of justifying their conduct only if Plaintiffs first prove the existence of an anticompetitive conspiracy. *In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 201 n.13 (2d Cir. 2006)*. Here, the parties dispute whether the "rule of reason" standard applies, as Plaintiffs contend that a horizontal agreement to adopt arbitration is per se unlawful. And while Plaintiffs have demonstrated **[*28]** genuine issues for trial, they have not proven their case by a preponderance of the evidence, and may not be able to do so. Accordingly, this Court denies Plaintiffs' motion for partial summary judgment against Discover.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment are denied. Plaintiffs' motion for summary judgment dismissing Citigroup's sixth affirmative defense is granted, and Plaintiffs' motion for partial summary judgment against Discover regarding the absence of pro-competitive justification is denied.

The Clerk of Court is directed to terminate the motions pending at ECF Nos. 301, 307, 311, and 312.

Dated: February 8, 2012

New York, New York

SO ORDERED:

/s/ William H. Pauley

WILLIAM H. PAULEY III

U.S.D.J.

End of Document

Free Freehand Corp. v. Adobe Sys.

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

February 10, 2012, Decided; February 10, 2012, Filed

Case No.: 11-CV-02174-LHK

Reporter

852 F. Supp. 2d 1171 *; 2012 U.S. Dist. LEXIS 17254 **; 2012-1 Trade Cas. (CCH) P77,811; 2012 WL 440819

FREE FREEHAND CORP. and JABEZ PALMER, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. ADOBE SYSTEMS INC., Defendant.

Core Terms

software, Plaintiffs', prices, antitrust, bundling, statute of limitations, monopoly power, acquisition, merger, monopolization, monopoly, anticompetitive conduct, new use, discontinuing, anticompetitive, graphic, anti trust law, illustration, products, argues, Clayton Act, Sherman Act, Reply, allegations, competitors, post-merger, monopolist, motion to dismiss, customers, vector

Counsel: **[**1]** For Free Freehand Corp, Jabez Palmer, Eric Rosenberg, Jamie Pritchett, on behalf of themselves and all others similarly situated, Plaintiffs: Jared Harrison Beck, LEAD ATTORNEY, Elizabeth Lee Beck, Beck & Lee Business Trial Lawyers, Miami, FL.

For Mark Oliver, Inc, Plaintiff: Elizabeth Lee Beck, Beck & Lee Business Trial Lawyers, Miami, FL.

For Adobe Systems, Inc., Defendant: Robert Allan Mittelstaedt, LEAD ATTORNEY, David Craig Kiernan, Jones Day, San Francisco, CA.

Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

[*1175] ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Now before the Court is Defendant Adobe Systems Inc.'s ("Adobe") motion to dismiss Plaintiff Free FreeHand's and Plaintiff Jabez Palmer's (collectively "Plaintiffs") first amended complaint. ECF No. 20. The Court held a hearing on the motion on November 8, 2011. Having considered the parties' briefing and arguments, the Court GRANTS in part and DENIES in part Adobe's motion for the reasons explained below.

I. Factual Background

This antitrust case arises out of Adobe's 2005 acquisition of FreeHand, a professional vector graphic illustration software, which, prior to the 2005 acquisition, competed with Adobe's professional **[**2]** vector graphic illustration software, Illustrator. FAC ¶ 1. Plaintiffs allege that "since acquiring FreeHand, Adobe has significantly raised the price of Illustrator while, at the same time, effectively removing FreeHand from the market by failing to update the program." *Id.*

Plaintiff Free FreeHand is a non-profit corporation comprising 5,500 members who are graphic design professionals and believe that FreeHand is a superior product to Illustrator. *Id.* ¶¶ 7-9. Free FreeHand members own FreeHand software licenses for either Windows or Macintosh, and most members have purchased software licenses for Illustrator. *Id.* ¶¶ 10-11. Plaintiff Jabez Palmer, a member of Free FreeHand, owns a software license for FreeHand and purchased a software license for Illustrator. *Id.* at ¶ 12.

In 1994, Adobe acquired Aldus, a software company that was licensed to market and sell FreeHand. *Id.* ¶ 57. The FTC challenged Adobe's acquisition of Aldus, charging that the effect of the acquisition may be substantially to lessen competition, or to tend to create a monopoly in the market for professional illustration software. *Id.* ¶¶ 58-59 (citing *In the Matter of Adobe Sys. Inc., et al., 118 F.T.C. 940, 942 (Oct. 18, 1994))*. **[**3]** The FTC found that the Adobe-Aldus merger would: (1) increase the already high concentration in the relevant market; (2) eliminate Aldus as a substantial independent competitive force in the relevant markets; (3) eliminate actual, direct, and substantial competition between Adobe and Aldus; (4) eliminate competition between the two closest substitutes, Illustrator and FreeHand; (5) allow the merged firm unilaterally to exercise market power; (6) allow the merged firm to raise prices, either directly or through reduced discounting, promotion, or services, on either Illustrator or FreeHand or on both products; (7) allow the merged firm to reduce innovation by delaying or reducing product development; and (8) increase the likelihood of coordinated interaction. *Id.* ¶ 61.

On October 18, 1994, Adobe, Aldus, and the FTC signed a consent order divesting Adobe of FreeHand. The divestiture's purpose was "to ensure the continuation of FreeHand as an ongoing viable Professional Illustration program, to maintain FreeHand as an independent competitor in the Professional Illustration Software Business, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's **[**4]** complaint." *Id.* ¶ 62 (quoting *Adobe, 118 F.T.C. at 946)*. The FTC also prohibited Adobe from acquiring FreeHand or any other professional illustration software for a period of 10 years. *Id.* ¶ 63 (citing *Adobe, 118 F.T.C. at 947)*. In 2005, at the conclusion of the **[*1176]** 10 year non-acquisition period mandated by the FTC consent order, Adobe acquired FreeHand by purchasing Macromedia, which had itself acquired FreeHand in the intervening period. *Id.* ¶ 65.

Plaintiffs allege that "[t]here are two relevant product markets for antitrust analysis in this action: (1) the market for professional vector graphic illustration software for Macintosh operating systems (the 'Mac OS Market') and (2) the market for professional vector graphic illustration software for Windows operating systems (the 'Windows OS Market')." *Id.* ¶ 32. They allege that the geographic scope of these markets is global, or, in the alternative, the entire United States. *Id.* ¶ 33. Plaintiffs allege that Illustrator and FreeHand are the only products competing in the Mac OS Market and that Illustrator, FreeHand, and CorelDraw are the only products competing in the Windows OS Market. *Id.* ¶¶ 47-48. Plaintiffs allege that since acquiring **[**5]** FreeHand, Adobe possesses 100% market share of the Mac OS Market and 80% of the Windows OS Market. *Id.* ¶¶ 52-53. Plaintiffs claim that Adobe "has the power to extract supracompetitive prices in the relevant markets." *Id.* ¶ 56.

Plaintiffs allege that "[t]here are currently no close substitutes for professional graphic illustration software, and no other product significantly constrains the price of this software." *Id.* ¶ 50. Plaintiffs also claim that there are high barriers to entry into the market.

First, Plaintiffs claim that "[m]arketing a technically comparable or even an improved software program would be difficult, time consuming, and unlikely because of network externalities associated with the current competitors' extensive installed user bases." *Id.* at 51.

Second, Plaintiffs claim that "any new software product would have to simultaneously overcome a second network effect in the commercial printer software market." *Id.* According to Plaintiffs, "[c]ommercial printers have their own software, which needs to be compatible with the files the designer sends to be printed. Commercial printers generally accept only Adobe, FreeHand, and, to a lesser extent, Corel files. Designers who **[**6]** want to print commercially cannot use file types that commercial printers cannot accept." *Id.* ¶ 39.

Plaintiffs allege that since acquiring FreeHand, Adobe has continually and significantly increased the price of Illustrator. In 2004, prior to the acquisition, the price for Illustrator was $399. In 2005, presumably after the merger, Adobe raised the price of Illustrator to $499. In 2008, Adobe released a new version of Illustrator and again raised the price of Illustrator to $599. *Id.* ¶ 68.

Plaintiffs also allege that Adobe purposefully misled the public, fostering the perception that Adobe would continue to support and develop FreeHand. *Id.* ¶ 69. On June 1, 2006, *MacWorld* quoted an Adobe representative stating that the company "plans to continue to support Freehand," "that it would 'develop Freehand 'based on [its] customer's needs," and that the product would not be discontinued. *Id.* On May 16, 2007, Plaintiffs allege that Adobe revealed "its true intentions" when its product manager, Jack Nack, wrote in a blog article titled "FreeHand No Longer Updated; Moving to Illustrator" that Adobe would not "develop and deliver any new feature-based releases of FreeHand, or . . . deliver patches **[**7]** or updates for new operating systems or hardware." *Id.* ¶ 70.

Plaintiffs allege that "Adobe has succeeded in ending competition" and "effectively acknowledged its intent to cripple innovation" in the relevant markets. *Id.* ¶ 72. Plaintiffs further claim that:

> **[*1177]** Adobe has used the asset of FreeHand in a different manner from the way FreeHand was used when and before FreeHand was acquired in the Adobe-Macromedia merger. Before the acquisition, FreeHand was an actively developed and supported piece of software and a living, breathing product. After the acquisition, Adobe has effectively crippled and killed FreeHand while scavenging its bones for features to incorporate into Illustrator.
>
> *Id.* ¶ 74.

Plaintiffs also allege that Adobe obtained and protects its monopoly power through anticompetitive conduct such as by "purchas[ing] and subsequent[ly] fail[ing] to update FreeHand," "crippling FreeHand," "providing materials to help consumers transition from FreeHand to Illustrator," and "bundling Illustrator . . . with other Adobe products . . . [thereby] limiting the ability of potential rival professional software manufacturers to enter the market without a full array of graphics software." *Id.* ¶¶ **[**8]** 75-77. Plaintiffs also allege that, despite repeated requests from Free FreeHand members to release FreeHand's source code to the public, Adobe has refused to make its source code public. *Id.* ¶¶ 88-89.

Adobe's actions have allegedly harmed Plaintiffs by exacting "unlawful monopoly prices" for purchases of Illustrator and FreeHand. *Id.* ¶¶ 95, 97. Plaintiffs also face the potential harm of their versions of FreeHand becoming incompatible with future versions of computer operating software and losing their designs because images created in FreeHand are not useable when imported into Illustrator. *Id.* ¶ 97.

II. Judicial Notice

As a general rule, a district court may not consider any material beyond the pleadings in ruling on a 12(b)(6) motion. *Lee v. Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*. However, a court may take judicial notice of "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*, *overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)*. In ruling on this motion, the Court considers the Federal **[**9]** Trade Commission's ("FTC") 1994 Consent Order, whose contents are alleged in the first amended complaint ("FAC") and whose authenticity no party questions. *See In the Matter of Adobe Sys. Inc., et al., 118 F.T.C. 940, 1994 WL 16011114 (Oct. 18, 1994)*.

III. Procedural Background

Plaintiffs filed the instant lawsuit, on behalf of themselves and all others similarly situated, on May 3, 2011. ECF No. 1. Adobe filed a motion to dismiss on July 7, 2011. ECF No. 10. On July 10, 2011, Plaintiffs filed their First Amended Complaint ("FAC"), which mooted Adobe's first motion to dismiss. ECF No. 19.

The FAC alleges claims for relief under the following statutes: (1) *Section 2* of the Sherman Act, *15 U.S.C. § 2*; (2) Section 7 of the Clayton Act, *15 U.S.C. § 18*; (3) *California Business and Professions Code § 16700 et seq.*; (4) *California Business and Professions Code § 17200 et seq.*; (5) Washington Consumer Protection Act, *RCW 19.86.020 et seq.*; and (6) Washington Consumer Protection Act, *RCW 19.86.040 et seq. Id.* at 27-30. Plaintiffs seek the following relief: (1) treble damages; (2) an injunction requiring divestiture of FreeHand; and (3) attorney's fees and costs. *Id.* at 30.

Plaintiffs seek to represent **[**10]** four classes as follows:

a. The first class, "Mac Damages Class," seeks damages only for violations **[*1178]** of *15 U.S.C. §§ 2*, *18*; *Cal. Bus. & Prof. Code § 16700 et seq.* and *RCW 19.86.020 et seq.* and is defined as:
All persons or entities that purchased FreeHand or Illustrator for a Macintosh operating system from at any time since Adobe's purchase of Macromedia in 2005 (the "Class Period").

b. The second class, "Windows Damages Class," seeks damages only for violations of *15 U.S.C. §§ 2*, *18*; *Cal. Bus. & Prof. Code § 16700 et seq.* and *RCW 19.86.020 et seq.* and is defined as:
All persons or entities that purchased FreeHand or Illustrator for a Windows operating system from at any time since Adobe's purchase of Macromedia in 2005 (the "Class Period").
* * *

c. The third class, "Mac Injunctive Class," seeks declaratory and injunctive relief only for violations of *15 U.S.C. §§ 2*, *18*; *Cal. Bus. & Prof. Code § 16700 et seq.* and *RCW 19.86.020 et seq.* and is defined as:
All persons or entities that currently use professional vector graphic illustration software on a Macintosh operating system, in addition to Free FreeHand.
* * *

d. The fourth class, "Windows Injunctive Class," seeks declaratory and injunctive **[**11]** relief only for violations of *15 U.S.C. §§ 2*, *18*; *Cal. Bus. & Prof. Code § 16700 et seq.* and *RCW 19.86.020 et seq.* and is defined as:
All persons or entities that currently use professional vector graphic illustration software on a Windows operating system, in addition to Free FreeHand.

*Id.*at 22-23.
On August 3, 2011, Adobe filed the instant motion to dismiss Plaintiffs' FAC. ECF No. 20.

IV. Legal Standards

A motion to dismiss for failure to state a claim under *Rule 12(b)(6)* tests the legal sufficiency of a complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. On a motion to dismiss, "all allegations of material fact are taken as true and construed in the light most favorable to [Plaintiffs]." *Facebook, Inc. v. MaxBounty, Inc., 274 F.R.D. 279, 282 (N.D. Cal. 2011)* (citing *Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996))*; *see also Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. However, the Court need not accept as true "allegations that contradict matters properly subject to judicial notice or by exhibit" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*. **[**12]** While a complaint need not allege detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 129 S. Ct. at 1949* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 1949*.

As the Ninth Circuit has stated, "a claim may be dismissed under *Rule 12(b)(6)* on the ground that it is barred by the applicable statute of limitations only when the running of the statute is apparent on the face of the complaint. A complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 969 (9th Cir. 2010)*, *cert. denied*, *131 S. Ct. 3055, 180 L. Ed. 2d 885* ***[*1179]*** *(U.S. 2011)* (internal citations and quotations omitted).

Claims sounding in fraud are subject to the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*. A plaintiff alleging fraud "must state with particularity the circumstances constituting **[**13]** fraud . . . ." *Fed. R. Civ. P. 9(b)*. To satisfy this standard, the allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. Accordingly, claims sounding in fraud must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)*.

If a court grants a motion to dismiss, leave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts. *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)*.

V. Discussion

Adobe argues that Plaintiffs fail to state a claim upon which relief can be granted. Adobe also argues that Plaintiffs' claims accrued in 2005 when, with the Department of Justice's approval, Adobe acquired FreeHand. Thus, Adobe contends that Plaintiffs' claims are barred by a four-year statute of limitations, which both parties agree apply to all of Plaintiffs' **[**14]** claims. The Court analyzes the adequacy of Plaintiffs' pleading first and the statute of limitations second.

A. Adequacy of Federal Antitrust Claims

Adobe argues Plaintiffs have failed to properly plead an unlawful monopolization claim under *Section 2* of the Sherman Act. The Court disagrees.

Section 2 of the Sherman Act makes it a crime to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ." *15 U.S.C. § 2 (2006)*. Section 4 of the Clayton Act, in turn, establishes a private right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" and provides "threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U.S.C. § 15 (2006)*. Section 16 of the Clayton Act establishes a right to injunctive relief "against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26 (2006)*.

To state an unlawful monopolization claim, a plaintiff must allege "(1) [p]ossession of monopoly power in the relevant market; (2) willful **[**15]** acquisition or maintenance of that power; and (3) causal antitrust injury." *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996)*.

Plaintiffs have alleged, and Adobe does not dispute, that Adobe has monopoly power in the global and/or national Macintosh and Windows markets for professional vector graphic illustration software. FAC ¶¶ 32, 33, 47-48, 52-53, 56. Thus, Plaintiffs have alleged possession of monopoly power in the relevant market, the first element of a monopolization claim. Accordingly, the Court looks to whether Plaintiffs have adequately alleged that Adobe willfully acquired or maintained that power, and whether Adobe's conduct caused Plaintiffs' antitrust injury. FAC ¶¶ 110-11.

As the Supreme Court has stated, a *Section 2* violation requires, "in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or **[*1180]** maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. "The possession of monopoly power will not be found unlawful **[**16]** unless it is accompanied by an element of anticompetitive conduct." *Id.* According to the Ninth Circuit, "[a]nticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)*; *see also* *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997)* (use of monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor" is anticompetitive conduct). As a sister court has observed, "'anticompetitive' conduct may include otherwise *legal* conduct." *Tele Atlas N.V. v. NAVTEQ Corp.*, 05-CV-1673-RS, 2008 WL 4911230, at *1 (N.D. Cal. Nov. 13, 2008) (citing *Trinko, 540 U.S. at 407*; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; *United States v. Microsoft, 253 F.3d 34, 346 U.S. App. D.C. 330 (D.C. Cir. 2001))* (emphasis in original).

Adobe argues that a series of practices that are neither exclusionary nor anticompetitive cannot combine to violate *Section 2* of the Sherman Act. Reply 9. Plaintiffs, on the other hand, maintain that they can state a *Section 2* **[**17]** claim by alleging a series of practices that are anticompetitive, even if some of the activities would be lawful if viewed in isolation. Opp'n 11.

These positions are not inconsistent. Under the theory of monopoly broth, "[t]here are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under *Section 2* if done by a monopolist." *City of Mishawaka v. Am. Elec. Power Co., 616 F.2d 976, 986 (7th Cir. 1980)*. The Ninth Circuit has likewise stated that it is not "proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect." *City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1376, 1378 (9th Cir. 1992)* (following *City of Mishawaka, 616 F.2d 976*); *see also Tele Atlas*, 2008 WL 4911230, at *1 ("[C]ourts must consider all of an alleged monopolist's related conduct in the aggregate.").

Thus, the Court analyzes the alleged anticompetitive practices below to determine whether, in the aggregate, they tend to reduce competition and maintain Adobe's monopoly power.

*a. Post-Merger **[**18]** Conduct and Monopoly Maintenance*

Plaintiffs allege the following post-merger anticompetitive conduct: (1) charging monopolist prices; (2) discontinuing support for and development of FreeHand; (3) bundling Illustrator with other Adobe products; and (4) declining to release FreeHand's source code to the open source community. Adobe argues that none of these alleged acts, either independently or combined, violates the antitrust laws. *See* Mot. 12; Reply 7. The Court discusses each alleged anticompetitive act in turn.

i. Supracompetitive Prices

Plaintiffs allege that Adobe raised the price of Adobe from $399 to $499 in 2005, and again from $499 to $599 in 2008. FAC ¶ 68.

Plaintiffs do not explain, either in their complaint, or in their opposition brief, how higher prices for Illustrator tend to reduce competition in the relevant markets for professional vector graphics illustration **[*1181]** software. Adobe argues that unilateral decisions to increase price are entirely lawful, even if done by a monopolist. Mot. 12; Reply 7.

Although monopolist pricing, by itself, is insufficient to state a monopolization claim, the Court disagrees with Adobe's blanket statement that "even an alleged monopolist is entitled **[**19]** to raise prices." Mot. 12. For example, when a company uses predatory pricing to reduce competition and then raises prices to a supracompetitive level, "[c]onsumers would not be harmed until the predator attained monopoly power through the predatory pricing and subsequently raised prices to supra-competitive levels to recoup the lost profits." *In re Live*

Concert Antitrust Litig., 247 F.R.D. 98, 152 (C.D. Cal. 2007). Adobe's claim that an alleged monopolist is "entitled" to raise prices relies on a quotation from a Supreme Court opinion that discussed the lawfulness of raising prices when a monopoly is acquired lawfully. The Supreme Court noted that the offense of monopolization "requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Trinko, 540 U.S. at 407 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). Although the Court stated that the "mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important **[**20]** element of the free-market system," the Court made clear that "monopoly power is unlawful [if] it is accompanied by an element of anticompetitive *conduct.*" *See* id. (emphasis in original).

Plaintiffs allege that Adobe willfully acquired monopoly power through its acquisition of FreeHand in 2005. FAC ¶¶ 1, 75-76. The mere fact that the Department of Justice "cleared" the merger in 2005 — a fact that does not appear in the Complaint, but that Plaintiffs apparently concede — does not mean that Plaintiffs are precluded from alleging that the merger itself was unlawful. *See, e.g.*, Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** § 315c (3d ed. 2007) (hereinafter "Areeda & Hovenkamp") (DOJ "lacks the power to immunize transactions generally" and DOJ clearance "cannot bind a court, a private plaintiff, or the FTC, although a court might choose to give it weight in the same way that it can consider enforcement guidelines."). Plaintiffs also claim that Adobe maintained its monopoly power through anticompetitive conduct such as discontinuing FreeHand and channeling FreeHand customers to Illustrator, which Adobe bundled with other Adobe products. FAC ¶¶ 1, 75-77. Thus, in the context of the **[**21]** facts as pled, and read in the light most favorable to Plaintiffs, Adobe, as a monopolist engaging in other alleged anticompetitive conduct to maintain that monopoly, would not be lawfully entitled to raise prices.

ii. Ceasing Development of FreeHand

Plaintiffs allege that since acquiring FreeHand in 2005, Adobe has not delivered any new features for FreeHand and has actively driven existing users of FreeHand to use Illustrator instead. FAC ¶¶ 70-72. Plaintiffs claim that Adobe acknowledged its intent to cease development of FreeHand and to cripple FreeHand's functionality on May 16, 2007. *Id.*

Adobe argues that all companies are entitled to make unilateral product line decisions, including discontinuing products, Mot. 13 (citing Glen Holly Entm't Inc. v. Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003)). [1]

[*1182] Adobe's argument relies on an overbroad reading of Ninth Circuit dictum. In reversing the district court's dismissal of plaintiff's antitrust claim, the Ninth Circuit **[**22]** in *Glen Holly* stated that the district court was correct in noting that the antitrust laws "do not preclude any manufacturer from independently discontinuing a product line any more than they preclude a manufacturer from independently raising prices." Glen Holly, 352 F.3d at 372. This statement merely stands for the unremarkable proposition that not all manufacturer decisions to independently raise prices or discontinue product lines violate the antitrust laws. But the Ninth Circuit also noted that "[o]ne form of antitrust injury is coercive activity that prevents its victims from making free choices between market alternatives" and found that the alleged injury "flowed from the discontinuation of the only competing product on the market by agreement between the only two competitors in the market," resulting in "no viable choice between market alternatives." Id. at 374. Thus, *Glen Holly* does not preclude the possibility that a unilateral decision to discontinue a product line can be anticompetitive.

Adobe also argues that integrating acquired assets from FreeHand and removing a product from the market place is "rational and normal business conduct" that could only reduce a firm's purported **[**23]** market power and give greater opportunities to its rivals. *See* Br. 13; Reply 7-8.

[1] To the extent that Adobe also relies on Brantley v. NBC Universal, Inc., 649 F.3d 1078, 2011 WL 2163961, at *5 (9th Cir. 2011), this decision was withdrawn on October 31, 2011, and has no precedential value.

The Court disagrees. As an initial matter, "the existence of valid business reasons in antitrust cases is generally a question of fact not appropriate for resolution at the motion to dismiss stage." *Tucker v. Apple Computer, Inc., 493 F. Supp. 2d 1090, 1101 (N.D. Cal. 2006)* (citing *SmileCare Dental Group, 88 F.3d at 786*).

Moreover, that Adobe was able to maintain its high market share, FAC ¶ 53, despite increasing Illustrator's price in 2008, FAC ¶ 68, after announcing that Adobe would essentially be discontinuing FreeHand in 2007, FAC ¶ 70, undermines Adobe's assertion that discontinuing FreeHand actually increased competition. It is possible that facts developed in discovery may show that discontinuing FreeHand benefited CorelDraw in the Windows Market. In the Mac Market, however, professional designers allegedly had no choice other than Illustrator if they wanted to purchase professional vector design software that was interoperable with the latest operating systems. FAC ¶ 72. Furthermore, as discussed below, Plaintiffs allege that Adobe was bundling Illustrator with other Adobe software products. Plaintiffs **[**24]** also allege that Adobe encouraged existing FreeHand users to purchase the bundled Illustrator product. *Id.* ¶¶ 72-74. Thus, it is reasonable to infer that Adobe's discontinuation of FreeHand and channeling of FreeHand users to Illustrator made it more difficult for potential competitors of Illustrator, who did not have a full array of graphics software, to enter the market. This barrier to entry is in addition to the already existing barrier due to the alleged "network externalities associated with Illustrator and FreeHand's extensive installed user bases and adoption as the standard file types accepted by commercial printers." *Id.* ¶ 54. Therefore, in the context of the facts as alleged in this case, it is reasonable to infer that Adobe's alleged crippling of FreeHand harmed competition.

[*1183] Adobe's reliance on *Arminak & Assocs., Inc. v. Saint-Gobain Calmar, Inc., 789 F. Supp. 2d 1201, 2011 WL 2268066 (C.D. Cal. 2011)*, for the proposition that Adobe's decision to cripple FreeHand was procompetitive, is unavailing. The *Arminak* court stated that integrating acquired assets into existing products to "more effectively compete for [the acquired product's] former customers and **[**25]** meet customer needs" represents "vigorous competition on the merits of the type that the antitrust laws seek to promote." *789 F. Supp. 2d 1201, Id. at *7*. *Arminak* is inapposite because plaintiff there was defendant's competitor, not a consumer, and thus had not suffered antitrust injury. Furthermore, unlike here, the plaintiff in *Arminak* had abandoned its monopoly broth theory of liability, *789 F. Supp. 2d 1201, id.at *3*, and the procedural posture was summary judgment, not a motion to dismiss. Moreover, based on the evidence produced in discovery, the court found that defendant's alleged anticompetitive conduct, which included introduction of a new product line and integration of acquired assets into defendant's existing product line, was actually procompetitive. *789 F. Supp. 2d 1201, Id. at *4-5*. Here, by contrast, reading the alleged facts in the light most favorable to Plaintiffs, it is reasonable to infer that Adobe's discontinuation of FreeHand, in aggregate with Adobe's other conduct, reduced competition. Accordingly, Plaintiffs can attempt to adduce evidence in discovery to support this allegation.

iii. Bundling

Plaintiffs argue that Adobe "bundled Illustrator with other Adobe graphic design products, raising significant entry barriers for **[**26]** potential rivals to enter the market without a full array of graphics software." Opp'n 10 (citing FAC ¶ 77). At the hearing, Plaintiffs admitted that Adobe's alleged bundling could not stand alone as a Sherman Act violation, but Plaintiffs argued that Adobe's alleged bundling could form part of a monopoly broth claim. Hr'g Tr. 15:4.

Adobe did not challenge Plaintiffs' bundling claims in its opening brief. In its reply, Adobe argued that bundling almost always benefits consumers and that Plaintiffs' bundling claim is neither well pled nor relevant to the claims and relief that Plaintiffs seeks to pursue. Reply 8 (citing *Cascade Health Solutions, 515 F.3d 883*).

Although the Court agrees with Adobe, and Plaintiffs concede, that Plaintiffs have not pled sufficient facts for a standalone bundling claim, the Court disagrees with Adobe that Plaintiffs' allegations of bundling are not relevant to Plaintiffs' *Section 2* claim. As stated earlier, "anticompetitive conduct may include otherwise *legal* conduct." *Tele Atlas N.V. v. NAVTEQ Corp.*, 05-CV-1673-RS, 2008 WL 4911230, at *1 (N.D. Cal. Nov. 13, 2008). Here, Plaintiffs have alleged that "Adobe's bundling of Illustrator constitutes a significant **[**27]** entry barrier by limiting the ability of potential rival professional software manufacturers to enter the market without a full array of graphics software." FAC ¶ 77. Plaintiffs have therefore alleged that Adobe's bundling foreclosed competition, especially when viewed in light of Adobe's discontinuation of FreeHand and active encouragement of existing FreeHand users to switch to Illustrator. Accordingly, Plaintiffs can adduce evidence to show that Adobe's bundling foreclosed competition. *Cf. Masimo Corp. v. Tyco Health Care Group, L.P., No. 2-CV-4770-MRP, 2004 U.S. Dist. LEXIS 26916, 2004 WL 5907538 (C.D. Cal. June 10, 2004)* (allowing plaintiffs to present evidence on whether bundled rebates reduced competition and therefore constituted anticompetitive conduct for monopoly maintenance claim).

iv. Withholding of Source Code from Open Source Community

Plaintiffs argue that "Adobe has also refused requests to release FreeHand's source code to the open source **[*1184]** community, notwithstanding that FreeHand is a 'dead' product as far as Adobe is concerned." Opp'n 11 (citing FAC ¶ 11). Adobe, on the other hand, argues that it has no duty to license its technology to foster competition or to give away its technology for others **[**28]** to clone. Mot. 13. At the hearing and in their briefing, Plaintiffs were unable to point the Court to any authority supporting the proposition that a company's refusal to give out its source code is anticompetitive or violates the antitrust laws. Hr'g Tr. 13:7-11.

The Court agrees with Adobe that Adobe has no duty to give away its technology for others to clone. *See United States v. Westinghouse Elec. Corp., 648 F.2d 642, 647 (9th Cir. 1981)*. Accordingly, the Court does not consider this conduct in evaluating the overall effect of Adobe's alleged anticompetitive conduct.

v. The Aggregate Effect of the Anticompetitive Conduct

In summary, Plaintiffs have plausibly alleged that Adobe willfully acquired monopoly power and maintained that power through anticompetitive conduct. If, as alleged, Adobe ceased the development of FreeHand while steering existing FreeHand users to a bundled product, thereby further raising already high barriers to entry, it is plausible to infer that this conduct tended "to impair the opportunities of rivals" and "did not further competition on the merits." *Cascade Health Solutions, 515 F.3d at 894*.

This is not a case "where none of the alleged conduct was anticompetitive, **[**29]** even when combined." *Tele Atlas*, 2008 WL 4911230, at * 2 (quoting *Cal. Computer Prods., Inc. v. IBM Corp., 613 F.2d 727, 745 (9th Cir. 1979))*. Indeed *California Computer*, on which Adobe relies, found that monopoly broth was inapplicable where a competitor-plaintiff benefited from defendant's alleged anti-competitive behavior. Thus, in that case plaintiff did not suffer antitrust injury. It is therefore inapposite here, where, as discussed below, consumers allegedly suffered antitrust injury. Therefore, *California Computer* does not foreclose the availability of the monopoly broth theory in these circumstances.

Furthermore, this Court need not decide whether a plaintiff can survive a motion to dismiss by alleging a series of procompetitive acts that, in the aggregate, combine to violate the antitrust laws. The allegations of anticompetitive acts, and their alleged aggregated anticompetitive effect, fall squarely within the bounds of established monopoly broth theory. *Cf. Tele Atlas*, 2008 WL 4911230, at *1.

Thus, Plaintiffs have sufficiently alleged the second element of a monopolization claim: willful acquisition or maintenance of monopoly power.

b. Antitrust Injury

In its Reply, Adobe raises **[**30]** for the first time that Plaintiffs have not alleged that Adobe's conduct caused them any antitrust injury. Reply 8. The Court disagrees.

To have standing to bring an antitrust claim, a plaintiff must allege antitrust injury, that is, injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. "[I]njury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110* **[*1185]** *S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (internal quotations and alterations omitted).

Plaintiffs claim that Adobe's anticompetitive conduct has injured them by: (1) allowing Adobe to charge Plaintiffs supracompetitive prices for Illustrator, FAC ¶ 68; (2) decreasing innovation in the market for professional vector graphics software, FAC ¶ 73; and (3) rendering Plaintiffs' existing artwork created on FreeHand obsolete, FAC ¶¶ **[**31]** 95, 97. These are the types of injuries that commonly satisfy the antitrust standing requirement. *Glen Holly, 352 F.3d at 374*; *Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001)* ("[T]he antitrust laws are only concerned with acts that harm 'allocative efficiency and raise[ ] the price of goods above their competitive level or diminish[ ] their quality.'"); *see also* *Abbyy USA Software House, Inc. v. Nuance Commc'ns Inc., Case No. 08-CV-01035, 2008 U.S. Dist. LEXIS 90308, 2008 WL 4830740, at *4 (N.D. Cal. Nov. 6, 2008)* (noting that direct purchasers of software would have antitrust standing stemming from injury of paying supracompetitive prices); *Catch Curve, Inc. v. Venali, Inc., 519 F. Supp. 2d 1028, 1036 (C.D. Cal. 2007)* (allegations of stifling innovation in the market sufficient for antitrust injury). Thus, Plaintiffs have pled antitrust injury.

Accordingly, Plaintiffs have alleged sufficient facts to state a monopoly maintenance claim under *Section 2* of the Sherman Act.

B. Adequacy of State Law Claims

The parties devote no more than three pages to discussing Plaintiffs' state law claims. Both parties agree that Plaintiffs' claims under the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*; **[**32]** the Washington Consumer Protection Act *RCW 19.86.020*; and the Washington antitrust statutes *RCW 19.86.040 et seq.*, rise and fall with Plaintiffs' federal claims. Hr'g Tr. 6:18-7:6. The Court found above that Plaintiffs have adequately stated a claim for their federal antitrust claims. Accordingly, Plaintiffs have also stated a claim under these state statutes.

Plaintiffs also seek relief under California Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.* Adobe argues that the Cartwright Act does not address unilateral conduct because it is modeled after *Section 1* of the Sherman Act, which Plaintiffs do no not invoke here. Mot. 15 (citing *Apple Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1204 (N.D. Cal. 2008))*. The Court agrees with Adobe. *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 198 Cal. App. 4th 1366, 1386, 131 Cal. Rptr. 3d 519 (2011)* ("[T]he Cartwright Act contains no provision parallel to the Sherman Act's prohibition against monopolization (*15 U.S.C. § 2*), and the Cartwright Act applies only to a 'combination' involving 'two or more persons' (*§ 16720*), not to *unilateral* conduct.") (emphasis in original); *see also* *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986)* **[**33]** (noting that Cartwright Act does not address unilateral conduct).

To state a claim under the Cartwright Act, Plaintiffs "must allege that (1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis; and (3) the restraint affected interstate commerce." *In re Late Fee & Over-Limit Fee Litig., 528 F. Supp. 2d 953, 961, 965 (N.D. Cal. 2007)* (noting that the analysis under the Cartwright Act mirrors the analysis under *Section 1* of the Sherman Act); *see also* *Chicago Title Ins. Co. v. Great W. Fin. Corp., 69 Cal. 2d 305, 318, 70 Cal. Rptr. 849, 444 P.2d 481 (1968)*. Plaintiffs have alleged no agreement, conspiracy, or combination between two or more entities.

[*1186] Plaintiffs contend that there is a valid Cartwright Act claim "[i]f a 'single trader' pressures customers or dealers into pricing arrangements . . . ." Opp'n 11 (quoting *Davis v. Pac. Bell, 204 F. Supp. 2d 1236, 1243 (N.D.*

Cal. 2002)). In *Davis*, Judge Illston denied defendant's motion to dismiss plaintiffs' Cartwright Act Claim where defendant telephone company coercively prevented plaintiffs-telephone customers from migrating to competitors **[**34]** by making misrepresentations and by interrupting and disconnecting telephone service to migrating customers. Even if *Davis* stands for the proposition that unilateral conduct can form the basis for a Cartwright claim if it amounts to coercion, Plaintiffs do not allege that Adobe coerced Plaintiffs by, for example, misleading them into buying its products or by taking punitive action against Plaintiffs seeking to migrate to Adobe's competitors.

Thus, Plaintiffs' Cartwright Act claim fails as a matter of law. Accordingly, Plaintiffs' third claim for relief is DISMISSED with leave to amend.

C. Statute of Limitations as to All Claims

The parties agree that all of Plaintiffs' claims are governed by a four-year statute of limitations. Opp'n 3; Reply 2. However, the parties' briefing focuses on the federal antitrust claims and tolling doctrines, and Defendants do not suggest that Plaintiffs' state law claims are time-barred for any independent reasons. *See* Mot. 14; Reply 11 ("Plaintiffs [state law claims] . . . are bootstrapped to their federal antitrust claims"). Accordingly, the Court limits its statute of limitations analysis to whether Plaintiffs' claims under the federal antitrust laws, Section 2 **[**35]** of the Sherman Act and Section 7 of the Clayton Act, are time-barred.

Absent tolling, any federal antitrust cause of action accruing prior to May 3, 2007, the date Plaintiffs filed their original complaint, is time-barred. "Generally, [an antitrust cause] of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . [E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*; *see also* *AMF, Inc. v. Gen. Motors Corp., 591 F.2d 68, 70 (9th Cir. 1979)* (same).

Adobe argues that Plaintiffs' cause of action accrued when Adobe acquired Macromedia in 2005 and should therefore be dismissed as time-barred. Adobe contends that "courts consistently hold that if a monopoly is created by a single identifiable act and is not perpetuated by an ongoing policy, the [four-year] statute of limitations runs from the [time of] commission of the act, notwithstanding that high prices may last indefinitely **[**36]** into the future." Mot. at 6 (citing Areeda & Hovenkamp, *supra*, § 320c4).

Plaintiffs contend that even if the Adobe-Macromedia merger itself triggered the statute of limitations in 2005, their claims are not time-barred under four tolling theories: (1) the continuing violation doctrine; (2) the discovery rule; (3) the "new use" exception to the Clayton Act's statute of limitations; and (4) fraudulent concealment. The Court analyzes each of these theories in turn.

1. Continuing Violation

Plaintiffs argue that their antitrust claims are not barred by the statute of limitations because Adobe's monopolization constitutes a "continuing violation."

Adobe, on the other hand, contends that the "continuing violation" doctrine does not apply in the merger context. To support **[*1187]** this position, Adobe cites cases declining to apply the continuing violation doctrine to claims under Section 7 of the Clayton Act. Mot. 6 (citing *Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 271 (8th Cir. 2004)*; *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1052 (8th Cir. 2000)*). Although the *Midwestern Machinery* court stated that "[o]nce a merger is completed, there is no continuing violation possible *under* ***[**37]*** *§ 7* [of the Clayton Act] that would justify extending the statute of limitations beyond four years," *392 F.3d at 271*, the court made clear that "merged firms are still subject to the Sherman Act's prohibitions on monopolization or attempts to monopolize." *Id. at 272* (emphasis added). *See also* *Smith v. eBay Corp., 10-CV-3825-JSW, 2012 U.S.*

Dist. LEXIS 1211, 2012 WL 27718, at *3 (N.D. Cal. Jan. 5, 2012) (applying continuing violation doctrine to toll Section 2 monopolization claim in context of an acquisition).

For Plaintiffs' Clayton Act Section 7 claim, the Court finds below in Section V.C.2 that Plaintiffs can rely on the "new use" exception to the Clayton Act's statute of limitations. Thus, the Court need not reach the question of whether the continuing violation doctrine applies to Plaintiffs' claim under Section 7 of the Clayton Act. Accordingly, the Court limits its analysis under the continuing violation doctrine to Plaintiffs' claim under Section 2 of the Sherman Act, where the doctrine applies. Smith v. eBay, 2012 U.S. Dist. LEXIS 1211, 2012 WL 27718, at *3.

Under the "continuing violation" doctrine, "each overt act that is part of the [antitrust] violation and that injures the plaintiff . . . starts the statutory period running again, **[**38]** regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (internal citations and quotations omitted); Pace Indus. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987) ("A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured."). In the Ninth Circuit, an overt act restarts the statute of limitations if it: (1) is "a new and independent act that is not merely a reaffirmation of a previous act"; and (2) "inflict[s] new and accumulating injury on the plaintiff." Pace, 813 F.2d at 237.

Plaintiffs allege that Adobe acquired monopoly power and charged supracompetitive prices in 2005, after the merger was consummated. Hr'g Tr. 11:14-15. Thus, Plaintiffs suffered injury, and their monopolization claim initially accrued as early as 2005. However, as discussed in Section V.A.1 above, Plaintiffs' allegations also support the reasonable inference that Adobe perpetuated its monopoly power and caused Plaintiffs new injury after the merger, through the following "new and independent acts:" (1) ceasing development of FreeHand; **[**39]** (2) channeling existing FreeHand customers to Illustrator; and (3) bundling Illustrator with other Adobe software products.

These are not mere "reaffirmations" of the merger such as "holding or using assets in the same manner as at the time of acquisition," Concord Boat, 207 F.3d at 1052, or "continu[ing] indefinitely to receive some benefit as a result of an illegal act performed in the distant past." Aurora Enters., Inc. v. NBC, Inc., 688 F.2d 689, 694 (9th Cir. 1982). Rather, Adobe's alleged post-merger acts here are more like an online auction provider's changes to its electronic payment policy after acquiring an online payment service provider, which a sister court found to "constitute overt acts, . . . [which] inflicted new and accumulating harm to [plaintiffs]." Smith v. eBay, 2012 U.S. Dist. LEXIS 1211, 2012 WL 27718, at *4 (taking note of eBay's banning of Google Checkout as an acceptable form of payment and doubling **[*1188]** the PayPal Buyer Protection to continue eBay's alleged efforts to monopolize the market for online payment services for use in online auctions). Just as in *Smith v. eBay*, where plaintiffs' monopolization claim was not based "*solely* on the fact that eBay acquired Paypal," 2012 U.S. Dist. LEXIS 1211, [WL] at *5, here, **[**40]** Plaintiffs' claims are not based solely on the fact that Adobe acquired Macromedia.

The exact date of Adobe's alleged post-merger anti-competitive acts and when Plaintiffs suffered injury as a result of these acts is unclear from the face of the FAC. However, it is reasonable to infer that Adobe did not discontinue its updates to FreeHand until after Adobe allegedly announced publicly its intent to do so on May 16, 2007, FAC ¶ 70. It is also reasonable to infer that Plaintiff suffered antitrust injury as a result, in the form of supracompetitive prices, in 2008. FAC ¶ 68.

Taking the facts in the light most favorable to Plaintiffs, Plaintiffs' Section 2 monopolization claim therefore appears to be timely under the continuing violation doctrine. At the very least, it does not appear "beyond doubt that [Plaintiffs] can prove no set of facts that would establish the timeliness of their claim." *Von Saher, 592 F.3d at 969*. Accordingly, Adobe's motion to dismiss is DENIED as to this claim.

2. "New Use" Exception

Plaintiffs argue that their Clayton Act Section 7 claim is also timely under the "new use" exception to the Clayton Act's four-year statute of limitations. Opp'n 6 (citing Abbyy, 2008 U.S. Dist. LEXIS 90308, 2008 WL 4830740, at *6). **[**41]** Under the "new use" exception, "[i]f assets are used in a different manner from the way that they were used when the initial acquisition occurred, and that new use injures the plaintiff, he or she has four years from the time that the injury occurs to sue." *See also* Midwestern Mach., 392 F.3d at 273 (citing Klehr, 521 U.S. at 188; Zenith Radio, 401 U.S. at 338).

Adobe argues that the "new use" exception is available only where a merger "cause[d] the plaintiff no injury at the time it occurred, but subsequently the acquired assets were used in an anticompetitive way not contemplated at the time of the acquisition and caused the plaintiff injury." Reply 5 (citing Areeda & Hovenkamp, *supra*, § 329c5 at 311-12). Adobe does not cite to any cases, let alone any cases binding on this Court, for imposing these requirements. Moreover, the Court has been unable to find any case imposing them. As such, the Court declines to require Plaintiffs to plead that they suffered no injury at the time of the merger in order to avail themselves of the "new use" exception to the Clayton Act's statute of limitations.

Plaintiffs argue that Adobe has used FreeHand differently from the way that it was used when **[**42]** the initial acquisition occurred, and that this new use has injured Plaintiffs within the limitations period. *See* Opp'n 6. Plaintiffs allege that prior to the 2005 merger, "FreeHand was an actively developed and supported piece of software and a living breathing product." FAC ¶ 74. Plaintiffs allege that after the merger, Adobe "effectively crippled and killed FreeHand while scavenging its bones for features to incorporate into Illustrator." *Id.* Plaintiffs allege that Adobe ceased its development of FreeHand while steering existing FreeHand users to purchase the bundled Adobe Illustrator product, thereby raising barriers to entry and decreasing competition. FAC ¶¶ 72, 74, 77. Plaintiffs allege that they were injured by supracompetitive prices and decreased innovation. *See* FAC ¶¶ 68, 73. Thus, Plaintiffs have alleged that Adobe used FreeHand in a different manner from the way that it was used at the time of the merger, and that the new use injured **[*1189]** Plaintiffs. Accordingly, Plaintiffs have pled sufficient facts to avail themselves of the "new use" exception to the Clayton Act's statute of limitations.

The case law Adobe cites does not support Adobe's position. In *Abbyy USA Software House,* ***[**43]*** *Inc.*, the court held that the "new use" exception was unavailable to plaintiff where plaintiff did "not allege any specific and separate conduct, following the acquisition of Caere Corporation, that identifies any new use of the assets that would reset the time for the tolling of the statute of limitations." 2008 U.S. Dist. LEXIS 90308, 2008 WL 4830740, at *6. Indeed, the *Abbyy* court's holding rested on the fact that plaintiff, a competitor of defendant's, had *benefited* from defendant's alleged post-merger anticompetitive conduct. Here, by contrast, Plaintiffs have alleged that FreeHand was used differently pre- and post-merger, and that they have *suffered injury* as a result.

Midwestern Machinery is similarly unavailing to Adobe. In that case, on *summary judgment*, plaintiffs had shown no facts supporting their claim that Northwest's acquired assets were used differently because plaintiffs provided no information about the pre-merger use. Here, by contrast, Plaintiffs have made the requisite allegations that FreeHand was used differently pre-and post-merger, and will have the opportunity to produce sufficient facts in discovery to support the "new use" exception if Adobe raises the statute of limitations defense **[**44]** again on summary judgment. Moreover, the Court disagrees that, as pled, Adobe's post-merger use of FreeHand was the "unabated inertial consequence" of the merger itself. Mot. 11 (quoting Midwestern Mach., 392 F.3d at 271). Taking the alleged facts in the light most favorable to Plaintiffs, Adobe did not initially intend to discontinue its development of and support for FreeHand. *See* FAC ¶ 69. As alleged in the FAC, Adobe's new use of FreeHand discussed above did not occur until at least May 16, 2007, when Adobe announced that it was changing course. FAC ¶ 70.

The Court is also not persuaded by Adobe's policy argument that tolling the statute of limitations on Plaintiffs' Clayton Act claim in this case will deter all mergers in the future. Not all mergers create monopolies with complete or nearly complete market power as alleged here. Moreover, "[t]here are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under [Section 2 of the Sherman Act] if done by a monopolist." City of Mishawaka, 616 F.2d at 986. Thus, finding **[**45]** Plaintiffs' Clayton Act claim timely here will not necessarily lead to the result that all post-merger firms would indefinitely face the specter of liability if they decided to raise prices or discontinue products after merging. Only those post-merger firms with monopoly power who use such tactics, along with other anti-competitive conduct, to maintain their monopoly power would have anything to fear. As discussed in Sections V.A.1.a and V.C.1, where the continuing violation doctrine applies, post-merger anticompetitive conduct by monopolists is already prohibited by *Section 2* of the Sherman Act. Thus, Adobe's policy argument is a red herring.

In sum, it is not apparent from the face of the FAC that Plaintiffs can prove no set of facts to avail themselves of the "new use" exception to the statute of limitations for their Section 7 Clayton Act claim. Thus, the Court cannot dismiss this claim as time-barred. Accordingly, Adobe's motion as to this claim is DENIED. Given that the viability of Plaintiffs' remaining state law claims under California's UCL and the Washington's Consumer Protection **[*1190]** Act is predicated on the viability of Plaintiffs' federal antitrust claims, Adobe's motion as **[**46]** to these state law claims is also DENIED.

3. Discovery Rule

The discovery rule "postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." *In re Copper Antitrust Litig., 436 F.3d 782, 789 (7th Cir. 2006)*. Adobe argues that Plaintiffs have not cited any Ninth Circuit cases applying the discovery rule to antitrust cases. Reply 2. The Court need not decide whether the discovery rule applies to Plaintiffs' claims because the Court finds that Plaintiffs' well-pled claims are not time-barred under the continuing violation doctrine and the "new use" exception.

4. Fraudulent Concealment

Plaintiffs argue that the statutes of limitations on their claims are also tolled by the fraudulent concealment theory. Because the Court has already found that the statutes of limitations for Plaintiffs' well-pled claims are tolled by other doctrines, the Court need not reach this argument.

VI. Conclusion

For the foregoing reasons, the Court GRANTS Adobe's motion to dismiss with leave to amend as to Plaintiffs' Cartwright Act claim and DENIES Adobe's motion as to all other claims. If Plaintiffs wish to amend their complaint to **[**47]** address the deficiencies identified above, they must do so within 21 days.

IT IS SO ORDERED.

Dated: February 10, 2012

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

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Coffee.org, Inc v. Green Mountain Coffee Roasters, Inc.

United States District Court for the Western District of Arkansas, Fort Smith Division

February 15, 2012, Decided; February 15, 2012, Filed

Case No. 2:11-CV-02031

Reporter

2012 U.S. Dist. LEXIS 18577 *; 2012-1 Trade Cas. (CCH) P77,790; 2012 WL 511485

COFFEE.ORG, INC., PLAINTIFF v. GREEN MOUNTAIN COFFEE ROASTERS, INC.; KEURIG, INC.; VAN HOUTTE USA ONLINE, INC.; VAN HOUTTE USA HOLDINGS, INC.; and VISTAR CORPORATION, DEFENDANTS

Core Terms

Coffee, org, pleadings, online, products, sales, monopoly, brewers, motion to dismiss, consumers, customers, monopolize, Unfair, Sherman Act, Practices, suppliers, business relationship, conspiracy, licensed, quantum meruit, subsidiaries, allegations, distributor, retailers, internet, brand, anti trust law, anti-competitive, termination, Violations

Counsel: **[*1]** For Coffee.Org, Inc., Plaintiff: Joe D. Byars, Jr., Christian & Byars, Fort Smith, AR.

For Green Mountain Coffee Roasters, Inc., Defendant: Gregory M. Hopkins, LEAD ATTORNEY, Hopkins & Allison, Attorneys, Little Rock, AR; Frank Headlee, Attorney at Law, Little Rock, AR.

For Van Houtte USA Online, Inc., Keurig Incorporated, Van Houtte USA Holdings, Inc., Defendants: Frank Headlee, LEAD ATTORNEY, Attorney at Law, Little Rock, AR.

Judges: P. K. HOLMES, III, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: P. K. HOLMES, III

Opinion

MEMORANDUM OPINION AND ORDER

Currently before the Court are Defendants Green Mountain Coffee Roasters, Inc. ("GMCR"), Keurig Inc., Van Houtte USA Online, Inc., and Van Houtte USA Holdings, Inc.'s Motion to Dismiss or for Judgment on the Pleadings (Doc. 44) and Brief in Support (Doc. 45); Plaintiff Coffee.org, Inc.'s ("Coffee.org") Response (Doc. 51); and Defendants' Reply (Doc. 52). Also pending are Defendants' Motion to Stay Discovery and Continue Trial Date (Doc. 53) and Brief in Support (Doc. 54). After due consideration of Defendants' Motion to Dismiss or for Judgment on the Pleadings (Doc. 44), the Court finds that the Motion should be **GRANTED.** In light of the Court's decision to dismiss **[*2]** this case, Defendants' Motion to Stay Discovery and Continue Trial Date (Doc. 53) is **DENIED AS MOOT.**

I. Background

Plaintiff Coffee.org is an Arkansas corporation with its principal place of business in Fort Smith, Arkansas. Coffee.org operates an e-commerce website selling coffee and coffee-related products online. One of the most popular coffee products sold by Coffee.org was the "K-cup," a single-serve coffee capsule that is instrumental in brewing one cup of coffee at a time through the use of a patented machine sold by GMCR and Keurig, Incorporated ("Keurig"). K-cups are purchased by millions of consumers in the United States. According to the Amended Complaint, Coffee.org has sold over 8,400,000 units of K-cups through its online business.

The other Defendants to this action are Van Houtte USA Online, Inc., and Van Houtte USA Holdings, Inc., which are wholly-owned subsidiaries of Defendant GMCR, and Vistar Corporation, which is a distributor of GMCR. [1]

Since early 2008, Coffee.org purchased K-cups for resale on its website from a number of suppliers, including Defendant GMCR, Timothy's Coffees of the World, Inc., Diedrich Coffee, Inc., and Wolfgang Puck, packaged by Van Houtte (LJVH Holdings, Inc.). Coffee.org alleges that Defendant GMCR has acquired essentially all distributors of K-cups in violation of state and federal antitrust laws. Specifically, Coffee.org asserts that in 2006, GMCR acquired Keurig, Inc., the company that patented the K-cup and the coffee brewing system that uses the K-cup. Then, in 2009, GMCR acquired Timothy's Coffees of the World, Inc., which distributes its coffee in K-cups. In May of 2010, GMCR acquired Diedrich Coffee, Inc., which is also a K-cup supplier; and by September 2010, GMCR had acquired all shares of LJVH Holdings, Inc., which included the Van Houtte, Bigelow, and Wolfgang **[*4]** Puck licensed brands of K-cup coffees.

By letter dated January 20, 2011, which is attached to the Amended Complaint, GMCR unilaterally terminated its business relationship with Coffee.org, thereby ending Coffee.org's existing supply source for K-cups. (Doc. 43-1). Coffee.org contends that GMCR has sought to create and perpetuate a monopoly in the market of the sale of K-cups, particularly in the e-commerce channel of distribution, in violation of the Arkansas Unfair Practices Act, *Ark. Code Ann. § 4-75-201, et seq.*, and the Sherman Act, *15 U.S.C.A. §§ 1-2*. Coffee.org maintains that GMCR has sold or offered to sell its Keurig coffee brewers at less than cost with the intent to injure Coffee.org, and GMCR's termination of the business relationship between it and Coffee.org will eventually put Coffee.org out of business. Additionally, Coffee.org asserts that GMCR has combined with Keurig, Timothy's, Diedrich, Van Houtte, and various other companies for the purpose of forming a monopoly on the internet supply of K-cups, drive out all competitors, and fix prices of K-cups in violation of *Ark. Code Ann. § 4-75-301, et seq.*, and the Sherman Act. In its plea for relief, Coffee.org asks that **[*5]** the Court issue an injunction precluding the termination of the business relationship between Coffee.org and GMCR and ordering GMCR to remunerate Coffee.org pursuant to a quantum meruit theory of recovery for the value of Coffee.org's advertising and promotion of K-cups, Coffee.org's substantial customer base, and the goodwill conferred upon GMCR by Coffee.org.

An *ex parte* temporary restraining order in this case was entered by the state court on February 3, 2011. GMCR removed the case to federal court on February 14, 2011. The restraining order expired on February 28, 2011. GMCR then moved to dismiss the case for failure to state a claim on March 1, 2011, asserting that Plaintiff failed to allege any sales below cost within Arkansas, as required under the Arkansas Unfair Practices Act, failed to allege any relevant product market, and lacked both antitrust injury and antitrust standing. Further, GMCR maintained that there is no private right to a cause of action under the Arkansas monopoly statutes, found at *Ark. Code Ann. § 4-75-301, et seq.* The Court granted leave for Plaintiff to amend its Complaint on November 15, 2011, which resulted in the addition of several Defendants and federal **[*6]** claims for antitrust violations, conspiracy, monopolization, and illegal restraint of trade pursuant to the Sherman and Clayton Acts. The Court then denied GMCR's Motion to Dismiss (Doc. 6) as moot after allowing Plaintiff to file its Amended Complaint asserting new causes of action. On November 18, 2011, the Court denied Plaintiff's request for a preliminary injunction, finding that Coffee.org did not have a probability of success on the merits on any of its claims. (Doc. 41).

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[1] Plaintiff stated in its Reply Brief: "Plaintiff no longer desires to pursue claims against Vistar Corporation and accordingly believes that its claims under *Section 1* may be subject to dismissal." (Doc. 51, p. 7). However, Plaintiff **[*3]** has not formally dismissed Defendant Vistar Corporation from this action, nor has Vistar Corporation moved separately to dismiss Plaintiff's claims against it. Accordingly, for purposes of deciding Defendants' Motion to Dismiss or for Judgment on the Pleadings, Vistar Corporation shall be considered a Defendant in this lawsuit.

II. Standard of Review

Defendants now ask the Court to enter judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)*. As a general rule, a motion for judgment on the pleadings is reviewed under the same standard as a *Fed. R. Civ. P. 12 (b)(6)* motion to dismiss for failure to state a claim. *Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1233 (8th Cir. 2010)*. Under this standard, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*; *Knapp v. Hanson, 183 F.3d 786, 788 (8th Cir. 1999)* ("A motion to dismiss should be granted only if 'it appears beyond doubt that **[*7]** the plaintiff can prove no set of facts which would entitle him to relief.'") In applying this standard, the Court must presume all factual allegations in the Complaint as true and draw all reasonable inferences in favor of the non-moving party. *See* *Whitmore v. Harrington, 204 F.3d 784, 784 (8th Cir. 2000)*.

"Judgment on the pleadings is appropriate when there are no material facts to resolve and the moving party is entitled to judgment as a matter of law." *Mills v. City of Grand Forks, 614 F.3d 495, 497-98 (8th Cir. 2010)*(citing *Faibisch v. Univ. of Minn., 304 F.3d 797, 803 (8th Cir. 2002))*. In ruling on a motion for judgment on the pleadings, the Court may not consider matters outside the pleadings; however, it is acceptable for the Court to consider exhibits attached to a complaint, materials that are necessarily embraced by a complaint, and materials that are part of the public record. *Mattes v. ABC Plastics, Inc., 323 F.3d 695, 698 (8th Cir. 2003)*; 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1006 (2d ed. 1990)(court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint"). **[*8]** The Eighth Circuit has held that in considering a motion for judgment on the pleadings, a district court may properly rely on a transcript of proceedings before another court on an earlier, related action involving the same parties. *Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999)*. Accordingly, in deciding the instant Motion, the Court will refer to and rely on the pleadings and orders filed in this case, as well as a transcript of a hearing that took place on April 14, 2011, before the Honorable Magistrate Judge James R. Marschewski, regarding Defendants' Motion to Dissolve a Temporary Restraining Order (Doc. 31). [2]

III. Discussion

A. Arkansas Unfair Practices Act Violations, *Ark. Code Ann. 4-75-201, et seq.*

The Arkansas Unfair Practices Act's purpose is "to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest **[*9]** competition is destroyed or prevented." *Ark. Code Ann. § 4-75-204*. Pursuant to this statute, "[a]ny person, firm, private corporation, or municipal or other public corporation . . . may maintain an action to enjoin a continuance of any act or acts in violation of this subchapter and, if injured thereby, for the recovery of damages." *Ark. Code Ann. § 4-75-211(a)*.

Plaintiff claims that GMCR engaged in business in Arkansas to sell, offer for sale, or advertise for sale Keurig brand coffee brewers, which utilize K-cups, at less than cost to the vendor for the purpose of injuring competitors and destroying competition in violation of *Ark. Code. Ann. § 4-75-209(a)(1)*. Even if the Court accepted as true Plaintiff's contention that GMCR sold Keurig coffee brewers at below cost in order to increase demand for its K-cups, such behavior would not constitute a violation of the Arkansas Unfair Practices Act. Selling below a competitor's price is markedly different from engaging in a sustained effort to destroy competition in a product area by selling below cost over a prolonged period of time. It is not illegal to sell items below cost as "loss leaders" to entice consumers to purchase products. *Wal-Mart Stores, Inc. v. American Drugs, Inc., 319 Ark. 214, 221, 891 S.W.2d 30 (Ark. 1995)*. **[*10]** Moreover, the Arkansas Supreme Court interpreting the Arkansas Unfair Practices Act has announced:

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[2] Plaintiff and Defendant GMCR were represented by counsel at this hearing, and both parties had the opportunity to present witnesses, introduce evidence, engage in oral argument, and fully brief the issues prior to the hearing.

> "[o]ur statute plainly does not contemplate a *prima facie* case of predation based on loss-leader sales, and we are not willing to invalidate, and indeed render illegal, the technique of using loss-leader products or services without a clear directive from the General Assembly."

Id.

Plaintiff asserts that GMCR obtained a controlling interest in co-Defendant Keurig in June of 2006, and afterward "included the sale of its AH (at home) brewers approximately at cost or sometimes at a loss when factoring in the incremental costs related to sales . . ." (Doc. 43, ¶ 51). However, at the hearing held before the Magistrate on April 14, 2011, Jim Travis, Vice President of Sales for GMCR, testified that he was unaware of any sales of Keurig brewers below cost (Doc. 31, p. 108-09). Even if such sales occurred, William McClure, the CEO of Plaintiff Coffee.org, testified that the sale of coffee brewers constituted only 4% of his company's sales since the inception of the company, though the sale of K-cups constituted 84% of Coffee.org's business. *Id.* at p. 38. Accepting the 4% figure as true, as the Court **[*11]** is required to do in evaluating a motion for judgment on the pleadings, the extent of Plaintiff's injury from alleged below-cost sales of Keurig coffee brewers is negligible at best, if such injury occurred at all; and the likelihood of competition being affected, let alone destroyed, by any alleged below-cost sales is similarly negligible. Moreover, Mr. McClure testified at the April 14 hearing that he did not know how Coffee.org, as a purveyor of K-cups, could be injured by a sale or giveaway of any Keurig machine, since Coffee.org benefitted when additional Keurig brewers appeared on customers' countertops. *Id.* at p. 83. Considering the allegations in the Amended Complaint and its attachments, as well as the contents of the April 14, 2011, hearing transcript, the Court accordingly finds that Plaintiff fails to state a claim under the Arkansas Unfair Practices Act.

B. Arkansas Monopoly Statute Violations, *Ark. Code Ann. §4-75-301, et seq.*

There is no private right to a cause of action pursuant to the subchapter of the Arkansas Code relating to unfair monopolies. The Eighth Circuit has affirmed this point of law. *See* *Baxley-Delamar Monuments, Inc. v. Am. Cemetery Association, 843 F.2d 1154, 1158 (8th Cir. 1988)*. **[*12]** Instead, the monopoly statutes are to be enforced by and through the Attorney General for the State of Arkansas, and private individuals or corporations lack the authority to assert violations of the monopoly statutes. *Ark. Code Ann. § 4-75-308* ("All actions authorized and brought under this subchapter shall have precedence on motion of the Attorney General . . .") and *§ 4-75-315(b)* ("The Attorney General also may bring a civil action in the name of the state, as parens patriae on behalf of natural persons residing in this state . . ."). Plaintiff therefore fails to state a claim under this statute. [3]

C. Quantum Meruit

Turning to Plaintiff's claim for quantum meruit or unjust enrichment, in order to prevail, Plaintiff must show that GMCR received something of value to which it was not entitled and which it must restore. *See* *Guaranty National Ins. v. Denver Roller, Inc., 313 Ark. 128, 854 S.W.2d 312 (Ark. 1993)*. Recovery via the equitable remedy of quantum meruit is based on quasi-contract, or contract implied in law. *Dews v. Halliburton Industries, Inc., 288 Ark. 532, 536, 708 S.W.2d 67 (Ark. 1986)*. **[*13]** No legal contract exists between the parties in a quasi-contract situation; rather, the basis for recovery is that a party has benefitted from services undertaken by another party, whether those services were requested or not. *Id. at 537*.

In the case at bar, GMCR and Coffee.org had an at-will business relationship, wherein GMCR or its wholly-owned subsidiaries sold K-cups to Coffee.org. At no time did Coffee.org enter into a licensing agreement to sell GMCR's patented K-cup product, nor did GMCR have a legal, contractual obligation to provide K-cups for re-sale to Coffee.org. Nevertheless, Coffee.org contends that it has expended significant funds on advertising, sales, and marketing of K-cups and on development of good will with its customer base. Coffee.org further argues that unless GMCR is prohibited from terminating its business relationship with Coffee.org, GMCR will be unjustly enriched by virtue of receiving Coffee.org's base of customers who purchase K-cups.

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[3] Further, the claim is invalid on the merits pursuant to the Court's reasoning in Section "E" below, since Plaintiff lacks monopoly power and is not a monopolist.

Plaintiff's quantum meruit argument is flawed in that Plaintiff's customers who purchase K-cups are also GMCR's customers. This is because the K-cup is a licensed product owned by GMCR, and therefore, GMCR receives some **[*14]** benefit from all K-cup sales to online customers. This is true whether Plaintiff or any number of online retailers make the sales. Coffee.org merely purchases K-cups for resale; the product itself is Defendant GMCR's and any sales of such product are realized in whole or in part by Defendant. Because Coffee.org's customers are, by definition, also GMCR's customers, Plaintiff cannot state a claim for quantum meruit.

A second, independent reason why Plaintiff's quantum meruit argument must fail is that there is substantial evidence that Plaintiff's online marketing strategy of actively denigrating the K-cup brand potentially resulted in a loss of goodwill to GMCR and a loss in profits. *See* Doc. 31, pp. 74-77 and 79. Plaintiff has marketed the K-cup on its website as a product that is both detrimental to the environment and too costly compared to other coffee products in a side-by-side comparison. Although Plaintiff did offer GMCR's product for sale on its website and in fact sold many units of product prior to 2011, Plaintiff has failed to state a claim that GMCR has been unjustly enriched despite Coffee.org's marketing methods and negative advertising.

D. Conspiracy and Restraint of Trade, **[*15]** Sherman Act § 1 and Clayton Act *§ 15*[4]

Plaintiff alleges that Defendants have entered into a conspiracy to restrain trade in violation of *Section 1 of the Sherman Act*. The Sherman Act provides that every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C.A. § 1*.

Initially, the Court observes that simply because Plaintiff alleges an unlawful restraint of trade in its Complaint does not mean that the Court is bound to accept this legal conclusion as true, even on a motion to dismiss. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*(citing *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 129 S.Ct. at 1949*.

The alleged restraint of trade at issue here is the refusal of a wholesaler or supplier (GMCR) to sell its product (K-cups) to a retailer (Coffee.org). **[*16]** The Supreme Court found in *Eastman Kodak Co. v. Image Technical Service, Inc., 504 U.S. 451, 112 S.Ct. 2072, 2090, 119 L. Ed. 2d 265 (1992)*, that "in some instances one brand of a product can constitute a specific market." However, "[t]he proper market definition . . . can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Id.* Defendant GMCR has an online service for customers to purchase K-cups, but there are also many online retailers of K-cups besides GMCR and Plaintiff. In addition, GMCR has established contractual relationships with online retailers of its licensed K-cup products, but it also has an at-will relationship with a host of other online suppliers of K-cups, including Bed Bath & Beyond, Target, Wal-Mart, and Kohl's. Consumers can also make online purchases of K-cups at Amazon.com. In light of the economic realities faced by consumers of K-cups in the case at bar, the Court cannot find that Defendant is placing an unlawful restraint on trade on K-cups.

Furthermore, the Court does not consider the relevant market in this case to be the single, licensed K-cup product. It is well-established that when a court engages in analysis of a party's alleged anti-competitive **[*17]** behavior, the relevant product market must first be defined to include all products that are reasonably interchangeable. *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; *United States v. E.I. du Pont d Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. A single trademarked product, such as GMCR's patented and trademarked K-cups, is not likely to constitute a specific market. *E.I. du Pont, 351 U.S. at 393*. Instead, the relevant product market must include all products that are reasonably interchangeable with the K-cup brewers and coffee packs, such as single-cup or "pod" brewers, single-cup or "pod" coffee packs, T-disc brewers and coffee packs, and reusable single-cup coffee containers. The product market must also include all

[4] The Clayton Act, *15 U.S.C.A. § 15*, states that any person who is injured in his person or property through a violation of the antitrust laws is entitled to damages.

current and potential methods of distribution of the product. *See* *Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215, 1234 (8th Cir. 1987)*. The Court finds, therefore, that the relevant product market, as defined by Coffee.org, is too narrow and must be rejected.

According to its Amended Complaint, Coffee.org maintains that co-Defendants GMCR, Keurig, Van Houtte USA Online, Inc., and Van Houtte USA Holdings, Inc., conspired to refuse to deal with Plaintiff and fix the price **[*18]** of K-cups in a manner contrary to law. The relevant fact regarding the non-GMCR Defendants is that all of them are either wholly-owned subsidiaries or assets/brands owned by GMCR. (Doc. 43 at ¶¶ 3, 4, 15, 93, and 109). As such, any agreements between GMCR and the other Defendants cannot violate *Section 1 of the Sherman Act*, since joint activities of a parent company and its wholly-owned subsidiaries cannot constitute a contract, combination, or conspiracy that violates federal ***antitrust law***. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*("If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for *§ 1* scrutiny"). Therefore, Plaintiff does not state a claim for conspiracy between GMCR and its subsidiaries.

Plaintiff has also alleged that Defendant Vistar Corporation, a distributor for GMCR and a company from which Plaintiff purchased K-cups in the past, has acted in concert with GMCR to refuse to deal with Coffee.org and has "conspired and agreed to restrict and limit the distribution and sale of K-cups to Coffee.org." **[*19]** (Doc. 43, ¶ 61). Such a practice, if true, would not constitute a *per se* violation. Vertical non-price restrictions, such as are alleged between supplier GMCR and distributor Vistar, are governed by the "rule of reason" analysis because such restrictions "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Double D Spotting Service, Inc. v. Supervalu, Inc., 136 F.3d 554, 559 (8th Cir. 1998)*, citing *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*.

The rule of reason analysis requires an inquiry into GMCR's market power and effect on competition. *Double D, 136 F.3d at 558*. In the instant case, Plaintiff has defined the relevant product market as internet sales of K-cups in the United States. (Doc. 43, ¶ 77). As discussed above, because this definition of the relevant product market is far too narrow, it is rejected. The correct definition of the relevant product market must be broadened to include all single-serve coffee products available for sale through the internet. In the case at bar, consumers have numerous retailers available throughout the United States from which to purchase single-serve **[*20]** coffee products, including K-cup coffee and coffee brewers. Even Coffee.org's company representative testified that he was able to secure K-cups from sources other than GMCR, including Kohl's or Midwest Supply. (Doc. 31, pp. 70-71.)

To prove a violation of the Sherman Act, it must be shown that only a small percentage of purchasers have alternative suppliers to whom they could practicably turn in the event that a defendant supplier's anti-competitive actions result in a price increase. *Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994)*; *Ryko, 823 F.2d at 1234* (*Sherman Act §1* claim based on exclusive dealing agreement depends on availability of alternative methods of distribution). The Court finds that so many alternate suppliers of the K-cup exist that e-commerce consumers would not be adversely affected if they could not purchase K-cups through Plaintiff. Accordingly, after considering the relevant product and geographic markets and the alleged restraint on trade asserted by Plaintiff, there does not appear to be any anti-competitive market effect resulting from GMCR's decision to refuse to allow Plaintiff to sell its K-cup product. Plaintiff's Sherman Act, Section 1 claim must **[*21]** therefore be dismissed for failure to state a claim. [5]

E. Monopolization, Attempted Monopolization, Conspiracy, Sherman Act *§ 2*

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[5] Plaintiff in its Response to the instant Motion asserts for the first time: "since the filing of this action, additional facts have come to light, and Plaintiff believes that Defendants are liable to the Plaintiff for violation of *Section 1 of the Sherman Act* because of the Defendants' illegal tying of the sale of Keurig brewers to the sale of K-cups." (Doc. 51, p. 7). This new tying claim does not appear in the Amended Complaint and therefore will not be considered.

Section 2 of the Sherman Act provides that every "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." 15 U.S.C.A. § 2. Plaintiff maintains that all Defendants, collectively, have monopoly power in the relevant market for the internet distribution of K-cups or have attempted to monopolize the internet distribution of K-cups. Plaintiff further contends that if GMCR's acts go unchecked, it may use its **[*22]** unlawful monopoly power to dictate K-cup prices and method of distribution, thereby hurting consumers.

To assert a violation under Section 2 of the Sherman Act, a party must show that an alleged monopolist demonstrates monopoly power, which is the power to control prices or exclude competition from the relevant market. *E.I. du Pont, 351 U.S. at 391*. "Although this is normally a factual inquiry, courts have not hesitated to dismiss antitrust claims where it is clear that the alleged geographic market is too narrow or implausible. " *Acre v. Spindletop Oil & Gas Co., 2009 U.S. Dist. LEXIS 108284, 2009 WL 4016116 (E.D. Ark. Nov. 18, 2009)*.

As stated above, the alleged product market asserted by Plaintiff is invalid due to its narrowness and implausibility, as it consists of GMCR's own patented and trademarked K-cup product and nothing more. GMCR does not have a monopoly on the single-brew business as a whole; indeed the evidence is clear that a number of products other than the K-cup deliver single-brew coffee, and consumers have a wide variety of internet and non-internet sources for single-brew coffee products and supplies.

The Supreme Court case of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610-11, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, **[*23]** announced that the unilateral termination of a voluntary course of dealing was considered anti-competitive when such refusal to deal "was not motivated by efficiency concerns" and indicated that the alleged monopolist "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." In *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, the Supreme Court elaborated on its reasoning in *Aspen Skiing* by finding that a refusal to deal can be unlawful only if the monopolist sacrifices profits today in the hope of reaping greater returns from eliminating competition in the future.

In comparing the facts of *Aspen Skiing* with those in the case at bar, GMCR's refusal to deal is plainly not violative of the antitrust laws. There is no indication that GMCR refused to deal with Coffee.org for anti-competitive purposes or to secure untold profits. Furthermore, the Court finds that GMCR is not a monopolist, and therefore, any refusal by GMCR to deal with Coffee.org cannot, by definition, violate any ***antitrust law***. GMCR decided to discontinue its business relationship with Coffee.org because of **[*24]** disagreement over Coffee.org's marketing strategies. *See* Doc. 31, p. 124. Specifically, GMCR's company representative testified at the April 14, 2011, hearing before the Magistrate that there were three specific reasons why GMCR decided to discontinue the business relationship it had with Coffee.org: 1) there was no contract between it and Coffee.org; 2) Coffee.org could not be a licensed "KAD" or "Keurig Authorized Distributor" by virtue of the fact that Coffee.org had only an online presence, but no brick-and-mortar retail store; and 3) Coffee.org was, according to GMCR, "representing our brands as though they had some ownership in the marking [sic] decisions, so they were creating blog space and website pages without ever discussing with us the use of our trademark." *Id.*

The Eighth Circuit summarized the issue well in *Ryko Manufacturing Co. v. Eden Services, 823 F.2d 1215, 1234 (8th Cir. 1987)*, when it observed: " . . . the concern of ***antitrust law*** is the protection of competition, not individual competitors." As inconvenienced and indignant as Coffee.org is at GMCR's refusal to authorize it as a licensed Keurig Authorized Distributor, the Court finds that the Complaint fails to **[*25]** state a Sherman Act Section 2 violation for monopolization or attempted monopolization.

IV. Conclusion

After consideration of Defendants' Motion to Dismiss or for Judgment on the Pleadings (Doc. 44), it appears clear that Plaintiff can prove no set of facts which would entitle it to relief. Accordingly, as there are no material facts to resolve and Defendants are entitled to judgment as a matter of law, the Court enters judgment on the pleadings in favor of Defendants.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss or for Judgment on the Pleadings (Doc. 44) is **GRANTED.** Plaintiff's claims against all Defendants are DISMISSED WITH PREJUDICE. In light of the Court's decision to dismiss this case, Defendants' Motion to Stay Discovery and Continue Trial Date (Doc. 53) is **DENIED AS MOOT.**

IT IS SO ORDERED this 15th day of February, 2012.

/s/ P.K. Holmes, III

P. K. HOLMES, III

CHIEF U.S. DISTRICT JUDGE

JUDGMENT

For the reasons set forth in the Court's Order filed contemporaneously herewith, IT IS HEREBY ORDERED AND ADJUDGED that Defendants' Motion to Dismiss or for Judgment on the Pleadings (Doc. 44) is **GRANTED.** This case is accordingly dismissed with prejudice, and the parties are instructed **[*26]** to bear their own fees and costs.

IT IS SO ORDERED this 15th day of February, 2012.

/s/ P.K. Holmes, III

P. K. HOLMES, III

CHIEF U.S. DISTRICT JUDGE

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Gold Refinery, LLC v. Aloha Island Gold, LLC

United States District Court for the District of Hawaii

February 15, 2012, Decided; February 15, 2012, Filed

CIVIL NO. 11-00522 SOM-RLP

Reporter

2012 U.S. Dist. LEXIS 18898 *; 2012 WL 518396

THE GOLD REFINERY, LLC, a Michigan Limited Liability Company, Plaintiff, vs. ALOHA ISLAND GOLD, LLC, a Hawaiian Limited Liability Company, SAM TIMAS, an individual; SANDY WARD, an individual; TAMMIE AKAU, an individual; KRISTY ARAUJO-NAGAO, an individual; LANA ATON, an individual; MARY KAY CARVALHO, an individual; SUNNY COLLO, an individual; PRISCILLA GRAY, an individual; CHISTOPHER HENRIQUES, an individual; RAINA SANTOS, an individual; GARY SCHLEIF, an individual; KAREN SCHLEIF, an individual; DENISE CABEL, an individual; OSWALDO CABEL, an individual; TIERRA HULIHEE, an individual; HOLLY KEANAAINA, an individual; CASSANDRA RYUSAKI, an individual; TAMMY MATTOS, an individual; JASON ATON, an individual; BRANDI PAGALA, an individual, Defendants.

Subsequent History: Motion granted by *Gold Refinery v. Aloha Island Gold, 2012 U.S. Dist. LEXIS 203549 (D. Haw., July 10, 2012)*

Magistrate's recommendation at *Gold Refinery, LLC v. Aloha Island Gold, LLC, 2014 U.S. Dist. LEXIS 22748 (D. Haw., Feb. 3, 2014)*

Core Terms

Counterclaim, alleges, gold, Counts, franchise, tortious interference, asserts, legal action, covenant, dismissal without prejudice, independent contractor, breach of contract, motion to dismiss, terminated, Conditions, negligent misrepresentation claim, negligent misrepresentation, tortious breach of contract, contractual relationship, factual allegations, cease and desist, punitive damages, good faith, bad faith, defamation, expectancy, competed, letters, parties, argues

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Jason Aton, an individual, Defendant, Pro se, Mililani, HI.

For Gold Refinery, LLC, The, a Michigan Limited Liability Company, Counter Defendant: Allison Mizuo Lee, Cheryl Akemi Kinoshita, William K. Shultz, LEAD ATTORNEYS, Cades Schutte, Honolulu, HI; Cathy Pham Zotti, Matthew Nguyen, Scott Wellman, LEAD ATTORNEYS, Wellman & Warren LLP, Laguna Hills, CA; Paul M. Saito, LEAD ATTORNEY, Cades Schutte, LLP, Honolulu, HI.

Judges: Susan Oki Mollway, Chief United States District Judge.

Opinion by: Susan Oki Mollway

Opinion

ORDER (1) GRANTING PLAINTIFF'S MOTION TO PARTIALLY DISMISS DEFENDANTS SAM TIMAS AND SANDY WARD'S COUNTERCLAIM TO PLAINTIFF'S COMPLAINT, AND (2) GRANTING PLAINTIFF'S MOTION TO DISMISS DEFENDANT ALOHA ISLAND GOLD, LLC'S COUNTERCLAIM

I. INTRODUCTION.

Plaintiff The Gold Refinery, LLC ("TGR"), buys and resells gold, usually in the form of personal jewelry. TGR is suing Independent Agents ("IAs"), individuals that, in return for commissions, solicited customers to sell gold to TGR. Compl. ¶¶ 2, 4, Aug 25, 2011, ECF No. 1. TGR claims that, while serving as TGR's IAs, Defendants Sam Timas and Sandy Ward formed Aloha Island Gold ("Aloha Island"), a company that competed **[*3]** directly with TGR. Id. ¶¶ 22-23. TGR sues Aloha Island as well as Timas, Ward, and eighteen other former or current IAs, claiming that Defendants have stolen TGR's proprietary business methods, customer lists, and distributors. Id. ¶ 1. Timas and Ward have counterclaimed, and Aloha Island has filed a separate counterclaim.

Two motions brought by TGR are now before the court. The first seeks dismissal of nine claims in the Timas and Ward counterclaim, and the second seeks dismissal of the Aloha Island counterclaim. The court grants both motions.

II. FACTUAL BACKGROUND.

Both TGR and Aloha Island buy and resell gold. They use "multi-level" or "network" marketing. Compl. ¶ 11; Sam Timas and Sandy Ward's Counterclaim Against The Gold Refinery, LLC For Violation of Hawai`i Franchise Investment Law, Unfair Competition, Breach of Contract, Tortious Breach of Contract, Defamation, Negligent Misrepresentation, Breach of Implied Covenant of Good Faith, Illegal Restraint of Trade, and Punitive Damages ("Timas and Ward Counterclaim") ¶ 9, Sept. 9, 2011, ECF No. 17-1; Defendant Aloha Island Gold, LLC's Counterclaim ("Aloha Island Counterclaim") ¶ 8, Oct, 20, 2011, ECF No. 4. Multi-level marketing usually **[*4]** involves independent contractors who earn commissions through sales on behalf of a company. Those independent contractors may also recruit other independent contractors and earn commissions based on sales by those recruits. TGR refers to its IAs' recruits as "junior IAs." Timas and Ward Counterclaim ¶ 11. Amway and Avon are well-known examples of multi-level marketing companies. See Compl. ¶¶ 1-4.

TGR enlists IAs to arrange home-based gold-selling parties or events. Id. ¶ 2. Potential customers are invited to a party or event at which an IA purchases gold, usually personal jewelry, from the attendees, using money advanced by TGR. Id.; Timas and Ward Counterclaim ¶ 9. The IAs then turn the gold over to TGR. Timas and Ward

Counterclaim ¶ 9. According to TGR, Aloha Island also hosts gold-selling parties and competes directly with TGR. Compl. ¶ 22.

One becomes a TGR IA by signing up online. Timas and Ward Counterclaim ¶ 10. The potential IA "agrees" to TGR's "Terms and Conditions" by clicking an "I agree" box on TGR's website. Id.

On September 15, 2010, Timas and Ward allegedly agreed to be IAs for TGR. Id. ¶ 12. They allege that, from the beginning of their relationship with TGR, TGR "engaged **[*5]** in conduct that was designed to, and ultimately did, sabotage" their business and their relationships with their junior IAs. Id. ¶ 14. For example, TRG allegedly "constantly berated" Timas and Ward and failed to advance them enough funds to host their parties. Id. ¶ 14. TGR also allegedly failed to assist Timas and Ward in training their junior IAs. Id. ¶ 15.

Timas and Ward terminated their relationships with TGR about two months after having signed up. Id. ¶ 19. In November or December 2010, a number of other TGR IAs also terminated their relationships with TGR (collectively, the "former IAs"). Aloha Island Counterclaim ¶ 10. Some of them entered into independent contractor agreements with Aloha Island. Id.; Timas and Ward Counterclaim ¶ 19. According to TGR, on December 16, 2010, Timas and Ward formed Aloha Island. Compl. ¶ 22.

Aloha Island alleges that, when TGR discovered its former IAs' agreements with Aloha Island, TGR sent the former IAs cease and desist letters threatening legal action if they continued to work with Aloha Island. Aloha Island Counterclaim ¶ 11. In their separate counterclaim, Timas and Ward describe the same cease and desist letters but do not mention Aloha Gold **[*6]** at all. Timas and Ward allege that TGR sent their junior IAs cease and desist letters threatening legal action if they worked with Timas and Ward to host gold-selling parties. Timas and Ward Counterclaim ¶ 19. Timas and Ward contend that, as a result, their junior IAs "quit the gold party business permanently," causing Timas and Ward to lose several weeks of profits and many party representatives. Id. For its part, Aloha Gold makes nearly identical allegations, except that the agreement and relations it says many of the former IAs allegedly terminated or abandoned were with Aloha Island. Id. ¶ 13.

On August 25, 2011, TGR filed suit against Defendants, alleging, inter alia, that Defendants misappropriated TGR's trade secrets, tortiously interfered with TGR's contracts and TGR's prospective business advantage, were unjustly enriched, competed unfairly, and violated the Hawaii Uniform Deceptive Trade Practice Act. Compl. ¶¶ 45-123. On September 25, 2011, Timas and Ward counterclaimed against TGR, asserting ten counts, including, inter alia, breach of contract, defamation, and violations of the Hawaii Franchise Act and the Hawaii Antitrust Act. TGR seeks dismissal of nine of those counts, **[*7]** moving under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for failure to state a claim and under *Rule 9(b) of the Federal Rules of Civil Procedure* for failure to plead fraud with particularity. On October 20, 2011, Aloha Island counterclaimed against TGR for tortious interference with contractual relations, and for tortious interference with prospective business advantage. TGR seeks dismissal of those counts on the ground that Aloha Island fails to state a claim.

III. LEGAL STANDARDS.

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

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defense[] by motion: . . . (6) failure to state a claim upon which relief can be granted[.]"

Dismissal under *Rule 12(b)(6)* may be based on either (1) the lack of a cognizable legal theory, or (2) insufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988)* (citing *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984))*. To state a claim, a pleading must contain a "short and plain **[*8]** statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. While *Rule 8* does not demand detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*.

On a *Rule 12(b)(6)* motion to dismiss, the court takes all allegations of material fact as true and construes them in the light most favorable to the nonmoving party. *Marcus v. Holder, 574 F.3d 1182, 1184 (9th Cir. 2009)*. To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1949*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing *Twombly, 550 U.S. at 554*). Whether a complaint states a plausible claim for relief is "context-specific," and such a determination "requires the reviewing **[*9]** court to draw on its judicial experience and common sense." *Id. at 1950*.

When reviewing motions to dismiss brought under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, the court is generally limited to the contents of the complaint. *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*; *Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996)*. If matters outside the pleadings are considered, the *Rule 12(b)(6)* motion is treated as one for summary judgment. See *Keams v. Tempe Tech. Inst., Inc., 110 F.3d 44, 46 (9th Cir. 1997)*; *Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996)*. However, courts may "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*. Documents with contents that are alleged in a complaint may also be considered in ruling on a *Rule 12(b)(6)* motion to dismiss, if no party questions its authenticity. See *Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994)*, overruled on other grounds by *Galbraith v. Cnty of Santa Clara, 307 F.3d 1119, 1125 (9th Cir. 2002)*.

B. **[*10]** *Rule 9(b)*.

Usually, a party's pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. However, *Rule 9(b)* requires that, when fraud or mistake is alleged, "a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*.

An allegation of fraud is sufficient if it "identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)* (internal citations and quotations omitted). "Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged." *Kearns, 567 F.3d at 1124* (quoting *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003))* (internal quotation marks omitted). To sufficiently identify the circumstances that constitute fraud, a plaintiff must identify such facts as the times, dates, places, or other details of the alleged fraudulent activity. *Neubronner, 6 F.3d at 672*. A plaintiff must also explain why **[*11]** the alleged conduct or statements are fraudulent. *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 n.7 (9th Cir. 1994)* (en banc), superseded by statute on other grounds by *15 U.S.C. § 78u-4*.

When a court exercises diversity jurisdiction, state substantive law determines the elements of the claims, but federal procedural requirements apply. "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the *Rule 9(b)* requirement that the circumstances of the fraud must be stated with particularity is a federally imposed rule." *Kearns, 567 F.3d at 1125* (internal citations and quotations omitted).

A court treats a motion to dismiss under *Rule 9(b)* like a motion to dismiss under *Rule 12(b)(6)*. *Vess, 317 F.3d at 1107*.

IV. ANALYSIS.

A. Timas and Ward's Counterclaim.

Timas and Ward assert ten claims: Count 1: "Violation of Hawai`i Franchise Investment Law, *H.R.S. § 482E-6(1)* (Bad Faith)"; Count 2: "Violation of Hawai'i Franchise Investment Law, *H.R.S. § 482E-2* (Failure to Provide or File

Offering Circular)"; Count 3: "Violation of Hawai'i Franchise Investment Law, H.R.S. § 482E-9(a), H.R.S. § 482E-6(2), and H.R.S. ch. 480 **[*12]** (Unfair Competition)"; Count 4: "Breach of Contract"; Count 5: "Tortious Breach of Contract"; Count 6: "Defamation"; Count 7: "Negligent Representation"; Count 8: "Breach of Implied Covenant of Good Faith and Fair Dealing"; Count 9: "Counterdefendant's Covenants Not to Compete are Unenforceable and Constitute an Illegal Restraint of Trade under the Hawai`i Antitrust Act"; and Count 10: "Punitive Damages." TGR seeks dismissal of all counts except Count 6. [1]

1. Counts 1, 2 and 3.

Counts 1, 2, and 3 assert claims under Hawaii's Franchise Investment Law, chapter 482E of the Hawaii Revised Statutes. TGR argues that Counts 1, 2, and 3 fail to state claims because, under Hawaii law, TGR is not a franchisor and did not have a franchisor/franchisee relationship with Timas and Ward. See Haw. Rev. Stat. § 482E-2 (defining a "franchise").

Timas and Ward allege that TGR is a franchisor under section 482E-2 and that "the Agreement" granted Timas and Ward franchise rights. Timas and Ward Counterclaim ¶ 22. It is unclear **[*13]** what agreement the counterclaim refers to. Paragraph 10 describes the Terms and Conditions that TGR's IAs assented to online, while paragraph 12 alleges that, on September 15, 2010, Timas and Ward agreed to be IAs for TGR pursuant to different provisions in "the Agreement."

Assuming "the Agreement" and the Terms and Conditions are different contracts, Timas and Ward do not plead sufficient facts to base claims on the Agreement. The first element of a franchise is the existence of an agreement. See Haw. Rev. Stat. § 482E-2 (defining a "franchise" as an "oral or written contract or agreement, either expressed or implied"). But aside from alleging that the Agreement was a franchise agreement, Timas and Ward provide insufficient relevant identifying information. It is unclear whether the Agreement was oral, written, or implied, or what rights and obligations each party had under the Agreement. A pleading need not exhaustively describe a contract, but it must describe it at least enough so its essential terms are discernable.

In their counterclaim, Timas and Ward merely recite formulaically the elements of a franchise. This is insufficient to state a claim. See Iqbal, 129 S. Ct. at 1949.

Timas **[*14]** and Ward allege that, under "the Agreement," TGR "granted [Timas and Ward] a license to use TGR's trade name, service mark, trademark, logotype or related characteristic in which there is a community interest in the business of the offering, selling, or distributing goods or services." Timas and Ward Counterclaim ¶ 12. They further allege that they "were required to pay directly or indirectly, a franchise fee, namely a monthly fee for access to TGR's 'back room' information without which they could not do business as an IA." Id.

These allegations are taken nearly verbatim from section 482E-2 of the Hawaii Revised Statutes. Section 482E-2 defines a franchise as an:

> oral or written contract or agreement, either expressed or implied, in which a person grants to another person, a license to use a trade name, service mark, trademark, logotype or related characteristic in which there is a community interest in the business of offering, selling, or distributing goods or services at wholesale or retail, leasing, or otherwise, and in which the franchisee is required to pay, directly or indirectly, a franchise fee.

What is missing from Timas and Ward's allegations is any factual basis for the assertion **[*15]** that a franchise existed, such as a description of what trade name, service mark, trademark, logotype or related characteristic was covered by the purported franchise and what Timas and Ward were licensed to do or use. Counts 1, 2, and 3 are dismissed without prejudice given the failure to plead sufficient facts. [2]

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[1] While TGR's motion states that it seeks dismissal of Count 6, TGR presents no arguments regarding that claim. TGR's reply clarifies that Count 6 is not in issue on TGR's present motion.

[2] TGR argues as an alternative ground for dismissal of Counts 1, 2, and 3 the lack of allegation by Timas and Ward that they paid a franchise fee. TGR contends that the reference by Timas and Ward to a monthly fee to access "back room information"

2. Count 4.

Count 4 asserts breach of contract. It **[*16]** alleges that TGR materially breached "the Agreement" by failing to advance Timas and Ward enough funds, provide adequate training for the junior IAs, pay Timas and Ward their commissions, maintain proper records and accurately weigh the gold, and maintain an accurate gold party calendar. Timas and Ward Counterclaim ¶ 43. TGR also allegedly violated the Agreement by harassing and berating Timas and Ward and their junior IAs. Id.

As the court stated with respect to Counts 1, 2, and 3, Timas and Ward do not provide sufficient factual information about the Agreement to sustain a claim based on it. Nor do they even suggest what provisions TGR allegedly violated. This court is not saying that, to state a breach of contract claim, Timas and Ward must quote the breached contractual provision, refer to a contract page or paragraph, or follow some other rigid format. But they do need to provide some indication of what TGR was obligated to do with respect to advancing funds, training junior IAs, paying commissions, records, weighing gold, and maintaining a party calendar, if they are alleging deficiencies in those areas. Otherwise, TGR cannot determine, for example, if the alleged breach concerning **[*17]** payment of commission goes to timeliness or amount. Count 4 cannot be said to give TGR adequate notice as to the basis for a breach of contract claim. As Count 4 does not plead sufficient facts, it is dismissed without prejudice.

3. Count 5.

Count 5 asserts tortious breach of contract. It alleges that TGR's breach of contract (alleged in Count 4) was tortious "because TGR acted willfully and in reckless disregard of its obligations as a Franchisor, both under the terms of the Agreement and Hawai`i law." Timas and Ward Counterclaim ¶¶ 48, 50.

In *Francis v. Lee Enterprises, Inc., 89 Haw. 234, 244, 971 P.2d 707, 708 (Haw. 1999)*, the Hawaii Supreme Court greatly restricted claims for tortious breach of contract:

> Hawai'i law will not allow a recovery in tort, including a recovery of punitive damages, in the absence of conduct that (1) violates a duty that is independently recognized by principles of tort law and (2) transcends the breach of the contract.

Timas and Ward do not allege in Count 5 that TGR committed an independent tort beyond the alleged breach of contract.

Timas and Ward argue that their allegation that TGR falsely accused them of stealing money, see Timas and Ward Counterclaim **[*18]** ¶ 18, goes to a tortious breach of contract. While tort law may indeed impose an independent duty on TGR to refrain from falsely accuse people of stealing, Count 5 does not allege a cognizable breach over and above Count 4, the breach of contract claim. The court's reading of Count 5 is that it is based on TGR's breach of contract, which Timas and Ward claim was willful and in reckless disregard of its obligations to TGR under the contract. Count 5 does not refer to TGR's alleged false accusation. Rather, the false accusation allegation forms the basis of Timas and Ward's defamation claim (Count 6).

At the hearing on this motion, Timas and Ward indicated that they were not challenging the dismissal of Count 5. Given the limitations Hawaii law places on tortious breach of contract claims, further amendment of Count 5 would be futile. Count 5 is dismissed with prejudice.

4. Count 7.

Count 7 asserts a claim for negligent representation. It alleges that TGR negligently made material misstatements of fact that Timas and Ward relied on to their detriment. TGR argues that Count 7 actually alleges fraud and is therefore subject to the heightened pleading standard under *Rule 9(b) of the Federal Rules of Civil Procedure*.

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cannot be read as going to any franchise fee. A franchise fee is "any fee or charge that a franchisee . . . is required to pay or agrees to pay for the right . . . to continue a business under a franchise agreement." *Haw. Rev. Stat. § 482E-2*. TGR notes that a fee for information is not included in the nonexclusive statutory list of fees that qualify as franchise fees. This argument by TGR may be better suited to a summary judgment motion than to a motion to dismiss. In any event, as the court dismisses Counts 1, 2, and 3 or other grounds, it need not address this alternate ground.

TGR **[*19]** is unpersuasive on this point. Although a negligent misrepresentation claim in some jurisdictions may be subject to *Rule 9(b)*, a negligent misrepresentation claim under Hawaii law is not. Compare *Neilson v. Union Bank of California, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003)* (analyzing negligent misrepresentation under California law and stating that it is "well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet *Rule 9(b)*'s particularity requirements"), with *Smallwood v. NCsoft Corp., 730 F. Supp. 2d 1213, 1231-32 (D. Haw. 2010)* (holding that, because a negligent misrepresentation claim under Hawaii law does not require intent, it is not subject to *Rule 9(b)*) (citations omitted), and *Peace Software, Inc. v. Hawaiian Elec. Co., Inc., Civ. No. 09-00408 SOM/LEK, 2009 U.S. Dist. LEXIS 107433, 2009 WL 3923350, at *6-7 (D. Haw. Nov. 17, 2009)* (declining to apply *Rule 9(b)*'s heightened pleading standard to negligent misrepresentation under Hawaii law because the defendant did not establish that negligent misrepresentation requires intent).

Hawaii law provides that the elements of a negligent misrepresentation claim are: "(1) false information be supplied as a result of **[*20]** the failure to exercise reasonable care or competence in communicating the information; (2) the person for whose benefit the information is supplied suffered the loss; and (3) the recipient relies upon the misrepresentation." *Ass'n of Apartment Owners of Newton Meadows v. Venture 15, Inc., 115 Haw. 232, 256, 167 P.3d 225, 263 (Haw. 2007)* (quoting *Blair v. Ing, 95 Haw. 247, 269, 21 P.3d 452, 474 (Haw. 2001))*. By contrast, the elements of fraud under Hawaii law are "1) false representations made by the defendant, 2) with knowledge of their falsity (or without knowledge of their truth or falsity), 3) in contemplation of plaintiff's reliance upon them, and 4) plaintiff's detrimental reliance." *Fisher v. Grove Farm Co., Inc., 123 Haw. 82, 103, 230 P.3d 382, 403 (Haw. Ct. App. 2009)*.

Count 7's allegations correspond to the elements of negligent misrepresentation, not fraud. Timas and Ward allege that TGR "negligently" made false statements, that Timas and Ward relied on those statements, and that they have suffered monetary loss as a result. They do not allege a key element of fraud: that TGR knew its alleged statements were false. Count 7 thus need not meet the heightened pleading standard **[*21]** under *Rule 9(b)*.

In its reply, TGR states that the allegations in Count 7 do not even comply with *Rule 8*. It is true that Count 7 recites the elements of a negligent misrepresentation claim without providing facts that make such a claim plausible on its face. Count 7 does not identify the statements that were allegedly made negligently. It alleges that, had Timas and Ward known the "true facts," they would not have become IAs with TGR, but it does not state what those "true facts" were. Count 7 does not plead sufficient facts to state a negligent misrepresentation claim. The court would ordinarily not countenance an argument raised for the first time in a reply. However, as other claims are being dismissed with leave to amend, efficiency is served by addressing Count 7's failure to state a claim at this time. Count 7 is therefore dismissed without prejudice.

5. Count 8.

Count 8 asserts that TGR breached the implied covenant of good faith and fair dealing, which it contends is incorporated into the Agreement that TGR allegedly entered into with Timas and Ward. This claim in essence asserts the tort of "bad faith." See *Best Place v. Penn AM. Ins. Co., 82 Haw. 120, 128, 920 P.2d 334, 342 (Haw. 1996)* **[*22]** (adopting tort of bad faith for breach of implied covenant of good faith and fair dealing in an insurance contract).

Hawaii law generally does not recognize tort claims for breach of good faith or fair dealing outside the insurance context. See *id. at 132, 920 P.2d at 346* (stating, "[T]he policy considerations surrounding the adoption of the tort of bad faith in the insurance context are atypical and will not necessarily extend to all types of contracts. Thus, the availability of a tort recovery for breach of the implied covenant of good faith and fair dealing may be justified in actions brought on insurance contracts, but not necessarily in actions brought on other types of contract"); see also *Francis, 89 Haw. at 238, 971 P.2d at 711* ("Other jurisdictions recognizing the tort of bad faith similarly limit such claims to the insurance context or situations involving special relationships characterized by elements of fiduciary responsibility, public interest, and adhesion." (citations omitted)). The context of this case does not allow for a claim for bad faith. Count 8 is therefore dismissed. At the hearing on this motion, Timas and Ward appeared to concede that Count 8 did not state **[*23]** a cognizable claim. Because further amendment would be futile, Count 8 is dismissed with prejudice.

6. Count 9.

Count 9 alleges that sections 3.6.1 and 3.6.4 in the Terms and Conditions constitute an "illegal restraint on trade" and are unenforceable noncompete provisions under the Hawaii ***Antitrust Law***, *chapter 480 of the Hawaii Revised Statutes.*

Count 9, however, does not indicate what specific statute is violated by sections 3.6.1 and 3.6.4 of the Terms and Conditions. It refers to *chapter 480 of the Hawaii Revised Statutes* as a whole, but *chapter 480* encompasses numerous provisions. The court and TGR are left to guess which statute forms the basis for Count 9.

In their opposition, Timas and Ward quote *section 480-4(a)* (improperly citing it as *section 480-4(c)*), which states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is illegal." *Haw. Rev. Stat. § 480-4(a)*. It is not enough for Timas and Ward to identify a specific provision in opposing a motion. *Rule 8(a)* requires that the counterclaim itself state a claim for relief. *Fed. R. Civ. P. 8(a)*. See also *Caniadido v. Countrywide Bank, FSB, Civil No. 11-00080 SOM/BMK, 2011 U.S. Dist. LEXIS 65415, 2011 WL 2470640, at *12-13 (D. Haw. June 20, 2011)* **[*24]** (dismissing a "predatory lending" cause of action because, as the common law does not recognize a "predatory lending" claim, the ambiguous term potentially encompasses a wide variety of alleged wrongs and fails to provide notice to any defendant of what is being claimed). Because Count 9 does not allow TGR to determine what law it is being accused of having violated, Count 9 does not plead a cognizable claim and is dismissed without prejudice.

TGR argues that Count 9 should be dismissed with prejudice because *section 480-4(c)* of the Hawaii Antitrust Act expressly permits sections 3.6.1 and 3.6.4. Under *section 480-4(c)*, certain restrictive covenants are lawful, including:

> A covenant or agreement by an employee or agent not to use the trade secrets of the employer or principal in competition with the employee's or agent's employer or principal, during the term of the agency or thereafter, or after the termination of employment, within such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

According to TGR, sections 3.6.1 **[*25]** and 3.6.4 are permissible covenants not to use trade secrets. Section 3.6.1 prohibits IAs from recruiting other IAs for other multi-level or network marketing companies while they are TGR IAs and for six months after. Section 3.6.4 restricts IAs from sharing TGR's "back room information" and using that information to compete with TGR, among other things.

The court declines to dismiss Count 9 with prejudice. Whether the identity of TGR's IAs or the content of its "back room information" is a "trade secret" is unclear. In addition, *section 480-4(c)* requires that restrictive covenants serve "a legitimate purpose not violative of [*chapter 480*]." Sections 3.6.1 and 3.6.4 of the Terms and Conditions do not expressly state a purpose, and Timas and Ward allege that TGR had no legitimate purpose. Timas and Ward Counterclaim ¶ 65(e). At this stage, the court cannot say that amendment of Count 9 would be futile. Count 9 is dismissed without prejudice.

7. Count 10.

Count 10 asserts "punitive damages." Recognizing that a punitive damages claim is not based on an independent tort, but rather is incident to a separate cause of action, Timas and Ward have withdrawn Count 10. They may continue to pray **[*26]** for punitive damages as incidental to their defamation action. See, e.g., *Machado v. Int'l Ass'n of Heat and Frost Insulators & Asbestos Workers (AFL-CIO), 454 F. Supp. 2d 1056, 1065 (D. Haw. 2006)* ("[A]s a matter of law, the Court finds that Plaintiff may recover punitive damages if he succeeds on his defamation claim.").

In sum, Counts 1, 2, 3, 4, 7, and 9 in Timas and Ward's counterclaim are dismissed without prejudice. Counts 5 and 8 in Timas and Ward's Counterclaim are dismissed with prejudice.

B. Aloha Island Counterclaim.

1. Count I.

Count I asserts a claim for "tortious interference with contractual relations." It alleges that TGR caused its former IAs to terminate their contracts with Aloha Island by threatening them with legal action.

Under Hawaii law, the elements of tortious interference with contractual relations are: "(1) a contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach the contract; (4) the absence of justification on the defendant's part; (5) the subsequent breach of the contract by the third party; and (6) damages to the plaintiff." *Lee v. Aiu, 85 Haw. 19, 32, 936 P.2d 655, 668 (Haw. 1997)* **[*27]** (citing *Weinberg v. Mauch, 78 Haw. 40, 50, 890 P.2d 277, 287 (Haw. 1995))*. Aloha Island's counterclaim alleges that TGR's cease and desist letters induced the former IAs to terminate their agreements with Aloha Island. See id. ¶¶ 12-13 (alleging that the former IAs terminated their agreements "[a]s a direct result of" the cease and desist letters).

To succeed on a tortious interference with contractual relations claim, a plaintiff must show "that the third party acted with intent and legal malice, i.e., the intentional doing of a harmful act without legal or social justification or excuse, or, in other words, the wilful violation of a known right." *Meridian Mortg., Inc. v. First Hawaiian Bank, 109 Haw. 35, 45-46, 122 P.3d 1133, 1143-44 (Haw. Ct. App. 2005)* (internal citations and italics omitted).

Aloha Island fails to allege specific facts that, if true, would establish that TGR lacked legal justification for threatening its former IAs with legal action. Count I states, "TGR lacked any lawful justification to threaten or prosecute legal action against the Former IAs and TGR's sole purpose was to induce the Former IAs to terminate their independent contractor agreements and business **[*28]** relations with [Aloha Island]." Aloha Island Counterclaim ¶ 20. These are in the nature of conclusions. They are unaccompanied by any indication of the ground on which Aloha Island makes its assertion or how Aloha Island can show this. The allegation that TGR lacked legal justification is merely a recitation of the fourth element of a tortious interference with contractual relations claim.

Without factual allegations, Aloha Island does not state a claim. See *GRK Holdings, LLC v. First American Ins. Co., 2010 U.S. Dist. LEXIS 107065, 2010 WL 3940575, *9 (D. Ariz. Oct. 6, 2010)* ("[T]he mere allegation that interference was improper is a legal conclusion, not a statement of fact.").

In *Simon Property Group, Inc. v. Palombaro, 682 F. Supp. 2d 508, 512 (W.D. Pa. 2010)*, the United States District Court for the Western District of Pennsylvania determined that a counterclaimant had insufficiently pled that a counterclaim defendant's interference was without legal justification when the counterclaimant pled only that the counterclaim defendant's actions were not protected by a judicial or financial interest privilege. The counterclaimant based its claim in part on the counterclaim defendant's initiation and publication of **[*29]** a lawsuit. Id. The court held that the counterclaimant's allegation that there was no privilege was a "blanket, conclusory statement," and that the pleadings failed to show how the counterclaim defendant's actions were not privileged. Id. (citing *Twombly, 550 U.S. at 555*)). See also *GRK Holdings, 2010 U.S. Dist. LEXIS 107065, 2010 WL 3940575, at *9* (dismissing a tortious interference with contractual relations claim on the ground that the plaintiff had not properly alleged that the defendant lacked legal justification for the lawsuit, as the allegation that the lawsuit was filed with improper motive was not accompanied by supporting factual allegations).

If TGR threatened or pursued legal action believing that it was asserting its legal rights under agreements with its former IAs, that would not be tortious. Aloha Island is unconvincing in arguing in its opposition that its claim is consistent with a comment in the Restatement (Second) of Torts, quoted in *Bowhead Information Technology Services, LLC v. Catapult Technology Ltd., 377 F. Supp. 2d 166, 175-77 (D.D.C. 2005)*. That comment says that threats of litigation are wrong only "if the actor has no belief in the merit of the litigation." *Restatement (Second) of Torts § 767 cmt c. (1979)* **[*30]** . It does not say that merely threatening a civil suit, without more, is actionable. In the present case, there are no factual allegations suggesting that TGR lacked belief in the merit of the allegedly threatened legal action. Without an explanation as to how TGR's threats of legal action were unwarranted, this court cannot say that Aloha Island states a claim for relief that is plausible on its face.

Aloha Island also cites this court's decision in *Peace Software, Inc. v. Hawaiian Electric Company, Inc., Civ. No. 09-00408 SOM/LEK, 2010 U.S. Dist. LEXIS 5187, 2010 WL 290649 (D. Haw. Jan. 22, 2010)*, in support of its position that its claim is sufficiently plead. *Peace Software* is distinguishable. That case concerned the scope of software and services that the plaintiff, Peace Software, was required to provide to the defendant, Hawaiian Electric Company ("HECO"), by contract. *2010 U.S. Dist. LEXIS 5187, [WL] at *1*. HECO asserted a counterclaim against Peace Software's former parent company, First Data, claiming that First Data intentionally interfered with Peace Software's contract with HECO, causing Peace Software to be unable to perform its contractual obligations. Id. The court was able to infer that First Data's alleged tortious **[*31]** interference was for an improper purpose because, among other things, First Data would not benefit economically by interfering with the contract. *2010 U.S. Dist. LEXIS 5187, [WL] at *7*. In this case, the court cannot similarly say that TGR lacked any financial reason to send its former IAs cease and desist letters. The former IAs' purported violations of their agreements with TGR may have been causing TGR an economic detriment.

The court thus dismisses Count I for failing to state a claim that, in the absence of factual allegations, is plausible on its face.

2. Count II.

Count II asserts tortious interference with prospective business advantage. Like Count I, Count II alleges that the threat and prosecution of legal action constitute the tortious interference. The elements of tortious interference with prospective business advantage are:

> (1) the existence of a valid business relationship or a prospective advantage or expectancy sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff; (2) knowledge of the relationship, advantage, or expectancy by the defendant; (3) a purposeful intent to interfere with **[*32]** the relationship, advantage, or expectancy; (4) legal causation between the act of interference and the impairment of the relationship, advantage, or expectancy; and (5) actual damages.

Meridian Mortg., Inc., 109 Haw. at 47-48, 122 P.3d at 1145-46.

TGR first argues that Aloha Island does not plead sufficient facts to establish the third element. "The third element—intent—denotes purposeful[] improper interference, and requires a state of mind or motive more culpable than mere intent. In other words, the plaintiff must prove that the defendant either pursued an improper objective of harming the plaintiff or used wrongful means that caused injury in fact. Asserting one's rights to maximize economic interests does not create an in[]ference of ill will or improper purpose." *Hawaii Medical Ass'n v. Hawaii Med. Serv. Ass'n, Inc., 113 Haw. 77, 117, 148 P.3d 1179, 1218 (Haw. 2006)* (quoting *Omega Envtl., Inc., v. Gilbarco, Inc., 127 F.3d 1157, 1166 (9th Cir. 1997)*, and *Locricchio v. Legal Services Corp., 833 F.2d 1352, 1358 (9th Cir. 1987))* (quotation marks omitted).

Aloha Island alleges with respect to intent that "TGR, through its unlawful threats and prosecution of legal action, did purposefully **[*33]** interfere with business relations between [Aloha Island] and the Former IAs and their expectancy of future economic benefit to be derived from such relationship." Aloha Island Counterclaim ¶ 26. However, Aloha Island's allegation that TGR's threats and prosecution of litigation were unlawful is conclusory and provides no explanation of what made the threats or lawsuit improper. The court thus agrees with TGR that this claim is not properly pled.

TGR argues in the alternative that Count II does not plead the first element: "the existence of a valid business relationship or a prospective advantage or expectancy sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff." It argues that Aloha Island alleges only facts that show it already had legal agreements with the former IAs, not that it had *prospective* agreements. The court disagrees with TGR on this point.

The Hawaii Supreme Court has stated that, although the "prospective economic relationship need not take the form of an offer[,] there must be specific facts proving the possibility of future association." *Hawaii Medical Ass'n, 113*

Haw. at 116, 148 P.3d at 1218 **[*34]** (citations omitted). Count II alleges that "[Aloha Island] and the Former IAs intended to continue with [their independent contractor agreements] and business relations with the definite expectation of future economic benefit to both parties." Aloha Island Counterclaim ¶ 24. Aloha Island says that the term "business relations" refers to Aloha Island's relationship with some of TGR's former IAs that it expected would lead to independent contractor agreements. Aloha Island's Counterclaim also alleges that the former IAs "agreed to enter into independent contractor agreements with Aloha Island." Id. ¶ 11. Read in the light most favorable to Aloha Island, these factual allegations satisfy Aloha Island's obligation to plead sufficient factual support for the first element.

V. CONCLUSION.

With respect to Timas and Ward's counterclaim, the court dismisses Counts 1, 2, 3, 4, 5, 7, 8, and 9. Counts 1, 2, 3, 4, 7, and 9 are dismissed without prejudice, while Counts 5 and 8 are dismissed with prejudice. With respect to Aloha Island's counterclaim, the court dismisses Count I and Count II without prejudice. Timas and Ward, as well as Aloha Island, are granted leave to amend their counterclaims. **[*35]** Timas and Ward may amend only the counts that are dismissed without prejudice. No later than March 15, 2012, the parties may file amended counterclaims that attempt to cure the identified deficiencies.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 15, 2012.

/s/ Susan Oki Mollway

Susan Oki Mollway

Chief United States District Judge

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In re TFT-LCD (Flat Panel) Antitrust Litig.

United States District Court for the Northern District of California

February 21, 2012, Decided; February 21, 2012, Filed

No. M 07-1827 SI; MDL No. 1827

Reporter

2012 U.S. Dist. LEXIS 21696 *; 2012 WL 555090

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION;This Order Relates to: All Indirect-Purchaser Plaintiff Class Actions

Subsequent History: Motion granted by, Complaint dismissed at *In re TFT-LCD Antitrust (Flat Panel), 2012 U.S. Dist. LEXIS 23278 (N.D. Cal., Feb. 23, 2012)*

Prior History: *In re TFT-LCD (Flat Panel) Antitrust Litig., 2012 U.S. Dist. LEXIS 19955 (N.D. Cal., Feb. 15, 2012)*

Core Terms

purchasers, overcharge, prices, defendants', panels, pass-through, models, regression, conspiracy, class member, retail, products, plaintiffs', indirect, cartel, manufacturers, classwide, class certification, damages, chains, calculation, antitrust, customers, expert testimony, methodology, construct, estimates, analyses, averages, reliable

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Mr. Daniel Weinstein, Special Master, Pro se, JAMS, Inc., San Francisco, CA.

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For BellSouth Telecommunications, Inc., 09-4997, Pacific Bell Telephone Company 09-4997, Southwestern Bell Telephone Company, 09-4997, AT & T Corp., 09-4997, AT & T Datacomm, Inc., 09-4997, AT & T Mobility LLC, 09-4997, AT & T Operations, Inc., 09-4997, AT & T Services, Inc., 09-4997, Plaintiffs: Christopher T. Leonardo, Kenneth L. Adams, R. Bruce Holcomb, Adams Holcomb LLP, Washington, DC; Jason C. Murray, Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & **[*3]** Moring LLP, Liaison Counsel for Direct Aciton Plaintiffs, Washington, DC; Nathanial John Wood, Crowell & Moring LLP, San Francisco, CA; Joshua C. Stokes, Crowell & Moring LLP.

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For Motorola, Inc., 09-5840, Plaintiff: Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Liaison Counsel for Direct Aciton Plaintiffs, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Nathanial John Wood, Crowell & Moring LLP, San Francisco, CA; R. Bruce Holcomb, Adams Holcomb LLP, **[*4]** Washington, DC.

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For State of Oregon, 10-4346, ex rel. John Kroger, Attorney General, Plaintiff: Blake Lee Harrop, Office of the Attorney General, Antitrust Bureau, Chicago, IL; Brady R. Johnson, Attorney General of Washington, Seattle, WA; Michael E. Haglund, Michael K. Kelley, Michael G. Neff, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Shay S. Scott, Haglund Kelley Horngren Jones & Wilder LLP, Portland, OR; Tim David Nord, Oregon Department of Justice, Financial Fraud/Consumer Protection, Salem, OR.

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For Tracfone Wireless, Inc., 10-3205, Plaintiff: David Bedford Esau, James Blaker Baldinger, Carlton Fields, P.A., West Palm Beach, FL; Robert L. Ciotti, Carlton Fields, Tampa, FL.

For State of Missouri, 10-3619, ex rel. Chris Koster, Attorney General, Plaintiff: Anne E. Schneider, Attorney General of Missouri; Liaison Counsel for the State Actions, LEAD ATTORNEY, Jefferson City, MO.

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For State of Michigan, 10-3619, ex rel. Michael A. Cox, Attorney General, Plaintiff: Mary Elizabeth Lippitt, Michigan Attorney General, Lansing, MI.

For State of Missouri, 10-3619, ex rel. Chris Koster, Attorney General, Plaintiff: Andrew McNally Hartnett, Office of the Missouri, Attorney General, Jefferson City, MO; Anne E. Schneider, Attorney General of Missouri, Consumer Protection, Jefferson City, MO.

For State of West Virginia, 10-3619, ex rel Darrell McGraw, Attorney General, Plaintiff: Douglas Lee Davis, Attorney General, Consumer Protection and Antitrust, **[*7]** Charleston, WV; Jill L. Miles, Assistant Attorney General, Charleston, WV.

For State of Wisconsin, 10-3619, ex rel J.B. Van Hollen, Attorney General, Plaintiff: Gwendolyn J. Cooley, Wisconsin Attorney General, Madison, WI.

For State of Florida, Office of the Attorney General, Department of Legal Affairs, 10-3517, Plaintiff: Eli Friedman, Office of the Attorney General, State of Florida, Tallahassee, FL; Lizabeth Ann Leeds Brady, Nicholas J. Weilhammer, Robert Scott Palmer, Office of the Attorney General, Antitrust Division, The Capitol, PL-01, Tallahassee, FL.

For Best Buy Co., Inc., 10-4572, Best Buy Enterprise Services, Inc., 10-4572, Best Buy Purchasing LLC, 10-4572, Best Buy Stores, L.P., 10-4572, Magnolia Hi-Fi, Inc., 10-4572, Plaintiffs: David Martinez, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA; Matthew David Taggart, LEAD ATTORNEY, Attorney at Law, Robins Kaplan Miller and Ciresi LLP, Los Angeles, CA; Elliot S. Kaplan, Robins Kaplan Miller & Ciresi, Minneapolis, MN; K. Craig Wildfang, Attorney at Law, Minneapolis, MN; Laura Elizabeth Nelson, Robins Kaplan Miller and Ciresi, Minneapolis, MN; Lauren E. Wood, Robins Kaplan Miller & Ciresi L.L.P., Minneapolis, **[*8]** MN; Roman M. Silberfeld, Robins Kaplan Miller & Ciresi L.L.P., Los Angeles, CA.

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For SB Liquidation Trust, 10-5458, Plaintiff: Allan Diamond, Jason Paul Fulton, Jim McCarthy, McCarthy D. James, Diamond McCarthy LLP, Dallas, TX; Erica W. Harris, Marc M. Seltzer, Ryan Christopher Kirkpatrick, Steven Gerald Sklaver, Susan Godfrey LLP, Houston, TX.

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For Alfred H. Siegel, 10-5625, as Trustee of the Circuit City Stores, Inc. Liquidating Trust, Plaintiff: David Humberto Orozco, Susman Godfrey LLP, Los Angeles, CA; H. Lee Godfrey, Johnny William Carter, Jonathan Jeffrey Ross, N/A, Kenneth S. Marks, Marc M. Seltzer, Susman Godfrey LLP, Houston, TX; Jordan Connors, Parker C. Folse, III, Rachel S. Black, Susman Godfrey LLP, Seattle, WA.

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For Benjamin Larry Luber, Class representative of the Missouri state, Plaintiff: Craig C. Corbitt, Francis Onofrei Scarpulla, Qianwei Fu, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Heather T Rankie, Zelle Hofmann et al, SF, CA; Joseph M. Alioto, **[*12]** Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA; Judith A. Zahid, Patrick Bradford Clayton, Zelle Hofmann Voelbel Mason & Gette, San Francisco, CA; Theresa Driscoll Moore, Alioto Law Firm, San Francisco, CA.

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For Schultze Agency Services, LLC, (11-3856) on behalf of Tweeter OPCO, LLC and Tweeter Newco, LLC, Marta Cooperative of America, Inc., 11-4119, P.C. Richard & Son Long Island Corporation, 11-4119, ABC Appliance, Inc., 11-4119, Plaintiffs: Anne M. Nardacci, Albany, NY; Christopher V. Fenlon, Albany, NY; Philip J. Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

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For Barry R. Himmelstein, Plaintiff: Barry R. Himmelstein, LEAD ATTORNEY, HIMMELSTEIN LAW NETWORK, Emeryville, CA.

For Tech Data Corporation, **[*13]** 11-5765, Tech Data Product Management, Inc., 11-5765, The AASI Creditor Liquidating Trust, 11-5781 (by and through Kenneth A. Welt, Liquidating Trustee), Plaintiffs: Melissa Willett, William A. Issacson, Boies, Schiller & Flexner, Washington, DC; Mitchell E. Widom, Robert William Turken, Bilzin Sumberg Baena Price & Axelrod, LLP, Miami, FL; Scott N. Wagner, PRO HAC VICE, Bilzin Sumberg Baena Price & Axelrod, LLP, Miami, FL; Stuart Harold Singer, Boies, Schiller & Flexner, LLP, Fort Lauderdale, FL.

For Compucom Systems Inc, 11-6241, Plaintiff: Christopher V. Fenlon, Philip J. Iovieno, Boies Schiller & Flexner LLP, Albany, NY; Lewis Titus LeClair, Mike McKool, Jr., Scott R Jacobs, McKool Smith, Dallas, TX; William A. Isaacson, Boies Schiller & Flexner, Washington, DC.

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For LG Display Co., Ltd., (D, I, 09-1115) formerly known as LG Philips LCD Co., LTD, Defendant: Jerome Cary Roth, LEAD ATTORNEY, Kristin Linsley Myles, **[*14]** Esq., Munger Tolles & Olson LLP, San Francisco, CA; Arman Oruc, Simpson Thacher and Bartlett LLP, Washington, DC; Brad D. Brian, Jonathan E. Altman, Jonathan Ellis Altman, Stuart Neil Senator, Truc Thanh Do, Munger Tolles & Olson LLP, Los Angeles, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Hailyn Jennifer Chen, Attorney at Law, Los Angeles, CA; Holly A. House, Paul Hastings LLP, San Francisco, CA; Jane Jung Ah Lee, Jonathan Lin, Simpson Thacher and Bartlett LLP, Washington, DC; Jonathan Charles Sanders, Simpson Thacher Bartlett LLP, Palo Alto, CA; Kevin C. McCann, Paul Hastings Janofsky & Walker LLP, San Francisco, CA; Lee F Berger, Sean David Unger, Paul Hastings LLP, San Francisco, CA.

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For NEC LCD Technologies, Ltd., (D, I), Defendant: Stephen Holbrook Sutro, Duane Morris LLP, San Francisco, CA.

For NEC Electronics America, Inc., (D, I), Defendant: Stephen Holbrook Sutro, Duane Morris LLP, San Francisco, CA; Edward G. Biester, III, Duane Morris LLP, Philadelphia, PA.

For AU Optronics Corporation, (D, I, 09-1115), Defendant: Christopher Alan Nedeau, LEAD ATTORNEY, Nossaman LLP, San Francisco, CA; Allison Marie Dibley, Bryan B. Barnhart, Carl Lawrence Blumenstein, Esq., Patrick J. Richard, Nossaman LLP, San Francisco, CA; Jessica Rae Madrigal, **[*17]** Kelly, Hockel & Klein P.C., San Francisco, CA; Kirk Christopher Jenkins, Michael F. Healy, Esq., Sedwick Detert Moran & Arnold LLP, San Francisco, CA.

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For Matthew Clark Lovell, LEAD ATTORNEY, Sedgwick LLP, San Francisco, CA; For Allison Marie Dibley, Bryan B. Barnhart, Carl Lawrence Blumenstein, Esq., Nossaman LLP, San Francisco, CA; Jason Haruo Wilson, Willenken Wilson Loh & Lieb LLP, Los Angeles, CA; Jessica Rae Madrigal, Kirk Christopher Jenkins, Michael F. Healy, Esq., Sedwick Detert Moran & Arnold LLP, San Francisco, CA; Patrick J. Richard, Nossaman LLP, San Francisc, CA.

For Chi Mei Optoelectronics USA, Inc., (D, I, 09-1115), Defendant: James Glenn Kreissman, LEAD ATTORNEY, Arka Dev Chatterjee, Jason Matthew Bussey, Simpson Thacher & Bartlett LLP, Palo Alto, CA; John Lyle Williams, Jr., LEAD ATTORNEY, San Jose, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA.

For Nexgen Mediatech **[*18]** USA Inc, (D, 09-1115), Defendant: James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Palo Alto, CA; John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Arka Dev Chatterjee, Simpson Thacher & Bartlett LLP, Palo Alto, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Harrison J. Frahn, IV, Jason Matthew Bussey, Simpson Thacher & Bartlett LLP, Palo Alto, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA.

For NEC Display Solutions of America, Inc., Defendant: Stephen Holbrook Sutro, Duane Morris LLP, San Francisco, CA; George Dominic Niespolo, Duane Morris LLP, San Francisco, CA.

For Samsung Electronics America, Inc., (D, I, 09-1115), Defendant: Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Daniel M Suleiman, Derek Ludwin, Elizabeth Catherine Arens, John Stewart Playforth, Neil K. Roman, Robert D. Wick, Covington and Burling, L.L.P. (DC), Washington, DC; Jeffrey Michael Davidson, Steven D Sassaman, Covington and Burling, San Francisco, CA; Timothy C. Hester, Covington & Burling, San Francisco, CA; Theodore Paul Metzler, Covington and Burling LLP, Washington, DC.

For Chi Mei **[*19]** Optoelectronics Corporation, (D, I, 09-1115), Defendant: James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Palo Alto, CA; John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Arka Dev Chatterjee, Simpson Thacher Bartlett LLP, Palo Alto, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Jason Matthew Bussey, Simpson Thacher and Barlett LLP, Palo Alto, CA; Melissa Margaret Derr, Simpson Thacher and Bartlett LLP, Palo Alto, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA.

For IPS Alpha Technology, LTD., (D), dismissed from IP amended complaint on 2/21/08, Defendant: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Epson Electronics America, Inc., (D), Dismissed as a indirect purchaser defendant on 4/1/08, Defendant: Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Derek Francis Foran, Stephen P. Freccero, Morrison & Foerster LLP, San Francisco, CA; Kimberly Linnell Taylor, Carr, McClellan, Ingersoll, Thompson & Horn, Burlingame, CA; Melvin R. Goldman, Morrison & Foerster, San Francisco, **[*20]** CA; Sean David Unger, Paul, Hastings, Janofsky & Walker LLP, San Francisco, CA; Stephen E. Taylor, Taylor & Company Law Offices, LLP, San Francisco, CA; David Lawrence Meyer, Morrison & Foerster, Washington, DC.

For Nexgen Mediatech, Inc. ("Nexgen"), (D, 09-1115), Defendant: James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Palo Alto, CA; John Lyle Williams, Jr., LEAD ATTORNEY, Manchester, Williams & Seibert, San Jose, CA; Arka Dev Chatterjee, Simpson Thacher Bartlett LLP, Palo Alto, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Jason Matthew Bussey, Simpson Thacher and Barlett LLP, Palo Alto, CA; Melissa Margaret Derr, Simpson Thacher and Bartlett LLP, Palo Alto, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA.

For Tatung Company of America, Inc. ("Tatung America"), (09-1115) (dismissed on 7/21/11 by Direct Purchaser Plaintiff Class), Defendant: Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Joel Calcar Willard, Gibson, Dunn Crutcher LLP, San Francisco, **[*21]** CA; Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA; William S Farmer, Collette Erickson Farmer & O'Neill LLP, San Francisco, CA; Austin Van Schwing, Gibson, Dunn & Crutcher LLP, San Francisco, CA.

For Toshiba America Electronics Components, Inc., (D, I, 09-1115), Toshiba America Information Systems, Inc., (D, I, 09-1115), Toshiba Mobile Display Co., Ltd., Defendants: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, NY; Kristen Jentsch McAhren, LEAD ATTORNEY, White and Case LLP, Washington, DC; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA.

For LG Display America, Inc., (D, I, 09-1115), formerly known as LG Philips LCD America, Inc, Defendant: Jerome Cary Roth, LEAD ATTORNEY, Kristin Linsley Myles, Esq., Munger Tolles & Olson LLP, San Francisco, CA; Arman Oruc, Jane Jung Ah Lee, Jonathan Lin, Simpson Thacher and Bartlett LLP, Washington, DC; Brad D. Brian, Jonathan E. Altman, Munger Tolles & Olson LLP, Los Angeles, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Hailyn Jennifer Chen, Attorney at Law, Los Angeles, CA; Holly A. House, Lee F Berger, Paul Hastings LLP, San **[*22]** Francisco, CA; Jonathan Ellis Altman, Munger Tolles and Olson, Los Angeles, CA; Jonathan Charles Sanders, Simpson Thacher Bartlett LLP, Palo Alto, CA; Katerina S Colitti, PRO HAC VICE, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Kevin C. McCann, Paul Hastings Janofsky & Walker LLP, San Francisco, CA; Sean David Unger, Paul, Hastings, LLP, San Francisco, CA; Stuart Neil Senator, Munger Tolles & Olson, Los Angeles, CA; Truc Thanh Do, Munger Tolles Olson LLP, Los Angeles, CA.

For Toshiba Mobile Display Technology Co., Ltd., 09-4997, Defendant: Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA.

For Mitsui & Co. (Taiwan), Limited, (D), Defendant: Erin Murdock-Park, Cleveland, Oh; Lisa Cox Ghannoum, Baker Hostetler, Cleveland, OH; Michael Edward Mumford, Ernest E. Vargo, Jr., Baker Hostetler LLP, Cleveland, OH; Paul P Eyre, Baker Hostetler LLP, New York, NY; Peter Wethrell James, Baker Hostetler, Los Angeles, CA; Tracy Lynn Cole, Baker & Hostetler LLP, New York, NY.

For Sanyo Consumer Electronics Co., Ltd., (D), Defendant: Allison Ann Davis, LEAD ATTORNEY, Sam N. Dawood, Sanjay Mohan Nangia, Davis Wright Tremaine LLP, San Francisco, CA; Christopher Alan Nedeau, Nossaman LLP, **[*23]** San Francisco, CA; Nick Steven Verwolf, Davis Wright Tremaine LLP, Bellevue, WA.

For Samsung SDI America, Inc., Defendant: Eric Scott O'Connor, Sheppard Mullin LLP, New York, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Samsung SDI Co., Ltd., Defendant: Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Eric Scott O'Connor, Sheppard Mullin LLP, New York, NY; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Chimei Innolux Corp., Defendant: James Glenn Kreissman, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP, Palo Alto, CA; Arka Dev Chatterjee, Simpson Thacher Bartlett LLP, Palo Alto, CA; Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; Jason Matthew Bussey, Simpson Thacher and Barlett LLP, Palo Alto, CA; Michael Jacob Ewart, Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA; Michael Ramsey Scott, HILLIS CLARK MARTIN PETERSON, SEATTLE, WA.

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For Tatung Company, Defendant: William S Farmer, Collette Erickson Farmer & O'Neill LLP, San Francisco, CA; Joel Steven Sanders, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Christopher Alan

Nedeau, Nossaman LLP, San Francisco, CA; William S Farmer, Collette Erickson Farmer & O'Neill LLP, San Francisco, CA.

For Chi Mei Optoelectronics Japan Co Ltd, Defendant: Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Melissa Margaret Derr, Simpson Thacher and Bartlett LLP, Palo Alto, CA.

For Renesas Electronics America, (11-2495), NEC Corporation of America, Defendants: Stephen Holbrook Sutro, Duane Morris LLP, San Francisco, CA.

For Mitsui & Co. (U.S.A.), Inc., Defendant: Erin Murdock-Park, Paul P Eyre, Cleveland, OH; Ernest E. Vargo, Jr., Michael Edward Mumford, Baker Hostetler LLP, Cleveland, OH; Tracy Lynn Cole, Baker & Hostetler LLP, New York, NY.

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Douglas C. Giordan, Interested Party, Pro se, Port Washington, NY.

For State of California, Amicus: Adam Miller, LEAD ATTORNEY, CA Dept of Justice, San Francisco, CA; Emilio Eugene Varanini, IV, State Attorney General's Office, San Francisco, CA.

For State of South Carolina, Amicus: Susan Foxworth Campbell, McGowan Hood and Felder, Columbia, SC.

For United States Antitrust Division, Department of Justice, Intervenor: Peter K. Huston, LEAD ATTORNEYS, Department of Justice, Antitrust Division, San Francisco, CA; Alexandra Jill Shepard, Micah Lanielle Wyatt, U.S. Department of Justice, Antitrust Division, San Francisco, CA; David J. Ward, U.S. Department of Justice, Antritrust Division, San Francisco Field Office, San Francisco, CA; E. Kate Patchen, U.S. Department of Justice, San Francisco, CA; Heather S. Tewksbury, United States Department of Justice, Antitrust Division, San Francisco, CA; Michael L. Scott, Antitrust Division, San Francisco, CA.

For State of Illinois, Intervenor: Blake Lee Harrop, LEAD ATTORNEY, Office of the Attorney General, Antitrust Bureau, Chicago, IL; Brady R. Johnson, Attorney General of Washington, Seattle, WA; Chadwick Oliver Brooker, Office of the Illinois **[*26]** Attorney General, Chicago, IL; Michael E. Haglund, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Michael K. Kelley, Haglund Kelley Horngren Jones & Wilde LLP, Portland, OR.

For State of Washington, 10-5711 (plaintiff), Intervenor: Brady R. Johnson, LEAD ATTORNEY, Attorney General of Washington, Seattle, WA; Blake Lee Harrop, Office of the Attorney General, Antitrust Bureau, Chicago, IL; Jonathan A Mark, Attorney General of Washington, Seattle, WA; Michael E. Haglund, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR; Michael K. Kelley, Haglund Kelley Horngren Jones & Wilde LLP, Portland, OR; Tina E. Kondo, Senior Assistant Attorney General, Seattle, WA.

For NEC LCD Technologies, Ltd., Intervenor: Stephen Holbrook Sutro, Duane Morris LLP, San Francisco, CA.

For Samsung SDI America, Inc., Samsung SDI Co., Ltd., Intervenors: Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Philips Electronics North America Corp., Intervenor: Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, CA.

For Sanyo Consumer Electronics Co., Ltd., Intervenor: Allison Ann Davis, Davis **[*27]** Wright Tremaine LLP, San Francisco, CA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER DENYING DEFENDANTS' MOTION TO EXCLUDE EXPERT TESTIMONY OF JANET S. NETZ AND WILLIAM S. COMANOR

On February 10, 2012, the Court heard argument on defendants' motion to exclude the testimony of plaintiffs' economic experts, Dr. Janet S. Netz and Dr. William S. Comanor. Having considered the moving papers and the arguments of the parties, and for good cause appearing, the Court hereby DENIES defendants' motion.

BACKGROUND

This antitrust class action involves allegations of price-fixing among manufacturers of thin-film transistor liquid-crystal display ("TFT-LCD") panels. TFT-LCD panels are electronic components found in a number of products, including computer monitors, notebook computers, and televisions. *See generally* Order Granting Indirect Purchaser Plaintiffs' Motion for Class Certification (March 28, 2010), Master Docket No. 1642, at 1-3 ("Class Certification Order"); Indirect Purchaser Plaintiffs' Third Consolidated Amended Complaint, Master Docket No. 2694, at ¶¶16-54 ("TAC"). The panels have no independent utility, and are not available to the average consumer. Instead, they are **[*28]** incorporated into finished products as discrete, physical objects within the products. Class Certification Order at 2.

Defendants in this case are the major global manufacturers of TFT-LCD panels. *See* TAC at ¶121 (alleging that "the top six companies (Samsung, LGD, Chi Mei, AU Optronics, Sharp and Chunghwa) currently control in excess of 80% of the LCD panels market"). Plaintiffs, consumers who purchased televisions, monitors, and notebook computers that contain defendants' TFT-LCD panels ("indirect-purchaser plaintiffs" or "IPPs"), contend that defendants conspired to raise the prices of the panels between 1999 and 2006. Plaintiffs claim that this conspiracy caused them to pay artificially high prices for the TFT-LCD products they purchased. They seek injunctive relief under federal law and damages under the antitrust and consumer-protection laws of 23 states and the District of Columbia.

In order to prevail on their claims for damages, plaintiffs must establish that the price-fixing conspiracy affected the prices they paid for the TFT-LCD products they purchased. Because plaintiffs did not purchase those products directly from the defendants, they propose to prove this effect through **[*29]** a two-step process. First, plaintiffs will prove that the conspiracy resulted in higher prices for defendants' customers — those companies that directly purchased TFT-LCD panels from defendants. Second, plaintiffs will show that this initial overcharge was "passed through" the manufacturing and retail chains and was included in the final price they paid for their TFT-LCD goods.

To help make this showing, plaintiffs have retained the services of two experts. The first, Dr. Janet S. Netz, holds a Ph.D. in Economics and is "a founding partner of ApplEcon, LLC." Chen Decl., Exh. 2 ("Netz Report") at 1. The second, Dr. William S. Comanor, is an "economist and Professor of Economics at the University of California, Santa Barbara." Chen Decl., Exh. 13 ("Comanor Report") at 2.

The experts' reports cover slightly different topics, but overlap to a significant degree. The plaintiffs' primary expert is Dr. Netz, whose expert report reaches the following conclusions:

> 1. The cartel formed by Defendants and Co-conspirators was effective at raising the price above the level that would have been obtained had Defendants and Co-conspirators [] behaved independently.
>
> 2. The cartel increased the price to **[*30]** direct purchasers by 12.1%.
> 3. The overcharge to direct purchasers was passed through to indirect purchaser class members.
> 4. [IPP] [c]lass members paid a price 12.1% higher than they would have had there not been a cartel.
> 5. The total nominal amount of harm borne by class members is $3.23 billion over the class period.

Netz Report at 4.

Dr. Comanor's report contains similar conclusions. It is primarily directed at the overcharge to direct purchasers, which Dr. Comanor calculates to be approximately 9.6%. Based on economic theory and the characteristics of the

TFT-LCD market — but little transactional analysis — Dr. Comanor hypothesizes that the expected pass-through rate to consumers would fall between 100% and 200%.[1] Comanor Report at 26. Dr. Comanor relies on Dr. Netz's analysis — which calculated a pass-through rate of slightly above 100%, depending upon the general product category — to confirm this hypothesis, and employs a "conservative" pass-through rate of 100%. *Id*. at 29. He ultimately estimates that the resulting damages to indirect purchasers amounted to $2.2 billion. *Id*. at 20, 29.

Defendants now move to exclude the testimony of Dr. Netz and Dr. Comanor. They contend that neither expert can satisfy the requirements of the Federal Rules of Evidence or *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

LEGAL STANDARD

Federal Rule of Evidence 702 provides that expert testimony is admissible if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *Fed. R. Evid. 702*. Expert testimony under *Rule 702* must be both relevant and reliable. *Daubert, 509 U.S. at 589*. When considering evidence proffered under *Rule 702*, the trial court must act as a "gatekeeper" by making a preliminary determination that the expert's proposed testimony is reliable. *Elsayed Mukhtar v. Cal. State Univ., 299 F.3d 1053, 1063 (9th Cir. 2002)*, *amended by* *319 F.3d 1073 (9th Cir. 2003)*. **[*32]** As a guide for assessing the scientific validity of expert testimony, the Supreme Court provided a nonexhaustive list of factors that courts may consider: (1) whether the theory or technique is generally accepted within a relevant scientific community, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether the theory or technique can be tested. *Daubert, 509 U.S. at 593-94*; *see also* *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*.

DISCUSSION

Defendants' motion is based, in large part, on their continued insistence that this case is not amenable to class treatment. As they have argued in the past, defendants contend that plaintiffs cannot prove their case unless they produce highly specific, individualized evidence of classwide injury. Underlying defendants' argument is their assertion that plaintiffs must establish impact "with certainty." Motion at 13; *see also* Motion at 15 (stating that plaintiffs "overcharge models are useless as evidence that . . . all direct purchasers paid an overcharge on all relevant LCD panels."). Based on this standard, defendants assert that plaintiffs must identify **[*33]** the overcharge that was placed on every LCD panel sold during the conspiracy period and trace that overcharge through the manufacturing and retail distribution chains until plaintiffs can identify the overcharge paid by a particular class member for a particular LCD product. Motion at 13 (stating that it is "necessary to trace the progress of the individual component whose price was allegedly fixed through the specific distribution chain at issue in order to establish with certainty that any increase in retail price of the finished product was not actually caused by other components or configurations unrelated to the supposedly inflated cost fo the LCD panel").

Of course, if defendants' standard were correct then common issues would not predominate in this case. Other courts have concluded as much. *See, e.g.,* *In re Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 505 (N.D. Cal. 2008)* ("[T]he only way to fully assess pass-through in this action would be to conduct a wholesaler-by-wholesaler and re-seller-by-re-seller investigation, which would essentially result in 'thousands of mini-trials, rendering this case unmanageable and unsuitable for class action treatment.'"); *In re Flash Memory Antitrust Litig., 2010 U.S. Dist. LEXIS 59491, 2010 WL 2332081, at *11 (N.D. Cal., June 9, 2010)* **[*34]** ("Determining the pass-through for an individual class member first requires the identification of the particular channel applicable to the

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[1] 100% pass-through signifies that an intermediary charges its customers for the entire amount **[*31]** of an increase in its costs. Pass-through rates may be higher than 100%. For example, if a retailer were always to set the price of a product at twice the price it purchased the product for, any increase in the price paid by the retailer would be doubled when the retailer sets its price, resulting in a 200% pass-through rate.

class member's purchase, and tracing the overcharge through the various intermediaries that lie between the particular Defendant and the member."). Defendants' position, however, is inconsistent with the nature of this case.

Most fundamentally, there is no requirement that plaintiffs prove impact "with certainty." To the contrary, impact, like the other elements of plaintiffs' case, must be established by a preponderance of the evidence. In fact, antitrust plaintiffs benefit from an especially lenient burden when it comes to proof of impact. *See* *Knutson v. Daily Review, Inc., 548 F.2d 795, 811 (9th Cir. 1976)* ("Even as to this minimal quantum of injury, the standard is relaxed; otherwise, it would defeat the loose standard applied even to the amount of damages in antitrust cases."). Thus, plaintiffs need not be able to articulate the precise degree to which every individual class member was injured; it suffices to show that it was more likely that not that classwide impact occurred.

In addition, as this Court has previously noted, the nature of the **[*35]** industry renders defendants' standard inappropriately strict. *See* Class Certification Order at 30. Plaintiffs assert that TFT-LCD panels are fungible commodities, and were largely treated as such by defendants and their customers. *Id*. (distinguishing *Graphics Processing* because "TFT-LCD panels are fungible, interchangeable, and largely homogenous"); Netz Report at 6-7 (noting that a panel purchaser could obtain panels from different manufacturers, provided they met the customer's specification). It is therefore unnecessary for plaintiffs to provide evidence of panel-by-panel impact. Rather, plaintiffs may resort to generalized methods of proof.

This does not, as defendants argue, violate the Rules Enabling Act. *See* *Ortiz, 527 U.S. 815, 845, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* ("[N]o reading of [*Rule 23*] can ignore the [Rules Enabling Act's] mandate that rules of procedure 'shall not abridge, enlarge or modify any substantive right . . . .'" (internal quotation marks omitted)). An individual plaintiff would not be required to meet the stringent standard defendants propose. Rather, such a plaintiff would be entitled to rely on evidence much like the evidence plaintiffs here have set forth: evidence that defendants **[*36]** illegally raised the prices of their TFT-LCD panels, and that retail prices increased as a result.

Thus, the Court rejects the standard articulated by defendants. Plaintiffs need not identify the overcharge on each and every panel sold to direct purchasers, and they need not trace that specific overcharge through the manufacturing and retail chains to the ultimate purchaser. The fact that plaintiffs lack perfect proof does not mean that plaintiffs lack any proof at all.

Turning to the merits of defendants' motion, the Court does not agree that the opinions of Dr. Netz and Dr. Comanor are inadmissible. Before addressing defendants' arguments for wholesale exclusion of plaintiffs' experts, however, the Court will address a narrower form of relief that defendants proposed at oral argument: that, at a minimum, the Court must preclude plaintiffs' experts from arguing that their regression models establish causation or impact.

I. Admissibility of Regression Analyses

As part of their analyses of the cartel's impact on indirect purchasers, Dr. Netz and Dr. Comanor each rely on regression models. To determine the initial overcharge to direct purchasers, both Dr. Netz and Dr. Comanor constructed **[*37]** "before-and-after" models, which "use[] determinants of price during competitive (non-cartel) periods to forecast the price that would have obtained but for the existence of the cartel." Netz Report at 87; *see also* Comanor Report at 17 ("The method employed is a variation on the widely-accepted Before/After approach."). As stated above, Dr. Netz's model estimates that the conspiracy resulted in a weighted average overcharge of 12.1%. Netz Report at 93. Dr. Comanor's model estimates an average overcharge of approximately 9.6%. Comanor Report at 20, 30. In addition, Dr. Netz constructed a second regression model to help determine the rate at which this overcharge was passed through to plaintiffs. Netz Report at 93-110.

Defendants contend that these models, while relevant to damages, may not be used to establish either impact to direct purchasers or pass-through to indirect purchasers. *See, e.g.*, Motion at 2 ("[The average pass-through rate] might be useful for calculating the aggregate amount of damages [but] it say[s] nothing about whether every class member, most class members, or *any* particular class member, paid an illegal overcharge and therefore suffered antitrust injury."). Defendants' **[*38]** overarching point is that regression models necessarily use averaging, and that the models therefore cannot establish that every class member was affected by the conspiracy. *See, e.g., Graphics Processing, 253 F.R.D. at 504* ("Dr. Netz's regressions would . . . be overly reliant on averages and would thus sweep in an unacceptable number of uninjured plaintiffs . . . .").

As discussed above, this argument is largely premised on the notion that plaintiffs must establish, to a certainty, class members' injuries on a panel-by-panel basis. This is not the correct standard. The very source defendants rely on confirms this point. Although it warns against using the "reduced-form pricing equation" because that model "assumes that a conspiracy has the same effect on every purchaser," the treatise endorses the use of "somewhat more complex models that do not make such an assumption." ABA Section of ***Antitrust Law***, Econometrics: Legal, Practical and Technical Issues 222 (2005). The "somewhat more complex" models the treatise suggests would break the class into categories and sub-classes but would continue to regress data. Thus, these models would also necessarily rely on averaging. *See id*. at 221 **[*39]** ("By their very nature, regressions summarize data."). They would therefore be unable to provide the panel-by-panel proof that defendants implicitly demand. *Cf. id*. at 223 (noting "practical and theoretical issues" of regression analyses that "present a formulaic estimate of [a conspiracy's] impact and damages" on every member of the class).

Defendants' concerns, while stated too broadly, are not wholly without merit. Obviously, a model cannot be used to prove of one of its basic assumptions. As defendants point out, plaintiffs appear to recognize this limitation. *See, e.g.*, Opp'n at 2 (stating that, only after determining that there was "class-wide harm" did the experts "construct[] before-and-after regression models to quantify the amount of harm in the form of an average percentage overcharge."); Opp'n. at 7 ("[The experts'] before and after [regression model] results, while also evidence of common impact, are not the basis for their conclusion that there was common impact."); Opp'n at 19 ("The pass-through studies are not designed to [distinguish between cartel overcharges and other cost changes], nor could they, nor need they.").

The Court finds that defendants' proposed remedy **[*40]** is inappropriate, and premature, at this juncture. Even if regression models are not enough, standing alone, to establish classwide impact, they may nevertheless be relevant to the issue. A large average overcharge, for example, might make it more likely that every direct purchaser was overcharged to some degree. And, of course, if defendants are correct that plaintiffs acknowledge the limits of their experts' models, they will have little trouble establishing those points on cross-examination.

Accordingly, the Court DENIES defendants' request to preclude plaintiffs' experts from testifying that their models establish either impact to direct purchasers or pass-through to indirect purchasers. When the experts' specific testimony is before the Court, defendants may renew their objections.

II. Exclusion of Plaintiffs' Experts

Defendants' motion seeks exclusion of Dr. Netz's and Dr. Comanor's opinions on three grounds. Defendants claim: (1) both experts' opinions regarding the overcharge paid by direct purchasers are not scientifically based; (2) Dr. Netz's calculation of the pass-through rate is unreliable; and (3) Dr. Netz's expert report suffers from miscellaneous econometric and mathematical **[*41]** errors.

A. Overcharge to Direct Purchasers

As mentioned above, plaintiffs' first step in establishing classwide impact is proving that direct purchasers were overcharged as a result of the conspiracy. Defendants contend that neither Dr. Netz nor Dr. Comanor used a reliable methodology to make this connection. They claim that plaintiffs have failed to come up with a "common, formulaic method for showing that direct purchasers paid an overcharge on every LCD panel they placed in the distribution chain for eventual resale to indirect purchasers." Motion at 14.

The Court disagrees. As discussed in its class certification order, the Court has found Dr. Netz's analysis appropriate for establishing common impact to direct purchasers:

> In support of their argument that antitrust impact can be proven on a class-wide basis, plaintiffs have submitted the expert report of economist Dr. Janet S. Netz. Dr. Netz has examined the TFT-LCD industry and market to determine if the indirect purchaser plaintiffs would have suffered impact as a result of the alleged price-fixing conspiracy. Dr. Netz assumes that there was a conspiracy among TFT-LCD manufacturers as plaintiffs have alleged, and her report asserts **[*42]** that there are a number of characteristics that make the TFT-LCD industry highly susceptible to cartelization and price-fixing, including (1) the lack of an alternative source of supply of TFT-LCD panels and the lack of an alternative technology; (2) the existence of barriers to entry; (3) regular meetings and interactions that allowed defendants to exchange information, come to agreements, and police cheating; and (4) difficulty in cheating due to the use of most-favored customer clauses. Dr. Netz's report examines the price targets set by the cartel and actual market prices, and finds that these prices match well. Based on these analyses, Dr. Netz concludes that the cartel was successful in increasing prices.
>
> Next, Dr. Netz considered the commonality of the impact on direct purchasers. Dr. Netz examined the pricing strategies used by defendants, including the use of most-favored customer clauses, the centralization of pricing decisions, and price negotiations starting from a common basis. Dr. Netz also analyzed the prices for TFT-LCD panels to determine whether the prices are related by market forces, and concludes that there is a common pricing structure for TFT-LCD panel prices. **[*43]** In reaching this conclusion, she examined the correlation between panel prices, and found that 76% of panel price correlations (approximately 50,000 of 66,000 correlations) are positive and statistically significant. Dr. Netz then used regression analysis to examine the determinants of panel prices, and found that 77% of price variation is determined by five variables that describe the panel characteristics (panel size, resolution, volume, application, and time-period). Based on these analyses, Dr. Netz concludes that most of the variation in transaction prices is driven by common factors rather than individual ones, and that these common influences on price are susceptible to being estimated using a formula.

Class Certification Order at 24-25 (footnotes and citations omitted). Dr. Netz relies on much the same information in her expert report. *See* Netz Report at 28-87 (using economic theory and analysis of evidence in this case to conclude that the cartel effectively raised prices for direct purchasers).

Defendants do not engage this component of Dr. Netz's analysis. Instead, they contend that the above analysis, standing alone, is not sufficient to prove common impact. Reply at 12 ("'Economic **[*44]** theory,' without more, is not a reliable methodology for demonstrating class wide impact . . . ."). They appear to argue that some "formal statistical technique" is required to prove that every direct purchaser was overcharged for LCD panels.

The Court disagrees. It is certainly possible that "economic theory" or a high-level analysis of the characteristics of a particular market may be too general or otherwise insufficient to establish classwide impact. *See, e.g.,* *In re Aftermarket Automotive Lighting Products Antitrust Litig., 276 F.R.D. 364, 370 (C.D. Cal. 2011)* (noting possibility that expert evidence could be "too general" to demonstrate classwide impact); *Graphics Processing, 253 F.R.D. at 502* ("Dr. Meyendorff essentially asks this Court to presume impact to direct purchasers based on the characteristics of the market."). Here, however, plaintiffs have far more detailed information, such as defendants' transactional data, detailed notes of discussions held at the crystal meetings, and the prices and production restrictions that defendants purportedly agreed to. This evidence, and Dr. Netz's corresponding analysis, is sufficient to constitute a reliable method of establishing common **[*45]** impact. *Cf.* *In re Commercial Tissue Products, 183 F.R.D. 589, 595 (N.D. Fla. 1998)* ("[E]ven if there is considerable individual variety in pricing because of individual price negotiations, class plaintiffs may succeed in proving class-wide impact by showing that the minimum baseline for beginning negotiations, or the range of prices which resulted from negotiation, was artificially raised (or slowed in its descent) by the collusive actions of defendants."); ABA Section of ***Antitrust Law***, Econometrics at 220-21 (noting that "formal statistical techniques . . . *may be required* to show common impact" (emphasis added)).

Instead of addressing the above, defendants' argument focuses on the experts' use of "before and after" regression models to demonstrate that direct purchasers were impacted by the conspiracy. Motion at 14 ("[T]hese regression models . . . attempt to calculate the *average* overcharge direct purchasers paid for LCD panels — they were never designed to prove, and in fact cannot prove, that direct purchasers paid an overcharge on every LCD panel placed in the distribution chain from 1999 to 2006."). Because the before-and-after models are not the only methodology plaintiffs rely **[*46]** on to prove impact to direct purchasers,[2] the Court is not convinced that Dr. Netz's opinion is unreliable.

B. Pass Through to Indirect Purchasers

In her report, Dr. Netz concludes that the overcharge incurred by direct purchasers was passed through to indirect purchasers. Defendants contend that this opinion is unsound. Much of their argument focuses on their contention that Dr. Netz relies too heavily on averages to show that an overcharge was passed through to every individual class member. Motion at 8 ("Dr. Netz's averages . . . provide no data about whether *each* individual class member was injured."). As discussed above, the Court does not agree that such a specific purchaser-by-purchaser showing is required. *See also* Class Certification Order at 30-31.

Defendants' specific challenges to Dr. Netz's pass-through analysis also do not provide reason to exclude her opinion. First, defendants contend that Dr. Netz's opinion that pass-through occurred is "based **[*47]** on a mere assumption" because "[p]erfect pass-on is a theoretical construct that cannot be presumed to exist in the real world." Motion at 6. Defendants assert that Dr. Netz acknowledges as much. *See* Chen Decl., Exh. 8 (testimony of Dr. Netz that pass-through occurs "the vast majority of the time"). Defendants also claim that Dr. Netz's pass-through conclusions are contradicted by anecdotal evidence obtained during discovery. This evidence consists of deposition testimony or declarations by various OEMs and retailers that increases in costs of components or products were not always passed along to customers. *See, e.g.*, Chen Decl. at Exhs. 3 (Dell), 4 (Best Buy), 5 (Newegg.com), 6 (Target), 7 (Radioshack), 24 (HP). Finally, defendants assert that transaction data obtained from Dell demonstrates that pass through did not always occur. They claim that Dell sold some of the panels it purchased to third parties and that in 30% of these sales, Dell's sales price "did not move in lockstep with changes in Dell's cost to purchase panels." Motion at 9.

None of these arguments is reason to exclude Dr. Netz's testimony.[3] Defendants' disagreements with the bases for her opinion do not render that **[*48]** opinion so inherently suspect that it may not be admitted at trial. These arguments are precisely the type of matter that is appropriate for cross-examination.

Next, defendants assert that Dr. Netz's regression model "cannot distinguish between a retail price increase caused by the pass-through of a cartel overcharge and a retail price increase caused by the retailers' decision to raise prices for other, legitimate reasons." Motion at 9. Defendants contend that there are thousands of different products that contain LCD panels, and that many of these products contain thousands of different configurations. *See* Chen

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[2] Indeed, it is unclear the extent to which Dr. Netz relies on the model for this purpose, given that it does not appear in the section of her expert report that addresses common impact to direct purchasers. *See* Netz Report at 28-87.

[3] As a corollary argument, defendants argue that Dr. Netz's methodology "sweep[s] in an unacceptable number of uninjured plaintiffs." Motion at 7 (quoting [Graphics Processing, 253 F.R.D. at 504]). They claim that: "Even assuming that by 'vast majority of the time' Dr. Netz meant 99% of the time, and assuming, conservatively, 50 million members of the classes here, that leaves *500,000* class members potentially eligible to collect treble damages although they suffered no injury whatsoever. If Dr. Netz meant '95% of the time,' that would amount to 2.5 million uninjured members of the class." *Id*.

Setting aside the implications of this argument — that class treatment is inappropriate because the injury in this case was *too* widespread — the Court declines to exclude Dr. Netz's opinion based upon one passing sentence in her deposition. Dr. Netz has opined that all class members were affected by the conspiracy. Netz Report at 87 ("I conclude that the higher prices borne by direct purchasers were passed on to class members . . ."). Defendants **[*49]** may explore her deposition testimony on cross examination.

Decl., Exh 3 at ¶11 (noting that there are over 40,000 potential configurations for the Dell Inspiron 15). They claim that this circumstance renders it impossible to determine the effect an increase in panel prices had upon the price of a finished product. Defendants rely on Judge Armstrong's criticism of Dr. Netz from a case involving allegations of price fixing in among manufacturers of flash memory:

> The tracing process requires more than the one-size-fits-all theoretical construct proposed by Dr. Netz. Within the three broad categories of products at issue (flash memory cards, USB flash drives and flash-based digital media players), there are thousands of differentiated **[*50]** products with diverse price points that have been purchased by putative class members over the course of the last decade. Such products are sold to class members by hundreds of different retailer suppliers. The price of any given product can vary across retailers, and differ even for a single retailer at a given point in time. Further, different retailers respond to cost changes in different ways, with some choosing not to pass-through cost changes in the form of higher prices for the end-user. The "economic theory" cited by Dr. Netz's accounts for none of these anomalies.

*Flash Memory, 2010 U.S. Dist. LEXIS 59491, 2010 WL 2332081, at *11*.

The Court again finds that defendants' focus is too narrow. Plaintiffs need not reconstruct each LCD product sold to a class member and determine the price of its constituent parts to establish that the class member paid an overcharge attributable to the conspiracy. Rather, the Court agrees with plaintiffs that they may establish pass-through by showing that companies in the manufacturing and distribution chains passed along cost increases in general. Dr. Netz's report does exactly that. Plaintiffs' proof need not rise to the level of establishing how every intermediary treated **[*51]** every LCD panel or product:

> A key concept in Dr. Leffler's analysis is the logical proposition that an increase in the cost of Microsoft OS affects each purchaser in the same manner as an increase in any other cost: "the impact of a change in Microsoft's charge to the distribution channel would have the same impact as a comparable change in other costs faced by the distribution channel." Leff. Aff. ¶ 21. This concept permits the effect on consumer prices of a Microsoft OS overcharge to distributors to be determined by actual analysis of the effects of other cost increases.

*Gordon v. Microsoft Corp., 2001 U.S. Dist. LEXIS 26360, 2001 WL 366432, at *11 (Minn. Dist. Ct., March 30, 2001)*. As above, defendants' arguments presume that plaintiffs must prove these matters to an absolute certainty, when such is not the case.

Finally, defendants assert that Dr. Netz's models are "100-Percent-Pass-Through Machines." Motion at 17. They claim that Dr. Netz's regressions "virtually always generate pass-through of 100% or more," regardless of whether the data actually shows any pass-through whatsoever. Defendants contend that this occurs because Dr. Netz compares the cost of a product to its price, instead of comparing the change **[*52]** in cost to the resulting change in price, if any. Defendants provide two example of this, but neither convinces the Court that Dr. Netz's methodology is unsound. *See* Motion at 18. If, as defendants contend, their examples are "simple but accurate" then they will be appropriate material for cross-examination. They are not, however, sufficient to establish that Dr. Netz's opinions are unreliable.

III. Other Errors

Finally, defendants contend that Dr. Netz's report includes a number of fundamental errors. For example, they assert that Dr. Netz's model relies on only half the available data because it ignores data from Japanese firms. They contend that including this data would reduce the average overcharge computed by her model in half, from 12.1% to 5.8%. They also contend that Dr. Netz's model fails to account for the downward trend in LCD panel prices during and after the conspiracy period. Finally, defendants argue that Dr. Netz's reply model contains three "critical" errors: 1) it applies the wrong calculation to convert from the but-for price (produced as a logarithm) to the final prediction; 2) it uses a log-based weighting scheme when Dr. Netz meant to use a levels-based scheme; **[*53]** and 3) the model predicts a negative 6.3% overcharge in 2001.

None of these purported errors are serious enough to warrant exclusion of Dr. Netz's report. Defendants may confront Dr. Netz about her methodological choices on cross-examination.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES defendants' motion to exclude expert testimony of Drs. Netz and Comanor. Docket Nos. 4380, 4381.

IT IS SO ORDERED.

Dated: February 21, 2012

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

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[MGA Entm't, Inc. v. Mattel, Inc.](#)

United States District Court for the Central District of California, Southern Division

February 21, 2012, Decided; February 21, 2012, Filed

Case No.: SACV 11-01063 DOC(RNBx)

Reporter
2012 U.S. Dist. LEXIS 22055 *; 2012-1 Trade Cas. (CCH) P77,800; 2012 WL 569389

MGA ENTERTAINMENT, INC., Plaintiff, vs. MATTEL, INC., and ROBERT A. ECKERT, Defendants.

Prior History: *MGA Entm't, Inc. v. Mattel, Inc., 2011 U.S. Dist. LEXIS 121467 (C.D. Cal., Oct. 20, 2011)*

Core Terms

antitrust claim, allegations, prior case, prior litigation, res judicata, sham, antitrust, Defendants', pleadings, counterclaim, injunction, compulsory, litigated, nucleus, cases, patent infringement, logical relation, give rise, infringement, compulsory counterclaim, discovery abuse, new act, damages, phase, counterclaims-in-reply, parties, courts, merits, monopolization, violations

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For Robert A Eckert, Defendant: Stephen R Neuwirth, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY.

Judges: DAVID O. CARTER, UNITED STATES DISTRICT JUDGE.

Opinion by: DAVID O. CARTER

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

Before the Court is a second Motion to Dismiss filed by Defendants Mattel, Inc., and Robert A. Eckert ("Defendants") against Plaintiffs MGA Entertainment, Inc. ("MGA"). After reviewing the motion, opposition, and reply, and after hearing oral argument, the Court concludes that MGA's antitrust claim is barred by *res judicata* and by *Federal Rule of Civil Procedure 13(a)*. Accordingly, the Court GRANTS Defendants' Motion and DISMISSES WITH PREJUDICE.

I. Background

The gravamen of Defendants' Motion it that Plaintiff's antitrust claim in their First Amended Complaint **[*2]** ("FAC") is barred by *res judicata* and by *Federal Rule of Civil Procedure 13(a)*. The Court provides the following procedural history, which includes facts derived from several documents judicially noticed by this Court. [1]

a. Prior Litigation Between Mattel and MGA: Cases 05-2727 and 04-9049

On April 27, 2004, Mattel, Inc., ("Mattel") filed a state court complaint against a former employee Carter Bryant ("Bryant") alleging that Bryant breached his contractual and common law duties to Mattel by failing to disclose his concept sketches and sculpts of the Bratz dolls prior to leaving Mattel for MGA Entertainment, Inc. ("MGA") on or about October 4, 2000. (04-9049 Dkt. 1).

MGA **[*3]** intervened in Mattel's suit and, on April 13, 2005, filed a stand-alone complaint in federal court against Mattel for unfair competition, trade dress infringement, dilution, and unjust enrichment. (05-2727 Dkt. 1). That complaint alleges that Mattel infringed MGA's distinctive packaging and interfered with MGA's business relationships.

On June 19, 2006, the Honorable Stephen G. Larson consolidated these cases. (05-2727 Dkt. 47).

b. Phase 1 of Prior Litigation

Mattel entered into a settlement with Bryant on the eve of the "phase 1" trial, leaving the following claims against MGA and other defendants to be tried to the jury: (1) intentional interference with contract; (2) aiding and abetting breach of fiduciary duty; (3) aiding and abetting breach of duty of loyalty; (4) conversion; (5) statutory unfair competition; (6) declaratory relief; and (7) copyright infringement. (04-9049 Dkt. 3917 at 11). Mattel prevailed on each of its claims. On the basis of the jury's special and general verdicts and after independently examining the similarity between the concept sketches/sculpts and MGA's Bratz dolls, the district court placed the Bratz trademarks in a constructive trust and enjoined MGA from **[*4]** continuing to sell dolls that were substantially similar to Bryant's initial works. MGA appealed.

During the pendency of MGA's appeal of the phase 1 orders, discovery preceded on the claims not tried in the phase 1 trial. Mattel repeatedly amended its pleadings three times, ultimately filing the operative Fourth Amended Answer and Counterclaims ("FAAC"). (04-9049 Dkt. 7714). The FAAC alleged, among other things, MGA's violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO") and trade secret misappropriation. These claims arose from MGA's relationships with Bryant and other former Mattel employees who allegedly stole Mattel's confidential information before leaving Mattel. The FAAC's claims also arose out of MGA's alleged litigation misconduct and unwillingness to comply with the phase 1 jury's verdicts, though many of these allegations were dismissed on August 2, 2010.

MGA, in turn, narrowed its trade dress infringement allegation to the two-pronged claim that Mattel copied MGA's trapezoidal and heart-shaped packaging.

c. Ninth Circuit Ruling Affecting Prior Litigation

On July 22, 2010, MGA prevailed on appeal of the phase 1 orders. In vacating the constructive trust **[*5]** and injunction, the Ninth Circuit held that this relief was impermissibly broad and predicated upon jury verdicts tainted by erroneous instruction.

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[1] This court takes judicial notice of the documents filed with this Court as matters of public record. *See Fed. R. Evid. 201*; *Lee v. City of Los Angeles, 250 F.3d 668, 688-689 (9th Cir. 2001)*.

d. Phase 2 of Prior Litigation

On August 16, 2010, MGA filed counterclaims-in-reply alleging Mattel's RICO violations, trade secret misappropriation, and wrongful injunction. (04-9049 Dkt. 8583). MGA alleged that Mattel and its CEO, Robert Eckert, ("Eckert") engaged in illegal market research and aggressive tactics in preparation for and during the pending litigation, including discovery abuses, disregard for the statute of limitations, and the pursuit of injunctive relief after phase 1.

On October 5, 2010, the Court dismissed MGA's wrongful injunction claim but permitted MGA's other counterclaims-in-reply. (Dkt. 8892). The Court held that *all* MGA's counterclaims-in-reply, including the one for wrongful injunction, were compulsory. *Id.* at 14. However, the Court dismissed MGA's wrongful injunction counterclaim-in-reply on the merits, reasoning that MGA sought to "recover two categories of damages that are unavailable as a matter of law." *Id.*

On October 22, 2010, in response to the Ninth Circuit ruling, this Court granted MGA's motion for a new **[*6]** trial on all claims and issues tried to the jury in phase 1, finding that the indistinct and inseparable claims were all infected by instructional error. The Court also discarded the earlier bifurcation of claims and ordered that all pending claims between the parties be tried in a single proceeding to commence on January 11, 2011.

On January 5, 2011, the Court granted Mattel summary judgment on MGA's claims for trade dress infringement, dilution, common law unfair competition, and unjust enrichment and MGA's counterclaim-in-reply for a RICO violation. (Dkt. 9600). The Court denied summary judgment as to MGA's claim for statutory unfair competition and MGA's counterclaim-in-reply for trade secret misappropriation.

e. Current Litigation and Original Complaint

On February 3, 2011, two weeks into trial in the prior litigation, MGA filed a complaint ("Original Complaint") in a stand-alone action against Mattel and Eckert ("Defendants"). Original Complaint (11-1063 Dkt. 1). The Original Complaint pled three claims. First, MGA alleged that "beginning at least . . . in 2001 and continuing through the present time [Defendants have] been violating *Section 2* of the Sherman Act by monopolizing and **[*7]** attempting to monopolize the sale and distribution of fashion dolls in the United States." *Id.* at ¶¶ 52-53. Second, MGA alleged that Mattel sought a remedy in its prior litigation against MGA that "required the district judge to enter a ruling that was an abuse of discretion," giving rise to an abuse of process claim. *Id.* at ¶¶ 59-60. Finally, MGA alleged that Mattel sold Wee 3 Friends "at prices which are below [Mattel's] fully allocated cost," giving rise to a claim under *California Business & Professions Section 17043*. *Id.* at ¶¶ 61-62.

f. Conclusion of Phase 2 and Effect on Case 11-1063 Motion to Dismiss

On August 4, 2011, this Court rendered judgment on the merits pursuant to a jury verdict in case 04-9049. (Dkt. 10704). The judgment awarded MGA $85 million in compensatory damages, $85 million in exemplary damages, and $2,172,000 in attorneys' fees for MGA's counterclaim-in-reply for trade secret misappropriation. Judgment was entered against MGA regarding its claims for common law unfair competition, statutory unfair competition, trade dress infringement, trade dress dilution, RICO violations, unjust enrichment, and wrongful injunction. Judgment was also entered against Mattel regarding **[*8]** its remaining claims against MGA. MGA was awarded addition attorneys fees and costs of more than $100 million.

On September 12, 2011, Defendants filed a Notice of Finality with the Court indicating that, because a final judgment had been entered in the prior litigation, Defendants' Motion to Dismiss the present case is no longer properly analyzed under the theory of claim-splitting, but rather under *res judicata.* (11-1063 Dkt. 26).

g. First Motion to Dismiss Case 11-1063

On October 20, 2011, after hours of oral argument, this Court dismissed the Original Complaint. *See* Order (Dkt. 29). The Court held that Mattel's "conduct in the prior litigation— conduct which must have occurred before August 16, 2010"—is barred by *res judicata* and *Rule 13(a)*. *See id.* at 9. However, the Court dismissed without prejudice because it did "not appear *impossible* for MGA to allege anticompetitive conduct *after* August 16, 2010." *Id.* at 20 (emphasis in original).

h. First Amended Complaint in Case 11-1063

On November 10, 2011, MGA filed its First Amended Complaint ("FAC"). The FAC brings one antitrust claim and primarily alleges conduct done by Mattel before MGA's last pleading in the prior litigation on August **[*9]** 16, 2010. *See e.g.,* FAC ¶¶ 32 ("[b]y the late 1990s . . . Mattel's share was over 90% of the fashion doll market"), 33 ("*Then came the competition*"), 36 ("In June 2001, [MGA] was propelled into the limelight after its daring release of an innovative line of Bratz fashion dolls"), 38 ("Toy Fair in January 2001"), 49 ("By the end of 2003 and early 2004, the reality of Mattel's inability to compete had set in.").

The gravamen of MGA's antitrust claim is that the prior litigation was sham litigation constituting an antitrust violation. The FAC alleges that the prior case was the product of Mattel's "'litigate MGA to death' strategy," in which Mattel "pursued a result"—a constructive trust over the *idea* of Bratz—that was "so extreme that no objective litigant could have expected it to survive full judicial review." *Id.* at ¶¶ 52, 59. The FAC alleges that Mattel knowingly litigated claims barred by the statute of limitations and committed discovery abuses that constituted "misrepresentations" to the court. *Id.* at FAC at ¶¶ 91, 93, 97-99, 87-88 ("after the January 2011 trial commenced, additional facts continued to be uncovered, which further demonstrate that . . . Mattel knew its original **[*10]** case was statute-barred and without any merit," specifically an "internal memo" about an "investigation filed in 2002 that related to whether Bratz was an infringement"); *see also id.* at ¶¶ 50 ("As MGA proved in the underlying litigation, Mattel's . . . strategy . . . consisted, in part, of anticompetitive practices . . . . Indeed, the jury found that Mattel . . . misappropriated 26 categories of MGA trade secrets . . . ."), 53 ("Carrying out this scorched earth strategy, Mattel filed and ruthlessly pursued claims against MGA . . . . Mattel's litigation strategy involved launching thousands of discovery requests, taking needless depositions, and filing hundreds and hundreds of motions."), 55 (citing cases in 2001 and 2003 recognizing Mattel's aggressive and sometimes sanctionable litigation practices).

The FAC also describes three instances of conduct that could have occurred after August 16, 2010: (1) "during the second trial," Mattel "wrongfully sought to withhold" Mattel's "communications with Kohl's Department Stores" and "35 boxes of Mattel documents," which this Court ordered to be produced (FAC at ¶ 94); (2) "on August 11, 2011," Mattel filed post-trial motions and appealed the **[*11]** adverse judgment it received in the prior litigation (*id.* at ¶ 79); and (3) Defendants "secured the appointment of an auditor and temporary receiver . . . based on false allegations" in court (*id.* at ¶ at 93).

Finally, the FAC alleges that this litigation conduct is continuing. *See id.* at 54 ("Mattel's 'litigate MGA to death' strategy continues unabated to this very day, with Mattel continually aggressively pursuing its baseless claims . . . ."); 80 ("Mattel has developed and continues to ruthlessly deploy a costly, lengthy 'litigate MGA to death' strategy, pursuing a case . . . to accomplish its anticompetitive objectives."). Specifically, the FAC alleges that "[b]eginning at least with the introduction of Bratz in 2001 and continuing uninterrupted through the present time, [Mattel and Eckert have] been continuously violating *Section 2* of the Sherman Act by monopolizing and attempting to monopolize the sale and distribution of fashion dolls in the United States. Mattel destroyed the value of a competitive company by pursuing scorched earth, baseless litigation as an anticompetitive business objective." *Id.* at ¶ 104.

i. Present Motion to Dismiss Case 11-1063

On December 9, 2011, in lieu **[*12]** of an answer, Defendants filed the present Motion to Dismiss that is before the Court. [2] (Dkt. 36). In addition to arguments on the merits that this Order does not reach, Defendants contend that MGA's current complaint is procedurally barred either: (1) under the doctrine of *res judicata*; or (2) because the current claims were compulsory under *Federal Rule of Civil Procedure 13(a)*.

II. Legal Standard

Under *Federal Rule of Civil Procedure 12(b)(6)*, a complaint must be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. In order for a complaint to survive a 12(b)(6) motion, it must state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*. A claim for relief is facially plausible when the plaintiff pleads enough facts, taken as true, to allow a court to draw a reasonable inference that the defendant is liable for the alleged conduct. *Id. at 1949*. If the facts only allow a court to **[*13]** draw a reasonable inference that the defendant is possibly liable, then the complaint must be dismissed. *Id.* Mere legal conclusions are not to be accepted as true and do not establish a plausible claim for relief. *Id. at 1950*. Determining whether a complaint states a plausible claim for relief will be a context-specific task requiring the court to draw on its judicial experience and common sense. *Id.* Dismissal does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1968, 167 L. Ed. 2d 929 (2007)* (abrogating *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*.

In evaluating a 12(b)(6) motion, review is "limited to the contents of the complaint." *Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994)*. However, exhibits attached to the complaint, as well as matters of public record, may be considered in determining whether dismissal was proper without converting the motion to one for summary judgment. *See* *Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*; *Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986)*. **[*14]** Further, a court may consider documents "on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)*. "The Court may treat such a document as 'part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *Id.*

Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey, 353 F.3d 750, 758 (9th Cir. 2003)* (citing *Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996))*. However, a district court's discretion to deny leave to amend is "particularly broad where plaintiff has previously amended the complaint." *Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)*.

III. Discussion

Because the Court GRANTS Defendants' motion under the doctrine of *res judicata* and *Federal Rule of Civil Procedure 13(a)*, the Court does not reach Defendants' alternative arguments on the merits.

a. [*15] MGA's FAC and Opposition Effectively Ask this Court to Reconsider Its Prior Order Dismissing the Original Complaint

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[2] *Federal Rule of Civil Procedure 12(b)(6)* permits a motion to dismiss for failure to state a claim upon which relief can be granted to be filed before an answer. *See* *Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984)*.

Before delving into the merits of Defendants' Motion, this Court notes that MGA's First Amended Complaint ("FAC") and Opposition all but ask this Court to reconsider its prior order dismissing the Original Complaint. In dismissing that Original Complaint, this Court previously held that Mattel's "conduct in the prior litigation—conduct which must have occurred before August 16, 2010"—is barred by *res judicata* and Rule 13(a). *See* Order (Dkt. 29) at 9. This Court dismissed the Original Complaint without prejudice because it did "not appear *impossible* for MGA to allege anticompetitive conduct *after* August 16, 2010." *Id.* at 20 (emphasis in original).

In its Opposition, MGA does not dispute that most of the FAC's antitrust claim arises from injuries and litigation conduct occurring well before August 10, 2010. Nor does MGA address the cases or arguments raised in Defendants' Motion that attack the paltry three allegations in the FAC regarding activity occurring after August 10, 2010. Instead, MGA primarily relitigates this Court's prior holdings regarding the *res judicata* doctrine **[*16]** and whether the *Mercoid/Hydranautics* exception to Rule 13(a) should be expanded beyond the realm of patent law. As a result, MGA offers this Court no basis on which to deny Defendants' Motion.

b. MGA's Claim Is Dismissed Under the Doctrine of *Res Judicata*

The doctrine of *res judicata*, also referred to as claim preclusion, bars any claims in a later case that could have been raised in a prior case where: (1) there has been a final judgment on the merits in the prior case; (2) the prior case involved the same parties or parties in privity; and (3) there is an identity of claims between the two cases. *Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001)*. [3] Because *res judicata* is an affirmative defense, the burden is on Defendants, as the parties asserting it, to prove all of its elements. *See* *Fed. R. Civ. P. 8(c)*; *Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 627 n.4 (9th Cir. 1988)* (abrogated on other grounds).

The parties do not dispute that this Court's judgment in the prior case (04-9049 Dkt. 10704) was a final judgment by a court of competent jurisdiction. [4] Nor do they dispute that that the present case involves the same parties in privity. [5]

Thus, the only disputed element of *res judicata* is whether the prior cases (CV 05-2727 and CV 04-9049) share an identity of claims with the present case (CV 11-1063). Whether there is an identity of claims depends on four factors, the first of which is the most important, namely: (1) the two cases arise out of the same transactional nucleus of facts; (2) the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second case; (3) substantially the same evidence is presented in the two cases; and (4) the two cases involve infringement of the same right. *Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir.*

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[3] If events were "actually litigated" in the prior suit, "then the res judicata bar would have to expand to encompass those events and others that might have been litigated with them." *See* *L.A. Branch NAACP v. L.A. Unified School Dist., 750 F.2d 731, 740 (9th Cir. 1984)*. **[*17]** However, *res judicata* does not require the claim to have been actually litigated in the prior suit. *See* *Costantini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982)*. Indeed, *res judicata* prevents "an imaginative lawyer" from relitigating old facts by "attaching a different legal label." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1079 (9th Cir. 2003)*.

[4] On April 4, 2011, this Court rendered a final judgment on the merits in the prior case 04-9049. See Order (04-9049 Dkt. 10704). Mattel's appeal of that decision does not impact the present analysis because "a final judgment retains all of its *res judicata* consequences pending decision of the appeal." *See* *Tripati v. Henman, 857 F.2d 1366, 1367 (9th Cir. 1988)*.

[5] Any dispute would indeed be unfounded given that Eckert is a senior employee of Mattel—a named party in MGA's prior litigation—and Eckert's conduct was the subject of MGA's prior claims. *See* ***[*18] Adams v. Cal. Dep't of Health Servs., 487 F.3d 684, 691 (9th Cir. 2007)*** (employees were parties in privity with corporation where corporation was prior suit's defendant and liability was premised on employee wrongdoing); *Single Chip Sys. Corp. v. Intermec IP Corp., 495 F. Supp. 2d 1052, 1064 (S.D. Cal. 2007)* (finding privity "even if the named parties differ").

1982). Because this Court concludes that these four factors show that MGA's current and prior cases share an identity of claims, *res judicata* bars the current **[*19]** claims and dismissal is proper.

i. The same transactional nucleus of facts give rise to MGA's current and prior claims

Claims arise from the same transactional nucleus of facts where the same "transaction, or series of transactions" could give rise to both claims, often shown by the similarity of the allegations in the prior and current pleadings. *See* Western Sys. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992); *Adams v. Cal. Dep't of Health Servs., 487 F.3d 684, 691 (9th Cir. 2007)*. A later claim arises from a different transactional nucleus of facts where the later claim alleges "new injuries caused by new acts" of the defendant. *See* Tahoe-Sierra Pres. Council, Inc.v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1076 (9th Cir. 2003). This rule regarding *res judicata* does not change when applied to an antitrust claim. To avoid being barred by *res judicata*, an antitrust claim must allege new injuries caused by new acts done "subsequent to the last date alleged in the prior adjudication." Int'l Techs. Consultants v. Pilkington PLC, 137 F.3d 1382, 1388 (9th Cir. 1998). The antitrust claim can not simply allege injuries or "damages from subsequent consequences of the earlier conduct." *Id.*

Thus, **[*20]** *res judicata* bars MGA's current complaint if Defendants can show that: (1) MGA's allegations in its prior pleadings could give rise to the current claims; and (2) MGA fails to allege new injuries arising from new acts occurring between August 16, 2010, and November 10, 2011. Those dates reflect MGA's last pleadings in the prior case and MGA's filing of its current FAC.

1. MGA's prior claims and its current antitrust claim share the same transactional nucleus of facts to the extent the antitrust claim relies on Defendants' litigation conduct before August 16, 2010

The vast majority of MGA's antitrust claim relies on Defendants' conduct during and in preparation for litigation prior to August 16, 2010. As shown by other documents filed with the Court, the FAC refers to conduct which occurred before August 16, 2010 and which was already detailed in MGA's pleadings, both in the prior case and in the present case's Original Complaint, which this Court dismissed. [6] For example, the gravamen of the FAC's antitrust claim is that the prior case was the product of Mattel's "'litigate MGA to death' strategy," in which Mattel "pursued a result"—a constructive trust over the *idea* of Bratz—that was **[*21]** "so extreme that no objective litigant could have expected it to survive full judicial review." FAC at ¶¶ 52, 59. Similarly, the FAC alleges that Mattel knowingly litigated claims barred by the statute of limitations and made several "misrepresentations" to the court. FAC at ¶¶ 91, 93, 97-99. This litigation conduct occurred prior to August 16, 2010, and these same allegations appeared in MGA's pleadings on and prior to August 16, 2010. *See* (04-9049) Dkt. 2573 ¶¶ 59-69 (MGA's March 8, 2008 proposed statement of facts); Dkt. 8583 ¶¶ 30-36, 60, 315-18 (MGA's August 16, 2010, counterclaims in reply). For that very reason, this Court dismissed these same allegations three months ago when they appeared in MGA's Original Complaint. *See* Order (Dkt. 29) at 9-10; *see also* Compl. (Dkt. 1) at ¶¶ 16-25, 30, 59-60 (alleging that Mattel sought a remedy against MGA that "required the district judge to enter a ruling that was an abuse of discretion" and that Mattel litigated time-barred claims and engaged in discovery abuses).

In its Opposition, MGA does not dispute that the vast majority of MGA's antitrust claim relies on Defendants' litigation conduct before August 16, 2010. [7] Thus, to the extent that the antitrust claim is based on Defendants' conduct in the prior litigation—conduct which must have occurred before August 16, 2010—the antitrust claim arises from the same transactional nucleus of facts as MGA's pleading in the prior litigation.

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[6] This court takes judicial notice of the documents filed with this Court as matters of public record. *See* Fed. R. Evid. 201; Lee v. City of Los Angeles, 250 F.3d 668, 688-689 (9th Cir. 2001). **[*22]** Defendants identified these documents in a useful chart in their briefing of the previous motion to dismiss. *See* Mot. to Dismiss Complaint (Dkt. 11) at 9-10; Reply (Dkt. 20) at 3, n.1.

[7] Instead, MGA argues that its antitrust claim arising from this litigation conduct was not ripe. The Court addresses this argument later in this Order.

2. MGA's prior claims and its current antitrust claim share the same transactional nucleus of facts to the extent the antitrust claim relies on Mattel's non-litigation conduct that was actually litigated

The FAC contains a few references to non-litigation conduct by Defendants which was actually litigated in the prior action. For example, the FAC alleges that, "[a]s MGA proved in the underlying litigation, Mattel's . . . strategy . . . **[*23]** consisted, in part, of anticompetitive practices such as infiltrating confidential competitor showrooms, accessing industry events with false identification, and representing sham toy retailers." FAC ¶ at 50. However, the FAC itself states that this non-litigation conduct was *already litigated* in the prior action—indeed, MGA received a judgment in its favor. *See id.* ("Indeed, the jury found that Mattel . . . misappropriated 26 categories of MGA trade secrets . . . ."). Thus, the non-litigation conduct that was actually litigated is also barred by *res judicata. See* *L.A. Branch NAACP v. L.A. Unified School Dist., 750 F.2d 731, 740 (9th Cir. 1984)* (holding that, to extent plaintiffs "actually litigated the liability of the" Defendant, "then the res judicata bar would have to expand to encompass those events and others that might have been litigated with them").

3. To the extent that MGA's antitrust claim alleges litigation conduct after August 16, 2010, those allegations are either too conclusory to state a claim or are not new acts giving rise to a new antitrust injury

The remaining litigation conduct alleged in the FAC constitute the same transactional nucleus of facts as the prior case **[*24]** because the remaining litigation conduct was not a new act creating a new antitrust injury separate from the injury created by Mattel's litigation conduct before August 16, 2010. The FAC describes three instances of conduct that could have occurred after August 16, 2010: (1) "during the second trial," Mattel "wrongfully sought to withhold" Mattel's "communications with Kohl's Department Stores" and "35 boxes of Mattel documents," which this Court ordered to be produced (FAC at ¶ 94); (2) "on August 11, 2011," Mattel filed post-trial motions and appealed the adverse judgment it received in the prior litigation (*id.* at ¶ 79); and (3) Defendants "secured the appointment of an auditor and temporary receiver . . . based on false allegations" in court (*id.* at ¶ at 93). [8]

a. Mattel's Discovery Abuses

In *Tahoe-Sierra*, the Ninth Circuit held that *res judicata* barred plaintiffs from challenging the defendant planning agency's decision in 1999 to enforce a plan enacted in 1987 because the decision was not a distinct act giving rise to a new injury separate from the enactment of the plan. *See* *Tahoe-Sierra Pres. Council, Inc.v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1076 (9th Cir. 2003)*. In the prior case, the plaintiffs had challenged the constitutionality of the plan itself; in the later case, they challenged the constitutionality of the decision to enforce the plan. *Id. at 1078*. The court held that the "transactional nucleus of facts" the two suits shared was the "enactment of the 1987 Plan." *Id.* The Court reached this conclusion because the defendant "acted in 1999 precisely as it was required to act by the plain terms of the 1987 Plan"; the "mere fact that it so acted in 1999 does not establish a new set of facts giving rise to a new legal claim." *Id. at 1079*. The court rejected the plaintiff's "attempts to frame its complaint in terms of new injuries caused by new acts," because the present action "is in reality **[*26]** a prayer for relief from wrongs allegedly done" at a time when they could have been raised in the prior litigation. *Id. at 1076*. The court concluded that the 1999 decision merely furnished plaintiffs with "more information about the extent of their alleged injury," but that this additional information did not create a "cause of action to recover increased damages from an injury that has already been addressed by a final judgment." *Id. at 1079 n.12*.

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[8] MGA's Opposition does not identify these three instances of conduct as a basis to deny Defendants motion, nor does it discuss the cases or arguments made by Defendants in their Motion regarding this post-pleading conduct. Instead, a substantial part of MGA's Opposition simply copies verbatim the cases and arguments MGA listed in its FAC, neither of which addresses the relevant issue of what conduct constitutes a new acts **[*25]** giving rise to a new antitrust injury.

As in *Tahoe-Sierra*, *res judicata* bars MGA from challenging Mattel's discovery abuses in the prior litigation because the discovery abuses were not a distinct act giving rise to a new injury separate from Mattel's other litigation conduct. In the prior case, MGA's RICO claim sought damages because Mattel engaged in discovery abuses and litigated time-barred claims. *See* (04-9049) Dkt. 2573 ¶¶ 59-69 (MGA's March 8, 2008 proposed statement of facts); Dkt. 8583 ¶¶ 30-36, 60, 315-18 (MGA's August 16, 2010, counterclaims-in-reply). In the current antitrust claim, MGA alleges that Mattel engaged in discovery abuses in the prior case and withheld evidence that Mattel knew its claims were time-barred. The transactional nucleus of facts that the two **[*27]** suits share is Mattel's conduct in the prior case, specifically, engaging in discovery abuses and litigating time-barred claims. Simply because Mattel *continued* the litigation conduct for which MGA's RICO claim sought damages "does not establish a new set of facts giving rise to a new legal claim." *See* *Tahoe-Sierra, 322 F.3d at 1079*. Rather, at most this continued conduct provided MGA with "more information about the extent of [its] alleged injury," but this additional information does not create a "cause of action to recover increased damages from an injury that has already been addressed by a final judgment." *Id. at 1079 n.12*.

Thus, the discovery abuses alleged in the FAC arise from the same transactional nucleus of facts as the prior case because these discover abuses were not new acts creating a new antitrust injury separate from the injury created by Mattel's litigation conduct before August 16, 2010.

b. Mattel's Appeal

For the purposes of determining when the statute of limitations runs for an antitrust claim based on litigation, the Ninth Circuit has held that a party's appeal of the judgment in a prior case does not constitute a "new and independent act" that "inflict[s] new . **[*28]** . . injury." *Pace Industries, Inc. v. Three Phoenix Co., 813 F.2d 234, 238 (9th Cir. 1987)*. In reaching this conclusion, the court reasoned that "no new injury results from the act of appealing that the [victim of the antitrust violation] does not already endure as a result of the act of filing the action initially." *Id.*

The Court imports this Ninth Circuit authority regarding the statute of limitations of an antitrust claim into the present *res judicata* analysis. Mattel's act of appealing the judgment in the prior case did not impose a new injury on MGA separate from the injury MGA endured due to Mattel's litigation conduct in the prior case. There was no new injury "because the reasonable expectation from the commencement of a lawsuit is that the plaintiff will pursue the litigation until it prevails or the last appeal is exhausted." *See id.* To hold otherwise would allow every victim of an antitrust violation based on sham litigation to file multiple suits at each phase in that sham litigation, a holding which would greatly undermine judicial economy. *Cf.* *Misischia v. St. John's Mercy Health Sys., 457 F.3d 800, 805 (8th Cir. 2006)* ("The doctrine of res judicata would become meaningless **[*29]** if a party could relitigate the same issue . . . merely by positing a few additional facts that occurred after the initial suit.").

Thus, Mattel's appeal of the prior case arises from the same transactional nucleus of facts as the prior case because the appeal was not a new act creating a new antitrust injury separate from the injury created by Mattel's litigation conduct before August 16, 2010.

c. Mattel's Court Action

Finally, to the extent that MGA relies on its allegation that Defendants "secured the appointment of an auditor and temporary receiver . . . based on false allegations" in court to argue that Defendants engaged in litigation conduct after August 16, 2010, this one-sentence allegation is too conclusory. *See* FAC ¶ at 93. In the prior Order dismissing MGA's Original Complaint, this Court previously held that a similar allegation was too conclusory. *See* Order (Dkt. 29) at 9-10 n.5 (rejecting allegation in Paragraph 30(c) of the Original Complaint that Defendants filed a "baseless and frivolous new lawsuit" in court).

4. MGA's allegation that antitrust violations "continue" or are "uninterrupted" is too conclusory to state a claim

Finally, the FAC sporadically describes Mattel's **[*30]** litigation conduct as "continuing" or "uninterrupted." *See* FAC at ¶ 80 ("Mattel . . . continues to ruthlessly deploy a costly, lengthy 'litigate MGA to death' strategy, pursuing a case . . . to accomplish its anticompetitive objectives."). In addition, the claim for relief states that: "[b]eginning at least with the introduction of Bratz in 2001 and continuing uninterrupted through the present time, [Mattel and Eckert have] been continuously violating *Section 2* of the Sherman Act by monopolizing and attempting to monopolize the sale and distribution of fashion dolls in the United States." *Id.* at ¶ 104.

Given that this Court has concluded that the FAC's other allegations share a transactional nucleus of facts with the prior case, the remaining issue is whether MGA's reference to continuous activity is too conclusory to allege new antitrust injuries arising from new acts by Defendants between August 16, 2010, and November 10, 2011. *See* *Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010)* ("A court need not credit a complaint's . . . allegations that are merely conclusory."). The Court concludes that these allegations are too conclusory.

In *Dual-Deck*, the Ninth Circuit applied **[*31]** collateral estoppel—also referred to as issue preclusion and a close cousin of *res judicata*—to bar an antitrust claim where the complaint asserted "violations of [***antitrust] law*** and other acts taken by the defendant . . . since the filing" of the prior suit and incorporated the factual allegations from the prior suit's complaint. *In re Dual-Deck Video Cassette Recorder Antitrust Litig., 11 F.3d 1460, 1463 (9th Cir. 1993)*. The Ninth Circuit held that this "ambiguous" reference to activity "since the filing" did not show that the plaintiff alleged that defendants had formed a new conspiracy *after* the filing, which was a necessary element of the antitrust claim. *Id. at 1463-64*. Later courts have interpreted *Dual-Deck* as holding that the "plaintiff alleged damages from subsequent *consequences* of the earlier conduct," not new *conduct* done after the filing. *Int'l Techs. Consultants v. Pilkington PLC, 137 F.3d 1382, 1388 (9th Cir. 1998)* (emphasis added) (recognizing that *Dual-Deck* could also be applied to *res judicata* analysis).

In contrast, in *Harkins* the Ninth Circuit held that *res judicata* did not bar an antitrust claim where the later complaint alleged that, "at least as early as September **[*32]** 1, 1976 and continuing without interruption[, defendants] formulated a plan and have continuously pursued a course of conduct intended to unreasonably restrain trade." *Harkins Amusement Enterprises, Inc. v. Harry Nace Co., 890 F.2d 181, 182 (9th Cir. 1989)*. The court reasoned that it would be "over-technical" to construe the complaint as alleging that a conspiracy formed *only* in September 1, 1976. *Id.* Thus, the court read the complaint as alleging that defendants "conspire[d] continuously since that date," which meant that defendants' conspiracy formed *after* the pleadings in the prior litigation. *Id.* The Ninth Circuit also noted that, "by the defendants' own concession," the facts alleged in the later and prior complaints were "at least 10 percent different," in addition to being "conduct that occurred in a different time period." *Id. at 184*.

The Court finds *Dual-Deck* more persuasive and distinguishes *Harkins.* First, unlike in *Harkins*, Defendants here do not concede that MGA's current complaint contains 10 percent new allegations. Instead, Defendants have demonstrated that MGA reiterates the same allegations as in its prior pleadings and that the allegations regarding conduct after **[*33]** August 16, 2010, were not new acts giving rise to new antitrust injuries.

Second, like in *Dual-Deck*, MGA's current complaint fails to identify by date the new conduct creating new antitrust injury that could be the basis for the allegation that Mattel is "continuously violating" antitrust laws. [9] Like in *Dual-Deck*, MGA's Opposition Brief does not identify *any* allegations of conduct after August 16, 2010, in the current complaint—indeed, MGA omits any mention of Mattel or Eckert's conduct between August 16, 2010, and November 10, 2011, in its summary of the facts of this case. (Pl. Opp'n at 4). And, like in *Dual-Deck*, MGA recreates allegations from its prior pleadings, including repeating verbatim allegations from its Original Complaint that this Court previously dismissed. *Compare* FAC ¶ 81 *with* Compl. ¶ 24.

Given that MGA's current claims mirror its prior allegations **[*34]** and that MGA's Opposition Brief does not identify a single allegation in the FAC regarding a new antitrust injury derived from a new act by Defendants since August

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[9] As the Court has already explained, the three allegations of conduct occurring after MGA's pleadings on August 16, 2010, do not constitute new acts giving rise to a new antitrust injury. Thus, if these allegations are the "continuing" conduct to which the FAC refers, these allegations are not enough to prevent dismissal.

16, 2010, MGA's allegations that Defendants' antitrust violations are "continuing" are too conclusory. At best, like in *Dual-Deck*, MGA is only alleging "damages from subsequent consequences of the earlier conduct," and not new conduct occurring after August 16, 2010. *See* *Int'l Techs. Consultants v. Pilkington PLC, 137 F.3d 1382, 1388 (9th Cir. 1998)*.

ii. The remaining factors also indicate that MGA's current and prior claims are the same

As noted earlier, courts consider three additional factors to determine if two suits share an identity of claims, namely whether: (1) substantially the same evidence is presented in the two actions; (2) the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; and (3) the two suits involve infringement of the same right. These factors militate strongly in favor of preclusion.

First, MGA's reliance on the same factual allegations in both its present and prior claim demonstrates that the same evidence would be presented to prove **[*35]** both claims. MGA argues that "new and distinct evidence is required to prove an antitrust claim, including detailed market analysis and expert economist opinions." Opp'n at 9. However, the availability of *additional* evidence is not enough. Instead, the controlling issue is whether substantially the same evidence could be used to satisfy both claims. *See* *Western Sys. v. Ulloa, 958 F.2d 864, 871-872 (9th Cir. 1992)*; *Int'l Union of Operating Eng'r-Employers Constr. Indus. Pension v. Karr, 994 F.2d 1426, 1430 (9th Cir. 1993)* (*res judicata* may apply even where there is some difference in the evidence). MGA failed to *introduce* evidence of market analysis in the prior case because MGA failed to *plead* an antitrust violation; such a failure does not preclude *res judicata. See* *In re International Nutronics, 28 F.3d 965, 970-71 (9th Cir. 1994)* (holding that *res judicata* barred antitrust claim in later case because "evidence of unlawful collusion" that would support antitrust claim "ought to have been brought forward at the" prior case, and thus the prior "proceeding was a perfunctory and narrow one only because the [antitrust victim] chose not to make it otherwise").

Second, the two suits involve **[*36]** infringement of the same right, namely, MGA's right to compete in the market free from Mattel's allegedly illegal litigation strategy.

Finally, the rights established in the prior judgment would be destroyed or impaired by prosecution of the current antitrust claim. If MGA is successful in its current claims, it could lead to either a double recovery for the same injury or recovery for a claim against which Mattel previously successfully defended. For example, judgment was previously entered against MGA regarding its counterclaims-in-reply that Mattel was liable for RICO violations and wrongful injunction—two claims that share the same transactional nucleus of facts as the current antitrust claim. Yet, MGA's current antitrust claim now seeks damages for Defendants' pursuit of this unreasonable injunctive relief.

iii. *Res judicata* is not set aside due to equitable considerations

In the FAC and its Opposition, MGA argues that this Court's imposition of a trial date in January 2011 gave MGA too little time to prepare an antitrust case, and thus MGA did not raise an antitrust claim on August 16, 2010. (Opp'n 18). However, *because* MGA never advanced its antitrust claim, the Court was not given **[*37]** the opportunity to decide whether to extend the trial deadline. Regardless, the Ninth Circuit and Supreme Court have "rejected any equitable exceptions to the application of *res judicata* based on 'public policy' or 'simple justice.'" *Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 714 (9th Cir. 2001)* (rejecting argument that *res judicata* should not apply due to counsel's failures in prior case); *see also* *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981)*.

Furthermore, MGA cannot now contend that this Court procedurally precluded MGA from raising its antitrust claim when the failure rests with MGA. In the prior litigation, this Court *agreed* with MGA that all its counterclaims-in-reply were compulsory, including the RICO and wrongful injunction claims which share the same transactional nucleus of facts as MGA's current antitrust claim. (04-9049 Dkt. 8892 at 14). Because these RICO and wrongful injunction counterclaims-in-reply were compulsory, the Court allowed MGA to raise those claims in the prior litigation. The Court dismissed MGA's wrongful injunction counterclaim-in-reply on the merits, reasoning that MGA sought to "recover **[*38]** two categories of damages that are unavailable as a matter of law." *Id.* Because the Court dismissed MGA's wrongful injunction counterclaim-in-reply on the merits, MGA's own failure to articulate a cognizable claim arising from the injunction prevented MGA from further litigating that claim.

Finally, this is not a case where the victim of sham litigation was kept ignorant about the sham until after she filed her last pleading in the case. *Res judicata* would not prevent such a victim from bringing an antitrust claim after discovering the baselessness of the sham litigation. *See* *Western Sys. v. Ulloa, 958 F.2d 864, 871-872 (9th Cir. 1992)* ("Ignorance of a party does not . . . avoid the bar of res judicata unless the ignorance was caused by the misrepresentation or concealment of the opposing party."). Here, the facts giving rise to MGA's current antitrust claim were either in MGA's possession or were public knowledge well before August 16, 2010—which is why, on that date, MGA pled these facts in its RICO and wrongful injunction counterclaims-in-reply. MGA simply chose to style those facts as a claim under RICO and for wrongful injunction. In short, the Court's ruling is narrow; it merely **[*39]** holds that *res judicata* bars a later claim that is based on allegations of misconduct of which the claimant was previously aware *and had alleged* in the prior case.

iv. Conclusion

In sum, an identity of claims is shown because MGA's current and prior pleadings arise from the same transactional nucleus of facts and the remaining other three factors also militate in favor of claim preclusion. The parties do no dispute that there has been a final judgment on the merits in the prior case and that the prior case was between parties in privity. Equitable considerations do not prevent the application of *res judicata.* Accordingly, *res judicata* bars MGA's antitrust claim because there has been a final judgment on the merits in a prior case, that prior case was between parties in privity, and the prior and present cases involve an identity of claims. *See* *Costantini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982)*.

c. MGA's Claim Is Dismissed Because It Was Compulsory in the Prior Litigation

A party who fails to plead a compulsory counterclaim in a prior action, as required under *Federal Rule of Civil Procedure 13(a)*, is precluded from raising that claim in a later action. *Mitchell v. CB Richard Ellis Long Term Disability Plan, 611 F.3d 1192, 1201 (9th Cir. 2010)*. **[*40]** The purpose of this rule is "to prevent multiplicity of litigation and to promptly bring about resolution of disputes before the court." *Id.*

A counterclaim is compulsory where it: (1) "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"; and (2) exists at the time the counterclaimant serves its pleading. [10] *Fed. R. Civ. P. 13(a)*. In the prior litigation, this Court followed MGA's urging and applied Ninth Circuit precedent to hold that *Rule 13(a)* applied not only to counterclaims, but also rendered compulsory MGA's counterclaims-in-reply, which were filed in response to Mattel's Fourth Amended Answer and Counterclaims. *See* Order 4:16-18 (04-9049 Dkt. 8892); *Davis & Cox v. Summa Corp., 751 F.2d 1507, 1525 (9th Cir. 1985)* (applying logical relationship test of *FRCP 13(a)* to counterclaim-in-reply).

Thus, MGA's current antitrust claim is precluded if Defendants can show that the claim: (1) arose from the same transaction as Mattel's last pleadings in the prior case, which were **[*41]** Mattel's Fourth Amended Answer and Counterclaims ("FAAC") (04-9049 Dkt. 7714); and (2) existed when MGA filed its last pleadings in the prior litigation, which were counterclaims-in-reply filed on August 16, 2010 (04-9049 Dkt. 8853). Although the Court concludes that these two requirements are all that it should consider under *Rule 13(a)*, the Court also addresses

[10] The term "transaction" in *Rule 13(a)* includes "a series of occurrences." *Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1, 94 S.Ct. 2504, 2506 n.1, 41 L. Ed. 2d 243 (U.S. 1974)*.

MGA's argument that the Supreme Court and Ninth Circuit have created an exception to the compulsory counterclaim rule for antitrust claims arising from sham litigation. [11]

i. MGA's current antitrust claim based on Defendants' litigation conduct shares a logical relationship with Mattel's pleadings in the prior litigation

The Ninth Circuit's "logical relationship test" holds that a claim arises from the same transaction, and thus is compulsory, where it "arises from the same aggregate set of operative facts" as the opponent's pleadings. *See* *In re Pinkstaff, 974 F.2d 113, 115 (9th Cir. 1992)*. Two claims may be logically related even though they do not arise out of the same **[*42]** nucleus of facts. *Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246, 1249 (9th Cir. 1987)*; *Jones v. Ford Motor Credit Co., 358 F.3d 205, 210-13 (2d Cir. 2004)* ("Although the 'logical relationship' test does not require 'an absolute identity of factual backgrounds,' . . . the 'essential facts of the claims must be so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.''). A logical relationship may exist even if the counterclaim's allegations need not be resolved in order to dispose of the underlying claim. *In re Marshall, 600 F.3d 1037, 1058-59 (9th Cir. 2010)*.

Applying the logical relationship test, MGA's current antitrust claim shares a logical relationship with Mattel's pleadings in the prior litigation. MGA's current antitrust claim and Mattel's RICO claim raised in the prior litigation share a logical relationship because each alleges misconduct by the other during the litigation of cases 05-2727 and 04-9049. In the prior litigation, Mattel's FAAC alleged, among other things, that MGA committed RICO violations because of MGA's alleged misconduct and unwillingness to comply with the phase 1 jury's verdicts **[*43]** in the prior litigation. In its current antitrust claim, MGA alleges that Mattel engaged in misconduct during the prior litigation through discovery abuse, disregard for the statute of limitations, and pursuit of unreasonable injunctive relief. Because both MGA's current claim and Mattel's prior claim arise from the parties' conduct in the prior litigation, MGA's current antitrust claim was compulsory and should have been brought in the prior litigation.

This conclusion is consistent with the holdings by several courts that an antitrust claim based on sham litigation is a compulsory counterclaim in the very litigation that is alleged to be a sham. *See, e.g.,* *Critical-Vac Filtration Corp. v. Minuteman Int'l., Inc., 233 F.3d 697, 700 (2d Cir. 2000)* (holding sham litigation claim compulsory in the action alleged to be "sham," since "[a]n obvious 'logical relationship exists" between the actions); *Eon Labs., Inc. v. Smithkline Beecham Corp., 298 F. Supp. 2d 175, 179-81 (D. Mass. 2003)* (holding "sham litigation" compulsory in litigation alleged to be sham); *Shmuel Shmueli, Bashe, Inc. v. Lowenfeld, 68 F. Supp. 2d 161, 162, 165-66 (E.D.N.Y. 1999)* (antitrust claim based on defendant's pursuit **[*44]** of litigation was "plainly compulsory" in the underlying litigation).

Furthermore, other courts in this Circuit have held an antitrust claim to be compulsory where, as here, the antitrust victim's pleading in the prior case alleges similar facts to the ones alleged in the later case's antitrust claim. In *Grumman*, the court dismissed a California antitrust claim brought in a later case because it was a compulsory counterclaim to the prior case for copyright infringement. *See* *Grumman Systems Support Corp. v. Data General Corp., 125 F.R.D. 160, 162 (N.D.Cal. 1988)*. The Court reasoned that the two actions shared a logical relationship because the antitrust victim's answer in the earlier action and complaint in the later action both "alleged monopolization by copyright misuse" by the same party. *Id.* The court reached this conclusion even though the later action alleged "additional facts going to its monopolization claim" and brought claims against two additional defendants over whom no personal jurisdiction existed in the prior action. *Id. at 162, 163*. The court noted that the differences between the legal theories advanced by the antitrust victim in the two cases "is largely irrelevant **[*45]** to *Rule 13(a)* analysis" because the "central issue is whether there is a logical relationship between the claims in the two actions." *Id. at 162-63*.

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[11] Regarding this exception, MGA's Opposition advances the same arguments that this Court found unconvincing when it previously dismissed the Original Complaint.

Like the plaintiff in *Grumman*, MGA previously defended against copyright infringement claims and now brings an antitrust claim in a later case. Like in *Grumman*, the two actions share a logical relationship because the MGA's pleadings in the two cases both allege the same facts: Mattel's discovery abuses, disregard for the statute of limitations, and pursuit of unreasonable injunctive relief in the prior litigation. Like in *Grumman*, even if MGA's antitrust claim alleges "additional facts going to its monopolization claim," these additional facts do not eliminate the logical relationship between the prior and present claims. *See* *id. at 162, 163*. Finally, like in *Grumman*, the differences between the legal theories advanced by MGA in the two cases— RICO and wrongful injunction in the prior case versus an antitrust claim in the present case—"is largely irrelevant to *Rule 13(a)* analysis" because the "central issue is whether there is a logical relationship between the claims in the two actions." *See* *id. at 162-63*.

Finally, courts have rejected **[*46]** similar arguments to the one MGA advances here, namely, that "judicial economy and fairness support" the characterization of MGA's antitrust claim as a "permissive claim." *See* Opp'n at 19. For example, the Ninth Circuit has held that an antitrust claim is compulsory in a prior infringement action because, "although the antitrust and patent infringement claims are grounded in different statutes, they raise many of the same legal, factual, and evidentiary issues" such that "[j]udicial economy and efficiency counsel analysis of these issues in a single proceeding." *Destiny Tool v. SGS Tools Co., 344 Fed. Appx. 320, 323 (9th Cir. 2009)*; *see also* *Mosdos Chofetz Chaim, Inc. v. Village Of Wesley Hills, 701 F. Supp. 2d 568, 590 (S.D.N.Y. 2010)* (allegation that prior lawsuit was a "pretext for illegal actions" is "logically intertwined" with the validity of the claims in the prior lawsuit and, consequently, principles of "judicial economy and fairness dictate that all the issues should be resolved in one lawsuit") (internal quotation marks omitted). In addition, treatises note that "[d]espite the fact that antitrust counterclaims involve a number of different issues, such as market definition **[*47]** and market power, several lower courts have ruled that antitrust counterclaims are compulsory counterclaims to infringement and similar actions under *Federal Rule of Civil Procedure 13(a)*." Jay Dratler, Jr., Licensing of Intellectual Property §2.04[1] n.10 (2006) (listing cases from the Third, Sixth, Seventh, and Ninth Circuits).

Thus, MGA's current antitrust claim arose from the same transaction as Mattel's last pleadings in the prior case. [12]

ii. MGA's antitrust claim was not unripe on August 16, 2010

As noted previously, *Rule 13(a)* bars claims in a later case that could have been brought in a prior case. *Mitchell v. CB Richard Ellis Long Term Disability Plan, 611 F.3d 1192, 1201 (9th Cir. 2010)*. However, if a claim was not ripe at the time of MGA's last pleadings on August 16, 2010, that claim could not have been brought in that prior case. *See* **[*48]** *Fed. R. Civ. P. 13(a)* (requiring counterclaim to exist at the time the counterclaimant serves its pleading). Thus, an unripe claim would not be barred in the present case.

MGA latches onto this rule and contends that its "antitrust claim was not ripe and was premature until MGA secured a favorable verdict and judgment in the underlying suit." (Pl. Opp'n at 18). MGA analogizes its antitrust claim to the common law tort of malicious prosecution, which requires that the tort victim obtain a judgment in her favor in the underlying litigation that is the malicious prosecution. *See* *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 62, 62 n.7, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (stating that the tort requires an "unsuccessful civil lawsuit"); *Restatement (Second) of Torts § 674* (1977) (stating that the tort requires that "the proceedings have terminated in favor of the person against whom they are brought"). MGA argues that, like in a malicious prosecution claim, an antitrust claim based on sham litigation should require, as an element of that claim, that the victim obtain a judgment in her favor in the underlying litigation that is the sham.

MGA's primary authority, *Professional* ***[*49]*** *Real Estate Investors*, does not support MGA's argument that this Court should import this malicious prosecution requirement into an antitrust claim. *Professional Real Estate*

[12] Although MGA does not argue that its current antitrust claim survives *Rule 13(a)* based on the three allegations of Defendants' litigation conduct after August 16, 2010, the same analysis this Court applied in this Order's *res judicata* discussion would lead to the conclusion that this conduct was not a new act creating a new antitrust injury.

Investors was not decided on ripeness grounds and says absolutely nothing about whether the victim of sham litigation must obtain a judgment in her favor in the underlying litigation before bringing an antitrust claim. *See* *Professional Real Estate Investors, Inc., 508 U.S. at 57* (explicitly defining the issue addressed as "whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant" and "answer[ing] this question in the negative").

Furthermore, MGA's novel rule urges exactly the kind of overreach that the Supreme Court cautioned against in *Professional Real Estate Investors* by seeking to "transplant[] every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings into federal ***antitrust law***." *See* *Professional Real Estate Investors, 508 U.S. at 68* (Souter, J., concurring) (expressing "concern that other courts could read today's opinion" too broadly). Indeed, no case has interpreted *Professional Real Estate Investors* to stand **[*50]** for the proposition that MGA urges. *See* *Kaiser Foundation Health Plan, Inc. v. Abbott Laboratories, Inc., 552 F.3d 1033, 1046 (9th Cir. 2009)* (explaining that "*Professional Real Estate Investors* provides a strict two-step analysis to assess whether a single action constitutes sham petitioning"); 2 Holmes, Intellectual Property and ***Antitrust Law*** § 38:4 (explaining the different tests for an antitrust claim based on one sham case versus several cases).

Finally, while MGA cites no authority that supports its novel rule, the several cases discussed in the previous section hold that an antitrust claim is a compulsory counterclaim in the very case alleged to be a sham because joint adjudication of the claims will conserve judicial and party resources. *See, e.g.,* *Critical-Vac Filtration Corp. v. Minuteman Int'l., Inc., 233 F.3d 697, 700 (2d Cir. 2000)*. In fact, in the very case on which MGA relies, the victim of the purportedly sham litigation brought its antitrust claim as a counterclaim *in* that sham litigation *before* receiving a favorable judgment. *See* *Professional Real Estate Investors, 508 U.S. at 52* ("In **[*51]** 1983, [plaintiff] sued [victim of purported sham] for alleged copyright infringement" and the victim "counterclaimed, charging [plaintiff] with violations of *§§ 1* and *2* of the Sherman Act"). In addition, the very treatise on which MGA relies states that "an antitrust counterclaim for anticompetitive litigation can clearly be brought before the underlying suit has terminated." *See* Herbert Hovenkamp, Mark D. Janis, Mark A. Lemley, IP and Antitrust, Antitrust Allegations as Compulsory Counterclaims in Enforcement Litigation §11.3b6(B) (2001) (discussing *Professional Real Estate Investors*).

Given the overwhelming weight of authority, this Court resists MGA's urging to create a new element to an antitrust claim that requires the victim of sham litigation to obtain a judgment in her favor in the sham litigation before bringing an antitrust claim.

iii. The Court is not persuaded to extend the *Mercoid/Hydranautics* exception to prior cases that are not based on patent infringement

In *Mercoid*, the Supreme Court held that an antitrust claim based on prior patent infringement litigation was not a compulsory counterclaim in that patent litigation, but rather a permissive counterclaim under *Federal Rule of Civil Procedure 13(b)*. **[*52]** *Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 671, 64 S. Ct. 268, 274, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641 (1944)* (overruled on other grounds, as stated in *Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F. Supp. 1350, 1361 (D. Colo. 1996))*. A half-century later, the Ninth Circuit relied on *Mercoid* to hold in *Hydranautics* that "a claim that patent infringement litigation violated an antitrust statute is a permissive, not a mandatory, counterclaim in a patent infringement case, and is not barred in a subsequent suit by failure to raise it in the infringement suit." *Hydranautics v. FilmTec Corp., 70 F.3d 533, 536 (9th Cir. 1995)*.

MGA urges this Court to extend *Mercoid* and *Hydranautics* beyond the realm of patent infringement and to hold that MGA's antitrust claim was not a compulsory counterclaim in the prior non-patent-related litigation. MGA argues that neither *Mercoid* nor *Hydranautics* expressly limit their holdings to prior litigation involving patent infringement, and thus these holdings can be extended to the present case.

First, as Defendants note, MGA cites no case within the Ninth Circuit that extends *Mercoid* or *Hydranautics* beyond the realm of patent infringement and courts in this circuit have refused **[*53]** to do so. MGA does cite one case, *Mead*, in which an Ohio district court held that an antitrust claim was not a compulsory counterclaim in the prior *copyright* infringement litigation. *See* *Mead Data Central v. West Pub. Co., 679 F.Supp. 1455 (S.D.Oh. 1987)*.

However, a court in this Circuit has rejected any analogy to *Mead* because *Mead* applied the Sixth Circuit's standard for compulsory counterclaims and did so in a manner that "differs from the Ninth Circuit standard in several ways." *See* Grumman Systems Support Corp. v. Data General Corp., 125 F.R.D. 160, 163 (N.D.Cal. 1988). Furthermore, courts in this and other circuits have not followed *Mead* and have not extended *Mercoid* or *Hydranautics* when urged to do so. In fact, the Ninth Circuit has noted that, since *Hydranautics*, the *Mercoid* exception has been read "more narrowly" by other circuits to apply to patent misuse, but not patent invalidity. *Destiny Tool v. SGS Tools Co., 344 Fed. Appx. 320, 323 (9th Cir. 2009)*; *see also* Grumman, 125 F.R.D. at 163 ("[I]t is clear at this point that there is no such general exception [grounded in *Mercoid*] to the operation of *Rule 13(a)* **[*54]** and no case decided in the last twenty years holds to the contrary."); Herbert Hovenkamp, Mark D. Janis, Mark A. Lemley, IP and Antitrust, Antitrust Allegations as Compulsory Counterclaims in Enforcement Litigation §5.5 n.22 (2001) (noting that cases applying *Mercoid* to prior non-patent-related litigation are "aberrational").

Second, while neither *Mercoid* nor *Hydranautics* expressly limit their holdings to patent infringement litigation, the Ninth Circuit's policy *justification* for an exception to the compulsory counterclaim rule applies to only patent infringement litigation. In *Hydranautics*, the Ninth Circuit explained that the *Mercoid* exception was due to the unique appeals process in patent infringement litigation. *Hydranautics, 70 F.3d at 536*. Because patent infringement decisions are appealed to the Federal Circuit, treating antitrust claims as compulsory in patent infringement litigation could result in a "difference between the ***antitrust law*** generally applicable within each regional circuit, and ***antitrust law*** in predatory patent infringement cases." *Id.* While this may be an ex post facto explanation for *Mercoid*'s opaque decision, the Court nonetheless finds the Ninth Circuit's **[*55]** logic a persuasive justification. [13]

Because other courts have not extended *Mercoid* or *Hydranatics* to prior litigation that is not based on patent infringement, this Court will not exempt MGA's antitrust claim from the traditional compulsory counterclaim analysis.

d. Because MGA's First Amended Complaint Does Not Cure the Defects Previously Identified By this Court, Dismissal With Prejudice Is Proper

A district court's discretion to deny leave to amend is "particularly broad where plaintiff has previously amended the complaint." *Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)*. In addition, leave to amend "need not be granted where the amendment of the complaint . . . constitutes an exercise in futility." *Id.*

As explained in this Order, MGA has failed to amend its pleadings to include new acts by Mattel giving rise to new antitrust injury after August 16, 2010. This failure, as well as MGA's arguments **[*56]** in its Opposition, indicates that MGA will not amend its complaint to include post-August 16, 2010, activity because MGA does not believe its complaint is defective as a matter of law. Instead, the parties clearly intend to seek the Ninth Circuit's guidance on the doctrine of *res judicata* and whether the *Mercoid/Hydranautics* exception to *Rule 13(a)* should be expanded beyond the realm of patent law. Accordingly, the Court can offer MGA no further guidance on how to amend its complaint to cure the present defects.

Therefore, the Court GRANTS Defendants' motion and DISMISSES WITH PREJUDICE.

IV. Disposition

For the reasons stated above, the Court GRANTS Defendants' motion and DISMISSES WITH PREJUDICE.

DATED: February 21, 2012

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[13] Other Circuits have bemoaned how *Mercoid* "effectively created an exception" to the definition of a compulsory counterclaim "without acknowledging or explaining the exception." *Critical-Vac Filtration Corp. v. Minuteman Intern., Inc., 233 F.3d 697, 702 (2d Cir. 2000)*.

/s/ David O. Carter

DAVID O. CARTER

UNITED STATES DISTRICT JUDGE

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VIBO Corp. v. Conway

United States Court of Appeals for the Sixth Circuit

October 6, 2011, Argued; February 22, 2012, Decided; February 22, 2012, Filed

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No. 10-5043

Reporter

669 F.3d 675 *; 2012 U.S. App. LEXIS 3475 **; 2012 FED App. 0050P (6th Cir.) ***; 2012-1 Trade Cas. (CCH) P77,796

VIBO CORPORATION, INC., Plaintiff-Appellant, v. JACK CONWAY, et al., Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the Western District of Kentucky at Louisville. No. 08-00571—Jennifer B. Coffman, Chief District Judge.

VIBO Corp. v. Conway, 594 F. Supp. 2d 758, 2009 U.S. Dist. LEXIS 220 (W.D. Ky., 2009)

Core Terms

immunity, Manufacturer, district court, waived, state-action, joined, constitutional claim, petitioning, escrow, federal court, provisions, antitrust, argues, rights, tobacco company, anti trust law, market participant, government action, anticompetitive, grandfathered, execute, sham, allegations, Settlement, violations, sovereign, tobacco, payment obligation, favorable terms, private party

LexisNexis® Headnotes

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

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

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

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

A court of appeals reviews de novo a district court's grant of a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted and a district court's grant of a *Rule 12(b)(1)* motion to dismiss for lack of subject matter jurisdiction. The facts alleged by the plaintiff must be accepted as true, and those factual allegations must be enough to raise a right to relief above the speculative level.

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

HN2[] **Sherman Act, Scope**

The Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is declared to be illegal. *15 U.S.C.S. §§ 1*, *3(a)*.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN3[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

Under the Petition Clause of the *First Amendment to the U.S. Constitution*, private actors have the right to petition the government for action. *U.S. Const. amend I* provides that Congress shall make no law abridging the right of the people to petition the government for a redress of grievances. Where private actors petition the government for action that would violate ***antitrust law***, the Petition Clause immunizes the actors from litigation in connection with their petitioning. Under these circumstances, private immunization from alleged violations of the Sherman Act is known as the Noerr-Pennington doctrine. The doctrine is an expression of the principle that the antitrust laws regulate business, not politics, and is designed to protect citizens' participation in government. Thus, where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. However, private actors remain liable for anticompetitive activity not associated with government petitioning or antitrust violations that they directly cause. The dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The United States Supreme Court has interpreted "petitioning" to encompass activities other than legislative lobbying. For example, Noerr-Pennington immunity protects private actors when they file court documents and enter contracts with the government. Petitioning also includes the acts of negotiating and entering into settlements or other agreements with the government. Some courts have held that a competitor's conduct of boycotting constitutes protected petitioning intended to induce government action, so long as the boycotting is not for the purposes of contracting for higher prices and does not amount to direct marketplace injury.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN5[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The bad intent or anticompetitive motivation of private actors seeking government action is irrelevant to the application of Noerr-Pennington. This is so because it is impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests, and it is likewise impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN6[] Noerr-Pennington Doctrine, Sham Exception

The sham exception to Noerr-Pennington prevents the application of immunity where a defendant's act of "petitioning" was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. This exception encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon. A "sham" situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means. One "classic" example of sham petitioning is where a defendant files frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.

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

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

HN7[] Parker State Action Doctrine, Local Governments & Private Parties

As the United States Supreme Court decided in Parker v. Brown, principles of federalism and state sovereignty prevent state governments' liability under the Sherman Act for their allegedly anticompetitive action. This doctrine is known as state-action, or Parker, immunity. Where a state enters into an agreement with private entities and is protected by state-action immunity, that immunity extends to the private entities with whom the state deals.

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

HN8[] Exemptions & Immunities, Parker State Action Doctrine

The Sherman Act does not apply to states or state officials when acting in their sovereign capacities. Even where the states act in conjunction with private parties, they remain entitled to immunity so long as they acted within their official capacity. There is also no conspiracy exception to the state-action doctrine. However, if a state acts as a commercial participant in a given market, action taken in a market capacity is not protected. Thus, with the possible market participant exception, any action that qualifies as state action is ipso facto exempt from the operation of the antitrust laws.

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

HN9[] Exemptions & Immunities, Parker State Action Doctrine

For purposes of Parker state-action immunity, a state is a market participant when it acts in a proprietary capacity as a purchaser or seller with regard to the challenged action or its actions constitute direct state participation in the market. A state does not become a market participant simply because it labels its actions as an "agreement."

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

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

Where a state is protected by state-action antitrust immunity, that immunity extends to private entities involved in the same course of dealing.

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

HN11[] **Exemptions & Immunities, Parker State Action Doctrine**

Even where a challenged restraint is clearly articulated and affirmatively expressed as state policy, the policy must be actively supervised by the state itself for state-action immunity to apply. In other words, even if the state authorized private parties to engage in anticompetitive behavior, immunity does not extend to the private actors unless the state retains active supervision over the private actors.

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

Contracts Law > Contract Interpretation > General Overview

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

HN12[] **Standards of Review, De Novo Review**

Under Kentucky law, contract interpretation is a question of law, which a court of appeals reviews de novo.

Contracts Law > Contract Interpretation > Intent

HN13[] **Contract Interpretation, Intent**

Courts interpreting contracts must look to the language of the agreement to determine the parties' intent. When no ambiguity exists in the contract, the court looks only as far as the four corners of the document to determine that intent.

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

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

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

HN14[] **Standards of Review, De Novo Review**

Whether a contract is ambiguous—in that a reasonable person would find it susceptible to different interpretations—is a question of law reviewed de novo.

Contracts Law > Contract Interpretation > Intent

HN15[] **Contract Interpretation, Intent**

A court looks only to the plain language of an agreement to determine the parties' intent.

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN16[] **Contract Conditions & Provisions, Waivers**

For a waiver to be valid, it must be made knowingly, voluntarily, and intelligently. There is a presumption against waivers of constitutional rights, which can be overcome by clear evidence that there was an intentional relinquishment or abandonment of a known right or privilege.

Constitutional Law > State Sovereign Immunity > General Overview

Governments > State & Territorial Governments > Claims By & Against

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Governments > State & Territorial Governments > Employees & Officials

HN17[] **Constitutional Law, State Sovereign Immunity**

The *Eleventh Amendment to the U.S. Constitution* grants immunity to states from litigation on state law claims in federal court. *U.S. Const. amend. XI*. A claim against a state officer acting in his official capacity is deemed to be a claim against the state for sovereign immunity purposes. Fraud is a state common law claim.

Constitutional Law > State Sovereign Immunity > Abrogation of Immunity

Constitutional Law > State Sovereign Immunity > Waiver > General Overview

Constitutional Law > State Sovereign Immunity > Waiver > Consent

HN18[] **State Sovereign Immunity, Abrogation of Immunity**

A state may lose sovereign immunity where the state consents to litigation, where the state is alleged to have acted unconstitutionally, or where Congress abrogates sovereign immunity. In cases of consent, waiver cannot be implied but must be unequivocally expressed. Waiver occurs if the state voluntarily invokes federal jurisdiction, or else if the state makes a clear declaration that it intends to submit itself to federal jurisdiction. This is a high standard to meet, as courts will give effect to a state's waiver of *Eleventh Amendment* immunity only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.

Constitutional Law > State Sovereign Immunity > Waiver > Consent

HN19[] **Waiver, Consent**

A court will not extend a state's consent to federal jurisdiction for disputes with or between other government entities to consent to federal jurisdiction for cases involving private parties.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Constitutional Law > State Sovereign Immunity > Waiver > Consent

HN20[] **Alternative Dispute Resolution, Arbitration**

A court will not construe a state's consent to federal arbitration as consent to be sued in federal court for state law claims.

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Judges: Before: CLAY, GIBBONS, and WHITE, Circuit Judges. CLAY, J., delivered the opinion of the court, in which GIBBONS, J., joined. WHITE, J., delivered a separate concurring opinion. HELENE N. WHITE, Circuit Judge, concurring.

Opinion by: CLAY

Opinion

[*680] **[***2]** CLAY, Circuit Judge. Plaintiff VIBO Corporation, Inc., appeals the district court's order dismissing its antitrust claims against Defendant tobacco companies, filed pursuant to the Sherman Act, *15 U.S.C. §§ 1*, *3(a)*; dismissing its constitutional claims against Defendant Attorneys General, filed pursuant to the *Equal Protection Clause of the Fourteenth Amendment*, the *Due Process Clauses of the Fifth* **[**3]** and *Fourteenth Amendments*, and the *Due Process*, Commerce, and Compact Clauses of Article I; dismissing its request for relief from the constitutional violations, filed pursuant to *42 U.S.C. § 1983*; dismissing its state common law fraud claim; and denying its motion for preliminary injunctive relief. For the reasons set forth below, we **AFFIRM**.

BACKGROUND

Plaintiff VIBO Corp., doing business as General Tobacco, filed a Complaint against sixteen tobacco manufacturers ("Manufacturer Defendants")[1] and fifty-two Attorneys General ("Attorneys General Defendants") acting in their official capacities,[2] **[***3]** alleging federal antitrust and constitutional violations and a pendent state fraud claim. On January 6, 2010, the district court entered judgment dismissing Plaintiff's claims against Defendants for failure to state a claim or lack of subject matter jurisdiction, denying as moot Defendants' other motions to dismiss, and denying Plaintiff's request for preliminary injunctive relief. *See* *VIBO Corp., Inc. v. Conway, 594 F. Supp. 2d 758, 788-89 (W.D. Ky. 2009)*.

A. The Master Settlement Agreement

The claims at issue revolve around a November 1998 settlement, the Master Settlement Agreement (MSA), which was executed to end litigation between several states and the four largest tobacco companies at the time.[3] The litigation involved the tobacco companies' advertising strategies, which allegedly misled consumers as to the harmful and addictive effects of tobacco and inappropriately **[**5]** targeted underage consumers.

Under the MSA, the Attorneys General of several states agreed to release their past and future claims against the tobacco companies in exchange for large settlement payments, future annual disbursements from the tobacco companies managed under an approved payment scheme, **[*681]** and restrictions on the companies' future advertising and marketing schemes. The four original tobacco companies party to the MSA were known as the original participating manufacturers (OPMs). In addition to releasing their claims against the OPMs under the MSA, Attorneys General Defendants released claims against the OPMs' suppliers, retailers, and distributors. The release provided an incentive for these businesses to partner with OPMs rather than tobacco companies that had not joined the MSA, known as non-participating manufacturers (NPMs).

Attorneys General Defendants also wanted **[**6]** NPMs to join the MSA and thus be subject to its payment and marketing requirements. Thus, the MSA outlined procedures **[***4]** for NPMs to join the MSA despite not being party to the original litigation. If an NPM joined the MSA, it would become a subsequent participating manufacturer (SPM). In order to encourage the expedited entry of SPMs into the MSA, any SPM that entered the MSA within ninety days of its November 1998 execution date was "grandfathered" into the MSA and had a reduced payment obligation for its future annual payments under the payment scheme when compared with the payment obligations of non-grandfathered SPMs. However, by MSA requirement, the OPMs retained the most favorable payment terms.

In order to induce NPMs to join the MSA and in order to prevent NPMs from having a market advantage over the OPMs and SPMs that were subject to large MSA payments and marketing restrictions, the agreement permitted the states to enact "Escrow Statutes." These statutes required an NPM to make annual deposits into state escrow accounts for each state where the NPM sold its products. The escrow payment amounts were based on each company's sales in each state. The deposits were held for twenty-five **[**7]** years, in the event that a state obtained a future judgment or settlement from that NPM. If no judgment is obtained during that time, the deposit would be released back to the NPM. For many tobacco companies, especially those selling products in multiple states, the

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[1] Manufacturer Defendants are comprised of two groups of tobacco companies: three companies who were parties to the original Master Settlement **[**4]** Agreement contested in this suit and thirteen companies who joined the settlement within ninety days of its execution. These companies include Lorillard Tobacco Co.; Philip Morris USA, Inc.; R.J. Reynolds Tobacco Co.; Commonwealth Brands, Inc.; Imperial Tobacco Limited/ITL; Japan Tobacco International USA, Inc.; King Maker Marketing, Inc.; Lane Limited; Liggett Group, LLC; Lignum-2, Inc.; P.T. Djarum; Premier Manufacturing, Inc.; Santa Fe Natural Tobacco Co.; Sherman's 1400 Broadway N.Y.C., Inc.; Top Tobacco, LP; and Vector Tobacco, Inc.

[2] The Attorneys General represent forty-six states, four United States territories, the Commonwealth of Puerto Rico, and the District of Columbia. Jack Conway, the lead named defendant, is the Attorney General of the Commonwealth of Kentucky.

[3] The agreement was originally executed by eight state Attorneys General. Other states joined the MSA by initiating similar litigation against the tobacco companies in their states' courts and subsequently moving the courts to approve their agreed-upon entry into the MSA and dismiss their claims with prejudice.

payment scheme under the MSA was less burdensome than the payment schedules provided in the Escrow Statutes.

If an NPM joined the MSA later than ninety days after its execution, it would be required to negotiate an MSA "adherence agreement" with the Attorneys General. After doing so, it became a non-grandfathered SPM and was subject to higher payment obligations than the OPMs and grandfathered SPMs. A "back-payment" provision required every tobacco company that joins the MSA after ninety days of its execution to make the payments to the states that it would have been obligated to make had it joined the MSA at the time of its execution. The payment amount was based on the company's nationwide sales since 1999. The company also had to make annual payments going forward, which were based on the company's national market shares. These payments were not reduced as were the grandfathered SPMs' payments. The **[***5]** adherence agreement **[**8]** determined the back-payment amount and the annual payment obligation amount going forward.

The MSA also contained provisions to ensure that the OPMs retained favored treatment among the other participating manufacturers (PMs). If any adherence agreement of an SPM provides for more favorable terms for that company than the terms governing the OPMs under the MSA, then a clause in Section XVIII(b) of the MSA, entitled "Limited Most Favored Nations" (LMFN), granted the OPMs the right to receive those same favorable **[*682]** terms. The LMFN clause did not grant any PM the authority to vote on whether an NPM may become a party to the MSA or to determine the terms of an adherence agreement. Other provisions in the MSA governed waiver of constitutional claims, jurisdiction, venue, and arbitration agreements.

B. Plaintiff Becomes a Party to the MSA

Plaintiff entered the tobacco market in 2000, two years after the MSA's execution. Plaintiff originally operated as an NPM in a few states, including Kentucky, Florida, and North Carolina. It paid into state escrow accounts, but the states began to amend their escrow statutes to make the escrow payments more burdensome. Ultimately, Plaintiff determined that **[**9]** it would be more profitable to operate as an SPM. Plaintiff joined the MSA in 2004 by negotiating its Adherence Agreement (AA) with Attorneys General Defendants. The AA outlined Plaintiff's mandatory back-payment amount and the payment amounts it would make going forward. These payment amounts were determined, in part, based on Plaintiff's two-percent share in the national tobacco market (the largest share among NPMs at the time).

According to Plaintiff, during negotiations for the AA, Attorneys General Defendants failed to explain the extent of the payment reductions granted to grandfathered SPMs and denied Plaintiff access to this information on the grounds that other PMs' payment arrangements were confidential. Plaintiff also claims that it was assured that Attorneys General Defendants enforced their Escrow Statutes (thereby confirming to Plaintiff that it would be more beneficial to join the MSA) and that the **[***6]** LMFN clause would not prevent Plaintiff's ability to obtain more favorable terms under the MSA if it sought to do so at a later date.

After joining the MSA, Plaintiff became dissatisfied with the disparate treatment afforded the other tobacco companies, such as the lack of **[**10]** back-payments for the OPMs and the reduced payment obligations available to eligible grandfathered SPMs. Plaintiff's per-carton payment obligation to Attorneys General Defendants was higher than the obligations of the OPMs and some SPMs.

Plaintiff eventually was unable to meet its back-payment obligations and its payments going forward, as was required by its AA. In an attempt to renegotiate its position under the MSA, Plaintiff sought to execute an Amended Adherence Agreement (AAA) with Attorneys General Defendants. The AAA was more favorable to Plaintiff than the AA because it lessened Plaintiff's payment obligations. According to Plaintiff, however, the AAA did not contain more favorable terms than the OPMs or grandfathered SPMs had under the MSA.

Initially, Attorneys General Defendants were willing to execute the AAA. However, the PMs learned of the proposed AAA's terms and sent written notice to Attorneys General Defendants to remind them of the LMFN clause. Specifically, the PMs noted that if the AAA contained more favorable terms than the PMs had under the MSA, the

LMFN clause would be triggered and the PMs would seek to receive the beneficial AAA terms. Attorneys General Defendants **[**11]** requested that the PMs waive any LMFN rights that they may have if the AAA was executed, but the PMs refused to waive their rights. Based upon this knowledge, Attorneys General Defendants declined to execute the AAA with Plaintiff. As a result, Plaintiff remains a party to the MSA through its original AA.

[*683] Plaintiff initiated the present civil action alleging that Manufacturer Defendants violated two antitrust provisions of the Sherman Act by assisting with the creation of the allegedly discriminatory MSA and by invoking their allegedly baseless LMFN rights. Plaintiff also raised claims against Attorneys General Defendants, asserting that the MSA violates the *Equal Protection Clause*, *Due Process Clause*, *Commerce Clause*, and **[***7]** Compact Clause of the United States Constitution. Finally, Plaintiff raised a fraudulent inducement claim against Attorneys General Defendants for allegedly failing to provide Plaintiff with material information regarding the payment terms of the other PMs during its AA negotiations.

DISCUSSION

HN1[] We review *de novo* a district court's grant of a *Rule 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted and a district court's grant of **[**12]** a *Rule 12(b)(1)* motion to dismiss for lack of subject matter jurisdiction. *Frank v. Dana Corp., 646 F.3d 954, 958 (6th Cir. 2011)* (considering *Rule 12(b)(6)* ruling); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 775 (6th Cir. 2010)* (considering *Rule 12(b)(1)* ruling). The facts alleged by the plaintiff must be accepted as true, and those "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

I. SHERMAN ACT CLAIMS

Plaintiff challenges Manufacturer Defendants' actions under two sections of the Sherman Act, *15 U.S.C. §§ 1*, *3(a)*. ***HN2***[] The relevant provisions provide that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared [to be] illegal." *15 U.S.C. §§ 1*, *3(a)*. Plaintiff alleges that Manufacturer Defendants' refusal to waive their LMFN rights, which caused Attorneys General Defendants to reject Plaintiff's proposed AAA, constituted a *per se* illegal boycott of Plaintiff, a concerted refusal to deal with Plaintiff, and the denial of Plaintiff's equal access to an essential facility, namely, the MSA. **[**13]** Manufacturer Defendants assert that, regardless of the truth of Plaintiff's allegations, they are immunized from Plaintiff's antitrust claims under the *Noerr-Pennington* doctrine or, in the alternative, the state-action doctrine.

[*8]** The district court found that Manufacturer Defendants were immunized under both the *Noerr-Pennington* and state-action doctrines and thus dismissed these claims under *Federal Rule of Civil Procedure 12(b)(6)*.[4] We agree.

A. *Noerr-Pennington* Immunity

HN3[] Under the *Petition Clause of the First Amendment to the U.S. Constitution*, private actors have the right to petition the government for action. *U.S. Const. amend I* ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). Where **[**14]** private actors petition the government for action that would violate ***antitrust law***, the *Petition Clause* immunizes the actors from litigation in connection with their petitioning. Under **[*684]** these circumstances, private immunization from alleged violations

[4] Although the court did not address the merits of the Sherman Act claims, it did note that, with respect to the LMFN waiver claim, "it is not actually clear that the wrong alleged even falls within the scope of the Sherman Act." *VIBO Corp., 594 F. Supp. 2d at 775 n.13*. Because we agree that Manufacturer Defendants are immune from Plaintiff's antitrust claims, we similarly decline to address the merits of these claims.

of the Sherman Act is known as the *Noerr-Pennington* doctrine. *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961). "The doctrine is an "expression[] of the principle that the antitrust laws regulate business, not politics," and is designed to protect "citizens' participation in government." City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 383, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). Thus, "'[w]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) (quoting Noerr, 365 U.S. at 136). However, private actors remain liable for anticompetitive activity not associated with government petitioning or antitrust violations **[**15]** that they directly cause. Id. at 501. "The dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious." Id. at 501-02.

[*9]** ***HN4***[] "The Supreme Court has interpreted 'petitioning' to encompass activities other than legislative lobbying. For example, *Noerr-Pennington* immunity protects private actors when they file court documents and enter contracts with the government." Sanders v. Brown, 504 F.3d 903, 912 (9th Cir. 2007) (citing Calif. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), and Greenwood Utils. Comm'n v. Miss. Power Co., 751 F.2d 1484, 1505 (5th Cir. 1985)). Petitioning also includes the acts of "negotiating and entering into settlements or other agreements with the government." Sanders, 504 F.3d at 912 (citing Campbell v. City of Chicago, 823 F.2d 1182, 1186-87 (7th Cir. 1987)). Some courts have held that a competitor's conduct of boycotting constitutes protected petitioning intended to induce government action, so long as the boycotting is not for the purposes of contracting for higher prices and does not amount to direct marketplace injury. *See* Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem'l Hosp., 185 F.3d 154, 157-60 (3rd Cir. 1999); **[**16]** Sandy River Nursing Care v. Aetna Cas., 985 F.2d 1138, 1141-44 (1st Cir. 1993); Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288, 296-97 (8th Cir. 1978).

Moreover, ***HN5***[] the bad intent or anticompetitive motivation of private actors seeking government action is irrelevant to the application of Noerr-Pennington. Campbell v. PMI Food Equip. Grp., Inc., 509 F.3d 776, 790 (6th Cir. 2007). This is so because it is "impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests[, and it is likewise] impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials." Omni Outdoor Adver., 499 U.S. at 383.

Here, Manufacturer Defendants assert *Noerr-Pennington* immunity from Plaintiff's Sherman Act claims because their involvement with the MSA and notice of their LMFN rights amounted to petitioning. Plaintiff argues that *Noerr-Pennington* does not apply because this is not a situation where Manufacturer Defendants petitioned Attorneys General Defendants for antitrust action, but rather where Manufacturer Defendants **[**17]** directly **[*685]** violated ***antitrust law***. *See* Allied Tube, 486 U.S. at 501-02. We **[***10]** disagree. Even taking Plaintiff's factual allegations as true, it is clear that the state governments' actions were the actual cause of the alleged antitrust violations. Although Manufacturer Defendants sent notice to Attorneys General Defendants that they would not waive their LMFN rights—to the extent that the AAA would trigger the LMFN clause at all—the LMFN clause itself creates no vote or veto power for the PMs; all decision-making authority rests with Attorneys General Defendants.[5] Moreover, Manufacturer Defendants' allegedly selfish motivation in refusing to waive their LMFN rights is immaterial.

Attorneys General Defendants were free to accept or reject both the MSA and the AAA, regardless of the explicit or implicit encouragement of Manufacturer Defendants. They could have executed the AAA and risked the possibility

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[5] Plaintiff also argues that the LMFN clause essentially granted veto power to the PMs in determining whether Plaintiff and Attorneys General Defendants could effectuate the AAA and that the PMs persuaded or coerced the Attorneys General to reject the AAA. We find no such power founded in the LMFN clause or the MSA, in general. Moreover, Plaintiff admitted that Manufacturer Defendants have "invoked" their LMFN rights on prior occasions, but that Attorneys General Defendants ignored the Manufacturer Defendants' petitioning **[**18]** in those instances. Plaintiff thus partially recognizes that only Attorneys General Defendants hold the decision-making power.

of triggering the LMFN clause, but they decided that the AAA was not worth that risk. Thus, the decision not to execute the AAA rested with Attorneys General Defendants. As the district court noted:

> Accepting all of the plaintiff's allegations as true, the plaintiff has merely alleged a classic example of a claim for which the *Noerr-Pennington* doctrine grants immunity. . . . [P]rivate actors . . . have exerted influence on the government actors; and, as a result of that influence, the government actors have declined to sign and execute the [AAA]. . . . [S]imply put, the [Manufacturer Defendants] have petitioned for, and received, certain government action that creates anti-competitive effects upon the plaintiff. Under the *Noerr-Pennington* doctrine, the defendant manufacturers are entitled to immunity for the anti-competitive effects of their **[**19]** successful petition for government action.

VIBO Corp., 594 F. Supp. 2d at 774 (internal footnote omitted). We find this reasoning to be sound.

[*11]** Plaintiff next argues that even if *Noerr-Pennington* initially applies, Manufacturer Defendants lose their immunity under the doctrine's "sham exception." ***HN6***[] The sham exception to *Noerr-Pennington* prevents the application of immunity where a defendant's act of "petitioning" was "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Omni Outdoor Advert., 499 U.S. at 380* (citing *Noerr, 365 U.S. at 144*). This exception "encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id*.; *N. Ky. Right to Life Comm., Inc. v. Ky. Registry of Election Fin., No. 95-6334, 1998 U.S. App. LEXIS 495, at *17-18 (6th Cir. Jan. 7, 1998)*; *Eaton v. Newport Bd. of Educ., 975 F.2d 292, 298 (6th Cir. 1992)*. "A 'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all, not one 'who genuinely seeks to achieve his governmental result, but **[**20]** does so through improper **[*686]** means.'" *Omni Outdoor Advert., 499 U.S. at 380* (quoting *Allied Tube, 486 U.S. at 500 n.4, 507 n.10*) (internal citations and emphasis omitted); *Knology, Inc. v. Insight Commc'n Co., LP, 393 F.3d 656, 658-59 (6th Cir. 2004)*. One "classic" example of sham petitioning is where a defendant files "frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *Omni Outdoor Advert., 499 U.S. at 380*.

On appeal, Plaintiff asserts that the "sham" exception applies because Manufacturer Defendants knew that the AAA did not contain more favorable terms than the PMs had under the MSA, and therefore did not trigger the LMFN clause, but the PMs nonetheless "invoked" their LMFN rights. Plaintiff undermines its argument that Manufacturer Defendants' petitioning was a sham by admitting that Manufacturer Defendants actually wanted to prevent the execution of the AAA. Thus, by Plaintiff's own admission, Manufacturer Defendants petitioned for a specific outcome from the government and succeeded; this is the precise situation that falls outside of the sham exception. *See id*.; *Noerr, 365 U.S. at 144*.

[***12] B. [**21] State-Action Immunity

Although we find that Manufacturer Defendants are protected from Plaintiff's antitrust claims by *Noerr*-*Pennington* immunity, we also find that they are protected by the extension of state-action immunity, in the alternative.

HN7[] As the Supreme Court decided in *Parker v. Brown*, principles of federalism and state sovereignty prevent state governments' liability under the Sherman Act for their allegedly anticompetitive action. *317 U.S. 341, 352, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*; *see* *Omni Outdoor Adver., 499 U.S. at 370*; *First Am. Title Co. v. Devaugh, 480 F.3d 438, 444 (6th Cir. 2007)*. This doctrine is known as state-action, or *Parker*, immunity. *First Am. Title Co., 480 F.3d at 444*. Where a state enters into an agreement with private entities and is protected by state-action immunity, that immunity extends to the private entities with whom the state deals. *S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56-57, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*; *Jackson Tenn. Hosp. Co., LLC v. W. Tenn. Healthcare, Inc., 414 F.3d 608, 612 n.4 (6th Cir. 2005)*. Although Plaintiff does not raise its antitrust claims against Attorneys General Defendants, we must first determine whether Attorneys General Defendants would have

[22]** immunity against such claims in order to decide whether that immunity extends to Manufacturer Defendants.[6]

1. State-Action Doctrine as Applied to Attorneys General Defendants

HN8[] The Sherman Act does not apply to states or state officials when acting in their sovereign capacities. *Parker, 317 U.S. at 352*. Even where the states act in conjunction with private parties, **[*687]** they remain entitled to immunity so long as they acted within their official capacity. *Omni Outdoor Advert., 499 U.S. at 374* (noting that there is also no conspiracy **[**23]** exception to the state-action doctrine). However, if a state acts as a "commercial participant in a given market," action taken in a market capacity is not **[***13]** protected. Thus, "with the possible market participant exception, *any* action that qualifies as state action is '*ipso facto* exempt from the operation of the antitrust laws.'" *Id. at 379* (quoting *Hoover v. Ronwin, 466 U.S. 558, 568, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984))* (internal alterations omitted).

Plaintiff alleges that Attorneys General Defendants were acting in a market participant capacity—not a sovereign capacity—in executing and enforcing the MSA and in refusing to execute the AAA. ***HN9***[] A state is a market participant when it acts "in a proprietary capacity as a purchaser or seller with regard to the challenged action" or its actions "constitute[] direct state participation in the market." *Huish Detergents, Inc. v. Warren Cnty., 214 F.3d 707, 714-15 (6th Cir. 2000)* (quoting *White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 208, 103 S. Ct. 1042, 75 L. Ed. 2d 1 (1983))* (internal citation marks omitted). A state does not become a market participant "simply because . . . [it] labels its actions as an 'agreement.'" *Huish Detergents, 214 F.3d at 715* (examining a state's market participant **[**24]** status in the dormant *commerce clause* context); *see A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc., 263 F.3d 239, 265 n.55 (3rd Cir. 2001)* (explaining the relationship of the market participant exception in dormant *commerce clause* jurisprudence to an assertion of state-action immunity against a claim related to the MSA).

Plaintiff does not allege any facts necessary to show that Attorneys General Defendants were acting as market participants. Plaintiff's allegation that Attorneys General Defendants were using their contractual powers when executing and enforcing the MSA is unhelpful to its claim. *See Huish Detergents, 214 F.3d at 715*. The Third Circuit considered this limited issue in a related circumstance, and noted in dicta that "[i]n joining the Multistate Settlement Agreement, the States did not enter the tobacco market as a buyer or seller, nor did they assume control or ownership of any entity within the market. . . . [T]he States' actions would not fall under the market participant exception to *Parker* immunity." *A.D. Bedell Wholesale Co., 263 F.3d at 265 n.55*. We agree.

[*14]** We hold that Attorneys General Defendants acted in their sovereign capacities, and not their market **[**25]** participant capacities, in enacting and enforcing the MSA and in deciding to forgo the AAA. Therefore, they are protected by state-action immunity.

2. State-Action Doctrine as Applied to Manufacturer Defendants

HN10[] Where a state is protected by state-action immunity, that immunity extends to private entities involved in the same course of dealing. *S. Motor Carriers Rate Conference, 471 U.S. at 56-57*; *Jackson Tenn. Hosp. Co., 414 F.3d at 612 n.4* (noting that state-action immunity would be worthless if the private parties dealing with the immunized states were also not protected). Because we have determined that Attorneys General Defendants are

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[6] When the district court ruled on the parties' motions, it was uncertain whether Plaintiff had also raised a Sherman Act violation claim against Attorneys General Defendants. The court found that, to the extent a claim was brought against the states, the states were immunized. During appellate argument, however, Plaintiff's counsel clarified that it had not brought antitrust claims against Attorneys General Defendants. Our analysis of the state-action doctrine as applied to Manufacturer Defendants requires that we consider whether the states are entitled to state-action immunity, but we do so only to adjudicate the antitrust claims against Manufacturer Defendants.

clearly protected by state-action immunity in relation to the MSA, such immunity extends to Manufacturer Defendants.

Plaintiff, however, points to a refinement of the state-action doctrine articulated by **[*688]** the Supreme Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. The Court held in *Midcal* that ***HN11***[] even where the challenged restraint is "clearly articulated and affirmatively expressed as state policy[,] . . . the policy must be actively supervised by the [s]tate itself" for state-action immunity to apply. *Id. at 105* **[**26]** (internal quotation marks and citation omitted); *see also* *Hoover, 466 U.S. at 568-69*. In other words, even if the state authorized private parties to engage in anticompetitive behavior, immunity does not extend to the private actors unless the state retains active supervision over the private actors. *Midcal, 445 U.S. at 105*.

The district court found that it need not apply the *Midcal* test, because (1) Plaintiff did not allege that the MSA was a law or regulatory scheme arising from a clear state policy; and (2) even if the MSA was characterized as a state regulatory scheme, Plaintiff did not allege that the MSA authorizes Manufacturer Defendants to violate ***antitrust law***. We agree. Even in its subsequent briefing, Plaintiff fails to argue the threshold issue that the MSA is a regulatory scheme that permits Manufacturer Defendants to violate ***antitrust law***. It instead argues that Manufacturer Defendants violated ***antitrust law*** when they *misinterpreted* the MSA and their rights under the LMFN clause and acted *contrary to or in conflict with* state supervision. Regardless of **[***15]** whether that assertion has merit, Plaintiff has confused the threshold inquiry of whether the state took action—such **[**27]** as passing a law, regulation, program, or other form of authorization—permitting the private actors to violate ***antitrust law***, with the subsequent inquiry as to whether Defendants were acting within the proper scope of state supervision. Furthermore, we have already found that Attorneys General Defendants, and not Manufacturer Defendants, were the direct cause of the failed execution of the AAA. Thus, Plaintiff has not demonstrated the applicability of the *Midcal* test.

Because Manufacturer Defendants are protected by *Noerr*-*Pennington* immunity and state-action immunity, we find that the district court did not err in dismissing Plaintiff's Sherman Act claims for failure to state a claim upon which relief can be granted.

II. CONSTITUTIONAL CLAIMS

Plaintiff next raises claims against Attorneys General Defendants for violations of the *Equal Protection Clause*, the *Due Process Clause*, the *Commerce Clause*, and the Compact Clause. The district court dismissed Plaintiff's *Equal Protection*, *Due Process*, and *Commerce Clause* claims as waived under the MSA and dismissed Plaintiff's Compact Clause claim for failing to state a claim upon which relief may be granted.

A. MSA Section XV Waiver

HN12[] Under Kentucky **[**28]** law, which the parties agree governs this issue, contract interpretation is a question of law, which we review *de novo*. *Noe v. PolyOne Corp., 520 F.3d 548, 551 (6th Cir. 2008)*; *Morganfield Nat'l Bank v. Damien Elder & Sons, 836 S.W.2d 893, 895 (Ky. 1992)*. ***HN13***[] Courts interpreting contracts must look to the language of the agreement to determine the parties' intent. "When no ambiguity exists in the contract, [the court] look[s] only as far as the four corners of the document to determine that intent." *Abney v. Nationwide Mut. Ins. Co., 215 S.W.3d 699, 703 (Ky. 2006)*. ***HN14***[] Whether a contract is ambiguous—in that a reasonable person would find it susceptible to different interpretations—is also a question **[*689]** of law reviewed *de novo*. *Id*.; *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 385 (Ky. Ct. App. 2002)*.

[*16]** Plaintiff agreed to be bound by the MSA when it signed the AA. Section XV of the MSA addresses the possibility of constitutional claims between the parties and contains a waiver clause. The provision states, in relevant part:

> Each Participating Manufacturer further acknowledges that it understands that certain provisions of this Agreement may require it to act or refrain from acting **[**29]** in a manner that could otherwise give rise to state or federal constitutional challenges and that, by voluntarily consenting to this Agreement it . . . waives for the purposes of performance of this Agreement any and all claims that the provisions of this Agreement violate the state or federal constitutions.

MSA Section XV.

Plaintiff and the district court adopted differing interpretations of this waiver provision. Plaintiff argues that the waiver only prevents it from challenging the constitutionality of MSA requirements that Plaintiff "act or refrain from acting" in a manner that may be deemed unconstitutional.[7] Plaintiff reads the second clause (the waiver of constitutional claims) as limited by the first clause (recognition that the Plaintiff may be required to act unconstitutionally). Plaintiff argues that the waiver does not bar its claims, because none of its constitutional claims are based on requirements that cause Plaintiff to act or refrain from acting.

On appeal, Plaintiff asserts that the district court erroneously read the waiver broadly so as to encompass all constitutional claims rather than only those claims related to requirements that Plaintiff act or refrain from acting. However, the district court actually adopted Plaintiff's limited interpretation of the waiver clause as only applying to restrictions on Plaintiff's own actions. *See* *VIBO Corp., 594 F. Supp. 2d at 782*. The difference of interpretation lies in the district court's broad construction of the phrase "requirements that Plaintiff act or refrain from acting" to mean "provisions that affect **[***17]** the Plaintiff's performance under the contract" and its liberal interpretation of what requirements "affect" Plaintiff's performance. *See id*.

Under the district court's interpretation, it concluded that three of Plaintiff's four constitutional claims related **[**31]** to provisions that affected its performance and were thus encompassed by the waiver. Specifically, the court found that Plaintiff's Equal Protection and Due Process claims involved "[t]he MSA's unequal application of its purported back-payment requirements, grandfather exemptions and escrow requirements." *Id*. Because the alleged unequal payment scheme affected Plaintiff by imposing on it obligations higher than those of the other manufacturers, the court found that these two claims affected Plaintiff's performance and were therefore waived. In regard to Plaintiff's *Commerce Clause* claim, the district court found that it "involves a requirement made on the plaintiff" and thus was waived. *Id. at 783*.

[*690] We reject both of these interpretations of the waiver clause. We read Section XV more broadly than the district court and find that all constitutional claims related to the MSA are waived, even those not grounded on restrictions to Plaintiff's own actions.[8] Our interpretation is based on a close reading of the language of the two clauses in the waiver. The waiver, which is outlined in a single sentence, states that each participating manufacturer "acknowledges that it understands" two things: **[**32]** (1) "that" it may be required to act unconstitutionally; (2) "and that" it "waives . . . any and all" of its constitutional claims. The use of "that . . . and that" demonstrates that this sentence has two separate and equal components. Thus, the second clause is not limited by the first clause, but rather they are distinct acknowledgments. For Plaintiff to succeed on its argument that the second clause was to be limited by the first, the language of the waiver would, at the very least, need more indication that the clauses are co-dependent by using language such as "that" and "therefore" or "so." The fact that both clauses are in the same sentence does not signify that they are co-dependent. Moreover, the second clause **[***18]** contains a clear, broad

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[7] Plaintiff also claims that MSA Section XV only waives *First Amendment* claims because the original litigation preceding the MSA involved advertising restrictions. This claim is utterly without merit, as the waiver language clearly **[**30]** provides for "*any and all* claims that the provisions of this Agreement violate the state or federal constitutions" and does not signal that it applies only to *First Amendment* claims. MSA Section XV (emphasis added). ***HN15***[] We look only to the plain language of the agreement to determine the parties' intent. *Abney, 215 S.W.3d at 703*.

[8] Our reading of the waiver provision does not require that we interpret the phrase "act or refrain from acting" within Section XV. However, we note that the district court's interpretation of "requirements that Plaintiff act or refrain from acting" to mean "any provision that affects Plaintiff's performance" appears **[**33]** too broad based on a reading of the provision's plain language.

waiver that Plaintiff has waived "any and all claims that the provisions of this Agreement violate the state or federal constitutions."

B. Knowing, Voluntary, and Intelligent Waiver

Plaintiff argues that even if the MSA waiver applies, the waiver was not valid because Attorneys General Defendants misrepresented certain facts regarding their enforcement of the MSA and the inability to enter into the AAA without the OPMs' approval. Specifically, Plaintiff alleges: "(1) that the plaintiff requested specific information about the extent of the exemptions granted to the grandfathered SPMs but was denied access to the information on the grounds that it was confidential . . . (2) that the plaintiff sought assurance that the Settling States were enforcing their Escrow Statutes and was so assured . . . and (3) that the Settling States represented to the plaintiff that the LMFN provision of the MSA would not affect the states' ability to grant the plaintiff entry into the MSA . . . ."[9] *VIBO Corp., 594 F. Supp. 2d at 784*.

HN16[] For a waiver to be valid, it must be made knowingly, voluntarily, and intelligently. *Fuentes v. Shevin, 407 U.S. 67, 94-95, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)*. There is a presumption **[**34]** against waivers of constitutional rights, which can be overcome by clear evidence "that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart v. Janis, 384 U.S. 1, 4, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1996)* (quoting *Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938))*.

Accepting Plaintiff's allegations of fraud as true, the district court found that the waiver was nevertheless knowing, intelligent, and voluntary because "[a]ny misrepresentations by the states as to how diligently [the] states were enforcing their Escrow Statutes or the impact of the LMFN clause have no relevance to the **[*691]** plaintiff's understanding of what rights it was giving up by signing on to the MSA." *VIBO Corp., 594 F. Supp. 2d at 785*. Plaintiff has not alleged that it did not understand that it was waiving its constitutional claims. The Section XV waiver is clear, and Plaintiff is a **[***19]** sophisticated corporation that was represented by counsel in the course of its arms-length negotiations. The waiver is valid.

Because Plaintiff knowingly, voluntarily, and intelligently agreed to Section XV, we find all of its constitutional claims, including its Compact Clause claim, properly dismissed as waived.

III. FRAUDULENT INDUCEMENT [35] CLAIM**

Finally, Plaintiff argues that the district court improperly dismissed its fraudulent inducement claim against Attorneys General Defendants. The district court found that Attorneys General Defendants were protected by sovereign immunity, so the court lacked subject matter jurisdiction to review the claim.

HN17[] The *Eleventh Amendment to the U.S. Constitution* grants immunity to states from litigation on state law claims in federal court. *U.S. Const. amend. XI*; *Sossamon v. Texas, 131 S. Ct. 1651, 1657-58, 179 L. Ed. 2d 700 (2011)*. A claim against a state officer acting in his official capacity is deemed to be a claim against the state for sovereign immunity purposes. *Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)*. Fraud is a state common law claim, and this action was filed in federal court. Plaintiff concedes that Attorneys General Defendants were acting in their official capacities. Attorneys General Defendants are thus immune from Plaintiff's allegations of fraud.

HN18[] A state may, however, lose sovereign immunity where the state consents to litigation, where the state is alleged to have acted unconstitutionally, or where Congress abrogates sovereign immunity. *Kovacevich v. Kent State Univ., 224 F.3d 806, 817 (6th Cir. 2000)*. **[**36]** In cases of consent, waiver "cannot be implied but must be unequivocally expressed." *United States v. King, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969)*; *United*

[9] These allegations also form the basis of Plaintiff's fraudulent inducement claim, analyzed *infra*.

States v. White Mt. Apache Tribe, 537 U.S. 465, 472, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003). Waiver occurs "if the [s]tate voluntarily invokes [federal] jurisdiction, or else if the [s]tate makes a 'clear declaration' that it intends to submit itself to [federal] jurisdiction." College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 675-76, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) (internal citations omitted). This is a high standard to meet, as courts "will give effect to a [s]tate's waiver **[***20]** of Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction." Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 306-07, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990) (internal citations, quotation marks, and alteration omitted).

Plaintiff claims that Attorneys General Defendants consented to litigation on matters involving the MSA and thereby waived their Eleventh Amendment immunity. On appeal, Plaintiff asserts four ways in which this occurred, none of which have merit.[10]

[*692] First, Plaintiff believes there is consent to be sued because the MSA is a contract between states, and the Supreme Court is the only forum available for disputes between states. This argument clearly fails, because the present action is not litigation between states, but between Plaintiff, which is a private party, against several states. Plaintiff next argues that consent was given since "each State consented to federal court jurisdiction to hear MSA disputes with the District of Columbia and any of the U.S. territories that is a party to the agreement because the courts in these jurisdictions are all federal courts." This argument also fails because this **[**38]** is a lawsuit by a private party against states, not between states and the District of Columbia or a territory. ***HN19***[] We will not extend consent to federal jurisdiction for disputes with or between other government entities to consent to federal jurisdiction for cases involving private parties.

Third, Plaintiff argues the existence of consent because the states "acknowledge the jurisdiction of the federal courts . . . through references to the United States District Courts for the Districts of Utah and Puerto Rico where the MSA was to be submitted for approval through a consent decree" per MSA Sections II(p), II(ss), VII, and XIII. We have reviewed the relevant MSA provisions and find no such consent. Furthermore, even though Utah and Puerto Rico joined the MSA by filing their consent decrees in **[***21]** federal courts, the jurisdiction granted under Section VII only applies to the federal courts of Utah and Puerto Rico, not a federal court in Kentucky. Moreover, such alleged consent could only be deemed as consent by Utah and Puerto Rico.

Finally, Plaintiff argues that consent to be sued was expressed in MSA Section XI(c), wherein the states agreed to arbitration that "would be subject to motions **[**39]** to affirm or vacate in federal court under the Federal Arbitration Act." This provision is inapplicable to the present lawsuit, which is not an arbitration. ***HN20***[] We will not construe consent to federal arbitration as consent to be sued in federal court for state law claims.

Because Plaintiff has not plausibly stated that Attorneys General Defendants gave clear and explicit consent to be sued on state law claims in federal courts, it has not shown that Attorneys General Defendants waived their Eleventh Amendment immunity. The fraudulent inducement claim was therefore properly dismissed.

CONCLUSION

For the reasons stated above, the judgment of the district court dismissing all claims against Defendants and denying Plaintiff's request for preliminary relief is **AFFIRMED**.

Concur by: HELENE N. WHITE

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[10] We note that the MSA would have permitted **[**37]** the jurisdiction of the Franklin Circuit Court of the Commonwealth of Kentucky on Plaintiff's fraud claim. MSA Section VII permits jurisdiction of the "Court" over disputes, and Section II(p) defines "Court" as the court in each settling state where the consent decree was presented for approval. In this case, Kentucky's consent decree was entered by the Franklin Circuit Court on December 21, 1998. Kentucky's consent to jurisdiction in the Franklin Circuit Court obviously does not extend to the federal district court in Kentucky.

Concur

[*22] CONCURRENCE**

HELENE N. WHITE, Circuit Judge, concurring.

I concur in the majority opinion for the reasons stated in Sections IA, II, and III.

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Dumas Towing, LLC v. DeArmond

United States District Court for the Northern District of Texas, Amarillo Division

February 24, 2012, Decided; February 24, 2012, Filed

2:11-CV-121-J

Reporter

2012 U.S. Dist. LEXIS 24012 *; 2012-1 Trade Cas. (CCH) P77,808; 2012 WL 620332

DUMAS TOWING, LLC, Plaintiff, v. SHERIFF J.E. (BO) DeARMOND, individually and in his capacity as sheriff of Moore County, State of Texas, and SCOTT HIGGINBOTHAM, individually and in his capacity as county attorney of Moore County, State of Texas, Defendants.

Core Terms

towing, non-consent, alleges, anti-trust, damages, official capacity, property interest, summary judgment, sheriff, wrecker, qualified immunity, preempted, rotation, argues, decision to remove, local government, complaints, conspiracy, reasons

Counsel: [*1] For Dumas Towing, LLC, a Texas limited liability company, Plaintiff: Darrell Ray Carey, LEAD ATTORNEY, Hester McGlasson & Cox, Canyon, TX.

For Sheriff J.E. (Bo) DeArmond, individually and in his capacity as Sheriff of Moore County, State of Texas, Defendant: Matt D Matzner, LEAD ATTORNEY, Mark W McBrayer, Crenshaw Dupree & Milam, Lubbock, TX; Traci Siebenlist, Crenshaw Dupree & Milam LLP, Lubbock, TX.

Judges: MARY LOU ROBINSON, UNITED STATES DISTRICT JUDGE.

Opinion by: MARY LOU ROBINSON

Opinion

Memorandum Opinion

Plaintiff Dumas Towing, LLC, in an unverified complaint, is suing Defendant J.E. (Bo) DeArmond in his individual and official capacity as sheriff of Moore County for violations of the Motor Carrier Safety Act, federal and state anti-trust violations, and state law claims for tortious interference of a business relationship and civil conspiracy. [1] Before the Court is Defendant J.E. (Bo) DeArmond's ("DeArmond") *Motion for Summary Judgment.* Defendant has moved for summary judgment on all of Plaintiff's claims based on federal law. Plaintiff has not responded to Defendant's motion.

Facts

[1] This Court dismissed Defendant's state law claims in a previous order.

Plaintiff Dumas Towing, LLC is a Texas limited liability **[*2]** company with its principal place of business in Dumas, Moore County, Texas. Defendant J.E. DeArmond is the sheriff of Moore County.

As sheriff of Moore County, one of Defendant DeArmond's responsibilities is to keep a towing rotation list for non-consent tows. This towing rotation list determines which wrecker companies the local government will contact to tow vehicles where the owner or driver is either incapable or unwilling to call a wrecker service. Defendant avers that the non-consent towing list is under his discretion and that there is no local statute that determines which wrecker services are included on this list.

Plaintiff alleges that, at one point, it was included on the towing rotation list. Plaintiff alleges that, after a number of complaints from individuals whose cars were towed, it was removed from the list in violation of its rights. Plaintiff alleges that while it was on the towing list, the Defendant put conditions on who Plaintiff could hire and that the Defendant would not allow Plaintiff to appear at accident scenes even if the tow was not a non-consent tow. Plaintiff requests compensatory damages, punitive damages "against the individual and non-governmental **[*3]** Defendants," court costs, attorneys fees, and for this Court to enjoin Defendant's "current regulation on the business of Plaintiff."

Defendant argues that Plaintiff's removal was not arbitrary or capricious, and that, acting in his official capacity as sheriff, he removed Plaintiff because of his disruptive behavior. Defendant alleges Plaintiff refused to stand down from a non-consent tow when asked and was untruthful to Defendant regarding a tow sharing arrangement with a competitor wrecker service. Defendant avers that Dumas police and private citizens complained that Plaintiff was leaving debris on the freeway following tows, which created a potential safety hazard. Plaintiff alleges that these complaints were without merit.

Summary Judgment Standard

A motion for summary judgment should be granted if the movant shows that there is no genuine issue as to any material fact. *Fed. R. Civ. P. 56(a)*.

A party who moves for summary judgment has the burden of identifying the parts of the pleadings and discovery on file that, together with any affidavits, show the absence of a genuine issue of material fact. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The nonmovant must set forth **[*4]** specific facts that show a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. To determine whether a genuine issue of material fact exists, courts must resolve all ambiguities of fact in favor of the non-moving party. *Id.* Summary judgment is mandated if the nonmovant fails to sufficiently establish the existence of an element essential to her case on which she bears the burden of proof at trial. *Nebraska v. Wyoming, 507 U.S. 584, 590, 113 S. Ct. 1689, 123 L. Ed. 2d 317 (1993)*; *Celotex Corp., 477 U.S. at 322*; *Cutrera v. Bd. of Supervisors of La. State Univ., 429 F.3d 108, 110 (5th Cir. 2005)*; *Patrick v. Ridge, 394 F.3d 311, 315 (5th Cir. 2004)*.

Violation of *49 U.S.C. § 14501*

Plaintiff alleges Defendant violated *§ 14501(c)* of the Motor Carrier Safety Act, which prohibits states from regulating the trucking industry except for safety or to control fees charged by towing companies for non-consent towing. See *49 U.S.C. § 14501*.

Plaintiff alleges that Defendant's act of removing Plaintiff from the non-consent tow list was preempted by *§ 14501* because the Defendant (a) attempted to interfere, for reasons other than safety, with who Plaintiff hired; (b) refused to allow Plaintiff to tow consent **[*5]** tows at the scene of an accident; (c) arbitrarily removed Plaintiff from the non-consent tow rotation list; and (d) conditioned Plaintiff's inclusion on the non-consent tow rotation list for reasons other than towing.

Defendant argues that § 14501 does not preempt his decision to remove Plaintiff from the non-consent tow list. He argues that his decision was a "proprietary" local government action that is not subject to federal preemption. He cites a Fifth Circuit ruling where the Court determined, relying on the United States Supreme Court's holding in *Boston Harbor, Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc, 507 U.S. 218, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993)* ("Boston Harbor"), that *49 U.S.C. § 14501(c)* did not preempt a city's ability to enter into a contract with a single tow company to handle non-consent tows. See *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex., 180 F.3d 686, 691 (5th Cir. 1999)*("Cardinal Towing").

In *Boston Harbor*, the Supreme Court found that "when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, **[*6]** such action does not constitute regulation subject to preemption." *Cardinal Towing at 691* (citing *Boston Harbor).* The Fifth Circuit, following the Court's decision in *Boston Harbor*, found in *Cardinal Towing* that the decision by a city to create an exclusive contract with a single tow company was not preempted by *§ 14501(c)*. The Court examined two factors to determine whether *§ 14501* preempted the local government's decision to grant exclusive towing rights. It examined if (1) the challenged action essentially reflects the entity's own interests in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances; and (2) if the narrow scope of the challenged action defeats an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem. *Id. at 693*.

In Defendant De Armond's affidavit he gives a number of reasons for removing Plaintiff from the non-consent tow list. He had received complaints that Plaintiff had left debris on the freeway following a tow. Plaintiff refused to stand down from a non-consent tow when Defendant asked. The local police **[*7]** felt uncomfortable working with the Plaintiff, and the Plaintiff made false statements to the Defendant about a tow sharing arrangement between Plaintiff and another wrecker service. Plaintiff alleges it was removed because of complaints against him that were unfair and alleges Defendant made a number of demands regarding hiring practices that Plaintiff refused to accept. Plaintiff presents no evidence that Defendant requested Plaintiff change its hiring practices.

Defendant's decision to remove Plaintiff from the towing list—to ensure safe towing with minimal problems—is a proprietary decision. Defendant maintained a non-consent towing list to ensure non-consent tows were effectively and safely dealt with following an accident. After working with the Plaintiff, the Defendant determined Plaintiff was not effectively carrying out its task. Defendant's concerns are similar to those a private company would have when determining with whom to do business.

Furthermore, Plaintiff does not present evidence that Defendant was attempting to promote a general policy with his decision to remove Plaintiff. Defendant claims that he removed Plaintiff after receiving complaints from both his employees **[*8]** and private individuals regarding Plaintiff's service, and that Plaintiff spoke dishonestly to him. These reasons defeat the inference that Defendant was attempting to promote a general policy with his decision to remove the Plaintiff. Accordingly, Defendant's actions are not preempted by *49 U.S.C. § 14501*.

Federal Anti-Trust Claim

Plaintiff alleges Defendant's decision to remove Plaintiff from the non-consent towing list violated state and federal anti-trust laws. It requests injunctive relief and damages under *15 U.S.C. § 15* and *26*, respectively. Defendant argues (1) that, under federal law, Plaintiff cannot recover damages because he was acting in his official capacity as sheriff and that (2) Plaintiff cannot establish that a common scheme exists between the Defendant and other entities in violation of anti-trust laws.

Damages under 15 U.S.C. § 15

Under federal anti-trust law, Plaintiff cannot seek damages against Defendant for acting in his official capacity. "[N]o damages, interest on damages, costs or attorney's fees may be recovered under Section 4, 4A, 4C of the Clayton Act (*15 U.S.C. §§ 15*, *15a*, or *15c*) from any local government, or official or employee thereof acting in an official **[*9]** capacity." *15 U.S.C. § 35*. A "local government" includes a county or city. *15 U.S.C. § 34*. Defendant DeArmond was acting in his official capacity as sheriff in running the non-consent towing list. Plaintiff cannot pursue damages against him.

Violation of 28 U.S.C. § 1

Defendant argues he violated no applicable anti-trust laws because there was no common scheme between him and another entity to restrain trade. He further argues that the Plaintiff cannot establish that he suffered any damages as a result of being removed from the non-consent towing rotation list. He presents Plaintiff's records showing Plaintiff continued to operate its business regardless of his inclusion on the non-consent tow list. The Defendant also avers that he made the decision to remove Plaintiff for reasons other than to restrict trade. Plaintiff, although not specifying under which section of federal anti-trust law its suit falls under, alleges that the Defendant "engaged in or conspired with others to participate in violations of state and federal ***antitrust law***." Defendant treats this language as a claim under *28 U.S.C. § 1*, which forbids "every contract, combination in the form of trust or otherwise, or conspiracy, **[*10]** in restraint of trade." *28 U.S.C. § 1*. The Court agrees that *28 U.S.C. § 1* is the applicable federal law.

To establish an antitrust violation under *15 U.S.C. § 1*, a Plaintiff must prove that "(1) the defendant engaged in a conspiracy; (2) that restrained trade; (3) in the relevant market." *Golden Bridge Technology, Inc. v. Motorola, Inc., 547 F.3d 266, 271 (5th Cir. 2008)*. To prove a conspiracy occurred, "the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement." *Golden Bridge Technology, 547 F.3d at 271*. A plaintiff must present evidence that the defendant was part of a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*.

Plaintiff presents no evidence that Defendant was engaged in a common scheme against the Plaintiff. His sole allegation to that point, that the Defendant was a friend with the owner of a wrecker service which was part of the non-consent rotation list, is unsupported by evidence. In the face of a failure to present evidence of a conspiracy between two parties or to show an actual restraint of market activities, **[*11]** Defendant's request for summary judgment on Plaintiff's federal anti-trust claim is granted.

Plaintiff's Due Process Claim

Plaintiff alleges he had a property interest in remaining on the non-consent tow list, and his removal from the list was an arbitrary and capricious violation of his right to due process. Defendant argues that he is immune from a suit in his individual capacity because of qualified immunity, and that Plaintiff has no property interest in remaining on the non-consent towing list.

Qualified Immunity

Qualified immunity is a defense that protects government officials from suit when they exercise the discretionary functions of their office. *See* *Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*. In order to overcome a defense of qualified immunity a plaintiff must establish that "(1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established at the time of the challenged conduct.'" *Morgan v. Swanson, 659 F.3d 359, 371 (5th Cir. 2011)*(citing *Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011))*. It is the plaintiff's burden to present evidence that a defendant is not entitled to qualified immunity when the defense is raised. *See* *Bazon ex rel. Bazan v. Hidalgo County, 246 F.3d 481, 489 (5th Cir. 2001)*.

Plaintiff **[*12]** presents no evidence to refute the claim that Defendant is entitled to qualified immunity. Defendant is therefore entitled to qualified immunity from a suit in his individual capacity as a matter of law.

Plaintiff's Property Interest

Plaintiff does not have a property interest to maintain a suit against Defendant in his official capacity as sheriff of Moore County. For there to be a due process violation by Moore County, the Plaintiff must show a "life, liberty, or property interest protected by the *Fourteenth Amendment* and identify a state action that resulted in the deprivation of that interest." *Blackburn v. City of Marshall, 42 F.3d 925, 935 (5th Cir. 1995)*. A property interest in a towing list is created by a "Texas or local statute, ordinance, or regulatory scheme governing the wrecker list." *Id. at 941*. An individual "must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)*.

In *Blackburn v. City of Marshall*, the Fifth Circuit determined that a wrecker service did not have a protected property interest in remaining **[*13]** on a non-consent towing list managed by the local government. It wrote, "We have consistently held that the mere existence of a governmental program or authority empowered to grant a particular type of benefit to one such as the plaintiff does not give the plaintiff a property right, protected by the *due process clause*, to receive the benefit, absent some legitimate claim of entitlement—arising from statute, regulation, contract, or the like—to the benefit. *Blackburn at 941* [citations omitted]. Plaintiff in this case presents no evidence supporting anything more than a unilateral expectation of remaining on the non-consent towing list, as Defendant avers he told Plaintiff the list was at his discretion prior to including Plaintiff. Accordingly, Plaintiff had no vested property interest in remaining on Defendant's non-consent towing list.

Conclusion

Defendant's motion for summary judgment on Plaintiff's claims that Defendant's action is preempted by *49 U.S.C. § 14501*, that it violated Anti-Trust provision *15 U.S.C. § 1*, and that it violated a constitutionally protected property interest is granted in full. Plaintiff's claims against Defendant, in both his individual capacity and official **[*14]** capacity as sheriff of Moore County, will be dismissed with prejudice.

It is SO ORDERED.

Signed this the 24th day of February 2012.

/s/ Mary Lou Robinson

MARY LOU ROBINSON

UNITED STATES DISTRICT JUDGE

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Guinn v. Mount Carmel Health

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

February 27, 2012, Decided; February 27, 2012, Filed

Case No. 2:09-cv-226

Reporter

2012 U.S. Dist. LEXIS 24353 *; 2012-1 Trade Cas. (CCH) P77,806; 2012 WL 628519

VINCENT L. GUINN, M.D., Plaintiff, v. MOUNT CARMEL HEALTH, et al., Defendants.

Prior History: *Guinn v. Mount Carmel Health Sys., 2010 U.S. Dist. LEXIS 85152 (S.D. Ohio, July 23, 2010)*

Core Terms

Defendants', allegations, antitrust, patients, motion to dismiss, scans, privileges, business relationship, relates, medical services, anti trust law, harmed, factual allegations, Clinical, Sherman Act, radiologist, competitor, consumer, second amended complaint, race discrimination, false statement, pleaded, suspend, tortious interference, similarly situated, defamation claim, facilities, imaging, reasonable inference, medical practice

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Pleadings > General Overview

HN1[] **Pleading & Practice, Pleadings**

Documents are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the plaintiff's claim.

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

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

Fed. R. Civ. P. 12(b)(6) provides for dismissal of actions that fail to state a claim upon which relief can be granted. Under this standard, a court must construe the complaint in favor of the plaintiff, accept the factual allegations contained in the complaint as true, and determine whether the plaintiff's factual allegations state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The factual allegations of a pleading "must be enough to raise a right to relief above the speculative level.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations. 15 U.S.C.S. § 1. Section 2 of the Sherman Act prohibits monopolies and attempts, combinations, or conspiracies to monopolize trade or commerce. 15 U.S.C.S. § 2. Section 4 of the Clayton Act provides for a private right of action under the Sherman Act, with the recovery of treble damages, costs, and attorney fees to any person, who has been injured in his business or property by reason of anything forbidden in the antitrust laws. 15 U.S.C.S. § 15(a).

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

Ohio's antitrust statute, the Valentine Act, was modeled after the Sherman Act, and the Ohio Supreme Court has interpreted the Valentine Act in light of federal decisions construing the Sherman Act.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN5[] **Standing, Requirements**

Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement a court must dismiss it as a matter of law--lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be. Antitrust standing and U.S. Const. art. III standing are not one and the same, and a court not only may--but it must--reject claims under Fed. R. Civ. P. 12(b)(6) when antitrust standing is missing.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Standing, Requirements**

Of the various requirements for establishing antitrust standing, the one that concerns the instant analysis is antitrust injury, which is a necessary, but not always sufficient, condition of antitrust standing. An antitrust claimant must show more than merely an "injury causally linked" to a competitive practice; it must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Standing, Requirements**

Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **Standing, Requirements**

The antitrust laws were enacted for the protection of competition, not competitors. Antitrust standing ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. To sufficiently allege harm to competition, a plaintiff must put forth factual allegations plausibly suggesting that there has been an adverse effect on prices, output, or quality of goods in the relevant market as a result of the challenged actions.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] **Standing, Requirements**

A plaintiff is required to show not merely injury to himself as a competitor, but rather injury to competition. Generally, the elimination of a single competitor, standing alone, does not prove anticompetitive effect.

Labor & Employment Law > Discrimination > Racial Discrimination > General Overview

HN10[] **Discrimination, Racial Discrimination**

Under Ohio law, it is unlawful: For any employer, because of the race of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment. *Ohio Rev. Code Ann. § 4112.02(A)*.

Labor & Employment Law > Discrimination > Reconstruction Statutes

HN11[] **Discrimination, Reconstruction Statutes**

42 U.S.C.S. § 1981 prohibits racial discrimination in the making, performance, modification, and termination of contracts. Both the Ohio Civil Rights Act and *§ 1981* are analyzed under the same standards as Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

HN12[] **Evidence, Burdens of Proof**

To establish a prima facie case of discrimination by the defendant, the plaintiff must show (1) that he is a member of a protected group; (2) that he was subject to an adverse employment decision; (3) that he was qualified for the position; and (4) that he was replaced by a person outside of the protected class. the fourth element may also be satisfied by showing that similarly situated non-protected employees were treated more favorably.

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

HN13[] **Evidence, Burdens of Proof**

A prima facie case is an evidentiary standard, not a pleading requirement. A court reviews the prima facie case standard in the Fed. R. Civ. P. 12(b)(6) context to determine whether a plaintiff has given the defendant fair notice of his or her claim and the grounds upon which it rests—not to determine if the standard is met.

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

HN14[] **Conspiracy Against Rights, Elements**

The elements of a 42 U.S.C.S. § 1985 claim are: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to either person or property or a deprivation of any right or privilege of a United States citizen.

Torts > ... > Defamation > Elements > General Overview

HN15[] **Defamation, Elements**

Defamation is a false publication that injures a person's reputation, exposes him to public hatred, contempt, ridicule, shame or disgrace, or affects him adversely in his trade or business. The essential elements of a claim for defamation under Ohio law are: (1) the defendant made a false statement; (2) that false statement was defamatory in the sense that it reflected unfavorably of the plaintiff's character or injured his trade or business; (3) the statement was published or communicated; and (4) the defendant acted with the necessary degree of fault.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN16[] **Intentional Interference, Elements**

Under Ohio law, the tort of interference with a business relationship occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another. The elements of tortious interference with a business relationship are (1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom.

Counsel: **[*1]** For Vincent L. Guinn, MD, Plaintiff: James Scott Mowery, Jr, LEAD ATTORNEY, Mowery, Youell and Galeano, Dublin, OH; Nicholas William Yaeger, Mowery, Youell & Galeano, Ltd., Columbus, OH.

For Mount Carmel Health Systems, c/o Donald E. Davies, Statutory Agent, Trinity Health Corporation, c/o Kelly Leahy, Stautory Agent, doing business as, Mount Carmel Health Systems, Claus Von Zychlin, Individually and in his official capacity with Mount Carmel Health Systems as President and CEO, Thomas R. Alexis, MD, Individually and in his official capacity with Mount Carmel Health Systems, Michael R. Murnane, MD, Individually and in his official capacity as Chairperson of the Medical Executive Committee of Mount Carmel Health Systems, Medard R. Lutmerding, MD, Individually and in his official capacity as Chairperson of the Clinical Department Council of Mount Carmel Health Systems, Barney B. Beaver, DO, Knollwood Physicians Group, Mount Carmel Health, Douglas G. Finnie, M.D., individually and in his official capacity with Mount Carmel Health Systems, Emergency Services, Inc., Jeffrey B. Thurston, D.O., individually and in his official capacity with Mount Carmel Health Systems, Columbus Inpatient Care, **[*2]** Inc., Dr. William J. Fanning, Cardiothoracic Surgeons, Inc., Defendants: Dan L. Cvetanovich, LEAD ATTORNEY, Sabrina Christine Haurin, Bailey Cavalieri LLC, Columbus, OH.

For Columbus Cardiology Consultants, Inc., Defendant: Dan L. Cvetanovich, LEAD ATTORNEY, Sabrina Christine Haurin, Bailey Cavalieri LLC, Columbus, OH; David Arthur Caborn, Caborn & Butauski Co LPA, Columbus, OH.

Judges: EDMUND A. SARGUS, JR., UNITED STATES DISTRICT JUDGE. Magistrate Judge Terence P. Kemp.

Opinion by: EDMUND A. SARGUS, JR.

Opinion

OPINION AND ORDER

This matter is before the Court for consideration of Defendants' Motion to Dismiss Claims for Relief One, Two, Three, Six, and Seven of Plaintiff's Second Amended Complaint ("Defendants' First Motion to Dismiss") (Doc. 50), which is **GRANTED IN PART AND DENIED IN PART**, and Defendants Claus Von Zychlin, Douglas G. Finnie, M.D., Columbus Cardiology Consultants, Inc., Emergency Services, Inc., Jeffrey B. Thurston, D.O., Columbus Inpatient Care, Inc., William J. Fanning, M.D., and Cardiothoracic Surgeons, Inc.'s Motion to Dismiss Claims for Relief Four and Five of Plaintiff's Complaint ("Defendants' Second Motion to Dismiss") (Doc. 51), which is **GRANTED IN PART AND DENIED IN PART**.

I. Background

The **[*3]** facts relied upon in this Opinion and Order were taken from the pleadings or documents that are properly considered part of the pleadings. *See* *Weiner v. Klais and Co., Inc., 108 F.3d 86, 89 (6th Cir. 1997)* (***HN1***[] documents are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the plaintiff's claim); *see also* *Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 445 (6th Cir. 1997)* (if extrinsic materials merely "fill in the contours and details of the plaintiff's complaint, and add nothing new," they may be considered without converting the motion to one for summary judgment).

Plaintiff, Vincent L. Guinn, M.D., is a successful African American physician who opened his medical practice in 2002 specializing in electrophysiology and cardiac care. Prior to Dr. Guinn opening his own practice, he was associated with a group practice and, during the years 2001-2002, was the chairperson of the Department of Cardiovascular Disease of Mount Carmel Medical Center in Columbus, Ohio and the vice chairperson in 1998 and 1999.

In 2007, Dr. Guinn was primarily associated with Defendant Mount Carmel Health. On approximately April 3, 2007, the Clinical **[*4]** Department Council of Mount Carmel West Hospital held a meeting at which Dr. Guinn's conduct in placing an intracardial device in a patient was discussed. Dr. Guinn alleges that Defendant Thomas Alexis, M.D. reported to the Council that Dr. Guinn had placed the device in a patient whose previous intracardial device pocket had broken down and was infected. Dr. Guinn alleges that Dr. Alexis' statement was false and that he knew that it was false when he reported it. Based upon this reported incident, the Clinical Department Council "summarily suspended" Dr. Guinn's clinical privileges. (Pl.'s Second Am. Compl. ¶ 33; Doc. 45.)

On April 13, 2007, Mount Carmel Health notified Dr. Guinn of the Clinical Department Council's decision to suspend his clinical privileges and informed him that Mount Carmel Health's Medical Executive Committee would review the decision. The Medical Executive Committee met on April 17, 2007, and upheld the Clinical Department Council's determination to summarily suspend Dr. Guinn's clinical privileges.

On October 16, 2007, Mount Carmel Health held an Ad Hoc Hearing on Dr. Guinn's suspension. The Ad Hoc Hearing Committee upheld the Medical Executive Committee's recommendation **[*5]** to suspend Dr. Guinn's privileges. Mount Carmel Health's Board of Trustees reviewed and upheld the Ad Hoc Hearing Committee's decision on July 14, 2008.

On March 24, 2009, Dr. Guinn filed this action. He has amended the complaint twice. The second amended complaint names as defendants Mount Carmel Health, Mount Carmel Health Systems, Trinity Health Corporation, Chief Executive Officer of Mount Carmel Health Systems Claus Von Zychlin, Medard R. Lutmerding, M.D. and Emergency Services, Inc., Thomas R. Alexis, M.D. and Mount Carmel Health Providers, Inc. d/b/a Big Run Internal Medicine, Michael R. Mumane, M.D. and Columbus Cardiology Consultants, Inc., Barney B. Beaver, D.O. and Knollwood Physicians Group/Heart and Rhythm Specialists, Jeffrey B. Thurston, D.O. and Columbus Inpatient Care, Inc., William J. Fanning, M.D. and Cardiothoracic Surgeons, Inc., and Douglas G. Finnie, M.D.

Dr. Guinn alleges that Defendants purposefully and intentionally engaged in a course of conduct to drive him from the medical field of electrophysiology and cardiac care by claiming falsely that his work relating to one specific patient fell below the applicable standard of care. Dr. Guinn contends that Defendants' **[*6]** motivation was to realize economic gain by excluding him as a competitor and to discriminate against him because he is an African American. In the second amended complaint he alleges claims for: (1) race discrimination in violation of *42 U.S.C. § 1981*; (2) conspiracy to engage in race discrimination in violation of *42 U.S.C. § 1985*; (3) race discrimination in violation of *Ohio Revised Code §§ 4112.02*, *4112.99*; (4) tortious interference with business relationships[1]; (5) defamation; (6) antitrust violations under the Sherman Act, *15 U.S.C. §§ 1*, *2*; and (7) antitrust violations under Ohio's Valentine Act, *Ohio Revised Code § 1331 et seq*.

On July 24, 2011, Defendants filed their First Motion to Dismiss. (Doc. 50.) Dr. Guinn filed his Memorandum in Opposition **[*7]** to Defendants' First Motion to Dismiss (Doc. 63) on October 7, 2011 and on November 7, 2011, Defendants filed a Reply Memorandum in Support of their First Motion to Dismiss (Doc. 69).

Also on July 24, 2011, Defendants Claus Von Zychlin, Douglas G. Finnie, M.D., Columbus Cardiology Consultants, Inc., Emergency services, Inc., Jeffrey B. Thurston, D.O., Columbus Inpatient Care, Inc., William J. Fanning, M.D., and Cardiothoracic Surgeons, Inc.'s ("Moving Defendants") filed Defendants' Second Motion to Dismiss. (Doc. 51.) On October 7, 2011, Dr. Guinn filed his Memorandum in Opposition to Defendants' Second Motion to Dismiss (Doc. 64), and on November 7, 2011, the Moving Defendants filed their Reply Memorandum in Support of Defendants' Second Motion to Dismiss (Doc. 68).

II. Standard

Defendants move under ***HN2***[] *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, which provides for dismissal of actions that fail to state a claim upon which relief can be granted. Under this standard, a court must construe the complaint in favor of the plaintiff, accept the factual allegations contained in the complaint as true, and determine whether the plaintiff's factual allegations "state a claim to relief **[*8]** that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009)* (clarifying the plausibility standard articulated in *Twombly*).[2] "A claim has

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[1] Dr. Guinn refers to his claim as one for tortious interference with "contract" but alleges facts that support a claim that Defendants interfered with his business relationships. Additionally, in his Memorandum in Opposition to Defendants' Second Motion to Dismiss he argues that Defendants interfered with his business relationships. Thus, the Court, as did Defendants, accepts the claim as one for interference with business relationships.

[2] In Dr.Guinn's Memorandum in Opposition to Defendants' First Motion to Dismiss, he sets out a now defunct standard, *i.e*., this Court may dismiss a "complaint 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" (Doc. 63 at 17) (quoting *Nilvar, M.D. v. Mercy Health System Western Ohio, 142 F. Supp. 2d 859, 867 (S.D. Ohio 2000))*. That language is taken from *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, which stated that a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support **[*9]** of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. As the Sixth Circuit has explained, however, that the Supreme Court has disavowed that language:

> In [*Twombly*], the Court disavowed the oft-quoted *Rule 12(b)(6)* standard of *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)* (recognizing "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle

facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1949*. The factual allegations of a pleading "must be enough to raise a right to relief above the speculative level . . . ." *Twombly, 550 U.S. at 555*.

III. Defendants' First Motion to Dismiss

In Defendants' First Motion to Dismiss, they move for dismissal of Dr. Guinn's antitrust and discrimination claims.

A. Antitrust Claims

HN3[] Section 1 of the Sherman Act prohibits "[e]very **[*10]** contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." *15 U.S.C. § 1*. *Section 2* of the Sherman Act prohibits monopolies and attempts, combinations, or conspiracies to monopolize trade or commerce. *15 U.S.C. § 2*. *Section 4* of the Clayton Act provides for a private right of action under the Sherman Act, with the recovery of treble damages, costs, and attorney fees to "any person, who [has been] injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15(a)*.

HN4[] "Ohio's antitrust statute, the Valentine Act, was modeled after the Sherman Act, and the Ohio Supreme Court has interpreted the Valentine Act in light of federal decisions construing the Sherman Act." *Care Heating & Cooling, Inc. v. Am. Standard, Inc., 427 F.3d 1008, 1012, n. 1 (6th Cir. 2005)* (citing *C.K. & J.K., Inc., Fairview Shopping Ctr., 63 Ohio St. 2d 201, 407 N.E.2d 507 (1980))*. *See also* *Johnson v. Microsoft Corp., 106 Ohio St. 3d 278, 281, 2005 Ohio 4985, 834 N.E.2d 791 (2005)* ("we will review the status of federal [***antitrust] law*** with respect to who may properly assert an antitrust action" under the Valentine Act). Therefore, **[*11]** Dr. Guinn's claims under the Valentine Act rise or fall with those under the Sherman Act.

Defendants argue that Dr. Guinn's claims filed under the Sherman Act must be dismissed because he does not have standing to bring those claims, he has failed to sufficiently allege that Defendants entered into an express or tacit agreement to exclude him from the market, and/or because many of the individual defendants cannot conspire with one another as a matter of law based upon the intra-corporate conspiracy doctrine. Because the Court finds Defendants' first argument well taken, it need not address the remaining two.

As to Defendants' first argument, ***HN5***[] "antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [a court] must dismiss it as a matter of law--lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be." *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)*. "[A]ntitrust standing and Article III standing are not one and the same, and [a court] not only may--but [it] must--reject claims under *Rule 12(b)(6)* when antitrust standing **[*12]** is missing." *Id. at 449*. *Cf.* *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (standing, in a conventional Article III sense, requires proof of actual injury, causation and redressability).

HN6[] Of the various requirements for establishing antitrust standing, the one that concerns the instant analysis is antitrust injury, which is a "necessary, but not always sufficient," condition of antitrust standing.[3] *NicSand, Inc., 507*

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him to relief"), characterizing that rule as one "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Twombly, 550 U.S. at 563*.

Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 548 (6th Cir. 2007). The Court notes that, although Dr. Guinn set forth the incorrect standard, he does not improperly rely on that standard, and instead correctly argues that he has stated plausible claims for relief.

[3] "***HN7***[] Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Assoc. Gen.*

F.3d at 450 (quoting Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)). "An antitrust claimant must show more than merely an 'injury causally linked' to a competitive practice; it 'must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" *Id*. (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)).

HN8[] "[T]he antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" Brunswick, 429 U.S. at 488 (quoting Brown Shoe v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)). "[A]ntitrust standing 'ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.'" NicSand, Inc., 507 F.3d at 449 (citing Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)). In other words, if Dr. Guinn was harmed as a result of Defendants' actions, but consumers of the medical services offered by Dr. Guinn and Defendants suffered no ill effects, then there would be no violation of the antitrust laws. *See* Aventis Envtl. Sci. USA LP v. Scotts Co., 383 F. Supp. 2d 488, 503 (S.D.N.Y. 2005) ("In other words, if AgrEvo EH was harmed as a result of Scotts' and Monsanto's actions, but NSH consumers suffered no ill effects, then there would **[*14]** be no violation of the antitrust laws."). To sufficiently allege harm to competition, a plaintiff must put forth factual allegations plausibly suggesting that there has been an adverse effect on prices, output, or quality of goods in the relevant market as a result of the challenged actions. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 31, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984); Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 541 (2d Cir. 1993).

Dr. Guinn submits that, contrary to Defendants' assertions, he has pleaded facts that plausibly suggest that an antitrust injury has occurred, which is sufficient to confer antitrust standing:

> Here, Dr. Guinn specifically alleges that, beginning in April, 2007, the Defendants conspired and reported false information to the [Clinical Department Council] to begin a sham peer review process intending to drive Dr. Guinn from the relevant medical market. (Pls. Compl. ¶¶ 31-33, 36, 38, 42, 45, 47). The harm suffered by Dr. Guinn was that his practice was brought to a screeching halt. (Pl.'s. Compl. ¶ 40). Further, that the relevant market (*i.e*., Franklin and surrounding counties, and central Ohio) (Pl.'s Second Am. Compl. ¶ 26) was harmed. Specifically, **[*15]** substantial interstate commerce involved including medical supplies and the quality of medical services was harmed because patients that utilized Dr. Guinn's services at [Mount Carmel Health] facilities could no longer after his privileges were suspended. (Pls. Compl. ¶¶ 25-28). As a direct result of the Defendants successful monopolization of the [intracardial device] market, patients had to choose between using one of the Defendants or some other physician because Dr. Guinn could not practice medicine in that field with Mount Carmel. (*Id*.).

(Doc. 63 at 30) (relying upon New York Medscan LLC v. NY. Univ. Sch. of Med., 430 F. Supp. 2d 140 (S.D.N.Y. 2006)). Dr. Guinn also alleges that Defendants' actions negatively impacted the relevant market because they "affected the cost of medical services provided and the choices of the patients." (Doc. 63 at 23) (citing Pl.'s Second Am. Compl. ¶ 26-28).

Dr. Guinn's allegations, however, simply do not permit the Court to make a reasonable inference that Defendants' actions reduced competition in the relevant market, *i.e*., caused injury "of the type the antitrust laws were intended to prevent." Brunswick Corp., 429 U.S. at 489. While Dr. Guinn does **[*16]** restate the appropriate language consistent with antitrust injury—the quality of medical services was harmed, consumers had less choice, and the cost of medical services was negatively impacted—his factual allegations do not support these contentions. *See e.g.,* CBCInnovis v. Equifax Info. Servs. LLC, 2008-1 Trade Cas. (CCH) P76, 199, 2008 U.S. Dist. LEXIS 11700, at *18 (S.D. Ohio Feb. 4, 2008) ("Though Plaintiffs maybe correct in asserting that Equifax's Reissue Policy is resulting in 'higher prices, lower quality services, and less choice for lenders,' there is nothing more to support these

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Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983); **[*13]** *see also* Bodie-Rickett & Assocs. v. Mars, Inc., 957 F.2d 287 (6th Cir. 1982) (setting forth the factors to be balanced in such an analysis). In their motion, however, Defendants do not dispute that Dr. Guinn has sufficiently alleged that he is the proper party to bring this action.

naked assertions.... Plaintiffs have therefore failed to assert a market-wide injury or specify any competition reducing effect of Defendants' behavior. Rather, Plaintiffs appear to just be restating the antitrust laws.").

First, Dr. Guinn contends that he sufficiently alleged market-wide injury because the cost of medical services was negatively impacted by Defendants' actions. Dr. Guinn, however, provides no factual allegations to support this contention. He merely states a conclusion. There is no allegation indicating that patients in the relevant geographic area were required to pay higher costs **[*17]** for services because of Dr. Guinn's removal as a provider. For example, in the case upon which Dr. Guinn relies to support his claim that he has alleged an injury sufficient to confer antitrust standing, *New York Medscan*, the court found that the plaintiffs had alleged sufficient factual allegations that the defendants' actions negatively impacted the cost of patient services.

In that case, the plaintiffs were a radiologist, Karolyn Kerr, M.D., and a limited liability company, New York Medscan. New York Medscan provided diagnostic imaging services at its office in New York City office. That company "invested millions of dollars in high-technology imaging scanners, other equipment, and non-medical staff to provide patients with state-of-the-art diagnostic imaging[, PET/CT scans]." *Id. at 142*. The plaintiffs had a three year contractual agreement with the New York University ("NYU") school of medicine to provide office facilities, equipment, and services to NYU radiologists for PET/CT outpatient diagnostic scanning. When an insured patient received a PET/CT scan, the performing radiologist would bill the patient's health plan for the costs of administering the scan and the radiologist's **[*18]** fee for interpreting the scan. The health plan would pay most or all of these costs, either directly or through a contractual administrator such as the defendant CareCore National LLC ("CCN").

CCN controlled the PET/CT services for more than 22 million subscribers, including approximately 3.5 million subscribers in New York City. This represented a dominant share of the market in New York City. "Thus, approval by CCN [wa]s necessary for a radiologist or scanning facility to effectively compete in the New York market." *Id. at 143*. By determining which facilities and radiologists CCN would authorize to provide PET/CT services, CCN and its board members, who were radiologists competing with each other and with the radiologists and facilities they determine to authorize or refuse, "effectively control[ed] the diagnostic imaging market." *Id*. New York **[*19]** Medscan and NYU engaged in negotiations for the renewal of their contractual agreement and a CCN boardmember advised New York Medscan that if it did not renew the agreement or enter into a new contract with NYU on the terms it demanded, then New York Medscan and Dr. Kerr would lose their status as a CCN-approved facility and a CCN-approved radiologist.

The plaintiffs filed an antitrust suit, and the court, in reviewing whether the plaintiffs alleged antitrust standing sufficient to survive a motion to dismiss, evaluated the plaintiffs' allegations of market-wide injury. The plaintiffs alleged that the defendants' actions negatively impacted, *inter alia*, the price of diagnostic imaging services in the New York City area. The court agreed. The plaintiffs in that case, unlike Dr. Guinn here, set forth facts from which a reasonable inference could be made that the cost of PET/CT scans for the consumer increased significantly. That is, the consumers of PET/CT scans could no longer receive approval from CCN to obtain the scans on the specialized state-of-art equipment owned only by New York Medscan. The patients were left with the choice of paying for the scans themselves or obtaining the **[*20]** scans from Defendants on inferior equipment.

This brings the Court to Dr. Guinn's second contention as to why his allegations of harm are sufficient to confer antitrust standing, *i.e*., the quality of medical services. Dr. Guinn contends that the quality of medical services was harmed because patients who had previously utilized his services no longer had that as a choice. That injury, however, did nothing to reduce competition in the market. It is the impact upon competitive conditions in a definable market which distinguishes the antitrust violation from the ordinary business tort. Here, Dr. Guinn admits that the patients could either choose one of the physician-defendants as a doctor or some other physician. Thus, eliminating Dr. Guinn as a competitor did not eliminate competition between Defendants and other doctors in the relevant geographic area nor did it prevent the relevant patients from choosing from a large array of doctors. ***HN9***[] A plaintiff is required to show not merely injury to himself as a competitor, but rather injury to competition. Generally, "the elimination of a single competitor, standing alone, does not prove anticompetitive effect." *Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)*. **[*21]** *See also* *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)* ("Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare."); *Products Liab. Ins. Agency, Inc. v. Crum & Forster*

Ins. Cos., 682 F.2d 660, 663 (7th Cir. 1982) ("Now there is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding whether the antitrust laws have been violated."); Gentile v. Fifth Ave. Otolaryngology, Inc., No. 4:05 CV 2936, 2006 U.S. Dist. LEXIS 60881, at *17-18 (N.D. Ohio Aug. 28, 2006) ("The loss of staff privileges does not harm the consumer of medical services, but simply constitutes a personal harm to the individual physician."); Sokol v. Akron Gen. Med. Ctr., No. 5:95CV1108, 1997 U.S. Dist. LEXIS 22078, at *32, n. 4 (N.D. Ohio Sept. 30, 1997), *rev.d on other grounds*, 173 F.3d 1026 (6th Cir. 1999) ("numerous courts have concluded that the loss of a physician's staff privileges, without more, is not an antitrust injury because the loss does not harm the consumer of medical services, but simply constitutes a personal **[*22]** harm to the individual physician").

Referring back to the case upon which Dr. Guinn relies, *New York Medscan*, and its consideration of "quality" and "choice" harm, the court explained:

> The complaint alleges that the quality of PET/CT services has decreased as a result of defendants' conduct because patients who had previously received PET/CT scans at Medscan were forced to receive subsequent scans on different equipment. With the use of different imaging devices, the accuracy of comparisons of the scans decreases, thereby adversely affecting diagnosis and treatment. Further, by requiring patients to change facilities, the continuity of patient treatment is disturbed, resulting in an adverse emotional impact on patients. Thus, accepting the allegations as true, this is not a situation where, "from the consumers' point of view, nothing about the market has changed" as a result of defendants' conduct. *Balaklaw [v. Lovell*], 14 F.3d [793], 798 [(2d Cir. 1994)]. Instead, the quality of diagnostic imaging services purportedly has decreased, and the courts have repeatedly held that a decline in quality is among the injuries that the antitrust laws were designed to prevent. *See, e.g.,* Capital Imaging Assocs., P.C., 996 F.2d at 546; **[*23]** Aventis Envtl. Sci. USA LP., 383 F. Supp. 2d at 503; *Nilavar [v. Mercy Health Sys. W. Ohio], 142 F. Supp. 2d [859], 874 [(S.D. Ohio 2000)]*.

Id. at 147-48.

In the instant action, Dr. Guinn uses the phrase "quality of care," which is consistent with antitrust injury, however, the factual allegations do not plausibly suggest antitrust injury. That is, the factual allegation that the "quality of medical services was harmed because patients [who] utilized Dr. Guinn's services at MCH facilities could no longer after his privileges were suspended.... [and therefore] Patients had to choose between using one of the Defendants or some other physician because Dr. Guinn could not practice medicine in that field with Mount Carmel" does not support an inference that there was an adverse effect on the quality of services in the relevant market. Unlike the patients in New York Medscan, the patients at issue here were not forced to go to a physician that utilized different equipment, which impacted adversely the accuracy of the test results and would have an effect on their treatment. Nor were any patients forced to change facilities at which they had been receiving their treatments thereby disturbing **[*24]** the continuity of their treatment, resulting in an adverse emotional impact on patients. No reasonable inference can be made from Dr. Guinn's allegations that the patients at issue here suffered any ill effects in the quality of their care by removing him as their physician.

The Court concludes that when accepting all of Dr. Guinn's allegations as true and making all justifiable inferences in his favor, he has failed to allege enough factual matter to suggest that an antitrust injury occurred that was sufficient to confer antitrust standing. *See* Twombly, 550 U.S. at 557 (antitrust claimant must put forth factual "allegations plausibly suggesting (not merely consistent with)" antitrust injury). Additionally, the Court finds that no amendment to the complaint could remedy this failure, for the insufficiency lies in the nature of the alleged harm, not in the specific allegations pleaded. Accordingly, the Court **GRANTS** Defendants' First Motion to Dismiss as it relates to Dr. Guinn's state and federal antitrust claims.

B. Discrimination Claims

Dr. Guinn alleges race discrimination in violation of Ohio Revised Code § 4112, et. seq., 42 U.S.C. § 1981, and 42 U.S.C. § 1985. Defendants move for **[*25]** dismissal of all three claims for relief for failure to state a claim upon which relief may be granted.

1. *42 U.S.C. § 1981* and Ohio Revised Code § 4112

Dr. Guinn alleges that Defendants discriminated against him on the basis of race in violation of the Ohio Revised Code Chapter 4112 and *42 U.S.C. § 1981*. ***HN10***[] Under Ohio law, it is unlawful:

> For any employer, because of the race . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Ohio Rev. Code § 4112.02(A). Similarly, ***HN11***[] *§ 1981* prohibits racial discrimination in the "making, performance, modification, and termination of contracts." *42 U.S.C. § 1981*. Both the Ohio Civil Rights Act and *§ 1981* are analyzed under the same standards as Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e*. *See Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 332 (6th Cir. 2008)* ("[a]ll references throughout this opinion to Title VII are therefore equally applicable to the plaintiffs' claims under Ohio Revised Code § 4112"); *Johnson v. Univ. of Cincinnati, 215 F.3d 561, 573 n.5 (6th Cir. 2000)* **[*26]** (noting that the elements of *prima facie* case and burdens of proof are the same for Title VII and *§ 1981*).

"***HN12***[] [T]o establish a *prima facie* case of discrimination by the defendant,[4] 'the plaintiff must show (1) that he is a member of a protected group, (2) that he was subject to an adverse employment decision, (3) that he was qualified for the position, and (4) that he was replaced by a person outside of the protected class. . . . the fourth element may also be satisfied by showing that similarly situated non-protected employees were treated more favorably.'" *Clayton v. Meijer, Inc., 281 F.3d 605, 610 (6th Cir. 2002)* (alteration in original) (quoting *Talley v. Bravo Pitino Rest., Ltd., 61 F.3d 1241, 1246 (6th Cir. 1995))*. Defendants take issue only with the fourth element, arguing that "Plaintiff has failed to plead any facts that would render plausible his statement that he was treated differently from other similarly-situated white physicians [and he] has failed to identify any similarly-situated physicians or allege how those physicians were treated differently from Plaintiff." (Doc. 50 at 8.) Defendants' arguments are not well taken.

Defendants contend that this case is similar to *Noble v. Genco I, Inc.*, where this Court found that the plaintiff's allegations were insufficient to save his race discrimination claims from the defendants' motion to dismiss. *94 Empl. Prac. Dec. (CCH) P44,080, 2010 U.S. Dist. LEXIS 137383 (S.D. Ohio Dec. 30, 2010)*. Judge Marbley explained:

> Plaintiff alleges in Count I that he "was disparately treated based on his race" and states claims for racial discrimination in Counts I - III. Plaintiff's only other allegations regarding racial discrimination concern Defendant's "long documented history of race discrimination complaints" filed by other black employees of the Defendant before Plaintiff became an employee of Defendant. Plaintiff has pled no facts that Defendant treated him differently than similarly situated white employees or that Defendant has an employment practice **[*28]** with a disproportionate negative impact on a particular race.

*Id. at *7*.

Dr. Guinn, however, has pleaded significantly more than simply "he was treated disparately based on his race." Indeed, Dr. Guinn specifically made allegations that he was treated less favorably than similarly situated coworkers; allegations that this Court found lacking in *Noble*. Moreover, not only does Dr. Guinn allege that he was treated less favorably than his similarly situated white coworkers, he states specifically in what way he was treated less favorably. That is, Dr. Guinn has alleged that Defendants (individually, officially, and in concert with each other) fabricated a patently false and untrue patient care incident allowing them to institute a "sham" peer review that they then utilized to drive Dr. Guinn from Mount Carmel Health because he is African American. He avers that white

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[4] The United States Supreme Court held in *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*, **[*27]** the ***HN13***[] *prima facie* case "is an evidentiary standard, not a pleading requirement." The Court reviews the *prima facie* case standard in the *Rule 12(b)(6)* context to determine whether a plaintiff has given the defendant fair notice of his or her claim and the grounds upon which it rests—not to determine if the standard is met.

physicians with privileges at Mount Carmel Health that have had actual patient care issues have either not been subjected to peer review or have been subjected to peer review but have received far less severe sanctions.

Courts in this District regularly find allegations similar to Dr. Guinn's to be sufficient to withstand a motion **[*29]** to dismiss under *Rule 12(b)(6)*. *See e.g., Campbell v. Korleski, No. 2:10-cv-1129, 2011 U.S. Dist. LEXIS 76310, at *17 (S.D. Ohio July 14, 2011)* (Frost, J.) (finding sufficient the plaintiff's "alleg[ations] that he was treated less favorably than his similarly situated white coworkers [because] he was evaluated on a racially discriminatory basis that prevented him from being promoted [and he] (unlike his similarly situated white coworkers) [] was placed into positions where his opportunity for advancement was minimal."); *cf. Ndene v. Columbus Acad., 2:09-CV-892, 2010 U.S. Dist. LEXIS 35235, at 9-10 (S.D. Ohio March 17, 2010)* (King, M.J.) ("this Court concludes that Plaintiff's failure to specifically plead that she was treated less favorably than an individual outside her protected class does not warrant dismissal of this claim" where the allegations "are not conclusory in nature" and have "given fair notice of the claim and the grounds upon which it rests").

Accordingly, the Court **DENIES** Defendants' First Motion to Dismiss as it relates to Dr. Guinn's race discrimination claims filed under *42 U.S.C. § 1981* and Ohio Revised Code § 4112.

2. *42 U.S.C. § 1985*

HN14[] The elements of a *42 U.S.C. § 1985* **[*30]** claim are:

(1) a conspiracy;

(2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

(3) an act in furtherance of the conspiracy; and

(4) an injury to either person or property or a deprivation of any right or privilege of a United States citizen.

Conklin v. Lovely, 834 F.2d 543, 548 (6th Cir. 1987). Defendants argue that they are entitled to dismissal of this claim because Dr. Guinn has failed to plead that any of the defendants conspired together with the express purpose of discriminating against him on the basis of his race. Defendants' argument is not well taken.

Throughout the second amended complaint, Dr. Guinn alleges that Defendants worked together and conspired to drive him from Mount Carmel Health and that Defendants committed acts in furtherance of their agreement. Further, Dr. Guinn alleges that Defendants' actions were taken, *inter alia*, because of his race, which could be shown by the fact that similarly situated white coworkers were treated more favorably than he was. The Court finds that it is reasonable to infer that Defendants are liable for **[*31]** the misconduct alleged and, therefore, that Dr. Guinn has pleaded a plausible claim for relief under *42 U.S.C. § 1985*. Consequently, the Court **DENIES** Defendants' First Motion to Dismiss as it relates to Dr. Guinn's race discrimination claim filed under *42 U.S.C. § 1985*.

IV. Defendants' Second Motion to Dismiss

As stated *supra*, Defendants' Second Motion to Dismiss was filed on behalf of the Moving Defendants, who are Claus Von Zychlin, Douglas G. Finnie, M.D., Columbus Cardiology Consultants, Inc., Emergency Services, Inc., Jeffrey B. Thurston, D.O., Columbus Inpatient Care, Inc., William J. Fanning, M.D., and Cardiothoracic Surgeons, Inc.'s. The parties refer to the four businesses included in the Moving Defendants as the "Practice Group Defendants." The Moving Defendants request dismissal of Dr.Guinn's claims for defamation and tortious interference with business relationships. In the event the Court finds that Defendants are entitled to dismissal of either of these two claim, "Dr. Guinn requests this Court to take Defendants' Motion under advisement until such a time as Dr. Guinn has completed meaningful discovery and may supplement the factual allegations contained in his" second **[*32]** amended complaint." (Doc. 64 at 1.)

A. Defamation Claim

HN15[] "Defamation is a 'false publication that injures a person's reputation, exposes him to public hatred, contempt, ridicule, shame or disgrace, or affects him adversely in his trade or business.'" *Knox v. Neaton Auto Prods. Mfg., 375 F.3d 451, 460 (6th Cir. 2004)* (citing *Sweitzer v. Outlet Communs., Inc., 133 Ohio App. 3d 102, 108, 726 N.E.2d 1084 (Ohio Ct. App. 1999)*.

> The essential elements of a claim for defamation under Ohio law are: (1) the defendant made a false statement, (2) that false statement was defamatory in the sense that it reflected unfavorably of the plaintiff's character or injured his trade or business, (3) the statement was published or communicated, and (4) the defendant acted with the necessary degree of fault.

Fuchs v. Scripps Howard Broadcasting Co., 170 Ohio App. 3d 679, 691, 2006 Ohio 5349, 868 N.E.2d 1024 (Ohio Ct. App. 2006).

Defendants argue that Dr. Guinn has "not stated a plausible claim for defamation against the Moving Defendants because he has failed to identify the allegedly defamatory statements allegedly made by the Moving Defendants, failed to identify to whom the statements were made, and in most instances failed to even allege that a single defamatory **[*33]** statement was made in the first place." Defendants arguments are well taken in part.

Dr. Guinn alleges that Dr. Alexis made false statements that harmed Dr. Guinn in his professional capacity to the Clinical Department Council and other competitors on April 3, 2007. (Pl.'s Second Am. Compl. ¶¶ 31-33.) Dr. Guinn further alleges that Drs. Alexis, Beaver, Mumane, and Lutmerding reported false statements that harmed Dr. Guinn in his professional capacity to the Medical Executive Committee on April 17, 2007. *Id*. ¶ 36. Defendants do not contend that these statements were privileged. Consequently, the Court finds that Dr. Guinn has stated a plausible claim for defamation as to these defendants.

However, as to the remaining Moving Defendants, Dr. Guinn makes no allegations that they made any statements at all. Dr. Guinn alleges that the remainder of the Moving Defendants "relied on and incorporated the 'incorrect and false information' in order to render [the Committee's] decision to suspend Dr. Guinn's privileges" and to uphold and justify the suspension. (Doc. 64 at 5.) Reliance upon a false statement and making a false statement are not one in the same. Reliance on a false statement cannot **[*34]** support a defamation claim. Moreover, Dr. Guinn's request for the Court to take this claim under advisement until he can engage in meaningful discovery is denied. No amount of discovery will change the fact that a defamation claim requires the allegation of a false statement. Dr. Guinn makes no suggestion that discovery will elicit more information about who said what at the administrative hearings.

Consequently, the Court **DENIES** Defendants' Second Motion to Dismiss as it relates to the defamation claim brought against Drs. Alexis, Beaver, Murnane, and Lutmerding and **GRANTS** the motion as it relates to the defamation claim brought against the remaining Moving Defendants.

B. Tortious Interference with Business Relationships Claim

"*HN16*[] Under Ohio law, '[t]he tort of interference with a business relationship occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another.'" *Harris v. Bornhorst, 513 F.3d 503, 523 (6th Cir. 2008)* (quoting *McConnell v. Hunt Sports Enters., 132 Ohio App. 3d 657, 689, 725 N.E.2d 1193 (Ohio Ct. App. 1999)* (bracket in original)). "'The elements of tortious interference with a **[*35]** business relationship are (1) a business relationship, (2) the wrongdoer's knowledge thereof, (3) an intentional interference causing a breach or termination of the relationship, and (4) damages resulting therefrom.'" *Id*. (quoting *McConnell, supra*). The Moving Defendants argue that Dr. Guinn "fails to allege any facts from which the Court may infer that such a claim is plausible against the Moving Defendants." (Doc. 51 at 11.) Defendants further assert that the second amended complaint alleges that Mr. Von Zychlin, Dr. Finnie, Dr. Thurston and the Practice Group Defendants were involved only minimally with the peer-review process and that "the only factual averments pertaining to the Practice Group Defendants, [Big Run Internal Medicine], and

[Heart and Rhythm Specialists] relate to their 'involvement' or 'future involvement' in economic transactions with Trinity, [Mount Carmel Health], and [Mount Carmel Health Systems]." *Id. at 7*. Defendants' arguments are not well taken.

The Moving Defendants rely upon two cases that they claim stand for the proposition that a tortious interference with business relationships claim cannot survive a motion to dismiss when the plaintiff failed to explain **[*36]** by what act or in what manner the defendant interfered with or caused interference. (Doc. 68 at 4-5) (citing *Bush Truck Leasing, Inc. v. Dynamex, Inc., No. 1:09-cv-354, 2011 U.S. Dist. LEXIS 1720, at **17-18 (S.D. Ohio Jan. 7, 2011)* and *Scrap Yard, LLC v. City of Cleveland, No. 1:10-cv-2465, 2011 U.S. Dist. LEXIS 103716, at *24 (N.D. Ohio June 23, 2011))*. Unlike those two cases, however, Dr. Guinn here does explain by what act and in what manner Defendants caused interference with his business relationships. Dr. Guinn's second amended complaint is replete with allegations that all of the defendants, including the Moving Defendants, conspired together to exclude Dr. Guinn from practicing medicine in the relevant geographic area so to eliminate him as a competitor. Dr. Guinn further alleges that all of the defendants not only conspired to interfere with his business relationships, but that they actually took actions to so interfere by improperly suspending his clinical privileges based upon information that they knew was false or that they failed to make a reasonable investigation to determine if such information was false and by failing to provide him with any opportunity to respond **[*37]** to the false charges against him. A reasonable inference can be made that the Practice Group Defendants were involved based upon the actions of the defendant doctors with whom the medical practices were associated and the financial gain each would allegedly realize if Dr. Guinn was eliminated as a competitor. Finally, Dr. Guinn avers that his medical practice was harmed significantly by Defendants' interference.

Accepting Dr. Guinn's allegations in the second amended complaint as true, and drawing all justifiable inferences in his favor, the Court concludes that he has sufficiently pleaded a claim for tortious interference with business relationships against the Moving Defendants that is plausible on its face. Consequently, the Court **DENIES** Defendants' Second Motion to Dismiss as it relates to this claim.

V. Conclusion

For the reasons set forth above:

1. The Court **GRANTS IN PART AND DENIES IN PART** Defendants' First Motion to Dismiss. (Doc. 50.) Specifically, the Court **GRANTS** the motion as it relates to as it relates to Dr. Guinn's federal and state antitrust claims and **DENIES** the motion as it relates to Dr. Guinn's federal and state discrimination claims.

2. The Court **GRANTS IN PART AND [*38] DENIES IN PART** Defendants' Second Motion to Dismiss. (Doc. 51.) Specifically, the Court **DENIES** the motion as it relates to Dr. Guinn's claim for tortious interference with business relationships, **DENIES** the motion as it relates to Dr. Guinn's defamation claim brought against Drs. Alexis, Beaver, Mumane, and Lutmerding, and **GRANTS** the motion as it relates to the defamation claim brought against the remaining Moving Defendants.

The Clerk is **DIRECTED** to **REMOVE** these two motions from the Court's pending motions list.

IT IS SO ORDERED.

2-27-2012

DATE

/s/ Edmund A. Sargus, Jr.

EDMUND A. SARGUS, JR.

UNITED STATES DISTRICT JUDGE

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Am. Airlines, Inc. v. Travelport Ltd.

United States District Court for the Northern District of Texas, Fort Worth Division

February 28, 2012, Decided; February 28, 2012, Filed

CIVIL ACTION NO. 4:11-CV-244-Y

Reporter
2012 U.S. Dist. LEXIS 191140 *

AMERICAN AIRLINES, INC., VS. TRAVELPORT LIMITED, et al.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Motion denied by, Request denied by *Am. Airlines, Inc. v. Travelport Ltd., 2012 U.S. Dist. LEXIS 191139 (N.D. Tex., Feb. 28, 2012)*

Prior History: *Am. Airlines, Inc. v. Travelport Ltd., 2012 U.S. Dist. LEXIS 191138 (N.D. Tex., Feb. 28, 2012)*

Core Terms

conspiracy, amended complaint, aggregate, state-law, foreclosed, restraint of trade, substantial share, own contract, reconsideration, challenges, airlines, counts

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For Hewlett Packard Company, Movant: Timothy F Gavin, LEAD ATTORNEY, Carrington Coleman Sloman & Blumenthal LLP, Dallas, TX.

For AirTrans Airways, Inc., Southwest Airlines Co, Movants: Alden L Atkins, Kathryn B Codd, PRO HAC VICE, Elizabeth C Brandon, Vinson & Elkins LLP, Washington, DC.

For ADR Provider, Mediator: Daniel Weinstein, LEAD ATTORNEY, JAMS, San Francisco, CA.

For ADR Provider, Mediator: Layn R Phillips, LEAD ATTORNEY, Irell & Manella LLP, Newport Beach, CA.

Judges: TERRY R. MEANS, **[*2]** UNITED STATES DISTRICT JUDGE.

Opinion by: TERRY R. MEANS

Opinion

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION

Before the Court is the Motion for Reconsideration (doc. 162) filed by plaintiff American Airlines, Inc. ("American"). By the motion, American asks the Court to reconsider its November 21, 2011 Order Regarding Motions to Dismiss and Motion for Leave to Amend (doc. 156). After review, the Court will grant the motion in part and deny it in part.

I. Legal Standard

Because the November 21 order is interlocutory, the instant motion is governed by *Federal Rule of Civil Procedure 54(b)*. See *Dos Santos v. Bell Helicopter Textron, Inc. Dist., 651 F. Supp. 2d 550, 553 (N.D. Tex. 2009)*. Under *Rule 54(b)*, the Court may revise an interlocutory order "at any time before the entry of a judgment adjudicating all the claims" in the case. *Fed. R. Civ. P. 54(b)*. "Although the precise standard for evaluating a motion to reconsider under *Rule 54(b)* is unclear, whether to grant such a motion rests within the discretion of the court." *Brown v. Wichita Cnty., Tex., No. 7:05—CV—108—O, 2011 U.S. Dist. LEXIS 44676, 2011 WL 1562567, at *2 (N.D. Tex. Apr. 26, 2011)* (O'Connor, J.) (citation omitted) (internal quotation marks omitted). Moreover, while the standard for reconsideration under *Rule 54(b)* is less exacting than the standards imposed by *Rules 59(e)* and *60(b)*, these latter standards inform the Court's analysis under **[*3]** *Rule 54(b)*. *See id.*

II. Analysis

A. The Court's Dismissal of Count Four

The first aspect of the November 21 order that American challenges is its dismissal of count four of American's first amended complaint.[1] Count four included claims against all defendants for alleged violations of *section 1 of the Sherman Antitrust Act*.[2] The Court dismissed those claims with prejudice after determining that American had failed to sufficiently plead a contract, combination, or conspiracy that foreclosed a sufficient share of the market to constitute an unreasonable restraint on trade.

American initially contends that the Court's dismissal of count four should **[*4]** not have been with prejudice. In the November 21 order, the Court decided to dismiss count four with prejudice after evaluating American's proposed second amended complaint and determining that it did not remedy the deficiencies in the first amended complaint. American complains that this was in error because American did not have the benefit of the Court's analysis when it filed its proposed second amended complaint. American insists that, if allowed, it can remedy the deficiencies described in the November 21 order.

The Court declines to grant reconsideration on this point. American is ably represented in this case by thirteen attorneys, all of whom work for sophisticated law firms in major cities. With such competent representation, American had all the knowledge it needed to meet Rule 8's requirements for stating a claim under *section 1 of the Sherman Act*. Moreover, Travelport's motion to dismiss American's original complaint provided American with sufficient notice of the potential grounds upon which the Court might find American's claims deficient. Given the large number of claims and parties involved in this case, in the November 21 order, the Court determined that the interests of efficiency **[*5]** and judicial economy made it necessary to dispose of all claims that had not been remedied by the first two rounds of amendments. The Court stands by this decision.

American also challenges two subsidiary legal positions taken by the Court in reaching its conclusion that American had not stated a section 1 claim. First, American contends that the Court was incorrect in determining that it could not aggregate the effects of Sabre's and Travelport's discrete vertical agreements with travel agents in evaluating whether either of those defendants had participated in a contract, combination, or conspiracy that foreclosed a substantial share of the market. Second, American challenges the Court's conclusion that American could not rely on its own contracts with Sabre and Travelport to establish a section 1 claim against those defendants.

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[1] In the November 21 order, the Court set out in detail the case's factual background and the parties' claims and defenses. The Court will not repeat them here.

[2] The defendants in this case are (1) Travelport Limited and Travelport, LP (collectively, "Travelport"); (2) Sabre Inc., Sabre Holdings Corporation, and Sabre Travel International Limited (collectively, "Sabre"); and Orbitz Worldwide, LLC ("Orbitz"). For the sake of brevity and clarity, in the text of this order, the Court will use the shorthand names of the defendants without first setting out their full names.

With regard to American's first argument, the Court maintains its position. To plead a section 1 violation, American must allege a contract, combination, or conspiracy that forecloses a substantial share of the market such that it unreasonably restrains trade. See *15 U.S.C.A. § 1 (West 2012)*; *Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 271 (5th Cir. 2008)*. In the Court's view, American cannot achieve this by pointing to several discrete vertical contracts, combinations, **[*6]** or conspiracies that only foreclose a substantial share of the market when viewed in the aggregate. Rather, it would seem that American must point to a single contract, combination, or conspiracy that **itself** forecloses a substantial share of the relevant market. *See Spectators' Commc'ns Network Inc. v. Colonial Country Club, 253 F.3d 215, 225 (5th Cir. 2001)* (noting that "the reason for looking at market power is to determine whether **the combination or conspiracy**, not each individual conspirator, has the power to hurt competition in the relevant market." (emphasis added)).

Admittedly, courts have had trouble analyzing situations in which a common defendant is involved in numerous discrete vertical agreements that do not restrain trade individually, but do when viewed in the aggregate. *See* William C. Holmes, ***Antitrust Law*** *Handbook* § 2:4 (West 2011) (collecting cases). American disagrees with the position taken by this Court, but has not demonstrated that the Court is manifestly wrong on this point. *Compare Dickson v. Microsoft Corp., 309 F.3d 193, 210 (4th Cir. 2002)* (concluding that aggregation is improper), *with Applied Med. Res. Corp. v. Johnson & Johnson, No. SACV 03-1329-JVS(MLGx), 2004 U.S. Dist. LEXIS 29409, at *12 (C.D. Cal. February 23, 2004)* (concluding that aggregation is permitted). In any event, even assuming the Court was incorrect on the aggregation issue, it nevertheless remains that American failed **[*7]** to adequately plead a contract, combination, or conspiracy in the first instance (aside from the Orbitz-Travelport compensation agreement). Thus, the Court will not reverse its position on the aggregation issue.

The Court, however, is inclined to agree with American concerning American's second argument. In footnote 15 of the November 21 order, the Court stated that "American cannot rely on its own contracts with Sabre to establish a section 1 violation because Sabre cannot be unilaterally liable under *section 1*." (Nov. 21 Order 30 n.15.) Because American had pointed to its contracts with Sabre and Travelport as indicative of anticompetitive behavior and at the same time maintained its innocence, the Court viewed American's allegations as complaining about Sabre's and Travelport's unilateral activities. And because unilateral conduct does not violate *section 1*, the Court found these allegations deficient. *See Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320, 325 (5th Cir. 1998)*.

But because "every contract" that unreasonably restrains trade or commerce is illegal under *section 1*, and given that a party can be an involuntary co-conspirator for purposes of *section 1*, the Court is persuaded that it must allow American the opportunity to show that its own contracts with Sabre and Travelport restrain **[*8]** trade or commerce in violation of *section 1*. *See 15 U.S.C.A. § 1* ("Every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."); *Spectators' Commc'ns, 253 F.3d at 220* ("[E]ven reluctant participants have been held liable for conspiracy."); *see also Albrecht v. Herald Co., 390 U.S. 145, 150 n.6, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)* ("Petitioner's original complaint broadly asserted an illegal combination under *§ 1 of the Sherman Act*. . . . [P]etitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price."), *overruled on other grounds by State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. The Court, therefore, will reconsider its position on this point.

B. The Court's Dismissal of Counts Five and Six

American also challenges the Court's dismissal of counts five and six of American's amended complaint. Counts five and six included state-law tortious-interference claims against Sabre and Travelport. The Court dismissed those claims with prejudice based on its conclusion that the Airline Deregulation Act ("ADA") preempted them.

First, American contends that the Court's dismissal of counts four and five should have been without prejudice. "Because American was dropping the state claims," argues American, "the Court was entitled to consider the motions **[*9]** to dismiss the state claims as moot." (Pl.'s Mot. 2.) According to American, the Court's dismissal of its state-law claims with prejudice amounted to an "erroneous advisory ruling." (*Id.* at 16.)

The Court rejects American's characterization of its ruling as "advisory." The Court's ruling on the preemption issue adjudicated an actual dispute between adverse parties. Travelport and Sabre properly moved for a decision on the dispute and the parties fully briefed the matter. In response, the Court ruled on it.

Rule 41(a)(2) authorizes the Court to allow a party to voluntarily dismiss its claims without prejudice, even after the defendant has filed an answer, "on terms that the court considers proper." *Fed. R. Civ. P. 41(a)(2)*. By the time American filed its motion for leave to file a second amended complaint, the Court had already worked to reach the merits of American's state-law claims and had expended significant judicial resources in the process. In light of this and other considerations, the Court did not view the terms of American's proposed dismissal as "proper." *Fed. R. Civ. P. 41(a)(2)*. And having determined that American's state-law claims were preempted by the ADA, in the interest of finality and judicial economy, the Court dismissed American's **[*10]** state-law claims with prejudice. In the Court's view, there was nothing improper about that.

Second, American challenges the Court's legal position on the preemption issue. In the November 21 order, the Court concluded that the ADA preempted American's state-law claims because those claims (1) related to the defendants' rates and services and had a significant relationship to the economic aspects of the airline industry and (2) sought to enforce state-created standards, not self-assumed contractual obligations. The Court determined that American's claims fell within the purview of *Lyn-Lea Travel Corporation v. American Airlines, Inc., 283 F.3d 282 (5th Cir. 2002)*, in which the United States Court of Appeals for the Fifth Circuit determined that the state-law claims before it were preempted by the ADA because they involved the defendant's prices and services to customers.

American contends that the ADA's preemptive umbrella only covers claims against airlines--not global distribution systems ("GDSes") like Sabre and Travelport. American acknowledges that the Fifth Circuit has previously stated that "ADA preemption is not limited to claims brought directly against air carriers." *Lyn-Lea, 283 F.3d at 287 n.8*. (citations omitted). But American makes a distinction between GDSes owned by airlines, **[*11]** such as Sabre at the time of *Lyn-Lea*, and independent GDSes, such as Sabre today. The Court does not find this distinction meaningful. In the Court's view, the November 21 order was correct on the preemption issue, and its dismissal of American's claims with prejudice was proper.

III. Conclusion

Based on the foregoing, American's motion for reconsideration is GRANTED in part and DENIED in part. The Court's dismissal with prejudice of counts five and six of American's first amended complaint and all subsidiary legal conclusions remain undisturbed. The Court's dismissal with prejudice of count four likewise remains undisturbed insofar as it concerns American's failure to plead a section 1 violation involving (a) Sabre and its travel-agent subscribers, (b) Travelport and its travel-agent subscribers (including Orbitz), and (c) Travelport or Sabre and any unnamed airlines. In this regard, the Court stands by its conclusion that it should not aggregate the effects of Travelport's and Sabre's discrete vertical conspiracies to determine whether either defendant's conduct, as alleged by American, had foreclosed a substantial share of any of the relevant markets.

At the same time, however, the Court concludes **[*12]** that it erred in holding that American could not rely on its own contracts with Travelport and Sabre to support a section 1 claim against those defendants. Thus, the November 21 order is VACATED to the extent that it holds otherwise. In light of this, American is GRANTED leave to file **no later than March 19, 2012**, a supplement to its second amended complaint (not a third amended complaint) that includes a section 1 claim based on American's own contracts with Sabre and Travelport.[3] Given that the defendants have already submitted three rounds of dispositive-motions briefing, the Court declines to grant American leave to file an entirely new complaint, which would moot the defendants' most recently filed motions to dismiss. Instead, upon the filing of American's supplement, the defendants shall be permitted to file supplemental or amended motions to dismiss within the time limitations imposed by the Federal Rules of Civil Procedure.

SIGNED February 28, 2012.

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[3] To be clear, in all other respects, the Court's dismissal of count four with prejudice remains undisturbed.

/s/ Terry R. Means

TERRY R. MEANS

UNITED STATES DISTRICT JUDGE

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Church & Dwight Co. v. Mayer Labs., Inc.

United States District Court for the Northern District of California

March 1, 2012, Decided; April 12, 2012, Filed

No. C-10-4429 EMC

Reporter

868 F. Supp. 2d 876 *; 2012 U.S. Dist. LEXIS 51770 **; 2012-1 Trade Cas. (CCH) P77,863

CHURCH & DWIGHT CO., INC., Plaintiff, v. MAYER LABORATORIES, INC., Defendants.

Subsequent History: Later proceeding at *Church & Dwight Co. v. Mayer Labs., Inc., 2012 U.S. Dist. LEXIS 51718 (N.D. Cal., Apr. 12, 2012)*

On reconsideration by, Vacated by, in part, Summary judgment denied by *Church & Dwight Co. v. Mayer Labs., Inc., 2012 U.S. Dist. LEXIS 68681 (N.D. Cal., May 16, 2012)*

Prior History: *Church & Dwight Co. v. Mayer Labs., Inc., 2011 U.S. Dist. LEXIS 141315 (N.D. Cal., Dec. 8, 2011)*

Core Terms

retailers, condom, sales, space, products, shelf, market share, brand, prices, manufacturers, contracts, discount, rebate, relevant market, market power, foreclosure, consumers, channels, competitors, c-stores, rivals, foreclose, planogram, anticompetitive, microthin, output, customers, summary judgment, parties, antitrust

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Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

[*884] **REDACTED**

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Docket No. 187)

Plaintiff/Counterdefendant Church & Dwight, Inc. ("C&D"), the maker of Trojan brand condoms, moves for summary judgment on Defendant/Counterclaimant Mayer Labs, Inc.'s ("Mayer's") counterclaims. Docket No. 187, 198 (redacted version). Mayer is the maker of Kimono brand condoms. The parties' primary dispute surrounds C&D's use of planogram [1] agreements with condom retailers, whereby C&D offers a percentage rebate off its wholesale price in exchange for a retailer's commitment to devote a certain percentage **[**3]** of the condom shelf space to C&D products. Mayer alleges that C&D's planogram rebate ("POG") program operates to foreclose competition from vital retail display space and hence sales. Mayer also alleges that C&D has engaged in other anticompetitive conduct, including abusing its position as category captain for certain retailers to exclude its rivals from, or at least disadvantage them in, the condom retail market. Based on this and other alleged conduct, Mayer brought twelve counterclaims against C&D for purported violations *§§ 1* and *2* of the Sherman Act, the Cartwright Act, the Lanham Act, and California unfair competition laws, as well as tort claims for tortious interference with contract and economic relations.

The parties have engaged in over three years of hotly contested litigation. This Court previously denied C&D's motion to dismiss Mayer's counterclaims finding that Mayer's **[**4]** complaint raised viable claims of anticompetitive conduct potentially violative of the Sherman Act. *See* Docket No. 105; *Church & Dwight Co., Inc. v. Mayer Laboratories, Inc., C-10-4429 EMC, 2011 U.S. Dist. LEXIS 35969, 2011 WL 1225912 (N.D. Cal. Apr. 1, 2011)*. The parties have conducted extensive discovery of over 15 million pages of documents and dozens of depositions. Reply at 1. Documents submitted in conjunction with the parties' summary judgment briefing total over four thousand pages.

Despite this voluminous record, Mayer has been unable to proffer any direct, admissible evidence of retailers switching or removing rival condom brands from their shelves as a result of any coercive effect of C&D's planogram program. Nor has Mayer submitted any admissible evidence that C&D misused its category captain positions to the detriment of its rivals. Surprisingly, Mayer failed to take the deposition of — or obtain other direct evidence from — any retailer's employees or other third parties who might have testified to the supposed coercive, anticompetitive effect of C&D's conduct. Indeed, the only direct (and unrebutted) evidence from third party retailers indicates just the opposite: that the planogram program has little, **[**5]** if any, effect on retailers' shelf space allocations, and that C&D had no undue influence over retailers' decisions as category captain. Without any such direct evidence, the Court is left largely with Mayer's (and its experts') own theory based largely on a rough correlation between C&D's moderately increasing market share and Mayer's moderately decreasing market share.

Accordingly, having considered the parties' briefs, accompanying submissions, oral argument, and all evidence of record, the Court **DENIES** the motion for summary **[*885]** judgment as to tortious interference with contract, and **GRANTS** the motion as to all other claims.

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[1] A planogram is "essentially a diagram showing where specific products are to be positioned in the space allotted by a retail store for a particular category of products." Second Amended Counterclaim ("SAC"), Docket No. 68, ¶ 6. The Court will refer to C&D's planogram rebate program as its POG program.

I. FACTUAL & PROCEDURAL BACKGROUND

The evidence submitted by the parties reflects as follows. Where there are factual disputes, they are so noted.

A. The Parties

Mayer Labs markets, distributes and sells latex male condoms. Second Amended Counterclaim ("SAC") ¶¶ 15, 19. Mayer's business involves the marketing and sale of, *inter alia*, its Kimono brand of ultra-thin latex condoms. *Id.* ¶ 15. Kimono condoms have a retail market share in the United States of less than one-half of 1%. Silberman Report Ex. 1. Between 2001 and 2007, Mayer's market share increased from .31% **[**6]** to .46%. *Id.* Starting in 2008, market share decreased to a low of .27% in 2009, and remained at .29% in 2010. *Id.* Its 2010 market share corresponds to annual revenue of $819,876.

Counterdefendant C&D manufactures and distributes, *inter alia*, Trojan and other brand-name condoms. C&D branded condoms now account for over 75% of all retail condom sales in the United States. Silberman Report Ex. 1. C&D's market share has steadily increased from its 2001 share of 67.2% (or $143,630,000 in annual revenues) to its 2010 share of 75.43% (or $210,086,934 in annual revenues). *Id.* Its market share has been over 50% since 1985. Wright Report Attachment 4.

The next largest condom brand is Durex, marketed by Reckitt Benckiser Group, with approximately 14% of sales as of 2010. *Id.* Attachment 8. Durex has maintained a steady market share of 14-15% since at least 2004. *Id.* The third largest brand is Lifestyles, marketed by Ansell Healthcare, with just under 10% market share as of 2012. *Id.* Its market share has ranged from a high of over 12% in 2004 to a low of 8% in 2008. *Id.* Together, condoms sold by the three largest companies account for over 99% of the nationwide market. Wright Report Attachment 8. **[**7]** Globally, Durex/Reckitt is the largest condom manufacturer with a 34% share of the global market, Lifestyles/Ansell is second with a 17% share, and Trojan/C&D is third with 11%. Wright Report at 35.

B. The U.S. Condom Industry

The vast majority of condoms in the United States are sold in one of three channels. First, the food, drug, and mass merchandiser channel, absent Wal-Mart ("FDMx"), [2] accounts for about 49% of the unit sales in the retail market. Wright Report Attachment 1. Second, Wal-Mart alone accounts for 33%. *Id.* Third, convenience stores ("c-stores") account for 14.9%. *Id.* The remaining sales occur in club stores (*e.g.*, Costco) and dollar stores (*e.g.*, Dollar General). *Id.*

These channels differ somewhat in their pricing and sales structure. For example, drug stores tend to carry the largest variety of condom brands, and their retail prices are on average twice as high as the mass merchandiser channel. Martineau **[**8]** Federal Trade Commission ("FTC") Depo., Mayer Ex.1, at 38-40. C-stores tend to carry only one or two brands of condoms in three-unit packs due to limited shelf-space, and typically seek exclusive contract bids from manufacturers. Baseman Report at 18; Wright Report at 4. Club stores and dollar stores may also use **[*886]** exclusive contracts, and club stores tend to sell bulk packs only. Wright Report 55-56.

The parties dispute the extent to which there are barriers to entry in the retail condom market. Mayer claims that there are considerable barriers, including costs of FDA and state regulatory approval and compliance, production minimums, and retailer program participation fees. *See, e.g.*, Baseman Report at 22-23; Wedel Decl. ¶¶ 15-19; Mayer Ex. 61. C&D argues that the FDA approval process is not overly rigorous and that the barriers to entry are not substantial. *See* Wright FTC Report at 14.

According to both parties, condoms are unique products that rely heavily on point of sale advertising because manufacturers face constraints in television and print advertising. In that respect, condoms are generally displayed

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[2] FMDx refers to all retailers in the FDM channel except Wal-Mart, while FDM refers to the entire channel including Wal-Mart. There is not as much data available on Wal-Mart's sales as for other retailers because Wal-Mart does not report to certain data-gathering companies.

on, and sold from, pegboards and shelves in one area of a store where consumers **[**9]** can quickly glance at them at once. The number and visibility of products available from a particular brand are therefore important in condom sales because of the private nature of the transaction and the speed by which buying decisions are made. Brand loyalty also plays a strong role in the industry, as 52% of customers will leave a store to find their preferred brand, while 48% will choose an alternative brand if their preferred brand is not available. Baseman Report at 6 n.13.

At the point of sale, condom manufacturers compete for retail space and sales marketing in a variety of ways. For example, they may pay retailer slotting fees for each condom "facing" on the shelf. [3] Baseman Report at 7-8; Wright Report at 58, 89. Manufacturers may front the costs of a certain amount of new product so that they, rather than the retailer, carry the risk of meager sales. Wright Report at 176. Retailers may require certain promotional budgets at manufacturer expense, including temporary price reductions (*i.e.*, short-term sales of a product in order to move inventory). Baseman Report at 7-8. Manufacturers can also offer promotional packages in order to secure premium shelf space at eye-level and/or **[**10]** on the left-hand side of the planogram. [4] Wright Report at 88-89. Besides placement in the primary condom section, manufacturers may negotiate for promotional or ongoing placement in endcaps (the shelves located at the end of each aisle) and sidecaps, as well as other locations within the store. Wright Report at 85-88. Manufacturers might also negotiate volume discounts, whereby retailers benefit from lower wholesale prices the more they purchase of that manufacturer's brand. Wright Report at 188. As noted above, some retailers also negotiate exclusive deals with condom manufacturers whereby the retailer carries only one brand. Wright Report 89-90. This is especially common in the c-store channel.

C&D spends **[**11]** approximately 17-19% of its gross sales on discounts and promotions. Overall, C&D, Mayer, Durex, and Lifestyles each offer promotional discounts of approximately 10-13% off of the wholesale price to retailers like Rite Aid. Wright Report Attachment 12.

Notwithstanding the importance of point-of-sale efforts, condom manufacturers **[*887]** also rely on other forms of marketing. Retailers look at a manufacturer's promotional budget as a factor in determining whether and how to stock their products. Martineau Depo. at 80-81. C&D, most notably, currently spends over $58 million per year on marketing, of which over $23 million is dedicated solely to advertising and media expenses. Wright Report Attachment 5. Mayer spends $127,000 and $23,000 respectively on these expenses. *Id.*

C. <u>C&D's Conduct in the Industry</u>

C&D engages in four types of conduct within the condom industry that are the source of the parties' disputes.

First, in addition to offering a number of the discounts and promotions described above, C&D offers planogram rebate agreements, described herein as its "POG program," to large chain retailers. C&D's POG program accounts for under $8 million of the $40 million it spent on promotional discounts **[**12]** in 2010, or just 3.5% of gross sales. Wright Report Attachment 11A.

The POG program gives the retailer an opportunity to receive a percentage rebate on its purchases of C&D condoms. The retailer gets the rebate if it dedicates a specified minimum percentage of the available condom facings on its in-store display to C&D condom products. C&D "inherited" this POG program in 2001 by acquiring the Trojan brand from Carter-Wallace; the program has been in existence since at least 1997. Wright Report at 48. In 2001, the Program had three "tiers" — a 55% tier (awarding a 4.0% rebate for 55% or more of a retail chain's display space), a 65% tier (awarding a 7% rebate for 65% or more of the display space), and a 70% tier (awarding a 7.5% rebate for 70% or more of the display space). Baseman Report at 10. In 2007, C&D changed the terms of its program, introducing 75% and 80% tiers (providing 8.0% and 8.5% rebates, respectively) and eliminating the 55% tier. *Id.* In 2009, C&D eliminated the 65% tier. *Id.* However, in 2010, C&D reinstated the 65% tier and eliminated the 80% tier. *Id.* Its current POG program specifies levels of 65%, 70%, or 75%, corresponding to rebates of 7%, 7.5%,

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[3] A "facing" refers to one column of product seen on a retail shelf. For example, if a customer looks at a shelf and sees five boxes of a product sitting side by side, those are five "facings." Sometimes, a popular product may be "double faced" so that two columns are dedicated to the same product, thus ensuring twice the amount of in-store stock available for purchase.

[4] C&D considers the left-hand side of a planogram to be the premium space. Mayer does not dispute this assessment.

and 8%, respectively. **[**13]** *Id.* About 91% of C&D's FDMx sales derive from retailers that participate in the POG program. Wright Report at 49. Wal-Mart does not participate. [5]

[*888] Second, in channels in which retailers request exclusive contracts, C&D bids for exclusive agreements with c-stores and dollar stores whereby the stores carry only one brand. For example, C&D holds an exclusive contract with 7-Eleven. Wright Report at 51-53. Overall, C&D has a 50-60% share of c-store condom sales, lower than its 75% share in the market as a whole. C-stores account for 14.9% of unit sales 22.5% of revenues in the overall condom market. Wright Report Attachment 1. Although the parties do not provide details, Durex and Lifestyles seem to account for the bulk of the remaining 40-50% of the **[**15]** c-store channel and regularly bid against C&D for c-store contracts. *Id.* at 92-93.

Third, C&D sometimes serves as a "category captain" for certain large retail chains. Category captains are appointed by some retailers to assist with shelf space allocation and provide advice as to how best to present the category (in this case, condoms). Wright Report at 105-06; Martineau Depo. at 74. Mayer alleges C&D has misused its category captaincy at certain retailers to its own advantage, at the expense of Mayer and other rivals

Fourth, the parties compete directly in the micro- or ultra-thin segment of the condom industry. Mayer began making its Kimono MicroThin condoms, sourced from a Japanese supplier named Sagami, in the 1990s. The parties dispute whether Mayer has or had an agreement with Sagami to be its exclusive North American condom distributor. *See* Mayer Depo. at 37, 127-29. Mayer claims it did and that C&D caused Sagami to breach that agreement. Mayer also asserts a trademark violation by C&D. Mayer trademarked the term "microthin" in 2009, but the parties dispute whether the mark is valid. C&D began using the term "micro-thin" on **[**16]** its packaging in 2006 to describe its ultra-thin condoms.

D. Procedural Posture

On November 21, 2008, C&D filed a declaratory action in the District of New Jersey seeking a judicial determination that C&D's conduct was legal under applicable federal and state laws. In that complaint, C&D seeks a declaratory judgment as to the conduct that Mayer alleged in a draft complaint conveyed by Mayer's counsel to C&D in October 2008. *See* Original Compl. ¶¶ 81-86. On February 17, 2009, Mayer filed an Answer together with Counterclaims. Mayer amended its counterclaims on March 9, 2009. The SAC includes claims for violations of the Sherman Act, *15 U.S.C. §§ 1* and *2* (Claims I & II); California's prohibition against trusts (Claim III), *Cal Bus. & Prof. Code §§ 16700, et. seq.*; California's prohibition against exclusive dealing (Claim IV), *Cal. Bus. & Prof. Code §§16727, et. seq.*; California's prohibition against secret rebates (Claim V), *Cal. Bus. & Prof. Code § 17045*, tortious interference with contractual relations (Claim VI), tortious interference with prospective economic advantage (Claim VII), and unfair competition under common law (Claims VIII & XII). The SAC also asserts claims for infringement **[**17]** under California common law (Claim XI) as well as the Lanham Act, *15 U.S.C. § 1114(a)* (Claim X), and a claim for false designation of origin under the Lanham Act, *15 U.S.C. § 1125(a)* (Claim IX). Mayer's SAC requests (1) a declaratory judgment that C&D's Condom Planogram Agreements are unenforceable, (2) a comprehensive

[5] It is undisputed that Wal-Mart has no POG contract with C&D. *See* Baseman Report at 12-13. However, Mayer's expert opines that Wal-Mart may be a *de facto* participant, based on certain internal C&D documents indicating that Wal-Mart dedicates a certain percentage of space to C&D. *Id.* However, C&D employees state unequivocally that Wal-Mart does not commit to the POG program, and C&D's charts do not list Wal-Mart as receiving a POG rebate. *See* Wright Report Attachment 11B. Instead, C&D lists Wal-Mart as receiving a 2.1% cash promotion and 21.1% promotional discount off of gross invoice. *Id.* This is similar to the lump-sum discounts allotted to other non-POG retailers, like Costco. *Id.* Mayer's expert also notes that C&D has sometimes negotiated discounts with Wal-Mart on the basis that Wal-Mart will add new C&D SKUs without subtracting others. Baseman Report at 14. Such negotiations are more akin to the promotional tools described above and employed by all manufacturers. In addition, none of Mayer's anecdotal evidence regarding its and other **[**14]** small manufacturers' dealings with Wal-Mart indicates that a shelf-space agreement with C&D was responsible for their difficulty getting a Wal-Mart deal. *See, e.g.*, [TEXT REDACTED BY THE COURT] Decl. ¶¶ 106-07 ([TEXT REDACTED BY THE COURT] condom brand pitched Wal-Mart but was turned down because it was not a national brand); Mayer Depo. at 62-64 (Mayer pitched Wal-Mart but was turned down because it was not a national brand). The Court concludes Mayer has failed to raise a genuine issue of fact as to whether Wal-Mart has a POG contract — the record evidence establishes it does not.

permanent injunction, (3) punitive and treble damages, (4) restitution and disgorgement of profits with interest, and (5) attorneys' fees and costs. SAC ¶¶ 102-106.

C&D filed a motion to dismiss the SAC on June 18, 2012. Docket No. 71. The district court for the District of New Jersey transferred the case, including C&D's **[*889]** pending motion to dismiss Mayer's counterclaims, to this Court. *See* Docket No. 76 (Order transferring case). On April 1, 2011, the Court granted C&D's motion to dismiss with respect to Mayer's Fifth Counterclaim (*§ 17045*) without prejudice, and denied the motion to dismiss with respect to all other counterclaims. *See* Docket No. 105; *Church & Dwight Co., Inc. v. Mayer Laboratories, Inc., C-10-4429 EMC, 2011 U.S. Dist. LEXIS 35969, 2011 WL 1225912 (N.D. Cal. Apr. 1, 2011)*.

C&D now seeks summary judgment on all of Mayer's counterclaims. Docket No. 187, 198 (redacted version). That motion **[**18]** is pending before the Court.

II. DISCUSSION

A. Motion for Summary Judgment — Legal Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. An issue of fact is genuine only if there is sufficient evidence for a reasonable jury to find for the nonmoving party. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "The mere existence of a scintilla of evidence ... will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Id. at 252*. At the summary judgment stage, evidence must be viewed in the light most favorable to the nonmoving party and all justifiable inferences are to be drawn in the nonmovant's favor. *See* *id. at 255*.

Where the plaintiff has the ultimate burden of proof, he or she may prevail on a motion for summary judgment only if he or she affirmatively demonstrates that there is no genuine dispute as to **[**19]** every essential element of its claim. *See* *River City Mkts., Inc. v. Fleming Foods W., Inc., 960 F.2d 1458, 1462 (9th Cir. 1992)*. In contrast, where the plaintiff has the ultimate burden of proof, the defendant may prevail on a motion for summary judgment simply by pointing to the plaintiff's failure "to make a showing sufficient to establish the existence of an element essential to [the plaintiff's] case." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

In the instant case, Plaintiff C &D moves for summary judgment on Defendant Mayer's counterclaims. Accordingly, the Court's inquiry will focus on whether Mayer has made a "showing sufficient to establish the existence of an element essential to [its] case." *Id.*

B. Section 1 — Sherman Act

1. Legal Standard

Section 1 of the Sherman Act prohibits, in broad terms, contracts or agreements that unreasonably restrain trade or commerce. It provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*. *See* *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group LP, 592 F.3d 991 (9th Cir. 2010)*. **[**20]** To state a claim under *§ 1*, a party must allege (1) an agreement, conspiracy, or combination between two or more entities, (2) an unreasonable restraint of trade, (3) anticompetitive effects within the relevant market, and (4) a resulting antitrust injury suffered by the claimant. *See generally* *Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 442 (3d Cir. 1997)*.

[*890] Vertical restraints on trade, including those alleged by Mayer, are subject to analysis under the "rule of reason." *See* *Continental T.V. v. GTE Sylvania, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (concerted action on non-price restrictions is subject to rule of reason analysis, requiring a showing of an adverse effect on competition in the relevant market); *Bus. Electr. Corp. v. Sharp Electr. Corp., 485 U.S. 717, 723-36, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (holding that a vertical restraint of trade is not *per se* illegal under *§ 1* of the Sherman Act unless it includes some agreement on price or price levels). An example of a vertical restraint is an exclusive dealing agreement. "Under the antitrust rule of reason, an exclusive dealing arrangement violates *Section 1* only if its effect is to foreclose competition in a substantial share of the line of commerce affected." *See Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group LP, 592 F.3d 991 (9th Cir. 2010)* **[**21]** (internal quotation marks and citation omitted); *Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997)* (explaining that an exclusive dealing arrangement violates *§ 1* only if its effect is to "foreclose competition in a substantial share of the line of commerce affected").

The antitrust plaintiff "carr[ies] the initial burden of showing that the challenged conduct has an actual adverse effect on competition as a whole in the relevant market." *R.J. Reynolds Tobacco Co. v. Philip Morris, 199 F. Supp. 2d 362, 380 (M.D.N.C. 2002)* (internal quotation marks and citation omitted). Such a burden is substantial, and requires the plaintiff to demonstrate that a firm has market power within the relevant market, and that its conduct has actual anticompetitive effects within that market. *See Tanaka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001)* ("The plaintiff bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a 'relevant market.'") (quoting *Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996)*; XI Areeda & Hovencamp, ***Antitrust Law***, ¶¶ 1820-21 at 178-80 (3d ed. 2011) (describing **[**22]** requirements for a *prima facie* case of illegality under the Rule of Reason as including a showing of an exclusive agreement, market power in the relevant market, and foreclosure "sufficient to warrant an inference of injury to competition"); *id.* ¶ 1822e at 220 (characterizing the plaintiff's *prima facie* burden as "substantial"). If the plaintiff succeeds, the burden shifts to the defendant "to establish the pro-competitive redeeming virtues of the action." *Reynolds, 199 F. Supp. 2d at 380*. If the defendant sustains that burden, the claimant "can still prevail by showing that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition." *Id.* (quotation marks and citation omitted).

As set forth below, the Court concludes that Mayer has failed to carry its initial burden of demonstrating that C&D's conduct in imposing a vertical contract has foreclosed competition from a substantial share of any relevant market. Accordingly, the Court does not evaluate whether C&D has proffered sufficient pro-competitive rationales for its conduct, or whether those effects could be achieved through less restrictive means.

2. Adverse **[**23]** Effect on Competition

C&D argues that Mayer has failed to establish a genuine issue of material fact as to whether C&D's planogram agreements violate *§ 1* of the Sherman Act. C&D claims that (1) it lacks market power in the relevant market because there is no evidence that it can charge supra-competitive prices or that its competitors lack the capacity to increase their output in the short run; (2) the agreements do not substantially **[*891]** foreclose competition under controlling Ninth Circuit precedent and other persuasive authority; and (3) the agreements have pro-competitive effects that override any competitive harm.

a. Relevant Market

As a preliminary matter, the parties dispute the relevant market within which to analyze C&D's market power and purportedly anticompetitive conduct. *See Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)* (defining the relevant market is the first step in assessing a party's market power); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291, 1300 (9th Cir. 1982)* ("A definition of a relevant market [i]s necessary in order to assess possible Sherman Act violations.").

The Ninth Circuit has held that the "definition **[**24]** of the relevant market is a question of fact for the jury." *Theme Promotions, Inc. v. News America Marketing FSI, 546 F.3d 991, 1002 (9th Cir. 2008)* (citing *Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997))*. "However, that an issue is factual does not necessarily preclude summary judgment. If the moving party shows that there is an absence of evidence to support the plaintiff's case, the nonmoving party bears the burden of producing evidence sufficient to sustain a jury verdict on those issues for which it bears the burden at trial." *Rebel Oil, 51 F.3d at 1435*.

The relevant market encompasses "commodities reasonably interchangeable by consumers for the same purposes," and "all sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Id.* (citations omitted); *see also* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393, 76 S. Ct. 994, 100 L. Ed. 1264 (1956) ("Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another."); Rebel Oil, 51 F.3d at 1434 ("A 'market' is any grouping of sales **[**25]** whose sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing with any group of buyers."). As the Ninth Circuit explained in more detail,

> Determining the relevant market can involve a complicated economic analysis, including concepts like cross-elasticity of demand, and "small but significant nontransitory increase in price" ("SSNIP") analysis. *See* United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal.2004) (Walker, C.J.). Cross-elasticity of demand measures the percentage change in quantity that consumers will demand of one product in response to a percentage change in the price of another. Forsyth, 114 F.3d at 1483 (Wallace, J., concurring). When demand for the commodity of one producer shows no relation to the price for the commodity of another producer, it supports the claim that the two commodities are not in the same relevant market. Forsyth, 114 F.3d at 1477.
>
> Similarly, a SSNIP analysis asks whether a monopolist in the proposed market could profitably impose a small but significant and nontransitory price increase. Oracle, 331 F. Supp. 2d at 1112. If a significant number of customers would respond to a SSNIP by purchasing substitute **[**26]** products, the SSNIP would not be profitable for the hypothetical monopolist. *Id.* If a monopolist could not profitably impose a SSNIP, the market definition should be expanded to include those substitute products that constrain the monopolist's pricing. *Id.*

Theme Promotions, 546 F.3d at 1002.

In the instant case, the parties agree that the relevant geographic market is the **[*892]** United States. They differ, however, as to the scope of the relevant product market. While Mayer's counterclaim had proposed a market of male condoms sold to retailers, [6] Mayer's expert now proposes a market definition of all male condoms sold to retailers in the FDM channels, excluding c-stores, club stores, and dollar stores. Mayer also proposes a submarket of drugstores specifically. By contrast, C&D proposes a market defined as all male condoms sold to retailers.

The Court agrees with C&D (and with Mayer's initial proposal) that the relevant market consists of all male condoms sold to **[**27]** retailers. Mayer conducts the wrong inquiry in assessing the relevant market. First, it focuses on the end-use consumers of condoms and argues that, for example, the c-store channel is a separate market from the food, drug, and mass channel because the retail price per unit in c-stores is higher and because consumers cannot avoid a per-unit price increase in the FDM channel by moving to the c-store channel. [7] However, for purposes of this case, the relevant "consumers" are the *retailers* who buy and stock the manufacturers' products, and it is their views as to the substitutability and interchangeability of products that matter. *See* Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291, 1297-99 (9th Cir. 1982) (finding that the focus for market definition purposes was the level at which the parties compete); Allied, 592 F.3d at 998 (defining the market as the "U.S. pulse oximetry sensor market"); Concord Boat, 207 F.3d at 1044 ("[T]he relevant market is the market for inboard and stern drive marine engines."); Reynolds, 199 F. Supp. 2d at 383 ("[T]he relevant product market for the purpose of this litigation is all cigarette sales through retail outlets and [] **[**28]** the relevant geographic market is the United States."); El Aguila Food Products, Inc. v. Gruma Corp., 301 F. Supp. 2d 612, 615 (S.D. Tex. 2003) (debating between market definitions of the retail market for tortillas vs. retail market for broader category of starches based on whether tortilla producers competed with producers in the broader category); Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1137 (S.D.N.Y. 1986) (defining the market for salted snack foods as retail sales of "corn chips,

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[6] Indeed, Mayer's counterclaim lists C&D's performance within the c-store chain and its exclusive contract with 7-Eleven as part of its antitrust claims, though it now seeks to exclude c-stores from the market entirely. *See* SAC ¶ 11.

[7] This, of course, also begs the question whether consumers could avoid a price increase in the c-store channel by purchasing their products in the food, drug, or mass channels.

tortilla chips, potato chips, cheese puffs, pretzels and popcorn"). Thus, the interchangeability and substitutability analysis must be conducted one level up, at the wholesaler-retailer level, rather than the retailer-consumer level.

Second, Mayer attempts to segregate the market by separating certain types of consumers for manufacturers' products. However, the Ninth Circuit has held that "the relevant market must be a *product* **[**29]** market. The consumers do not define the boundaries of the market; the products or producers do." Newcal Industries, Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008) (citing Brown Shoe v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)); *see also* Omega, 127 F.3d at 1162 ("The relevant market for [the] purpose [of determining foreclosure effects] includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations.") (quoting 2A Phillip E. Areeda **[*893]** et al., ***Antitrust Law*** ¶ 570b1 at 278 (1995)). Accordingly, the relevant question is whether the products (in this case, condoms) are substitutable within the market, not whether certain customers (*i.e.*, c-stores vs. drugstores) may make their purchasing decisions based on somewhat different criteria. *See* Brown Shoe, 370 U.S. at 326 ("Brown argues that the predominantly medium-priced shoes which it manufactures occupy a product market different from the predominantly low-priced shoes which Kinney sells. But agreement with that argument would be equivalent to holding that medium-priced shoes do **[**30]** not compete with low-priced shoes. We think the District Court properly found the facts to be otherwise.").

In another case involving condom manufacturers, a district court defined the relevant market to include all retail sales of condoms. *See* Ansell Inc. v. Schmid Laboratories, Inc., 757 F. Supp. 467, 475 (D.N.J. 1991). Addressing the differences between the retail market and the entire wholesale sales market (including sales to government agencies and nonprofits), the court found that all "retailers' decision to carry a product depends upon the product's proven or reasonably anticipated product turnover," and that all retailers are focused on sales to the individual consumer. Id. at 473. The court also found the retail market to be the best market according to factors such as industry recognition of the market and price sensitivity. Id. at 473-74.

Mayer offers no evidence to demonstrate otherwise in this case. Indeed, at the wholesaler-retailer level, as in *Ansell*, it is undisputed that the parties herein compete with each other and with other manufacturers for retailers' business, and that retailers view their products as substitutable. *See* Martineau Depo. at 60-61, 117 (retailer **[**31]** decision-making process for what products to stock is based on sales performance of the product and sales per shelf-space allocation). There is also unrebutted evidence that retailers pay attention to other retailers' prices, and attempt to demand price equity from manufacturers. *See* Martineau Depo. at 106 (when C&D raised prices in 2008, CVS confirmed that the increase would be applied to "all retailers" and then increased its own price accordingly). While Mayer points to significant retail price differences between channels, those price differences are much less severe at the wholesale price level, the level at which the parties compete. For example, there is only a 10% difference in the wholesale price for drugstores over mass merchandisers. Wright Rebuttal Report at 9; Baseman Report at 20. Mayer also provides no evidence that prices in one channel do not constrain prices in another. Mr. Baseman fails to cite to any support for his contention that "condom prices in convenience stores are not a significant constraint on the prices that prevail in FDM channels," and he fails to address the relevant prices for purposes of this analysis: the *wholesale* prices retailers pay for manufacturers' **[**32]** products. Baseman Report at 18. Mr. Baseman's later corollary argument, that there is "obviously price-based substitution across the FDM channels," is similarly unsupported by citation or reference to evidence. *Id.* at 19. He provides no basis for the conclusion that Wal-Mart's low prices have taken market share only from other FDM retailers and not from c-stores, dollar stores, and/or club stores.

Moreover, price equity is not dispositive. Twin City Sportservice, 512 F.2d at 1274 ("[T]he scope of the relevant market is not governed by the presence of a price differential."). The Ninth Circuit explained in *Rebel Oil* that cross-elasticity of both supply *and* demand are relevant to defining a market. Rebel Oil, 51 F.3d at 1434-35. The Court applied this principle in concluding **[*894]** that full-serve gasoline had to be included in the relevant market with self-serve gasoline even though there were enduring price differences between the two segments, and even though consumers did not necessarily switch readily from one service to the other. The Court nevertheless found that they were both part of the relevant market because of "[t]he ease by which marketers can convert their full-serve facilities **[**33]** to increase their output of self-serve gasoline." Rebel Oil, 51 F.3d at 1436; *see also* Ansell, 757 F.

Supp. at 475-76 (finding product substitution to be a key component in the market definition analysis, where manufacturers could divert products from one segment of the market to another).

Similarly, in this case, manufacturers can respond to limited opportunities or price increases in one channel by directing their efforts to alternative channels and increasing output in those channels. For example, Durex has won exclusive contracts with retailers in the c-store and dollar store segments, and both Durex and Lifestyles have competed for premium shelf space at Wal-Mart in the mass segment. *See, e.g.*, Wright Report at 55-56 & n.187, 191, 192 (Costco, Family Dollar and Dollar General replaced C&D with Durex as the exclusive supplier); Wright FTC Report at 72 (internal documents reveal that C&D believed it had been "out maneuvered" by Durex and Lifestyles for premium space in Wal-Mart). Thus, as in *Rebel*, it may be "immaterial that consumers do not regard the products as substitutes, that a price differential exists, or that the prices are not closely correlated." Rebel Oil, 51 F.3d at 1436. **[**34]** Rather, what matters is that condom manufacturers compete across these channels and that they can respond to changes in one channel through conduct in another.

Mayer's claim that the different size of products offered across these channels — *i.e.*, 3-count packs versus larger packs — warrants excluding c-stores from the relevant market is unpersuasive. In *Reynolds*, the court examined the different behavior of pack outlets — "comprised of convenience stores and gas stations where primarily cigarette packs are sold" — as opposed to carton outlets — "comprised of supermarkets and cigarette and tobacco stores where primarily cigarette cartons are sold," but included both within the relevant market. Reynolds, 199 F. Supp. 2d at 383. Mayer fails to explain why differences between the FDM and c-store channels are relevant (*i.e.*, the fact that c-stores sell 3-count packs at higher per-unit prices), but differences between other retailers within the FDM channel are not relevant (*i.e.*, the fact that mass merchandisers sell a substantial number of 36-count packs and larger, at lower prices). *See* Baseman Report at 18. In addition, the fact that c-stores carry largely 3-packs of condoms, while other **[**35]** channels carry 3, 12, 24, 36, and higher-quantity packs is irrelevant to the market analysis, as the manufacturers compete for sales within all channels. That each channel may cater to certain distinct tastes or preferences for individual consumers (*e.g.*, variety of brands offered, low price, bulk packs, etc.) does not separate the channels into distinct markets vis à vis manufacturers - the pertinent arena for defining the relevant market herein.

Mayer's remaining arguments in favor of a narrower market are similarly unavailing. For example, Mayer's expert argues that c-stores are not part of the relevant market because C&D does not use its POG program and faces stiffer competition in that channel. *See* Baseman Report at 18-19. However, Mayer cannot simply eliminate all segments in which C&D does not (allegedly) exclude competitors so that it can generate a higher foreclosure rate in its antitrust analysis. Instead, the **[*895]** fact that the POG program does not encompass all condom retailers may indicate a lesser degree of foreclosure for antitrust purposes. *See* Omega, 127 F.3d at 1163 ("If competitors can reach the ultimate consumers of the product by employing existing or potential alternative **[**36]** channels of distribution, it is unclear whether [restrictive arrangements] foreclose from competition *any* part of the relevant market.") (emphasis in original). Thus, the fact that certain channels are untouched by C&D's planogram program does not render them distinct for purposes of defining the relevant market. C&D competes with Durex and Lifestyles in c-stores. As noted above, Durex and Lifestyles do relatively well, garnering approximately 40% of the c-store market. Since a key inquiry of antitrust analysis is whether alternative channels of distribution exist through which businesses can compete, Mayer's attempt to exclude those channels in which competitors have the best success against C&D, simply on the basis of their success, is unwarranted.

Mayer has also failed to produce evidence of a relevant submarket consisting of drugstores only. The existence of a submarket may be determined "by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the products's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors." Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). **[**37]** In this case, the unrebutted evidence in the record suggests that drug retailers view the rest of the category as competitors. *See* Martineau Depo. at 106. As discussed above, Mayer has failed to explain how any distinctions between the drug segment and food and mass segment are more salient than distinctions within or between the food and mass segments, or between other segments of the retail market. While Mayer notes certain differences between the drug channel and other channels (*e.g.*, higher retail prices), as noted above, it fails to account for the fact that other channels within its proposed market definition also vary in price. Indeed, the *Ansell* court examined the *Brown Shoe* factors and concluded that all condom retail sales formed a relevant submarket; it did not note any salient distinctions within the retail market. *Ansell, 757 F. Supp. at 475-76*.

"In the context of ***antitrust law***, if there are undisputed facts about the structure of the market that render [an] inference economically unreasonable, the expert opinion is insufficient to support a jury verdict." *Rebel Oil, 51 F.3d at 1435-36* (citing *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 468-69, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*. **[**38]** In the instant case, Mayer's expert opinion on the pertinent issues regarding the relevant market is without a factual basis. In attempting to define the relevant market Mayer seeks to carve out channels in which C&D has been exposed to the most rigorous competition and in which Mayer has elected not to compete (*i.e.*, c-stores, dollar stores, and club stores), [8] and to create a separate category for the channel in which C&D appears to have had the most success with its POG program (*i.e.*, drugstores). This bootstrap is not a proper basis for defining the relevant market. The question is whether manufacturers compete with each other across these segments, not whether **[*896]** their inclusion or exclusion supports one party's case.

Accordingly, the Court finds that the relevant market is all male condoms sold to retailers in the United States. However, the Court notes that even accepting Mayer's market definitions, the below analysis would largely yield the same outcome, as much of the parties' available data focus specifically on the FDM channels.

b. Market Power

C&D argues that Mayer has **[**39]** failed to provide evidence that C&D holds market power. "Market power is the power to force a purchaser to do something that he would not do in a competitive market." *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (citation and quotation marks omitted). Market power is required in order to demonstrate an adverse effect on competition, because without market power firms cannot rationally adopt restraints that have anticompetitive effects if they wish to survive. *R.J. Reynolds Tobacco Co. v. Philip Morris, 199 F. Supp. 2d 362, 380 (M.D.N.C. 2002)* ("'A threshold inquiry in any Rule of Reason case is whether the defendant had market power' in the relevant product and geographic markets.") (quoting *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc., 889 F.2d 524, 528 (4th Cir. 1989))*; *Church & Dwight Co., 2011 U.S. Dist. LEXIS 35969, 2011 WL 1225912 at *6* (noting in the context of the motion to dismiss that the counterclaim adequately alleged market power and that such a showing would be necessary for a § 1 claim). Market share alone does not establish market power, though it is relevant to the analysis. *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1439 (9th Cir. 1995)* **[**40]** ("A mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme.") (citing *Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1232 (8th Cir.1987))*. [9] There are two ways of demonstrating market power: directly or circumstantially.

i. Direct Evidence

Under the direct method, Mayer must put "forth evidence of restricted output and supracompetitive prices." *Rebel Oil, 51 F.3d at 1434* (citing *Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*. C&D claims that Mayer has failed to put forth any evidence to satisfy the direct method of showing market power, as Mayer has not created a genuine issue of fact as to either restrictive output or supracompetitive **[**41]** prices. Mayer claims to have produced evidence of supracompetitive pricing through C&D's documents indicating that it will not engage in price competition "because it does not need to." Opp. at 40.

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[8] *See* Mayer Depo. at 166 (stating that c-stores' "pricing structure is such that we don't choose to compete.").

[9] Although the *Rebel Oil* court conducts this analysis in the context of a *§ 2* attempted monopolization claim, it explicitly adopts the same analysis with respect to a § 1 claim. *Rebel Oil, 51 F.3d at 1444* ("[F]or the same reasons that we stated in our analysis of Rebel's claim under Sherman Act *§ 2*, Rebel's evidence is insufficient for a jury reasonably to conclude that ARCO possesses market power, or is dangerously close to obtaining it, under *§ 1*.").

Mayer has not produced the direct evidence necessary to demonstrate market power as defined in *Rebel Oil.* First, Mayer has not offered any evidence of restricted output. Although it claims that C&D's planogram agreement successfully drives some competitors out of the market, it offers no evidence that C&D has used such a program to restrict its own, and hence the market's, output. *See* Rebel Oil, 51 F.3d at 1434 ("A predator **[*897]** has sufficient market power when, by restricting its *own* output, it can restrict marketwide output and, hence, increase marketwide prices.") (emphasis added). Indeed, the only evidence in the record regarding supply indicates that, while both parties have faced hiccups with their supply chain, C&D has never attempted to restrict its supply. *See* Mayer Depo., C&D Ex. 17, at 250 (discussing document in which Mr. Mayer had noted the company's supply problems and the fact that competitors would point out to retailers that Mayer's supply was unreliable); Daniels Depo., Mayer **[**42]** Ex. 2, at 178-85 (C&D's head of Sexual Health Marketing Department noting problems at certain points with fulfilling supply orders when demand exceeded their expectations); C&D 11/9/10 Letter to Federal Trade Commission ("FTC"), C&D Ex. 28, at 6 (stating in response to FTC inquiry that C&D's Colonial Heights plant is running at capacity). Mayer does not directly respond to C&D's arguments regarding output in its brief, nor does it attempt to highlight any evidence in the record that would support this prong of the direct evidence test.

Second, Mayer has not provided evidence of supracompetitive prices. While Mayer alleges broadly that C&D is able to charge high prices, it fails to note that its own prices are even higher. *See* Opp. at 40 (citing Silberman Expert Rebuttal Report, Mayer Ex. 20, at 7 (noting that the weighted average price for Trojans is 23% higher than Ansell and 2% higher than Durex, but failing to note that Table R-1, on which Mr. Silberman relies, shows that Mayer's prices are even higher than Trojan)); Mayer Depo. at 178 ("We've made some decisions about how we wish to position our product. We price it high. End of story."). Mayer also noted at oral argument that C&D **[**43]** enjoys a higher profit margin in the U.S. condom market (65-67%) than it does in the Canadian market (51-56%). *See* Baseman Report at 46. However, Mayer fails to provide any basis for comparison between the two markets or account for the variety of factors that may affecting pricing and profit margins, such that a jury might reasonably infer that this difference was an indication of supracompetitive pricing. More to the point, Mayer does not provide evidence as to its own or other rivals' comparative margins.

In addition, high prices are not equivalent to supracompetitive prices. The court in *Reynolds* similarly concluded that plaintiffs had failed to demonstrate supracompetitive pricing when they had merely alleged that defendants' prices were "artificially high" without providing evidence that they were supracompetitive. 199 F. Supp. 2d at 382. Similarly, a court in this district has rejected evidence of price inelasticity and price increases over the relevant time period as insufficient to withstand summary judgment as to direct evidence of market power. *See* In re Ebay Seller Antitrust Litigation, No. C 07-01882 JF (RS), 2010 U.S. Dist. LEXIS 19480, 2010 WL 760433, at *5 (N.D. Cal. Mar. 4, 2010) ("Evidence that **[**44]** eBay has raised prices over a period of years, and that several of its employees believe that the company may have raised them too high, proves nothing with respect to whether the prices are supracompetitive.").

Mayer also refers to C&D documents discussing C&D's ability to raise prices without suffering lower sales, but the evidence it cites indicates that this inelasticity applies to the condom market as a whole as well. While C&D does appear to enjoy especially high price inelasticity, its own research indicates that it is also at least somewhat vulnerable to price competition from its rivals. *See* Mayer Ex. 7 (2007 Nielsen report to C&D indicating that a regular price increase had little impact because condoms are one of the **[*898]** most price inelastic categories in the FDM channel, and Trojan in particular is even more inelastic; but noting that competitive influence accounts for 20-30% of Trojan's elasticity).

Moreover, even assuming C&D's "high prices" are supracompetitive, they must also be accompanied by output restrictions in order to constitute direct evidence of market power. *See* Forsyth v. Humfana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997) ("The plaintiffs submitted evidence that **[**45]** Sunrise Hospital routinely charged higher prices than other hospitals while reaping high profits. With no accompanying showing of restricted output, however, the plaintiffs have failed to present direct evidence of market power."). There is no such evidence in the record.

Accordingly, Mayer has failed to raise a triable issue of fact as to C&D's market power under the direct evidence test.

ii. Circumstantial Evidence

Mayer has also failed to demonstrate market power via circumstantial evidence. A plaintiff can demonstrate market power circumstantially by: "(1) defin[ing] the relevant market, (2) show[ing] that the defendant owns a dominant share of that market, and (3) show[ing] that there are significant barriers to entry and show[ing] that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil, 51 F.3d at 1434*. As noted above, a large market share alone does not in and of itself demonstrate such power. *Id. at 1439*. "A mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme. The plaintiff must show that new rivals are barred from entering the market and show that existing **[**46]** competitors lack the capacity to expand their output to challenge the [defendant's] high price." *Id.* citing *Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1232 (8th Cir. 1987)*. "To justify a finding that a defendant has the power to control prices" sufficient to warrant judicial intervention, "entry barriers must be ... capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting." *Id.* (citing *United States v. Syufy Enters., 903 F.2d 659, 663 (9th Cir. 1990))*.

The Court has already addressed the first prong above. The second prong is not in dispute, as regardless of how the parties define the relevant market, C&D holds a dominant share of approximately 75%.

With respect to the third prong, the parties dispute the level of barriers to entry in the condom market. The Ninth Circuit has defined entry barriers as "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Western Parcel Exp. v. United Parcel Service of America, Inc., 190 F.3d 974, 975 (9th Cir. 1999)* (quoting *Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427-28 (9th Cir. 1993))*. **[**47]** "The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preference; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale." *Rebel Oil, 51 F.3d at 1439*.

Mayer claims that barriers are high because of the FDA approval and inspection process, consumer brand loyalty, and C&D's POG program. *See* Baseman Report at 22-23; Wedel Decl. ¶¶ 15-19. The parties do not dispute that consumer brand loyalty is high in this industry. *See* Baseman Report at 6 n.13 (stating that Church & Dwight's Omnibus Study concluded 52% of consumers would go to another store to **[*899]** purchase condoms if their preferred brand were not available); Wright Rebuttal Report at 54 n. 154 (acknowledging same). This factor accordingly weighs in Mayer's favor. As for regulation, C&D's expert characterizes the FDA approval process, which takes anywhere from 6-24 months, as insubstantial, but it does not explain the basis for this opinion. *See* Wright Report at 18. On the other hand, Mayer does not provide any data to quantify the extent of costs associated with the FDA process. **[**48]** In addition, as the Court explains in detail below, the Court disagrees with Mayer's claim that the POG program constitutes a substantial barrier to entry. *See* *Western Parcel Exp., 190 F.3d at 975-76* (rejecting argument that purported "exclusive dealing contracts" constituted a barrier to entry where contracts were of short duration, easily terminable, and did not prevent consumers from also contracting with competitors).

However, it is undisputed that just three major players have long dominated the condom market, and that while numerous small players have entered the market, none have seriously challenged the big three in recent history. *See, e.g.*, Wright Report, Attachment 8. Such a market structure indicates that the combination of factors described above may prevent the market from self-correcting in the face of anticompetitive conduct. *See* *Rebel Oil, 51 F.3d at 1440* ("Barriers may still be 'significant' if the market is unable to correct itself despite the entry of small rivals."). Accordingly, the Court concludes that Mayer has at least raised a question of fact as to the extent of barriers to entry.

Nonetheless, even assuming significant barriers to entry, Mayer has inexplicably **[**49]** failed to produce either evidence or argument as to the last portion of the third prong, whether "existing competitors lack the capacity to increase their output in the short run." *Rebel Oil, 51 F.3d at 1434*. Mayer's opposition brief omits this language from its quotation of *Rebel*, stating only that it must "show that there are significant barriers to entry. . . ." Opp. at 40 (citing *Rebel Oil, 51 F.3d at 1434*). However, *Rebel* is clear that both are required. "Market power cannot be inferred solely from the existence of entry barriers and a dominant market share. The ability to control output and prices-the essence of market power-depends largely on the ability of existing firms to quickly increase their own output in response to a contraction by the defendant." Rebel Oil, 51 F.3d at 1441.

Although Mayer's counsel stated at oral argument that C&D's competitors lacked capacity to increase output due to lack of access to shelf space, such an argument is unpersuasive for several reasons. First, Mayer does not claim that Durex, Lifestyles, and other rivals have *no* or mere *de minimus* shelf space. As indicated below, nearly 50% of the industry display space is not covered by the POG program, **[**50]** including non-POG retailers in the FDM channel, Wal-Mart, c-stores, dollar stores, and club stores. Moreover, Mayer seems to assume that the only way to increase output would be to increase shelf space, but it fails to account for (much less produce evidence regarding) a competitor's ability to increase output by, *e.g.*, increasing the sales velocity of each item they already have on the shelves. *See* Martineau Depo. at 117 (noting the importance for CVS of sales per shelf-space allocation); Daniels Depo., C&D Ex. 13, at 39-41 (noting that retailers can swap out products for new ones with better sales velocity).

Second, Mayer does not argue that rivals lack the *capacity* to expand output. Indeed, given that Durex and Lifestyles have larger global market shares than C&D, it is obvious there is no capacity limitation. Mayer conceded at the hearing it makes no such claim. Mayer cites no case **[*900]** which establishes that the *Rebel Oil* requirement that rivals "lack the capacity to increase output in the short run" can be based simply on marketing advantages of the dominant incumbent.

Accordingly, Mayer cannot demonstrate market power via circumstantial evidence as defined by *Rebel.*

Notwithstanding **[**51]** Mayer's failure to produce evidence to satisfy the Ninth Circuit's tests for market power, Mayer contends that the Court's analysis places excessive weight on *Rebel Oil.* Mayer notes that its primary claim is that C&D can exclude rivals, regardless of whether C&D has raised prices and thus the capacity to expand output to provide price competition is irrelevant. Mayer also argues that other cases have employed a more flexible and practical method of analyzing direct evidence of market power. Indeed, the Supreme Court has suggested that market power can include not only a firm's power to set prices, but also its ability to exclude competition. *See, e.g.,* Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 464-65, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (considering evidence that certain parts were available exclusively through Kodak, that Kodak had restricted the availability of used machines, "that consumers have switched to Kodak service even though they preferred ISO service," that Kodak's services were higher priced and lower quality, and that certain ISO's had been driven out of business as a result; concluding that this evidence was "sufficient to entitle respondents to a trial on their claim of **[**52]** market power"). *Eastman* cautions that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***," and that "in determining the existence of market power ... this Court has examined closely the economic reality of the market at issue." Eastman, 504 U.S. at 466-67; *see also* Re/Max Intern., Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999) (finding that there was "a genuine issue of material fact as to whether the plaintiffs' evidence shows direct evidence of a monopoly, that is, actual control over prices *or actual exclusion of competitors*") (emphasis added); R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690, 695 (7th Cir. 2006) (the lower court erred in ruling on summary judgment that a 25% market share was "too small to create market power" for purposes of § 1, where a triable issue of possible market power was raised by evidence of brand differentiation, high market concentration, and the defendant's demonstrated ability to change prices of its brands substantially without affecting output).

Such a functional approach suggests that evidence of the ability to exclude some competitors **[**53]** from the market, even in the absence of market-wide restricted output or supracompetitive prices, could suffice to demonstrate market power in certain instances, especially given C&D's undisputed dominant market share. [10] For example, although the district court in *Reynolds* cited *Rebel Oil* for its market power tests, it also entertained RJ Reynolds' argument — similar to the one advanced here — that Philip Morris's merchandising contracts excluded

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[10] Flexibility in defining market powers seems particularly warranted in light of the fact, discussed below, that monopoly power — which is narrower than market power — may in some instances be inferred from dominant market share. The Court must examine the economic realities of the particular **[**54]** situation.

competition from the market and were thus evidence of market power. *199 F. Supp. 2d at 381*. [11] Despite the **[*901]** thin evidence produced by Mayer, because this inquiry essentially dovetails with Mayer's arguments and burden on the merits (*i.e.*, does Church & Dwight's conduct substantially foreclose competition), the Court assumes *arguendo* that Mayer has at least raised a triable issue fact as to C&D's market power and proceeds to the elements of its § 1 claim.

c. Substantial Foreclosure

C&D argues that Mayer fails to raise a genuine issue of material fact as to whether C&D's planogram agreements "foreclose competition in a substantial share of the line of commerce affected." *Allied Orthopedic, 592 F.3d at 996* (quoting *Omega, 127 F.3d at 1162*). Rather than merely potential foreclosure, *actual* foreclosure is required for Mayer's Sherman Act claim: "[I]n a case under *Section 1* of the Sherman Act, the plaintiff must prove that the exclusive dealing arrangement actually foreclosed competition." *Id. at 996 n.1* (citations omitted).

C&D claims that *Allied Orthopedic* renders its agreements permissible as a matter of law. *See* Mot. at 21. In addition, C&D argues that Mayer has failed to produce any quantitative **[**55]** or qualitative evidence of substantial foreclosure.

The parties do not dispute that the vertical restraint imposed by the POG program should be analyzed by the *Allied Orthopedic* test: foreclosure of competition in a substantial share of the market. That test is rooted in cases involving exclusive dealing agreements. Although the POG program here is not as inherently coercive as an exclusive dealing agreement — which, instead of incentivizing the establishment of limits on retailers' display space or sales, completely precludes rivals from sales — the POG program may have a similar anticompetitive effect by effectively establishing a ceiling or quota on the amount of display space available to rivals, display space essential to sales. The percentage approach has the potential for functioning as a zero-sum game, unlike, *e.g.*, discounts based on the number of facings or size of display space with no trade off against space occupied by rivals. The question then is whether Mayer has made a sufficient factual showing of substantial foreclosure of competition to satisfy *Allied Orthopedic* and similar cases.

i. No Actual Foreclosure

(a) *Allied Orthopedic*

In *Allied Orthopedic*, the Ninth Circuit **[**56]** found that market share agreements by which Tyco gave "substantial discounts to customers that actually purchased a high percentage of their sensor requirements from Tyco" did not foreclose competition in the pulse oximetry market. *592 F.3d at 996*. The court described Tyco's program as follows:

> Market-share discount agreements allowed customers, typically small hospitals or groups of small hospitals, to purchase Tyco's products at discounts off list prices if they committed to purchase some minimum percentage of their pulse oximetry product requirements from Tyco. The greater the percentage of the customer's requirements purchased from Tyco, the greater the discount Tyco gave. The agreements did not contractually obligate Tyco's customers to buy anything from Tyco. The only consequence of purchasing less than the agreed upon percentage of Tyco's products was loss of the negotiated discounts.

Id. at 995. In addition, Tyco offered "sole-source agreements, [in which] a [group **[*902]** purchasing organization] agreed that it would not enter into a purchasing contract with any other vendor of pulse oximetry products, and Tyco in return offered a deeper discount." *Id.*

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[11] In *Reynolds*, the court rejected such a theory on the basis that other entities besides defendants had successfully competed for the same merchandising space, and some had also obtained space in excess of their market share. *Id. Reynolds* also considered the fact that many firms made concessions to retailers in order to secure their desired merchandising agreements as evidence that weighed against a finding of market power. *Id. at 382*.

The court found that neither agreement **[**57]** foreclosed competition. In analyzing these incentives, the court found it "significant that the market-share discount and sole-source agreements in this case did not contractually obligate Tyco's customers to purchase anything from Tyco." *Id. at 996*. Instead, Tyco simply offered a discount if and when a customer decided to purchase the required percentage of sensors from Tyco. The court noted that generic sensors were available at a lower price, and that plaintiffs had failed to demonstrate that Tyco's program "forced customers to purchase its sensors rather than generics." *Id. at 997*.

In addition, the court found that because a customer could terminate its agreement with Tyco at any time if it determined that a competitor offered a better deal, "a competing manufacturer need[ed] only offer a better product or a [] better deal to acquire their [business]." *Id.* (quoting *Omega, 127 F.3d at 1164*). Finally, the court found that because alternative channels of distribution were open, even Tyco's sole-source agreements did not foreclose from competition "*any* part of the relevant market." *Id.* (emphasis in original) (quoting *Omega, 127 F.3d at 1163*); *see also* *Western Parcel Exp., 190 F.3d at 975-76* **[**58]** (finding volume discount contracts did not constitute exclusive dealing because they were short term, terminable for any reason, and "did not foreclose consumers from entering into contracts with other delivery service providers"). For example, a buyer "could simply forgo the negotiated discounts with Tyco and purchase less expensive generics instead." *Id.* In addition, although the buyers were precluded from accessing other discounts through non-Tyco group purchasing organizations, the Court concluded that there was no foreclosure because "[t]here is no evidence . . . that HealthTrust members were unable to access less expensive generic sensors through other means," including "potential," rather than just already-established, channels of distribution. *Id.*

Allied reaffirmed the Ninth Circuit's treatment of contracts which are not fully exclusive, but which merely reward a buyer for dedicating a certain volume or portion of its business to one seller while still permitting the buyer to purchase the remainder of its products from other sellers. In *Omega*, for example, the Ninth Circuit held that a manufacturer's contract prohibiting a distributor from becoming the *authorized* distributor **[**59]** of any competing petroleum dispensers, but still permitting the distributor to sell competing dispensers, did not foreclose competition. Previewing the themes repeated in *Allied*, the court held that because there were alternative sources of distribution for the products and the contracts were of short duration and easily terminated for any reason, there was no probable effect of substantial foreclosure. *Omega, 127 F.3d at 1162-64*. Significantly, the *Omega* court conducted its foreclosure analysis under the Clayton Act, which requires only a *probable* effect of substantial foreclosure. *Omega, 127 F.3d at 1162*. In contrast, as noted above, the Sherman Act requires *actual* foreclosure. *Allied, 592 F.3d at 996 n.1*.

Similarly, in *Western Parcel Express*, the Ninth Circuit held that agreements were not actually "exclusive dealing contracts" where UPS merely used volume discount contracts that did "not preclude consumers from using other delivery services" in addition to UPS. *Western Parcel Express, 190 F.3d at 976*. The court also found that the contracts "had termination provisions that allowed a customer to terminate the contract for any reason with very little notice," which "substantially **[**60]** negated" **[*903]** any foreclosure effect. *Id.* (quoting *Omega, 127 F.3d at 1163*).

The Ninth Circuit case law is not unique. The prevailing rule in districts and circuits across the country is that where exclusive or semi-exclusive contracts are short in duration, easily terminable, incentive-based, and leave open alternative channels to competitors, they are not exclusionary. *See* XI Areeda & Hovencamp, ***Antitrust Law*** ¶ 1821, at 186 (3d ed. 2011) ("[M]any courts hold that 'market share' agreements or discounts, which require or reward a firm for using a particular firm's goods for a specified percentage but less than all of its needs, do not amount to exclusive dealing.") (citing *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000))*; *see also id.* (distinguishing further between market-share *discounts*, which still allow competitors to "steal" the customer by matching the discount and are therefore even less exclusive, from market-share *contracts*, which may be of long duration and are therefore more similar to exclusive dealing).

For example, in *Southeast Missouri Hosp. v. C.R. Bard, Inc., 642 F.3d 608 (8th Cir. 2011)*, the Eighth Circuit considered C.R. Bard's program offering discounts **[**61]** to hospitals that agreed to purchase a specified percentage of their catheters from Bard. *Id. at 611*. The program offered increasingly steep discounts as the percentage allocated to Bard grew. Like Tyco in *Allied*, Bard also provided sole-source discounts in the event a customer purchased all of its catheters from Bard. *Id.* Plaintiffs argued that Bard's discount programs were "*de facto* exclusionary because the discount prices are so attractive that hospitals cannot afford to forgo them." *Id. at 612*. However, the court noted that the only penalty for failing to meet the agreed upon percentage of purchases was that the customer "simply lost its negotiated discount." *Id.* The court found that the agreements were not exclusionary "[b]ecause [they] are voluntary agreements, terminable at will and on short notice, [and] any hospital could, at any time, decide to forego [sic] the offered discounts and purchase catheters from a different brand." *Id. at 617* (citing *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1060 (8th Cir. 2000)* (granting summary judgment to defendants in similar case in which plaintiffs had argued that "golden handcuffs" forced customers to accept market-share discount **[**62]** because the agreements were voluntary and customers were willing to purchase the products elsewhere if they received a better offer)).

In the instant case, C&D's POG program, as currently implemented and described in the record, is arguably permissible as a matter of law under the controlling law of this circuit. First, like Tyco's program in *Allied*, here C&D does not force retailers to purchase anything, much less a certain percentage, of condom products from C&D. Nor do the agreements force retailers to give any specified amount of shelf space to C&D over its rivals. Rather, retailers are free to give C&D as much or as little shelf space as they want. The only consequence is that retailers may not receive a rebate based on those decisions. Thus, the distinction drawn in *Allied Orthopedic, 592 F.3d at 997 n.2 —* between contracts that obligated customers to purchase a set percentage of their products from a supplier and those which merely conditioned a discount on such a purchase — applies here.

Second, retailers can terminate their agreements with C&D at any time, for any reason, on 30 days notice. [12] *Omega* **[*904]** found that a 60-day termination period "substantially negated" the risk of foreclosure **[**63]** effects. *127 F.3d at 1163*. Even absent early termination, the contracts last only one year. The Seventh Circuit has stated, "Exclusive-dealing contracts terminable in less than a year are presumptively lawful" as a matter of ***antitrust law***. *Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 395 (7th Cir. 1984)* (reviewing contracts under the Clayton Act) (cited by *Omega, 127 F.3d at 1163*).

Finally, the POG leaves open existing and potential alternative channels of distribution. Each POG retailer is free to contract with C&D's competitors for shelf space, and a substantial portion of the retail market is untouched by the POG program at all, including Wal-Mart (which accounts for **[**64]** 20% of all retail condom revenues and 33% of unit sales), 10% of other FDM retailers, c-stores, dollar stores, and club stores. Even within POG stores, there is substantial (typically 25 to 35%) shelf space not covered by the POG rebate program. In addition, rivals are free to compete for endcap and sidecap space, supplemental facings in other sections of the store (*i.e.*, feminine hygiene and others), and other promotional display space in the store. Rivals can also negotiate for premium space within the condom section, as the POG program places no restrictions on where retailers must place C&D products. Mayer does not dispute that rivals may compete for these alternative paths to distribution. These alternative channels leave competitors a wide range of options to get their products to customers. *See* *Southeast Missouri, 642 F.3d at 616* ("[I]n determining whether a market is foreclosed, the relevant inquiry is what products are *reasonably available* to a consumer, not what products the consumer ultimately chooses to buy."). [13]

(b) Distinguishing *Allied Orthopedic*

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[12] C&D argues separately that the Ninth Circuit created a safe harbor for short duration contracts such as its planogram agreements. *See* Reply at 18 (citing *Omega, 127 F.3d at 1163* ("[T]he short duration and easy terminability of these agreements negate substantially their potential to foreclose competition."). However, while *Omega*, like *Allied*, highlighted short duration as an element in favor of a challenged contract, it does not appear to create any safe harbor as a matter of law for such contracts.

[13] Indeed, given *Allied*'s and *Omega*'s focus on *potential* alternative channels of distribution, the Court's focus on existing alternatives within retail stores is **[**65]** conservative. For example, CVS's buyer indicated that internet sales, on which the parties do not substantially focus, are a potential alternative channel that may be uniquely suited to small rivals attempting to gain a foothold in the market. *See* Martineau Depo. at 82 (indicating that she sometimes puts a new item on CVS.com to monitor its sales before deciding whether to carry it in the store); *id.* at 91-92 (indicating that a new condom product had received placement on CVS.com to evaluate its potential in-store sales).

Mayer claims that, notwithstanding the purported short duration, easy terminability, and voluntary nature of the POG program *in theory*, it is nonetheless coercive *in practice.* Mayer claims that there are distinct facts about C&D's POG's program that distinguish it from *Allied.* Thus, assuming *Allied* does not render the POG program *per se* permissible (because of its basic nature as a price-based incentive to which retailers may respond voluntarily), the Court will address Mayer's claims that the facts in this case nonetheless establish a Section I violation.

First, Mayer argues that *Allied* is distinguishable because in that case, Tyco **[**66]** had only a 35% market share as compared to its primary rival, which had a 40+% share. In contrast, C&D occupies over 75% of the condom market, and is five times larger than its biggest rival, Durex, at under 15%. *See* Wright Report at Attachment 8. While a dominant market share does not necessarily render a leading player's efforts to maintain that share anticompetitive, *see Harmar, 218 S.W.3d at 676-77* **[*905]** (contracts requiring shelf space commensurate with 75-80% market share not anticompetitive); *Louisa Coke, 94 F. Supp. 2d at 815* (contracts by distributor with 70% market share to guarantee shelf space not anticompetitive); *Reynolds, 199 F. Supp. 2d at 388* (shelf space commensurate with 55% market share not anticompetitive), the coercive effect of a discounted-based incentive can be amplified where the entity providing the inducement sells at volumes many times greater than its competing rivals. For example, a 7% discount from a company that sells $10 million in merchandise results in a savings of $700,000 to the retailer. If the rival manufacturer only has a sales volume of $2 million, it would have to discount its merchandise by 35% to match the $700,000 in savings offered by the dominant **[**67]** firm.

This is related to Mayer's second argument. Mayer's expert posits that C&D's program creates a "tax" on competitors by increasing the cost of switching from C&D to rival products if such a switch would result in a reduction or cancellation of the C&D rebate. Baseman Report, Mayer Ex. 9, at 25. Mayer claims that in this case, the tax is exacerbated by the fact that the POG program offers a discontinuous stepped rebate hierarchy. In other words, C&D's POG program has set participation rates (*e.g.*, 65%, 70%, and 75% of shelf space) with discrete rebate levels that drop off when retailers miss a certain target rate, rather than a continuously increasing discount or a discount applied only to increased marginal purchases. [14] Mayer contends that such a discontinuous rebate structure creates "cliffs" whereby retailers face harsh penalties (in the form of lost rebates applicable to all sales starting with the first dollar, thus increasing costs to the retailer) for moving downward on the rebate rate schedule. There is an especially jarring penalty for dropping below the 65% level (at which point they would lose the 7% rebate on *all* of their purchases of C&D products). Mayer argues that **[**68]** the POG is particularly coercive and results in golden handcuffs, whereby retailers cannot afford to forgo the rebate and thus are forced to devote unjustified display space to C&D.

Mayer makes a third related argument in claiming that unlike in *Allied*, C&D's product has strong brand loyalty and is considered a "must carry" brand in the FDM market. Opp. at 34; Baseman Report at 6. This arguably gives C&D more leverage to "force" retailers to give it a certain percentage of shelf space because they have to purchase at least some of the product anyway. Brand loyalty thus theoretically increases the coercive effect of the golden handcuffs.

Before considering the evidence in the record to support Mayer's theories, the Court first notes that with respect to Mayer's tax effect theory, it is noteworthy that such a theory has yet to be recognized by this Circuit. Interestingly, the district court in *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group L.P., 2008 U.S. Dist. LEXIS 112002, 2008 WL 7346921, at *5 (C.D. Cal. July 9, 2008)*, **[**69]** considered the expert's conclusions that contracts imposed costs on competitors and found that "regardless of whether Tyco's discounts represent a penalty price or involve kickbacks to hospitals, they do not 'force' hospitals to do anything."). The Ninth Circuit did not question that finding. *Allied, 592 F.3d at 996-98* (considering plaintiff's arguments and expert projections and concluding that characteristics of the contracts — such as the lack of purchase **[*906]** requirement and easy terminability — precluded a finding that the contracts foreclosed competition). There is no indication that *Allied*'s discount program worked any differently than C&D's POG program here. There is no indication that the gradation of discounts in

[14] For example, one could offer a 7% rebate on purchases *above* a certain level, rather than a 7% rebate on *all* purchases back to the first dollar once a retailer reaches a certain level.

Allied did not also have a theoretical "tax effect." Yet, the *Allied* court did not find the discount structure was material to its analysis.

In any event, even assuming Mayer's arguments in distinguishing *Allied* have potential legal merit in theory, Mayer has failed to present any evidence that the POG program had any more coercive effect than in *Allied* and similar cases (*e.g., Western Parcel Express, Omega, Southeast Missouri Hosp., Concord Boat*).

Irrespective of Mayer's **[**70]** theories, Mayer must present some competent evidence of an actual coercive effect that substantially foreclosed competition in order to create a genuine dispute of material fact. *See* *Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671, 689 (Tex. 2006)* (applying federal ***antitrust law*** and stating that although challenged contracts "*could have had* anticompetitive and monopolistic effects," it was improper to "conclude[] that the jury was therefore entitled to infer that the CMAs *did have* such effects"; instead, "[t]here must be evidence of 'demonstrable economic effect,' not just an inference of possible effect") (emphasis in original) (quoting *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988))*.

In this regard, the Court notes that a number of cases dealing specifically with shelf space limitations have found they do not foreclose competition based on the facts particular to the challenged practice. For example, in *Harmar Bottling Co.*, the Texas Supreme Court relied on federal ***antitrust law*** and upheld contracts requiring favorable promotion, placement, and pricing, including shelf space commensurate with 75-80% market share, limits on rivals' shelf space and some bans **[**71]** on certain products. *218 S.W.3d at 676-77*. The court also noted that such contracts were common in the industry. In *Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1135 (S.D.N.Y. 1986)*, the court considered a retail display case and concluded that "[b]ecause of the limited duration of the TOP program, the fact that defendant has not alleged that Frito-Lay obtained a greater share of shelf space than its sales warranted, and the fact that dealers were free to drop out of the program or not enroll in it at all, leaving Bachman free to introduce its own competitive scheme, it is very difficult to see how the agreements between Frito-Lay and their retailers could constitute contracts in restraint of trade within the meaning of *Section 1* of the Sherman Act." Similarly, in *Reynolds*, a North Carolina district court held that cigarette manufacturers' contracts with retailers for advertising and product space are not anticompetitive where they "do not preclude the display of competing products, do not control the prices at which those products are offered, and do not provide Defendant with more than its market share of product space." *199 F. Supp. 2d at 387*. Finally, one court specifically **[**72]** noted the zero-sum game inherent in some shelf-space agreements, yet found that such an outcome did not foreclose competition when "all of the evidence indicates that the store owners within the Louisa Coke market allot shelf, storage and display space at their sole discretion based on such factors as the market's demand for a product and the supplier's ability to keep such products in stock." *Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metropolitan Bottling Co., Inc., 94 F. Supp. 2d 804, 814 (E.D. Ky. 1999)*.

In the case at bar, Mayer has not presented admissible evidence of a coercive effect distinguishing this case from *Allied.* **[*907]** First, if the POG coerced retailers into increasing their C&D shelf space allocations (at the expense of Mayer or other rivals) solely because of C&D's rebate program, one would expect to see retailers clustered at the bottom tier of the rebate structure. Such a cluster could indicate — or at least create a reasonable inference — that retailers were seeking to avoid the penalty of dropping out of the rebate entirely, and that there were no other business justifications for giving C&D that level of shelf space. However, the record does not indicate such an effect. **[**73]** Instead, the majority of retailers choose tiers higher than the minimum required to obtain the rebate, suggesting that other market factors govern their decisions. For example, from 2004-2007, despite the fact that a 55% shelf space tier was available, retailers' participation at that level never exceeded 3.3%, and declined to under 1% by 2007. Wright Report Attachment 14. Instead, the majority of retailers participated at the 65% shelf space level. In 2007 and 2008 the data is even more pronounced, as a substantial number of retailers moved to the 70% level despite the availability of lower tiers. The only exception to this trend is 2009, during which over 70% of C&D's revenues came from retailers at the lowest available tier. [15] However, this phenomenon lasted only one year. On the whole, then, these data belie Mayer's theory that the POG creates any cusp or "cliff" effect, forcing retailers to make decisions they otherwise would not make solely to obtain the rebate. In short, Mayer presented no factual

[15] In 2009, the lowest available tier was 70% of shelf space.

evidence of a coercive "tax effect." *See* Concord Boat, 207 F.3d at 1056 (rejecting tax theory in the context of a market-share discount because some buyers purchased more than necessary **[**74]** to qualify for the discount).

Moreover, as shown by undisputed data, a significant number of large retailers do not participate in the program, and some have changed levels of participation, indicating that retailers are not locked into POG participation. *See* Wright Report Attachment 15 (providing chart of top 25 retailer planogram participation by level, showing that as of 2011, 6 retailers do not participate at all, 1 participates at 55%, [16] 1 at 65%, 10 at 70%, and 7 at 75%; showing that 2 retailers had decreased levels from 2010-2011 and others had shifted downward in previous years).

The record also contains qualitative evidence that retailers can and do reduce or eliminate their participation in the planogram agreements based on market forces. For example, CVS buyer Michele Martineau testified before the FTC that she does not include the C&D rebate in sales projections, that her planogram decisions do not depend on the rebate, and that CVS is not currently getting the rebate because it is out of compliance **[**75]** due to independent sales decisions. Martineau FTC Depo., Mayer Ex. 1, at 59-62, 67. Similarly, 2009 emails between Rite-Aid and Ansell (Lifestyles) show that Ansell proposed a rebate in exchange for a certain number of SKUs [17] and vertical planogram positioning. In response to Rite-Aid's statement that Ansell would need to be competitive on their incentive offer to match C&D's 7.5% rebate, Ansell in fact revised its offer to do so. C&D Exs. 18, 19; *see also* Wright Rebuttal Report, C&D Ex. 121, App. B, at 5 n.12 ("Rite Aid indicated that it first independently determines what **[*908]** share of its planogram it wants to devote to Church & Dwight products and then claims whatever rebate it is entitled to as a result of that decision.") (citing Rite Aid email to the FTC, September 24, 2009, RAHC 000775 at 776)). Mayer provides no evidence to rebut these retailers' assertions.

Furthermore, the undisputed evidence in the record indicates that C&D's average share of sales at non-POG retailers is roughly on par with its share of sales at POG retailers. *See* Silberman Report Ex. 3. In fact, comparing those retailers that never had POG programs with those that always **[**76]** had them, C&D's share of unit sales at "never had" retailers has *always equaled or exceeded* its share of sales at "always had" retailers for every quarter between 2004 and 2010. Wright Rebuttal Report Figure A3. In only two quarters of 2010 were the shares actually equal; in every other quarter measured, sales at "never had" retailers exceeded those at "always had" retailers. Indeed, for nearly three of the years measured, C&D's share of sales at "never had" retailers was at least five (and sometimes ten+) percentage points higher than at "always had" retailers.

Similarly, C&D's data indicate that system-wide, C&D's shelf share rarely exceeded its market share. *See* Wright Report at Attachment 16A (comparing average shelf share per year to unit sales share per year from 2004-2010, and showing that sales share exceeded shelf share for all years except 2005 and 2009, when it trailed by .8% and .5% respectively); Table 16B (breaking same data out by retailer and showing few deviations below parity). In addition, of the top 25 FDM merchants (excluding Wal-Mart) selling C&D products between 2004 and 2011, on only five instances has C&D's shelf share exceeded its market share. *See* Wright Report **[**77]** Attachments 15 and 17B. [18] Mayer's claim that "C&D consistently used the planogram program to obtain shelf space that exceeded its market share" is thus unsupported by the record. Opp. at 32. The isolated instances in which C&D's market share fell slightly below its sales share are not indicative of an antitrust violation. *See* LePage's Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003) ("The relevant inquiry is the anticompetitive effect of [the defendant's] exclusionary practices considered together.... [C]ourts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation."); *see generally* Harmar Bottling Co., 218 S.W.3d at 689-90 ("There is no evidence that such isolated instances impacted consumers throughout any exclusive territory, much less throughout the Ark-La-Tex region. While consumers may have paid more on occasion in a particular store, there is no evidence that Coke's CMAs caused consumers to pay higher prices generally."). Courts have considered parity between shelf space and market share to be an important indicator that a firm is not using its contracts to foreclose competition.

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[16] Meijer has a special contract to keep its 55% planogram participation, which is apparently not offered to other retailers.

[17] SKU refers to a stock-keeping unit.

[18] Moreover, C&D points out that in the case of Target, the reason for the aberration was its acceptance of a two brand strategy promoted by Durex, an event unconnected to the POG program.

Reynolds, 199 F. Supp. 2d at 388 (considering it significant **[**78]** in foreclosure analysis that "[u]nder every level of Retail Leaders, PM obtains cigarette product space in an amount equal to or less than its market share"); *Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1134 (S.D.N.Y.1986)* (upholding agreement that guaranteed supplier shelf space equal to its market share); *Harmar Bottling Co., 218 S.W.3d at 677*(reversing judgment and holding that there was no evidence of anticompetitive harm based in part on the **[*909]** fact that contracted shelf space did not exceed market share).

Mayer also fails to account for the fact that Durex and Lifestyles have avoided the purported anticompetitive effect of C&D's POG program. *See* Silberman Report, Mayer Ex. 24, at 15 (admitting that Durex's sales have been "essentially unaffected" by the planogram rebate program). Durex has maintained its roughly 15% market share throughout the period in question, and Lifestyles has both dropped and increased during the same period. Although Mayer's counsel averred at oral argument that Lifestyles **[**79]** may have been affected by the POG program, Mayer provides no evidence or argument in the record from which a jury could draw such a conclusion. *See id.* (stating that Lifestyles's market share fell between 2004-2006 and 2008-2010, but offering no facts or analysis as to why). By contrast, C&D offers unrebutted evidence to explain Lifestyles's changes in market share, including an FDA quarantine in 2005 and a successful Durex strategy to persuade retailers to adopt a two-brand strategy with Durex and Trojan only. *See* Wright FTC Report, Mayer Ex. 8, at 87; *see also* Wright Report at 115-21 (describing other factors, including a decline in Lifestyles sales among small non-POG retailers, minimal advertising as compared to C&D and Durex, and changes in packaging that may have confused consumers).

Without explaining how C&D's two primary competitors have escaped relatively unscathed, Mayer has not provided a plausible basis for attributing its own misfortune to C&D rather than other forces. In fact, C&D has presented evidence of numerous reasons why Mayer has lost business. For example, C&D presents evidence that (1) Mayer prices its condoms at a high level (which Mr. Mayer admits) [19]; (2) **[**80]** it targets a narrow sub-set of the condom-buying population, women age 25-35; (3) it has limited product offerings, with 10 SKUs in 2010 as compared to Ansell, Durex, and C&D at 43, 51, and 65 SKUs respectively; (4) it is severely financially constrained with high production costs due to its dependency on its supplier, Sagami, for lines of credit and its failed investments in products such as eZ-on and the Female Condom; (5) it faced inventory constraints in 2006 and 2007 due in part to an FDA hold on shipments; (6) it did not engage in consistent marketing efforts; (7) it has faced continual competition in the ultra-thin segment of the condom market, where Durex and Ansell hold 33% and 20% shares, respectively; (8) it faced competition from the new ONE brand condom, which Mayer blamed internally for its difficulty gaining new distribution in 2007; (9) Mayer suspected that Ansell and Durex were buying shelf space to keep Mayer out in 2007; and (10) it chooses not to compete in the c-store channel. *See* Wright Report at 126-63, 202-03.

In addition, C&D offers evidence that Mayer has had opportunities to sell its products through large chain retailers, but has lost those opportunities due to poor sales and other factors. *See, e.g., id.* at 168-69 (Rite Aid discontinued some Mayer products in 2006 and all products in 2007 due to what Mayer described at the time as a lost battle with bigger companies who introduced new products); *id.* at 174-75 (Brooks/Eckerd failed to stock Mayer **[*910]** products in half the stores in which it had agreed to stock them in 2005, and sales were lower than expected: Mayer was discontinued in 2007); *id.* at 177-78 (CVS Kimono sales were lower than the CVS average per condom product, and were outpaced by smaller rivals; CVS discontinued Mayer in 2007 but reintroduced five SKUs in 2009 in California stores); *id.* at 186-87 (Walgreens introduced ONE condoms in 2008 which outpaced Kimono sales; Walgreens complained in 2010 that Kimono's sales **[**82]** were low and declined to increase their distribution); *id.* at 189-92 (Duane Reade discontinued one of four Kimono SKUs in 2008 due to poor sales, and discontinued a second slow-selling SKU in 2009); *id.* at 195-96 (Target ran a test of Kimono SKUs in selected stores in 2010, but discontinued the test after what an internal Mayer document described as "no gains for Kimono after a test").

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[19] Indeed, C&D supports its claim that Mayer's high prices are at least partially responsible for its limited success by offering evidence that its 2004 **[**81]** "buy-one-get-one-free promotion at Longs quadrupled Mayer's sales. Wright Report at 132. In contrast, the record is replete with internal Mayer documents bemoaning the fact that buyers complain about high prices. *See, e.g.*, Mayer Depo. at 174, C&D Exs. 44-51, 54-56.

Mayer's expert fails to address most of these and other proffered reasons for Mayer's losses. *See, e.g.*, Silberman Damages Report at 15-16 (noting that the small manufacturer segment of condom manufacturers could have declined due to the consolidation of retailers and their central purchasing strategies, as well as some chains' adoption of a two-brand strategy with Durex and Trojan, but nonetheless attributing the decline to C&D's planogram program). Mr. Silberman's Rebuttal Report addresses and rebuts some of C&D's evidence from the early 2000s, pointing out that any weaknesses in Mayer's financial position and business model did not prevent Mayer from increasing its sales from 2001-2006. Silberman Rebuttal Report at 4. The Court credits that rebuttal for purposes of summary judgment. However, Mr. Silberman **[**83]** still fails to address the more recent alternative explanations cited above. Most critically, Mayer fails to explain any alternative reasons for why it suffered from slow sales in the national retailers in which it had already secured at least some distribution, or how any slow sales and resulting discontinuance were due to C&D rather than Mayer's performance or some other factor. Instead, Mr. Silberman merely states that Mayer's lost distribution is also consistent with C&D's increased POG efforts, but does nothing to draw any causal connection. *See id.* at 11 (noting without explaining that Rite Aid reduced number of stores carrying Kimono in 2006, and stating that Mayer's internal document indicating it had lost the battle with larger manufacturers that had introduced new products was "entirely consistent with C&D's shelf-space contracts having an anticompetitive effect"); *id.* at 16 (repeating argument that removal of certain SKUs from Longs coincides with increases in POG program, but failing to address any alternative reasons for the coincidence). Mr. Silberman also presents other unrelated evidence that has no connection to the POG program. *See id.* at 12 (explaining Mayer's low **[**84]** sales at CVS in 2006 due to C&D achieving eye-level placement in the planogram, a perk unconnected to the POG); *id.* at 17 (stating that Walgreens accounted for a large percentage of Kimono's sales in 2008, which says nothing about how Kimono performed relative to other brands at Walgreens). Failure to account for alternative causes of a business injury renders Mayer's assertion that it lost business due to C&D's program unsubstantiated. *See* *Frito-Lay, 659 F. Supp. at 1135* ("[E]ven though defendant has made specific allegations regarding its own market losses, it has asserted no facts to show that its losses were a result of defendant's allegedly anticompetitive activity, rather than a result of financial difficulties within the company or some other problem.").

Mayer also fails to present any direct evidence of anticompetitive harm suffered as a result of C&D's POG **[*911]** program. Mayer offers only a couple of anecdotes from Mr. Mayer and Mr. Wedel (of Global Protection Corporation, the makers of ONE condoms) relaying hearsay statements of suppliers who stated they could no longer make room for Mayer/GPC products because they needed the space for C&D. *See* Silberman Report, Mayer Ex. 24, at **[**85]** 16-17 (Duane Reade employee stated that they could not lose the C&D rebate); Wedel Decl., Mayer Ex. 10, ¶ 91 ([TEXT REDACTED BY THE COURT] buyer told Global Protection that it was discontinuing its SKUs because C&D agreement required them to increase self space by 10% for C&D). But these statements constitute hearsay and are not admissible. If anything, Mayer's reliance on such hearsay underscores the fact that Mayer did not depose any third party retailers and presented no admissible testimony or documents showing C&D's POG program had the anticompetitive effect of coercing displacement of competitors' display space. In any event, such evidence is insufficient to support a jury verdict that C&D harmed competition (rather than simply one or two discreet competitors). *See* *Louisa Coca-Cola, 94 F. Supp. 2d at 814* ("Plaintiff offers nothing other than its own projected lost profits to prove that Pepsi's actions have foreclosed a substantial share of the soft drink market. A single competitor's lost profits does not demonstrate a market wide competitive detriment.") (citations omitted); *Frito-Lay, 659 F. Supp. at 1135* (failure **[**86]** to trace losses to accused conduct dooms claim of harm to competition).

Mayer further fails to address the fact that POG rebates comprise only a small part of C&D's promotional budget. C&D spends only approximately 3.4% of gross sales on the planogram rebate, as compared to other promotional programs that make up 15% of gross sales. Wright FTC Report at 2, 30, Table 7A, 7B. These additional promotions are commonplace in the industry and include things like slotting fees, trade promotions, and cash discounts. *See, e.g.*, C&D Ex. 61 (2004 email from Mayer to Sagami noting increasing costs imposed by retailers through means such as slotting fees); C&D Ex. 115 (Durex proposal to Target including funds for promotional discount). Given that C&D's other promotional dollars dwarf its spending on the POG program, in the absence of evidence to the contrary, it is difficult to see how the program exercises the coercive power on the market that Mayer alleges. In addition, C&D points out that its promotional spending, including the POG agreements, is proportionate to its main competitors, including Mayer. Wright Report Attachment 12 (showing C&D, Mayer, Durex, Ansell, and Global Protection all spending **[**87]** approximately 10% of gross condom purchases on promotional funding).

In sum, there is no evidentiary support in the record that C&D's POG rebates created a coercive effect on retailers which foreclosed competitors from a substantial share of the market. The lack of such evidence of coercive effect stands in contrast to cases where such an effect was found. For instance, *Allied*, in finding no substantial foreclosure, distinguished a previous case involving Tyco's contracts in which the court had found anticompetitive conduct because a patent still in effect precluded customers from purchasing generic products as a substitute for Tyco sensors. *See* *Allied, 592 F.3d at 997 n.2* ("The R-Cal patent was still in effect during the time period at issue in *Masimo*, so owners of Tyco's R-Cal monitors had no choice but to purchase Tyco's sensors for use with those monitors.") (citing *Masimo Corp. v. Tyco Health Care Group, 350 Fed. Appx. 95, 2009 WL 3451725 (9th Cir. 2009))*. The level of coercion at issue in *Masimo* was much higher than in this case, as customers in *Masimo* had *no* product alternatives. *Cf.* Wright Rebuttal Report, C&D Ex. 121, **[*912]** at 54 n.154 ("Church & Dwight's Omnibus Study found **[**88]** that 52% of consumers would go to another store to purchase condoms if their preferred brand were not available. The remaining 48% would stay in the store and choose from other brands.").

Qualitatively, Mayer has failed to raise a genuine issue of fact as to whether C&D's POG program has had a coercive effect upon retailers, forcing them against their own business judgment to take display space away from rivals and give it to C&D.

ii. Overestimating the Foreclosure Rate

Even if the Court were to assume there was evidence of a coercive effect which foreclosed some competition, thus distinguishing this case from *Allied*, there is no evidence that competition was foreclosed from a *substantial* portion of the market.

In this regard, Mayer's expert claims that the foreclosure rate is upwards of 75-95%, depending on the scope of the relevant market. Mr. Baseman arrives at this rate by calculating the percentage of FDMx sales by retailers who participated in and were in compliance with C&D's planogram program (not including c-stores). Baseman Report at 38. Using this formula, Mr. Baseman concludes that the foreclosure rate ranged from a low of 76.8% in 2005 to a high of 88.8% in 2008. *Id.* However, **[**89]** Mr. Baseman's methodology is implausible and unsupported by evidence.

First, his formula fails to account for the portion of shelf space available in a C&D-compliant store that is *not* covered by the planogram agreements. Mayer offers no basis to conclude that all competition is foreclosed in retailers participating in the program; all retailers do not devote 100% of shelf space to C&D. [20] However, as the court noted in *Omega, 127 F.3d at 1163*, "If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition *any* part of the relevant market." (Emphasis in original). *Cf.* *Reynolds, 199 F. Supp. 2d at 387* (comparing shelf space rebate program to an exclusive dealing agreement but noting that "[b]ecause Retail Leaders is less restrictive than an exclusive dealing arrangement, it arguably should face less scrutiny under antitrust analysis"). Indeed, in *Reynolds*, the court excluded stores from its foreclosure calculation in which plaintiffs still had an opportunity to display and promote their products, even though defendant required a percentage of available **[**90]** signage. *Id. at 390*. The court noted that the proper foreclosure rate would probably take into account only stores in which the defendant had an exclusive contract, but it used a higher number merely for the sake of argument. *Id.* [21] By contrast, Mayer's expert not only included all stores in which C&D had secured a

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[20] Mr. Baseman seems to acknowledge the speculative nature of his foreclosure calculation, as he describes the foreclosure rate in terms of the percentage of retailers that were "likely incentivized" by the POG. Yet all discounts offered by competitors "likely incentivize" buyers to buy more of the discounted product. That is the point of discounts. The question is not whether the POG "likely incentivized" retailers to choose C&D products, but whether it *foreclosed* competition.

planogram agreement, despite Mayer's (and other rivals') ability to compete for space in those stores, he **[*913]** also treated those stores as 100% foreclosed. In fact, 25-35% of the space in POG retailers is typically available to rivals, which equals or exceeds those rivals' combined market share.

Second, the calculation is flawed because it overstates the actual foreclosure effect in this context — it overstates the amount of total shelf space in the condom market under the auspices of the POG. In *Omega, 127 F.3d at 1162*, the court calculated the foreclosure rate by multiplying the "percent of Gilbarco's total dispenser sales [that] are through distributors" (70%) by Gilbarco's market share (55%). Using *Omega's* foreclosure methodology, if C&D has a 75% market share, and 66.1% [22] of its sales derive from POG contracts and c-store contracts, the foreclosure rate would be 49.6%. However, even this rate overstates the actual foreclosure in the market because it treats exclusive contracts POG/percentage contracts as equally foreclosing, which does not reflect the realities of the market. Instead, one could apply *Omega* to the realities of this market, in which C&D's average contracted shelf share is 72% [23] in the POG stores and 60% [24] in the **[**92]** c-stores. *See* Wright Report Attachment 16A; *id.* at 53. If 44.1% of C&D's sales derive from POG retailers, where it has a contracted shelf share of 72%, and 22% of its sales derive from c-stores, where it has a 60% share, one could calculate a foreclosure rate of 45%. [25] Yet another method would be to attempt to calculate the approximate total shelf space in the condom market dedicated to C&D through either the POG or c-store contracts. Such a method would first multiply the percentage of the total condom market occupied by POG retailers (51.6%) [26] by C&D's average shelf share in those retailers (72%), which is 37%, or the total percentage of condom shelves occupied by the POG program. Second, for the c-store market, one would multiply the percentage of the total condom market occupied by c-stores (22.5%) [27] by C&D's average shelf share in that market (60%), which is 13.5%, or the total percentage of the condom market occupied by C&D c-store sales. Adding these two figures together, the total percentage of condom shelves dedicated to C&D through a POG or c-store agreement is 50.5%. [28] Thus, using **[*914]** any of these three methods, the foreclosure rate could be calculated as 49.6%, 45%, or **[**93]** 50.5%.

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[21] Indeed, the court even voiced concern that the "exclusive" contracts still did not foreclose competition because **[**91]** "Retailers generally carry manufacturers' products in these stores even though they do not have merchandising contracts in these stores. Furthermore, Plaintiffs are free to negotiate merchandising contracts with these stores." *Id. at 390 n. 20*.

[22] 22% of C&D's sales derive from the c-store channel. Wright Report at 51. 28% of its sales derive from Wal-Mart. Wright Report Attachment 2. 1% of its sales derive from Sam's Club. *Id.* This leaves 49% of C&D revenues which derive from all other retailers, which the Court will label FDMx for simplicity's sake even though it also includes a small portion from dollar stores and club stores. Of those revenues in the FDMx channel, 90% of C&D's FDMx revenues derive from POG retailers. Thus, approximately 44.1% of C&D revenues (90 X 49) derive from POG participants. 44.1% (POG sales) + 22% (c-store sales) = 66.1% of C&D revenues that derive from some form of exclusive or semi-exclusive agreement.

[23] 72% is the highest average shelf share, reflecting data from 2009. It is thus a high water mark for the POG program.

[24] 60% is again a high water mark, as Mr. Wright calculates C&D's c-store market share at 50-60%.

[25] 44.1% × 72% = 31.8%. 22% × 60% = 13.2%. 31.8% + 13.2% = **45%.**

[26] 92% of FDMx sales are from POG retailers (Baseman Report Table 2) × 56.1% of condom market is FDMx retailers = 51.6% of the condom market that is POG retailers.

[27] Wright Report Attachment 1.

[28] This final method uses the **[**94]** data for *revenue share* to determine what percentage of the condom market is occupied by POG retailers and c-stores. Yet another alternative method would be to use the percentage of *unit sales* to calculate each segment's market share. These percentages are different because each channel uses somewhat different pricing (*e.g.*, drugstores charge higher retail prices, so they have a greater revenue share than unit share in the condom market). Using unit share would arguably yield a more accurate rate for purposes of this case because it would calculate the total percentage of condom units sold that are attributable to the POG or c-stores. Under this method, 45% of the condom market is occupied by POG retailers. *See* Wright Report Attachment 1 (49% of unit sales are from FDMx retailers); Baseman Report Table 1 (92% of FDMx retailers are POG retailers). Since C&D contracts for an average shelf share of 72% in POG retailers, the foreclosure rate due to the POG would be 32.4%. In the c-store channel, c-stores account for 14.9% of condom unit sales. Wright Report

Any one of these rates, though high, is not clearly outside of the permissible range. *See, e.g., B & H Med., L.L.C. v. ABP Admin., Inc., 526 F.3d 257, 266 (6th Cir. 2008)* ("Courts routinely observe that foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent.") (internal citations and quotation marks omitted); *Omega, 127 F.3d at 1162-63* (agreement foreclosing 38% did not violate antitrust laws); *Reynolds, 199 F. Supp. 2d at 390* (upholding space-to-sales rebate program with 34% foreclosure); *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 237-38 (1st Cir. 1983)* (Breyer, J.) (upholding requirements contract with 50% foreclosure rate).

Importantly, courts assessing similar contracts have discounted the quantitative foreclosure rates because of the qualitative factors the Court has already discussed. In *Omega*, the court discounted the foreclosure rate of 38% due to qualitative factors, including the fact that (1) the exclusive dealing occurred at the distributor level, leaving open alternative channels of distribution; (2) the contracts **[**96]** were short in duration; and (3) the contracts were easily terminable. *127 F.3d at 1162-64*. In *Barry Wright, 724 F.2d at 237-38*, Judge Breyer discounted a 50% foreclosure rate based on a three-year high fixed dollar amount contract affecting 50% of the market as "considerably overstat[ing] the size of the foreclosure and its likely anticompetitive effect" because the buyer still had the ability to buy small amounts from other sellers if necessary and the contracts were each one year, among other factors.

Most importantly, the 45-50.5% foreclosure rate must be discounted because the POG incentive-based program lacks the same coercive effect as an exclusive contract. As discussed above, *Allied* can be read as presuming there is no foreclosure given the voluntary price-based nature of the incentive. *Allied, 592 F.3d at 997* (approving of incentive-based exclusive contracts). As the analysis above demonstrates, if there is any tax effect or coercive impact due to the POG program, it does not exist with respect to the entire shelf space covered by the program. At best, there may be a marginal effect at the cusps of the rebate hierarchy. The evidence discussed above demonstrates that the vast **[**97]** majority of shelf space devoted to C&D would have been stocked with C&D product even in the absence of the POG program. The foreclosure effect, if any, of the POG program appears only at the margins.

Finally, Mayer contends that C&D forecloses competition because its POG indirectly limits new entrants' ability to gain a foothold in the market. Mayer argues that certain non-POG retailers, such as Wal-Mart, will not stock smaller brands' products unless they already have **[*915]** an established market presence, and that the retailers most suited to giving small brands a shot at establishing that presence are "foreclosed" by the POG, thus leaving small brands at a disadvantage. *See* [TEXT REDACTED BY THE COURT] Decl. ¶¶ 106-07. However, that certain major alternative channels of distribution such as Wal-Mart may be less hospitable to Mayer does not give rise to an ***antitrust law*** violation. The ***antitrust law*** does not require competitors to be able to *succeed* in alternative channels; it merely requires them to have the *opportunity* to succeed. *Omega, 127 F.3d at 1163* ("Competitors are free to sell directly, to develop alternative distributors, or to compete for the services of the existing distributors. **[**98]** Antitrust laws require no more."). *See American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc., 108 F.3d 1147, 1154 (9th Cir. 1997)* ("[R]eputation alone does not constitute a sufficient entry barrier in this Circuit."); *United States v. Syufy Enterprises, 903 F.2d 659, 669 (9th Cir. 1990)* ("We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition.")). *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991)* (no anticompetitive impact where plaintiffs not foreclosed from every alternative)). As for the POG retailers, the Court has already found that a substantial part of the market is open to competition.

iii. Conclusion

Accordingly, the Court concludes that Mayer has failed to raise a genuine issue of material fact as to whether C&D's POG programs foreclose competition in a substantial share of the relevant market. Undisputed record evidence supports the conclusion that C&D's program falls within the conduct permitted by *Allied* and other persuasive authority. While there may be factual scenarios that might render conduct **[**99]** such as C&D's POG

Attachment 1. Since C&D has an average 60% share of the c-store channel, the foreclosure rate due to the c-store contracts would be **[**95]** 8.9%. Thus, the total foreclosure rate using this method would be 41.3%, lower than any of the above-calculated rates.

program impermissible even under *Allied*, on this record, Mayer has failed to make the requisite factual showing to escape its ambit.

The Court therefore **GRANTS** summary judgment to C&D as to Mayer's *§ 1* Sherman Act claim, and declines to reach the question of whether the POG program has pro-competitive effects, and whether there are less restrictive means by which C&D could tailor its program.

C. *Section 2* — Sherman Act

Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations." *15 U.S.C. § 2*. Mayer alleges three theories of liability under *§ 2*: monopolization, attempted monopolization, and conspiracy to monopolize.

To prevail on its *§ 2* monopolization claim, Mayer must prove: (1) C&D's possession of monopoly power in the relevant market, (2) C&D's willful acquisition or maintenance of that power (as opposed to success resulting from "a superior product, business acumen, or historic accident"), and (3) a resulting antitrust injury. *See Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 448, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*.

To **[**100]** prove an unlawful monopolization conspiracy under *§ 2*, Mayer must show: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) a specific intent to monopolize; and (4) causal antitrust injury. *Paladin Assocs. v. Montana Power Co., 328 F.3d 1145, 1158 (9th Cir. 2003)*.

A private party seeking damages under an attempted monopolization theory **[*916]** must demonstrate "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury." *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)*; *see also Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *Rebel Oil, 51 F.3d at 1433* (noting that a private party seeking damages for antitrust violations "must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior").

Each claim is similar, "differing primarily in the requisite intent and the necessary level of monopoly power." *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997)* (on remand). **[**101]** The key question under *§ 2* in the context of C&D's motion for summary judgment is whether Mayer has raised a genuine issue of material fact as to exclusionary conduct or anticompetitive acts. *See R.J. Reynolds, 199 F. Supp. 2d at 394-395*.

In the case at bar, Mayer alleges the same anticompetitive conduct described above as a basis for each of its Sherman Act claims. Thus, Mayer's *§ 2* claim necessarily fails to the extent that it rests on the POG alone. As the Ninth Circuit held in *Williams v. I.B. Fischer Nevada, 999 F.2d 445, 448 (9th Cir. 1993)*, a "§ 1 claim insufficient to withstand summary judgment cannot be used as the sole basis for a *§ 2* claim." "The two sections overlap in the sense that a monopoly under *§ 2* is a species of restraint under *§ 1*." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n. 59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*.

However, Mayer raises additional conduct as part of its *§ 2* claim, including alleged misconduct by C&D in its role as category captain for certain retailers and its purported "sabotaging" of Mayer's performance. *See* Opp. at 39. Mayer also claims C&D has engaged in similar conduct with respect to Global Protection Corporation, a rival condom manufacturer. *Id.* (citing **[**102]** Wedel Decl., Mayer Ex. 10). In assessing C&D's potential antitrust liability, the Court considers the effects of its conduct in the aggregate, including, as appropriate, cumulative or synergistic effects. *See Masimo Corp. v. Tyco Health Care Group, L.P., No. 02-4770, 2004 U.S. Dist. LEXIS 26916, at *19 (C.D. Cal. June 10, 2004)* (considering the combined effect of all of the defendant's allegedly exclusionary contracts, including, inter alia, sole source contracts and "market share volume/loyalty discounts in compliance-based contracts"); *Tele Atlas N.V. v. NAVTEQ Corp., No. C-05-01673 RMW, 2008 U.S. Dist. LEXIS 111866, 2008 WL 4809441, at *23 (N.D. Cal. Oct. 28, 2008)*. Accordingly, the Court considers Mayer's evidence regarding C&D's purported misconduct outside of and in addition to its POG program.

1. Monopoly Power

Monopoly power is "power to control prices or exclude competition." *Eastman, 504 U.S. at 481* (citations omitted). Like market power, Mayer may establish monopoly power either directly or indirectly. "Monopoly power under *§ 2* requires, of course, something greater than market power under *§ 1*." *Id.* However, the *§ 2* case law indicates that at least for summary judgment purposes, monopoly power may sometimes **[**103]** be inferred from market share, especially when accompanied by barriers to entry. *See id.* ("Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is, however, sufficient to survive summary judgment under the more stringent monopoly standard **[*917]** of *§ 2*."); *United States v. Grinnell, 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* ("The existence of [monopoly] power ordinarily may be inferred from the predominant share of the market."). *Cf. Safeway Inc. v. Abbott Laboratories, 761 F. Supp. 2d 874, 889 (N.D. Cal. 2011)* ("A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.") (quoting *Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360, 366 (1988))*.

In the instant case, as with market power in the context of the *Section 1* claim, the Court will assume *arguendo* that Mayer has raised a genuine issue of material fact as to C&D's monopoly power.

2. Willful Acquisition or Maintenance of Monopoly Power

The second element distinguishes "the willful acquisition **[**104]** or maintenance of [monopoly] power . . . from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell, 384 U.S. at 570-71*. *Section 2* thus prohibits "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman, 504 U.S. at 482-83* (quoting *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948))*.

As described above, Mayer has not produced evidence to support a jury finding that C&D's POG programs are anticompetitive and exclusionary so as to violate *§ 2* of the Sherman Act. As for C&D's conduct additional to the POG program, Mayer compares C&D's actions as category captain for certain retailers to defendant's conduct in *Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002)*. In *Conwood*, the Sixth Circuit found that the defendant had abused its category captain position "by providing misleading information to retailers in an effort to dupe retailers into . . . discontinu[ing] carrying Conwood products" and by removing Conwood products from the racks without store authorization. *Id. at 783*.

However, Mayer's evidence of purported misconduct is nowhere near the level **[**105]** of that in *Conwood.* The only conduct to which Mayer can point involves, at best, C&D's suggested planogram designs which some retailers decided to adopt. *See* Martineau FTC Depo., C&D Ex. 118, at 70 (stating that C&D made some recommendations as to how CVS could increase its shelf space dedicated to C&D, some of which CVS adopted). Mayer provided no evidence as to how often these recommendations were adopted and whether they had the intent and/or effect of sabotaging Mayer. Its evidence is extremely thin, amounting to nothing more than a "scintilla" of support for its claims. *Anderson, 477 U.S. at 252*. For instance, Mayer alleges that "[f]ollowing C&D's appointment as category captain [at Long's in 2007], the shelf placement of condom SKUs for Kimono products at Long's changed. After C&D became category captain, Long's double faced one of Kimono's slower moving SKUs." Baseman Report, Mayer Ex. 9, at 44-45. But Mayer produced no evidence that C&D was actually responsible for this change. Indeed, unrebutted evidence in the record indicates that category captains do not have control over retailer's shelf placement decisions, either in the case of Long's or any other retailer. *See* Walker **[**106]** Depo., Mayer Ex. 47, at 222 (stating in response to question about Long's planogram while she was category captain, which double faced the Kimono product that she "had no input in the Kimono brand"); *id.* at 92 (she only followed Long's directions when adjusting **[*918]** the planogram); *id.* at 42-45 (stating that category captains do not have control over planogram designs); Martineau Depo. at 74 (when C&D was category captain, it made suggestions but CVS required data to support them).

Unlike *Conwood*, there is no evidence that C&D surreptitiously undermined the retailers' decisions and attempted to change arrangements without their approval. Instead, undisputed evidence in the record indicates that it is commonplace in the industry for manufacturers to suggest planogram designs to retailers or provide retailers with other information to advocate for their brands, regardless of whether those manufacturers serve as category captains. Martineau Depo. at 78 (all manufacturers give ideas on best ways to present the category); *id.* at 59 ("[M]anufacturers complain about other manufacturers [in relationship to shelf space and other retailer decisions], complain all the time. So in one ear, out the other, **[**107]** whatever. I expect a manufacturer to complain, that's great, but the name on the store still says CVS.").

Mayer itself has engaged in certain advocacy tactics in an attempt to influence retailer decisions. *See* C&D Ex. 135 (Mayer email to Target providing data to show that Kimono is outperforming other brands in the thin-condom segment and expressing hope that Target will give Kimono a broader distribution); Wright Report at 199-200 (describing Mayer's proposal to Safeway that it replace Durex as the second brand). That Mayer may have been unaware of — or uninterested in — other means by which manufacturers compete for retailers' business does not render C&D's conduct nefarious. *See, e.g.*, Mayer Depo., C&D Ex. 17, at 57 (stating that he was unaware of the ability to pay fees in exchange for shelf placement, and that Mayer has never done so: "We did not understand that it was part of the planogram decision making process, that it was sold based on position on shelf."); *id.* at 145-47 (stating that 7-Eleven rejected Mayer's proposed business deal, that he was unaware C&D had won its exclusive contract through a bidding process, and that Mayer has not focused on the c-store market).

Thus, **[**108]** the fact that C&D was successful in achieving a degree of cooperation with retailers does not, without more, establish anticompetitive conduct. *See generally* *United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945)* (Hand, J.) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

Accordingly, there is no evidence in the record to suggest that C&D engaged in any exclusionary conduct with respect to its POG programs and its role as category captain, considered in isolation or together. Without such exclusionary conduct, the Court cannot reasonably infer either general or specific intent to monopolize so as to support either a claim of completed or attempted monopolization. The Court therefore **GRANTS** summary judgment to C&D on Mayer's *§ 2* claim.

D. Antitrust Injury

There is another reason to grant summary judgment on Mayer's Sherman Act claims. In addition to the elements described above, to assert a claim under the federal antitrust laws, a plaintiff must have suffered an "antitrust injury," meaning an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." **[**109]** *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *see* *In re Lorazepam and Clorazepate Antitrust Litig., 295 F.Supp.2d at 38* (a plaintiff must show a "direct relationship between the **[*919]** claimed injury and the alleged anticompetitive conduct.... The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."). Furthermore, the plaintiff must allege an injury to the market or to competition in general, not merely to itself. *Id.* (quoting *Brunswick Corp., 429 U.S. at 489* ("The antitrust laws were enacted for the protection of competition, not competitors.")); *U.S. v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (the correct measure of harm is "harm [to] the competitive process and thereby harm [to] consumers. In contrast, harm to one or more competitors will not suffice"); *Louisa Coke, 94 F. Supp. 2d at 814* ("A single competitor's lost profits does not demonstrate a market wide competitive detriment.") (citing *Baum Research and Development Co., Inc. v. Hillerich & Bradsby Co., Inc., 31 F. Supp. 2d 1016, 1021 (E.D. Mich.1998))*. Injury can be shown by anticompetitive acts resulting in reduced output **[**110]** or raised prices. *Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 516 (4th Cir. 2002)* (internal quotation marks and citation omitted).

The key question here is whether Mayer suffered losses as a result of the defendant's anticompetitive acts, as opposed to other market forces. *See* [*Safeway Inc. v. Abbott Labs., 761 F. Supp. 2d 874, 2011 WL 133008 (N.D. Cal. 2011)*] ("To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior .") (citation omitted).

In the instant case, Mayer has failed to raise a genuine issue of fact as to the existence of such harm. While Mayer alleges harm to itself and to other small manufacturers (*i.e.*, Global Protection, the maker of ONE brand condoms) in terms of diminution in sales and market share over the last several years, it fails to: (1) causally link this harm to C&D's anticompetitive conduct; and (2) demonstrate harm to competition.

First, Mayer fails to explain why other larger rivals in the industry have managed to compete with C&D despite the alleged misconduct. *See, e.g.*, Silberman Damages Report, Mayer Ex. 24, at 15 (admitting that Durex's "share of sales appears to **[**111]** have been essentially unaffected by the ramp up in Planogram Rebate tiers"); *id.* (noting that Lifestyles has been in decline from 2004-2010, but declining to offer any suggested reason for the decline); Wright FTC Report at 72 (discussing internal C&D documents revealing that C&D believed it had been "out maneuvered" by Durex and Lifestyles for premium space in Wal-Mart); *id.* at 77 (from 2008-2010, Lifestyles and Durex introduced new products that captured 5% market share in the FDMx channel). Durex's market share has not materially changed over the relevant time period. Wright Report at 115 & Attachment 24 (showing Durex market share consistently between 14-15% from 2004-2010). While Lifestyles declined in market share from 2004-2008, it began bouncing back in 2009 and 2010. Wright FTC Report at Table 4. Ms. Martineau of CVS attributes part of Lifestyles' recent success to its popular new SKYN condom. Martineau Depo. at 96-98 (explaining that Ansell "hit a home run" with SKYN, [TEXT REDACTED BY THE COURT]). As noted above, C&D has offered unrebutted explanations for the vicissitude in Lifestyles' sales unrelated to C&D's POG program. Wright Report at 115-21.

As for the small manufacturers' **[**112]** sales (accounting for roughly 1% of the market), Mayer's only direct evidence that C&D blocked access to retailers is in the form of inadmissible hearsay. *See, e.g.*, Silberman Report, Mayer Ex. 24, at16-17 (discussing Mr. Mayer's statement that a Duane **[*920]** Reade employee said the C&D rebate was too big to lose); Wedel Decl., Mayer Ex. 10, ¶ 91 (stating that a [TEXT REDACTED BY THE COURT] buyer told Global Protection they needed to make room for C&D shelf space). As previously noted, this hearsay is inadmissible. Mayer fails to present *any* direct testimony from *any* retailers or other third parties on the subject.

Instead of direct evidence to prove antitrust injury, Mayer relies almost entirely on the supposed correlation between increases in C&D's rebate tiers and Mayer's (and small manufacturers generally) diminution in sales to infer causation. Mayer's primary correlation claim is that its sales increased from .31% to .46% between 2001 and 2007, and then decreased to .34%, .27%, and .29% in 2008, 2009, and 2010 respectively. Silberman Report, Mayer Ex. 24, at Ex. 1. Small brands in general (including Mayer) faced a similar fate; their market share increased from 1.8-1.9% from 2004-2005, **[**113]** held at 1.6% in 2006 and 2007, and decreased to 1.3% in 2008 and .8% in 2009 and 2010. Wright FTC Report, Mayer Ex. 8, at Table 4. Mayer attempts to correlate this trend with the period during which C&D introduced its higher rebate level and began to more strictly enforce compliance.

Yet Mr. Silberman's own data indicates a less noticeable pattern. For example, from 2004-2007, Mayer's market share increased steadily, even though C&D's average shelf share also increased. Moreover, C&D implemented stricter compliance measures for its POG program in 2005, well before Mayer and the small competitors suffered any loss in sales. Opp. at 10. In addition, the major change in C&D's POG program took place in 2007, when C&D introduced its 80% planogram level and many retailers moved from 65% to 70%. *See* Wright Report, C&D Ex. 3, at Table 14 (showing C&D's revenues by shelf share for 2004-2010). Yet, the market share of all small manufacturers also held steady at 1.6% in both 2006 and 2007, suggesting they were unaffected by C&D's conduct. Moreover, examining the data separately for each of the big retailers for which Mr. Silberman alleges Mayer lost sales due to C&D conduct (*i.e.*, Long's, CVS, **[**114]** Walgreens, and Duane Reade), the Court finds that C&D's percentage of shelf space does not map onto Mayer's variation in sales. In short, Mayer produced no evidence that its rough and imperfect correlation between C&D's escalation of its POG program and Mayer's decline in sales was statistically significant.

More importantly, given Mayer's tiny market share, without more substantial evidence, it is speculative to infer that Mayer's decline from .46% in 2007 to .27% in 2009 is the result of C&D's expansion from 69% to 72% during the same period. In raw dollars, Mayer claims that C&D's $5.3 *million* increase in annual sales in 2009 (over 2007) must have caused Mayer's $450,000 decrease in annual sales over the same period. Given the structure of the market, there is no basis for assuming a zero-sum game between Mayer and C&D; there is no factual basis to infer a one-to-one correlation between C&D's and Mayer's market shares.

The same flaw applies to shelf-space allocations. Mayer asks the Court to assume, without admissible evidence, that its loss of a few facings on certain retailers' shelves is the result of C&D's POG program coercing retailers to increase C&D's shelf share from 65% to **[**115]** 70%. Such a conclusion requires several assumptions — that C&D's shelf share increase was not warranted by its sales performance; that Mayer's shelf share decline was not warranted by its sales performance; and that among the remaining 25-35% of shelf space available in POG retailers, Mayer **[*921]** was unable to secure a larger portion of that residual space because of C&D's conduct. The only admissible evidence in the record from actual retailers like CVS and Rite Aid is to the contrary — display decisions were made without regard to incentives created by the POG program.

Mayer's evidentiary conjecture mirrors the claims found wanting in *Louisa Coke.* The court's analysis in that case is worth repeating here as it applies directly to Mayer's purported antitrust injury:

> There is probably no question that Pepsi's promotions influence retailers to give more space to Pepsi products. When Pepsi gets more space, others will obviously get less. There is no evidence, however, that Pepsi can control the retailers' decisions or has the power to exclude its rivals' products outright. Rather, all of the evidence indicates that the store owners within the Louisa Coke market allot shelf, storage and display **[**116]** space at their sole discretion based on such factors as the market's demand for a product and the supplier's ability to keep such products in stock. Common sense dictates that retailers will give more space to those products which are more popular with consumers and available for sale. Pepsi's uncontraverted evidence indicates that it is superior within Louisa Coke's territory in both respects. Not only are Pepsi products more popular among consumers, Pepsi presented ample evidence that Louisa Coke has an inadequate service record franchise-wide. Indeed, Coke USA's own investigation confirmed that Louisa Coke was fairly represented among its retailers given its operational shortcomings.
>
> To refute Pepsi's evidence, Louisa Coke offered neither claim nor evidence that Pepsi's allotted shelf space is inconsistent with its market share. Nor did it provide any proof that either it or any other soft drink competitor received less retail shelf space than either market demand or their service history justified. Under these circumstances, this Court has no business in engaging in "affirmative action" among retail outlets by telling retailers to give Coke and Pepsi equal retail space. The Court **[**117]** would be protecting a competitor rather than competition if it were to do so. Since Louisa Coke has failed to justify its demand for more retail space, it has failed to state an antitrust injury premised upon the same.

Louisa Coke, 94 F. Supp. 2d at 814-15 (internal citations omitted).

Mayer's failure to raise a genuine issue of material fact whether C&D's conduct caused any antitrust injury is an independent bar to its Sherman Act claims. Summary judgment in favor of C&D a claim under both *Sections 1* and *2* is warranted on this basis as well.

E. Cartwright Act & UCL Claims

Mayer's Cartwright Act claims rise and fall with the antitrust claims above. *See Theme Promotions, Inc. v. News America Marketing FSI, 546 F.3d 991, 1001 & n.3 (9th Cir. 2008)* (stating that California courts analyze Cartwright Act claims under the same rubric as antitrust claims and citing to federal antitrust case law). Accordingly, the Court **GRANTS** summary judgment in C&D's favor as to Mayer's Counterclaims III, IV, VIII and XII.

F. Tortious Interference with Contract

C&D next argues that summary judgment is warranted on Mayer's counterclaim for tortious interference with contract. Mayer claims that C&D interfered with **[**118]** its contractual relationship with Sagami, Mayer's condom supplier. Mayer claims it has an exclusive distribution contract with Sagami, and the C&D tortiously interfered with said contract by inducing **[*922]** Sagami to sign an agreement to supply condoms to C&D.

The elements of a tortious interference with contract claim are: (1) a valid contract between plaintiff and a third party, (2) defendant's knowledge of this contract, (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship, (3) actual breach or disruption of the contractual relationship, and (5) resulting damage. *Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal.3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)* (citing *Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal.3d 752, 765-766, 206 Cal. Rptr. 354, 686 P.2d 1158 (1984)*. Mayer claims that C&D interfered with Mayer's exclusive contract with Sagami, the supplier for Mayer's microthin condoms. C&D argues that summary judgment is appropriate because Mayer cannot demonstrate any of the elements of this claim.

Although Mayer's evidence is thin, the Court finds that summary judgment cannot be granted in light of credibility determinations at issue.

First, Mayer has not produced any independent **[**119]** evidence of a valid contract. Its only evidence is Mayer's own representations. *See* Opp. at 43-44 (reciting Mayer's verified interrogatory responses in which Mayer states he had a verbal agreement with Sagami to be its exclusive North American distributor and agent); Mayer Depo., Mayer Ex. 17, at 128-29 (Around 1998, Sagami told Mayer that Mayer would be its exclusive distributor in North America); Mayer Ex. 68 (Mayer 1999 memo to Sagami with meeting minutes including the statement: "Mayer can be the sole agent representing Sagami, for the sale of latex condoms in North America"); *id.* at Mayer_160496 (2005 Mayer letter to Sagami acknowledging notice of Sagami's contract to sell C&D its polyurethane condom, noting that Sagami had stated Mayer would be its exclusive representative, and requesting clarification); *id.* at Mayer3454 (2007 Mayer letter to Sagami stating that Mayer has been Sagami's exclusive distributor of latex condoms, and that Sagami's sales of latex condoms to C&D are a breach of their agreement; acknowledging that Sagami does not think they had an exclusive agreement).

That representation is contradicted by substantial record evidence, including statements from Sagami **[**120]** personnel denying an exclusive agreement. *Id.* at Mayer3455 (2007 Mayer letter to Sagami acknowledging that Sagami does not think they had an exclusive agreement); Mayer Depo., Mayer Ex. 17, at 134-36 (acknowledging statements made by Mr. Burt of Sagami to the French Minister of Justice that Mr. Burt did not think there was an exclusive agreement); *id.* at 137-39 (acknowledging statements from Sagami that there has never been an exclusive agreement); C&D Ex. 103 (Mayer document translating notes from 2008 meeting with Sagami, noting that Mr. Oato did not recall any exclusive agreement with Mayer). There do not appear to be any documents or statements in the record in which Sagami directly acknowledges exclusivity.

However, drawing all inferences in Mayer's favor, it is possible the jury could credit Mr. Mayer's testimony over the conflicting evidence. Given that the existence of a contract is essentially a "he-said/she-said" dispute, it may not be resolved on summary judgment.

Assuming there was an exclusive contract, Mayer's evidence with respect to the remaining elements also turn on credibility determinations. For example, the primary evidence that C&D knew of the purported contract **[**121]** was Mr. Mayer's statements to C&D. C&D Second Amended Complaint, ¶ 70 (acknowledging that Mr. Mayer informed C&D that he believed **[*923]** he had an exclusive agreement with Sagami). Although Mayer acknowledges that Sagami told C&D otherwise (Opp. at 45; *see* Daniels Depo., C&D Ex. 13, at 222-24 (C&D VP of Marketing stating that Sagami had told C&D there was no exclusive arrangement with Mayer)), a confidentiality agreement drafted for a 2007 meeting between Mayer and C&D states that the parties were to discuss a possible C&D acquisition of the "Kimono brand and distribution rights to Sagami products." Mayer Ex. 72, at 1. Given C&D's acknowledgment that it was informed about Mayer's position, and the fact that documents indicate C&D may have acknowledged at least some distribution rights attached to Mayer's relationship with Sagami, a jury could infer that C&D knew an exclusive contract existed.

Intent to induce breach is also a jury question. C&D need not have developed its relationship with Sagami for the sole — or even primary — purpose of disrupting its relationship with Mayer. *See* Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal.4th 26, 56, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (1998) ("[T]he tort of intentional interference **[**122]** with performance of a contract does not require that the actor's primary purpose be disruption of the contract. . . . The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action."). Thus, the requisite scienter may reasonably be inferred here.

Similarly, Mayer has raised a question of fact as to actual breach and resulting damages because if the point of the contract was exclusivity, as Mayer suggests, then C&D's relationship with Sagami necessarily entails a breach of that contract and could result in harm to Mayer. *See* Mayer Ex. 68, at Mayer3454-55 (2007 Mayer letter to Sagami indicating that, in Mayer's view, losing exclusivity with Sagami would directly cause Mayer to lose business as market players would view Kimono as a redundant product).

Accordingly, the Court **DENIES** C&D's motion for summary judgment as to Mayer's tortious interference with contract claim.

G. Tortious Interference with Economic Relations

The similar tort of interference with economic relations with retailers has the following elements: (1) an economic relationship between the plaintiff and a third **[**123]** party with a likelihood of future economic benefit to the plaintiff, (2) the defendant's knowledge of such a relationship, (3) intentional act designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) resulting economic harm. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. Mayer's claim here is based on C&D's purported interference with Mayer's retailer relationships. As such, it rises and falls with Mayer's Sherman Act claims above. Accordingly, the Court **GRANTS** summary judgment to C&D on this claim.

H. False Designation, Trademark Infringement, and UCL

Mayer's final counterclaims against C&D are based on C&D's use of the term "micro-thin" to describe its ultra-thin condoms. C&D has used the term since 2006. C&D Ex. 113. Mayer has used the mark "microthin" on its Kimono MicroThin line of products since 1992, and filed an application to register "MICROTHIN" as a trademark in April 2008. *Id.* Mayer received a trademark registration in June 2009.

To prevail on a claim for trademark infringement, a holder of a registered service mark must show that another **[*924]** person is using: (1) any reproduction, counterfeit, copy or colorable imitation **[**124]** of a mark; (2) without the registrant's consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution or advertising of any goods; (5) where such use is likely to cause confusion, or to cause a mistake or to deceive. *15 U.S.C. § 1114(1)(a)*; *Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1178 (9th Cir.1988)*. The analysis for the related claim of false designation of origin under *15 U.S.C. § 1125* is generally "identical" to the analysis for infringement of a registered trademark under *15 U.S.C. § 1114*. *See* *Brookfield Communs., Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1046-47 & n. 8 (9th Cir. 1999)*. [29]

A "trademark" is any combination of words or symbols used in commerce to identify and distinguish one's goods from those manufactured or sold by others and to indicate the source of the goods. *15 U.S.C. § 1127*. "The **[**125]** first to use a mark is deemed the 'senior' user and has the right to enjoin 'junior' users from using confusingly similar marks in the same industry and market or within the senior user's natural zone of expansion." *Brookfield, 174 F.3d at 1047*.

The key question in assessing trademark-related claims is the likelihood of confusion prong. *See* *M2 Software, Inc. v. Madacy Entertainment, 421 F.3d 1073, 1080 & n.5 (9th Cir. 2005)* ("The test of trademark infringement under

[29] In its summary judgment papers, Mayer offered neither evidence nor argument to rebut C&D's contention that it labels its condoms "Made in Japan" because they are, in fact, made in Japan. Accordingly, the Court finds that Mayer has abandoned any claim against C&D based on the designation of certain condoms as "Made in Japan."

state, federal, and common law is whether there will be a likelihood of confusion. . . . Furthermore, for M2 Software to succeed on each of its other federal, state, and common-law based claims, it must establish a likelihood of confusion.") (citations omitted). The Court assesses likelihood of confusion via the eight-factor *Sleekcraft* test:

> (1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines.

Surfvivor Media Inc. v. Survivor Productions, 406 F.3d 625, 630 (9th Cir. 2005). **[**126]** The Ninth Circuit has cautioned that summary judgment should not be routinely granted on the issue of likelihood of confusion. *See Thane Int'l, Inc. v. Trek Bicycle Corp., 305 F.3d 894, 901-02 (9th Cir. 2002)* (district courts should grant summary judgment motions "regarding the likelihood of confusion sparingly, as careful assessment of the pertinent factors that go into determining likelihood of confusion usually requires a full record.").

A "properly registered service mark is presumed to be valid" and constitutes "prima facie evidence of the validity of the registration, registrant's ownership of the mark, and of registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate, subject to any conditions and limitations stated therein." *Surgicenters of America, Inc. v. Medical Dental Surgeries, Co., 601 F.2d 1011, 1014 & n.8 (9th Cir. 1979)* (quoting *Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 542 (2d Cir. 1956)*; *15 U.S.C. § 1057(b)*). However, the Ninth Circuit has found it relatively easy to overcome the presumption of validity where the defendant produces evidence that the mark **[*925]** is generic or lacks secondary **[**127]** meaning. *See, e.g., Surgicenters, 601 F.2d at 1014* (noting presumption but proceeding to analyze secondary meaning and likelihood of confusion; granting summary judgment for defendant due to lack of evidence of secondary meaning); *Tie Tech, Inc. v. Kinedyne Corp., 296 F.3d 778, 783 (9th Cir. 2002)* ("Overall, the plaintiff retains the ultimate burden of persuasion in a trademark infringement action, namely proof of infringement. A necessary concomitant to proving infringement is, of course, having a valid trademark; there can be no infringement of an invalid mark.").

The presumption merely shifts the burden of production to the defendant. *Id.* If "the presumption of validity is overcome, however, the mark's registration is merely evidence of registration, nothing more." *Id.* (citations and quotation marks omitted). Thus, once "the defendant can demonstrate through law, undisputed facts, or a combination thereof that the mark is invalid, the evidentiary bubble bursts and the plaintiff cannot survive summary judgment." *Id.*; *see also Brown v. Quiniou, 744 F. Supp. 463, 469 (S.D.N.Y. 1990)* ("[A]lthough a registered mark is presumptively distinctive, it does not inevitably follow that the mark **[**128]** is strong.") (citations omitted); *Shaw-Barton, Inc. v. John Baumgarth Co., 313 F.2d 167, 169 (7th Cir.)*, *cert. denied*, *374 U.S. 831, 83 S. Ct. 1873, 10 L. Ed. 2d 1054 (1963)* ("It is well established that where descriptive words are used, the presumption of validity attaching to a registered trademark may be easily overcome.").

In the instant case, the parties dispute whether C&D's use of the word "microthin" is a valid trademark and whether it is likely to cause confusion among consumers. C&D argues that Mayer cannot survive summary judgment because "microthin" is merely a generic or descriptive term to describe thinness, and because Mayer has failed to produce any evidence of secondary meaning or consumer confusion to rebut C&D's proffered evidence. Mot. at 47-48. C&D does not address the remaining *Sleekcraft* factors.

1. Validity of the Mark

"The strength of a mark is determined by its placement on a continuum of marks from 'generic,' afforded no protection; through 'descriptive' or 'suggestive,' given moderate protection; to 'arbitrary' or 'fanciful' awarded maximum protection." *E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1291 (9th Cir. 1992)* (quotations omitted); *see also Filipino Yellow Pages, Inc. v. Asian Journal Publ'ns, Inc., 198 F.3d 1143, 1146 (9th Cir. 1999)* **[**129]** (grouping trademarks into four categories: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful"). C&D places the term "microthin" on the generic/descriptive end of the spectrum, arguing that it merely describes the thinness of the condom. C&D also provides evidence to that effect, noting that "microthin" is defined on www.dictionary.com as "extremely or, sometimes, microscopically thin." Mot. at 47. Dictionary definitions are relevant to determining the placement of a mark on the spectrum of generic to fanciful. *See* Surgicenters, 601 F.2d at 1015 n.11.

The Court finds that "microthin" is descriptive because it immediately conveys the intended meaning as to the type of condom sold — one that is extremely thin. *See* Surgicenters of America, Inc. v. Medical Dental Surgeries, Co., 601 F.2d 1011, 1019 (9th Cir. 1979) (distinguishing a suggestive term — one that "requires imagination, thought and perception to reach a conclusion as to the nature of goods" — from a descriptive term — one that "conveys an immediate idea of the ingredients, qualities or characteristics of the goods"). **[*926]** Indeed, Mayer does not appear to contest that its mark is descriptive, as it focuses **[**130]** its argument on secondary meaning. *See* Opp. at 47.

If a term is otherwise merely descriptive, a plaintiff must demonstrate a valid mark by showing that the mark carries secondary meaning, which is "the consumer's association of the mark with a particular source or sponsor." *Id.* (citations omitted); Filipino Yellow Pages, Inc. v. Asian Journal Publications, Inc., 198 F.3d 1143, 1147 (9th Cir.1999). Mayer argues that microthin has developed secondary meaning associated specifically with Kimono condoms. Although the presumption of validity attached to Mayer's registered mark places the initial burden of production on C&D to show that the mark lacks secondary meaning, the "ultimate burden of persuasion" still rests with Mayer. Tie Tech, 296 F.3d at 783.

"[T]he question of secondary meaning is one of fact." Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1355 (9th Cir. 1985) (en banc). To determine whether a descriptive mark has secondary meaning, a finder of fact considers: "(1) whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer, (2) the degree and manner of advertising under the claimed trademark, (3) the length and manner **[**131]** of use of the claimed trademark, and (4) whether use of the claimed trademark has been exclusive." Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc., 419 F.3d 925, 930 (9th Cir. 2005) (quoting Levi Strauss, 778 F.2d at 1358).

C&D has presented evidence to rebut the presumption of validity. Specifically, C&D's letter of protest to the PTO attaches numerous articles using the term microthin in various contexts, including to describe Lifestyles condoms and to describe a point of competition in the condom market over "'microthin sheaths.'" *See* Mayer Ex. 75, ¶ 2. It also points out the Lifestyles and a brand called SURE use the term "micro-thin technology" in its own advertisements for its condoms. *Id.* at Ex. F. Other articles use the term microthin to describe non-condom products such as latex gloves. *Id.* at Ex. G. Absent further rebuttal by Mayer, this evidence is sufficient to overcome the presumption. *See* Tie Tech, 296 F.3d at 783. ("In the face of sufficient and undisputed facts demonstrating [lack of secondary meaning] . . . the registration loses its evidentiary significance.").

In contrast, the only evidence Mayer offers in support of its argument that microthin has secondary **[**132]** meaning is Mr. Mayer's own declaration filed with the U.S. Patent and Trademark Office ("PTO"). *See* Mayer Ex. 74, ¶¶ 4-7 (stating that Mayer has been the only company to use the term microthin in relationship to condoms since it began using the term in 1992 until C&D began using it, that Mayer has advertised under the mark through package design and point of sale materials, and that the media refer to microthin as unique to Kimono). Mayer failed to file the exhibits to Mr. Mayer's declaration in this record, so the articles to which he refers are not included in the record. The Ninth Circuit has found that self-serving statements by a trademark holder are entitled to little weight. *See* Filipino Yellow Pages, 198 F.3d at 1152 (granting summary judgment where "the only evidence of secondary meaning offered by FYP was contained in the declaration of its founder and president" because "[e]vidence of secondary meaning from a partial source possesses very limited probative value" and the president's "vague, uncorroborated, and clearly self-interested testimony did not create a genuine issue for trial as to whether 'Filipino Yellow Pages' has acquired secondary meaning").

[*927] Given the descriptive **[**133]** nature of the word, without any expert reports, surveys, or other independent evidence of secondary meaning, Mayer has not demonstrated that it has a protectable mark notwithstanding its registration. *See* Japan Telecom, Inc. v. Japan Telecom America Inc., 287 F.3d 866, 875 (9th Cir. 2002) (affirming summary judgment where, although company had been using mark since 1984, there was little evidence of pervasive advertising, few declarations from customers regarding actual confusion, and an affidavit from the company president that lacked foundation to state that the company had received "many" letters and "several" calls from confused customers); *Echo Drain v. Newsted, 307 F. Supp. 2d 1116, 1122 (C.D. Cal. 2003)* ("Echo Drain offered no expert reports or surveys to prove that the Echo Drain mark has secondary meaning. In addition, there is no consumer testimony in this case to indicate that a significant portion of the consuming public associates the Echo Drain mark with the products or services offered by Echo Drain. Because the Echo Drain mark is descriptive and there is no evidence that it has acquired a secondary meaning, the mark is not protectable and the Court grants Defendants' **[**134]** motion for summary judgment.") (internal citations omitted). *Cf. Yellow Cab, 419 F.3d at 930* (reversing grant of summary judgment when plaintiff had provided "various declarations detailing the history of the Yellow Cab of Sacramento, customer confusion concerning the companies, advertising data and other evidence addressing the [secondary meaning] factors").

2. Likelihood of Confusion

Mayer admits it has produced no evidence of actual confusion on the part of consumers. *See* Opp. at 48 ("Mayer has not offered evidence of actual confusion."). Mayer is correct that its failure to do so is "not dispositive," *AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 353 (9th Cir. 1979)*. However, it is another factor weighing in favor of summary judgment. *See Cohn v. Petsmart, Inc., 281 F.3d 837, 842-43 (9th Cir. 2002)* (where "the parties used the same trademark in the same city for six years to market closely-related goods and services . . . some evidence of actual confusion should have become available if Petsmart's coexisting use had created a genuine likelihood of confusion."); *Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1041 (C.D. Cal. 1998)* ("Survey evidence is not required to establish likelihood **[**135]** of confusion, but it is often the most persuasive evidence. . . . Consequently, a plaintiff's failure to conduct a consumer survey, assuming it has the financial resources to do so, may lead to an inference that the results of such a survey would be unfavorable.") (internal citations omitted).

Without some evidence beyond Mr. Mayer's own testimony, the Court cannot infer that consumers might view "microthin" any differently than they view other descriptive terms used by condom manufacturers, such as "ultra-thin." As the Ninth Circuit has pointed out, even when a defendant uses the same mark in the same type of business, the danger of confusion is lower when those marks are merely "taglines" to descriptive business names. *See id. at 842* (finding no likelihood of confusion between "Critter Clinic - Where Pets Are Family," and "Petsmart - Where Pets Are Family" due in part to the fact that "[t]he names 'Petsmart' and 'Critter Clinic' present the dominant commercial identity"). Likewise, in this case Trojan and Kimono are the dominant brand terms; "microthin" is used by the parties merely as a type of Kimono condom and a descriptive phrase for certain Trojan condoms. *See* C&D Ex. 113 (picturing **[**136]** Trojan package with the phrase, "Now with Micro-Thin Technology"). The term is also apparently used to describe certain thin Lifestyles condoms, as well as at least one **[*928]** other brand of condom and additional Ansell latex products, such as surgical gloves. *See id.* Ex. F (displaying websites advertising LifeStyles condoms as "us[ing] Micro-Thin technology," and advertising a SURE brand condom called the "SURE Micro-Thin"); *id.* Exs. G, H (advertising Ansell latex gloves as "micro-thin"). Further, as noted above, there is undisputed evidence in the record that consumers look for particular brands and many will go to a different store to find their preferred brand. Mayer has "fail[ed] to create a genuine issue that confusion is 'probable, not simply a possibility.'" *Id.* (quoting *Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217(9th Cir. 1987))*; *see* Wright Rebuttal Report, C&D Ex. 121, at 54 n.154 ("Church & Dwight's Omnibus Study found that 52% of consumers would go to another store to purchase condoms if their preferred brand were not available.") (quoting Baseman Report, Mayer Ex. 9, at 6 n. 13).

In sum, Mayer has failed to establish a genuine issue of fact whether "microthin" **[**137]** is a valid mark (given the lack of substantial evidence of secondary meaning) and whether its use by C&D is likely to cause consumer confusion.

Accordingly, the Court **GRANTS** summary judgment in C&D's favor as to Mayer's trademark claims. The Court therefore declines to address C&D's laches claim.

III. CONCLUSION

For the foregoing reasons, the Court **DENIES** C&D's motion for summary judgment as to tortious interference with contract, and **GRANTS** the motion as to all other claims. In light of the Court's ruling, C&D's motion to exclude portions of Mr. Baseman's expert report is **DENIED** as moot. Docket No. 232.

This Order disposes of Docket Nos. 198, 232.

IT IS SO ORDERED.

Dated: March 1, 2012

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

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Shirokov v. Dunlap, Grubb & Weaver PLLC

United States District Court for the District of Massachusetts

March 1, 2012, Decided; March 1, 2012, Filed

Civil Action No. 10-12043-GAO

Reporter
2012 U.S. Dist. LEXIS 42787 *

DMITRIY SHIROKOV, on behalf of himself and all others similarly situated, Plaintiff, v. DUNLAP, GRUBB & WEAVER PLLC, et al., Defendants.

Subsequent History: Adopted by, Motion granted by, in part, Motion denied by, in part, Complaint dismissed at, in part, Sanctions disallowed by *Shirokov v. Dunlap, Grubb & Weaver, PLLC, 2012 U.S. Dist. LEXIS 42240 (D. Mass., Mar. 27, 2012)*

Class certification denied by *Shirokov v. Dunlap, Grubb & Weaver PLLC, 2013 U.S. Dist. LEXIS 42617 (D. Mass., Mar. 26, 2013)*

Request granted, Judgment entered by, Costs and fees proceeding at *Shirokov v. Dulap, 2014 U.S. Dist. LEXIS 40642 (D. Mass., Mar. 27, 2014)*

Core Terms

alleges, Lawsuit, motion to dismiss, infringement, defendants', recommends, contacts, class member, conspiracy, district court, settlement, courts, personal jurisdiction, copyright infringement, parties, Counts, misuse, argues, legal fees, website, attorney's fees, damages, cases, fail to state a claim, general jurisdiction, service of process, fraudulent, commerce, costs, lack of personal jurisdiction

Counsel: **[*1]** For Dmitriy Shirokov, on behalf of himself and all others similarly situated, Plaintiff: Daniel G. Booth, Jason E. Sweet, LEAD ATTORNEYS, Nazli A. Saka, Booth Sweet LLP, Cambridge, MA.

For Dunlap, Grubb & Weaver PLLC, Thomas Dunlap, Nicholas Kurtz, Defendants: Kara G. Thorvaldsen, LEAD ATTORNEY, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, Boston, MA.

For US Copyright Group, Defendant: Kara G. Thorvaldsen, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, Boston, MA.

For GuardaLey, Limited, Achte/Neunte Boll Kino Beteiligungs Gmbh & Co KG, Defendants: Harvey Weiner, LEAD ATTORNEY, Kevin C. Cain, Kiley M. Belliveau, Peabody & Arnold LLP, Boston, MA.

Judges: JENNIFER C. BOAL, United States Magistrate Judge.

Opinion by: JENNIFER C. BOAL

Opinion

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT

[Docket Nos. 28, 42, and 46]

Boal, M.J.

In this proposed class action, Plaintiff Dmitriy Shirokov ("Shirokov") alleges that the defendants defrauded him and thousands of similarly situated individuals. He alleges that the defendants entered into a scheme to profit from copyright infringement allegations through fraud and extortion, which caused members of the class to make millions of dollars **[*2]** in excess settlement payments to the defendants. According to Shirokov, with the help of defendants GuardaLey, Limited ("GuardaLey") and the United States Copyright Group ("USCG"), defendants Thomas Dunlap ("Dunlap"), Nicholas Kurtz ("Kurtz") and law firm Dunlap, Grubb & Weaver PLLC ("DGW"), misrepresented defendant Achte/Neunte Boll Kino Beteiligungs Gmbh & Co KG's ("Achte") rights in the movie Far Cry to the United States Copyright Office (the "Copyright Office"), federal courts and class members. In summary, Shirokov alleges that the defendants told him and class members that Achte was entitled to statutory damages and attorneys' fees for Shirokov and others' alleged copyright infringement, knowing that Achte was not entitled to those remedies.

All of the defendants have moved to dismiss the Second Amended Complaint. For the following reasons, this Court recommends that the District Judge assigned to this case GRANT the motions in part and DENY them in part.

I. PROCEDURAL HISTORY

Shirokov filed his original complaint on November 24, 2010. (Docket No. 1). In response, the Dunlap Defendants filed a motion to dismiss the complaint and a motion for sanctions under *Rule 11 of the Federal Rules of Civil Procedure*. **[*3]** (Docket Nos. 4, 6).

On February 8, 2011, Shirokov filed a First Amended Complaint. (Docket No. 10). The Dunlap Defendants filed renewed motions to dismiss and for sanctions under *Rule 11* on February 22, 2011. (Docket Nos. 15, 17).

On March 9, 2011, the District Court granted Shirokov's motion to file a Second Amended Complaint and Shirokov filed such complaint on March 18, 2011. (Docket Nos. 25 and 26). All defendants have moved to dismiss the Second Amended Complaint. (Docket Nos. 28, 42, 46). The Dunlap Defendants have also filed a renewed motion for sanctions under *Rule 11*. (Docket No. 30). On May 13 and 24, 2011, the District Court referred the pending motions to this Court for a report and recommendation.

The pending motions have been the subject of extensive briefing by the parties. (See Docket Nos. 29, 36, 44, 48, 51, 55, 56, 64-66, 71-73, 77). The Court heard oral argument on February 15, 2012.

II. FACTS[1]

A. **[*4]** The Defendants

Defendant DGW is a Virginia law firm with offices in Leesburg, Virginia, Washington, D.C., and Naples, Florida. (Second Amended Complaint ("Complaint"), ¶ 34). DGW holds itself out as having special expertise in intellectual property law, and in copyright law specifically. (Complaint, ¶ 58). Defendant Dunlap is an attorney and the managing partner at DGW and USCG. (Complaint, ¶ 36). Defendant Kurtz is an attorney at DGW. (Complaint, ¶ 37).

Defendant USCG is a Virginia corporation that acts as a registered alias for a partnership between DGW and GuardaLey. (Complaint, ¶ 35). USCG also acts as a registered alias of several corporations with ties to DGW. (Id.).

[1] Because this case is presently before the Court on motions to dismiss, the Court sets forth the facts taking as true all well-pleaded allegations in the Second Amended Complaint and drawing all reasonable inferences in the plaintiff's favor. See *Morales-Tanon v. P.R. Elec. Power Auth., 524 F.3d 15, 17 (1st Cir. 2008)*.

GuardaLey, a German company with offices in the United Kingdom, is a partner with DGW in managing USCG. (Complaint, ¶ 38). Defendant Achte is a German limited partnership in the business of motion picture creation and distribution. (Complaint, ¶ 39).

B. The Alleged "Copyright Scheme"

Shirokov alleges that DGW, in connection with USCG, Dunlap, Kurtz, GuardaLey, and Achte, has developed a lucrative trade "in monetizing copyright infringement allegations." (Complaint, ¶ 2). GuardaLey monitors and records online instances **[*5]** of alleged copyright infringement of motion pictures. (Complaint, ¶ 4). USCG provides information of the alleged infringement to film industry clients, but cautions them that civil prosecution of copyright claims is not "practical," in light of the financial status of individual infringers. (Id.).

On the basis of GuardaLey's records, the Dunlap Defendants typically file a single civil complaint in the United States District Court for the District of Columbia against hundreds of John Does from all over the country, regardless of the jurisdiction where the alleged infringements took place. (Complaint, ¶ 6). The complaint alleges mass online infringement and petition the court to issue subpoenas to Internet Service Providers ("ISPs"), seeking contact information for the alleged infringers. (Id.).

The Dunlap Defendants use the information provided by the ISPs to send to the alleged infringers virtually identical "litigation settlement demand" letters. (Complaint, ¶ 7). The letters demand $1,500 from each recipient, increasing to $2,500 if not sent promptly, under deceptive threats of impending litigation. (Id.). The Dunlap Defendants and their clients, however, have no intention of litigating **[*6]** these claims to resolution, and indeed do not have the capacity to do so, should the alleged infringers not pay the amount demanded. (Complaint, ¶ 8).

Shirokov alleges that he and the class members received these settlement demand letters from the Dunlap Defendants on behalf of Achte. (Complaint, ¶¶ 158-161 and Exhibit N thereto). Shirokov alleges that the defendants acted together in an effort to coerce him and other class members to pay the amounts demanded, even though the Dunlap Defendants knew that Achte could never prevail on its claims for statutory damages. (Complaint, ¶¶ 15, 24, 176, 178-182).

C. Achte's Copyright

Achte is a German film production company that has made over twenty feature-length motion pictures. (Complaint, ¶ 91). One of its pictures, Far Cry, was filmed in Canada in the summer of 2007. (Complaint, ¶ 98). Far Cry was first released in theaters in Germany on October 2, 2008. (Complaint, ¶ 99). It premiered on over 200 different screens in the first week of release. (Id.).

Far Cry was first released in United States theaters on December 17, 2008. (Complaint, ¶ 100). The film was first published on DVD on April 14, 2009, when the DVD was offered for sale in the Netherlands. **[*7]** (Complaint, ¶ 101). Far Cry was also offered for sale to the public in the United Kingdom and Italy on September 7, 2009 and October 14, 2009, respectively. (Complaint, ¶ 102-103). The film was commercially released on DVD in the United States and Canada on November 24, 2009. (Complaint, ¶ 104).

DGW submitted a copyright registration application for Far Cry to the Copyright Office. (Complaint, ¶ 111). The application falsely stated that Far Cry was first published on November 24, 2009. (Id.). Defendants knew that the statement that Far Cry was first published on November 24, 2009 was false. (Complaint, ¶ 115). Accordingly, Shirokov claims that Achte's registration for Far Cry is invalid. (Complaint, ¶ 22).

Shirokov alleges that DGW and Achte intentionally lied to the Copyright Office about the first publication date in order to maximize the infringement damage awards that Achte could pursue. (Complaint, ¶¶ 11-12). Properly registered works, asserts Shirokov, enjoy the benefits of statutory damage awards of between $750 and $30,000 for each infringed work and $150,000 for each infringed work if the infringement was committed willfully. (Complaint, ¶ 43). If DGW and Achte had been truthful **[*8]** about the first publication date, however, Achte would be limited to recovering actual damages for each alleged act of infringement. (See generally Complaint at ¶¶ 44-57, 90-130). For every act of infringement allegedly committed by Shirokov and Class members, the most that Achte could recover is $26.99, the list price of a new DVD of Far Cry. (Complaint, ¶¶ 219-221).

D. The Underlying Achte Lawsuit

On March 18, 2010, DGW filed a suit in the United States District Court for the District of Columbia on behalf of Achte against 2,094 anonymous individuals ("John Doe Defendants"), alleging infringement of Far Cry (the "Achte Lawsuit"). [2] (Complaint, ¶ 134). The Achte Lawsuit alleged that the John Doe Defendants had infringed Achte's copyright in Far Cry. (Id.). On the same date, DGW sought leave of court to serve subpoenas on ISPs across the country to determine the identity of the John Doe Defendants and their contact information. (Complaint, ¶ 135). The court granted leave on March 23, 2010. (Id.).

Pursuant to the subpoenas, DGW obtained the names and contact information of the John Doe Defendants. **[*9]** (Complaint, ¶¶ 136-137). Shirokov was identified as one of the John Doe Defendants. (Complaint, ¶ 139).

On May 12, 2010, DGW filed a First Amended Complaint for Copyright Infringement on behalf of Achte, raising to 4,577 the alleged number of infringers of Far Cry. (Complaint, ¶ 142). DGW repeatedly sought to extend the time for serving the complaint, prolonging the pendency of the Achte Lawsuit against the class members. (Complaint, ¶ 195). More than six months after filing the original complaint, Achte asserted through DGW that the class members (who had not been yet formally served and had not been named) were "not yet named parties" and therefore had no standing to seek dismissal. (Complaint, ¶ 197).

On September 10, 2010, the court in the Achte Lawsuit ordered Achte to show cause why class members who had submitted affidavits regarding their locations should not be dismissed on the basis of lack of personal jurisdiction. (Complaint, ¶ 204). On the same date, certain John Doe Defendants filed an omnibus motion to quash a subpoena issued by Achte and to dismiss the moving defendants from the Achte Lawsuit. (Id.). The motion sought dismissal on jurisdictional grounds and explained **[*10]** that geographic location information available in the IP addresses, which served as the basis for the Achte Lawsuit, revealed that each of the moving defendants was located outside of Washington, D.C. at the time of the alleged infringement. (Id.). In opposition to the motion, Achte argued that "it would not make practical sense to dismiss particular Doe Defendants on a piecemeal basis" before the court-ordered deadline to name and serve all defendants. (Complaint, ¶ 205).

On November 18, 2010, the last day of its already extended time to name and serve defendants, Achte filed a motion asking the court to extend the deadline for service for five years, arguing that it should not be forced to litigate its case against any class member until every class member had been identified. (Complaint, ¶ 207).

On November 19, 2010, the court ordered Achte to file a second amended complaint "identifying by name and address Defendants over whom it reasonably believes the Court has personal jurisdiction and whom it wants to sue," or if it did not have that information, the IP address of those over whom Achte continued to claim the court had jurisdiction. (Complaint, ¶ 208). The court also ordered Achte **[*11]** to file a status report by February 18, 2011 as to any class members for whom it did not yet have identifying information from the ISPs. (Id.).

In response to the November 19, 2010 order, Achte filed a second amended complaint on December 6, 2010. (Complaint, ¶ 209). The second amended complaint named only one class member as a defendant, along with 139 unnamed John Doe Defendants, out of the 4,577 class members Achte had identified in the first amended complaint. (Id.). Achte also filed a notice of dismissal without prejudice of its claims against all other members of the class. (Id.). On December 14, 2010, the court entered an order approving Achte's dismissal of its claims against all other members of the class. (Complaint, ¶ 212).

After voluntarily dismissing the claims against 4,437 of the members of the Class, Achte filed suit against eight class members as named defendants in individual lawsuits in other courts. (Complaint, ¶ 214). Since the dismissal of most of the John Doe Defendants in the Achte Lawsuit, Achte has not refiled any claims against any member of

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[2] Achte/Neunte Boll Kino Beteiligungs Gmbh & Co. Kg v. Does 1-2,094, No. 10-cv-453 (D.D.C.).

Subclass I (defined below) and has filed only one case against a named member of Subclass II (defined below). (Complaint, **[*12]** ¶ 215). At oral argument, the parties confirmed that Shirokov has not been named in any lawsuit.

E. The Settlement Demand Letters

On or about May 19, 2010, Defendant Kurtz sent a letter to Shirokov, accusing him of infringing the copyright in Far Cry (the "Letter"). (Complaint, ¶ 158 and Exhibit N thereto). The Letter stated that DGW had filed suit on behalf of Achte in the District of Columbia and that Shirokov's ISP had supplied DGW with Shirokov's contact information, identifying him as "one of the Defendants who has illegally obtained or shared our client's copyrighted motion picture through a peer-to-peer network..." (Complaint, ¶ 162 and Exhibit N thereto). The Letter also stated, in relevant part:

> We are sending you this letter as a courtesy before we are required to take more formal legal action which would involve adding you as a named Defendant to the lawsuit.
>
> ***
>
> The law provides protection for copyright owners through the Federal copyright statute found at *17 U.S.C. §§ 501-506*, which allows the copyright owner to impound your material, recover their attorney's fees, and seek damages of $750 - $150,000 per work, depending on the circumstances surrounding the infringement. . . **[*13]** .
>
> In exchange for a comprehensive release of all legal claims which will enable you to avoid becoming a named Defendant in the lawsuit, our firm is authorized to accept the sum of **$1,500** as full settlement for its claims. **This offer will expire at 5pm EST on June 11, 2010.** Thereafter, our client will accept no less than the sum of **$2,500** to settle this matter, but this increased settlement offer will expire on June 30, 2010. In addition, you must remove the file from the shared folder or location where our client's film can be shared or copied within three (3) days of paying a settlement. If you have chosen not to settle by June 30th, we may add you to the list of defendants to be served with a lawsuit.
>
> ***
>
> We look forward to resolving this without further action on our part, however if you do not comply with the above requests we may be forced to name you as a Defendant to the lawsuit and proceed directly against you on behalf of our client. If forced to do so, our client will be seeking to recover the maximum amount of fees provided under the Copyright Act for copyright infringement, which is up to $30,000 per illegally downloaded film, plus attorneys' fees and costs of litigation. **[*14]** Because torrent-file sharing requires *deliberate* action by the uploader or downloader of a movie, we may be able to prove that your actions were intentional, rather than just negligent. In the event we are able to prove that the infringement was intentional, our client will be seeking the maximum statutory damages allowed by the Copyright Act in the amount of $150,000 per infringement, attorneys' fees and costs.
>
> ***
>
> **We strongly encourage you to consult with an attorney to review your rights and risk exposure in connection with this matter.** You should also visit the Frequently Asked Questions web page we have posted at *www.farcry-settlement.com*, which will provide additional information and hopefully answer many of the questions you have. . . .

(Exhibit N to Complaint) (emphasis in original).

The Letter directed Shirokov to a "Frequently Asked Questions" website. That website included the following information:

> 2. I have received a letter in the mail about a lawsuit. Why did I get this letter?
>
> This letter is a demand letter. A lawsuit has been filed against you in the United States Federal District Court for the Federal District of Columbia for copyright infringement as a result of information **[*15]** about your infringing download of a motion picture. If you pay the settlement amount and accept the terms of the

> settlement agreement proposed on your case then you will be dismissed from the lawsuit and your information will remain anonymous. If you do not accept the settlement agreement you may subsequently be served with the lawsuit and expected to defend the claim of copyright infringement as alleged in the complaint.
> ***
>
> 4. What are the consequences or damages that can be awarded in a copyright infringement case?
>
> Statutory damages are available to the owner of a registered work under *Title 17, Section 504 of the United States Code* in an amount of between $750 and $30,000 per infringed work, if the infringement was not willful. If the infringement was willful, as asserted in the Complaint filed in this case, damages may be as much as $150,000 per infringed work.
>
> 5. Are there potential benefits to settling this claim?
>
> We are not your attorneys and we are not providing you legal advice. We strongly recommend that you seek advice from an attorney. There are several aspects of settling the copyright infringement claim against you that you might find beneficial. Settling the claim allows **[*16]** you to pay a relatively nominal, onetime lump sum payment to completely resolve the claim, without having to defend yourself in court. The legal fees incurred in defending a copyright infringement claim will almost always exceed the settlement amount demanded by our client. Second, your settlement, identity and contact information will remain private, in that we will not release your information to any third party unless legally required to do so. Third, by settling, you will avoid the potential for a jury verdict against you that could exceed the amount of the settlement (up to $150,000, for willful infringement) and include an award of our client's attorneys' fees, which will be certainly be several thousand dollars more. Finally, settling allows you to resolve the claim quickly and easily, over the Internet or by mail.

(Exhibit P to Complaint). Beyond factually specific allegations, the defendants have sent substantially identical letters to the members of the class. (Complaint, ¶¶ 159-160).

Shirokov did not pay to settle the claims. (Complaint, ¶ 232). However, he alleges that he has incurred costs in retaining counsel "in reliance on the false allegations of the Letter and in order **[*17]** to determine the merits of its claims... Plaintiff would have avoided those costs had the Letter been truthful." (Complaint, ¶ 232).

Based on his allegations, Shirokov has brought nineteen causes of action, including conspiracy, Computer Fraud and Abuse Act claims, RICO violations, fraud on the court, abuse of process, malicious prosecution, fraud on the copyright office, copyright misuse, and unfair and deceptive practices under *Chapter 93A*.

F. The Putative Class

Shirokov brings this action on behalf of a class of all 4,577 persons who defendants allege infringed Achte's copyright in Far Cry prior to May 12, 2010, the date on which Achte filed its amended complaint in the Achte Action. (Complaint, ¶ 239). The class is further divided into two subclasses: (1) a subclass of all 917 persons ("Subclass I") who defendants allege infringed Achte's copyright prior to its claimed date of publication, November 24, 2009; and (2) a subclass of all 3,644 persons ("Subclass II") who defendants allege infringed Achte's copyright prior to its effective date of registration, January 19, 2010. (Id.). Shirokov alleges that he is a member of Subclass II. (Complaint, ¶ 139).

III. ANALYSIS

A. GuardaLey's Motion **[*18]** To Dismiss For Lack Of Personal Jurisdiction

In addition to moving to dismiss the Complaint for failure to state a claim, defendant GuardaLey also argues that the Complaint must be dismissed against it pursuant to *Rule 12(b)(2) of the Federal Rules of Civil Procedure*, because this Court does not have personal jurisdiction over GuardaLey. (Docket No. 44 at 4-14). "[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)." *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430-31, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007)*. Therefore, the Court first addresses the jurisdictional issue before reaching GuardaLey's motion to dismiss for failure to state a claim. For the reasons that follow, this Court recommends that the motion to dismiss for lack of personal jurisdiction be ALLOWED.

1. Documents Outside Of The Complaint

In order to determine precisely which materials are properly before the Court for purposes of deciding the defendants' motions to dismiss, this Court must first decide GuardaLey's motion to strike. (Docket No. 58). Shirokov has **[*19]** submitted certain exhibits in connection with his opposition to GuardaLey's motion to dismiss the Complaint. (See Ex. A through L to Docket No. 56). In addition, he has included a section entitled "Statements of Facts Specific to GuardaLey" on pages 5 through 9 of his opposition. (Docket No. 56 at 5-9). For the reasons set forth below, the Court denies in part and grants in part GuardaLey's motion to strike. The Court will consider those materials only in connection with GuardaLey's motion to dismiss the Complaint for lack of personal jurisdiction but not in connection with the motion to dismiss the Complaint for failure to state a claim. [3]

GuardaLey is correct that, generally, the Court may not consider documents outside of the complaint in connection with a motion to dismiss under *Rule 12(b)(6)*. *Nollet v. Justices of the Trial Court of Mass., 83 F. Supp. 2d 204, 208 (D. Mass. 2000)* (Harrington, J.), aff'd, *248 F.3d 1127 (1st Cir. 2000)*. Nevertheless, on a motion to dismiss for lack of personal jurisdiction, the court may consider facts outside of the complaint. *Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 675 (1st Cir. 1992)* (citations omitted) (In order to sustain burden of proving personal jurisdiction, "plaintiff must go beyond the pleadings and make affirmative proof."); *Callahan v. Harvest Bd. Int'l, Inc., 138 F. Supp. 2d 147, 152-53 (D. Mass. 2001)* ("The consideration of materials outside the complaint is appropriate in ruling on a motion to dismiss for lack of personal jurisdiction."). This Court, therefore, declines to strike any of the challenged submissions but will consider them only in connection with GuardaLey's motion to dismiss for lack of personal jurisdiction under the following framework:

> On a motion to dismiss for want of *in* ***[*21]*** *personam* jurisdiction, *Fed. R. Civ. P. 12(b)(2)*, the plaintiff ultimately bears the burden of persuading the court that jurisdiction exists . . . In conducting the requisite analysis under the prima facie standard, we take specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe them in the light most congenial to the plaintiff's jurisdictional claim . . . We then add to the mix facts put forward by the defendants, to the extent that they are uncontradicted . . . We caution that, despite the liberality of this approach, the law does not require us struthiously to credit conclusory allegations or draw farfetched inferences.

Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 34 (1st Cir. 1998) (internal citations omitted). As part of this analysis, the Court does not act as a fact finder. Rather, the Court must determine "whether the facts duly proffered [when] fully credited, support the exercise of personal jurisdiction." *Alers-Rodriguez v. Fullerton Tires Corp., 115 F.3d 81, 84 (1st Cir. 1997)*. However, "allegations in a lawyer's brief or legal memorandum are insufficient, even under the relatively relaxed prima facie standard, to **[*22]** establish jurisdictional facts." *Barrett v. Lombardi, 239 F.3d 23, 27 (1st Cir. 2001)*.

2. Standard of Review

Although GuardaLey filed the motion to dismiss, Shirokov ultimately bears the burden of persuading the Court that it has personal jurisdiction over GuardaLey. *Hannon v. Beard, 524 F.3d 275, 279 (1st Cir. 2008)*. In considering a

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[3] Shirokov argues that the Court may also consider materials outside of the Complaint in connection with the defendants' motion to dismiss on the basis of subject-matter jurisdiction (standing). (Docket No. 66 at 9-10). However, none of the challenged materials have any relevance to the issue of subject-matter jurisdiction. As such, the Court does not consider them for that purpose. In addition, the Court finds that none of the exceptions regarding the prohibition against considering materials outside the Complaint in connection with a *Rule 12(b)(6)* **[*20]** motion apply to the challenged materials. See *Nollet, 83 F. Supp. 2d at 208*.

motion to dismiss for lack of personal jurisdiction, a court may choose from three methods for determining whether the plaintiff has met his burden of establishing personal jurisdiction. Adelson v. Hananel, 510 F.3d 43, 48 (1st Cir. 2007). These methods include the prima facie method, the "preponderance of the evidence" method, and the "likelihood" method. Foster-Miller, Inc. v. Babcock & Wilcox Can., 46 F.3d 138, 145-47 (1st Cir. 1995). When, as here, a court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, the "prima facie" standard governs its determination. United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 618 (1st Cir. 2001). Under the prima facie standard, Shirokov must "go beyond the pleadings and make affirmative proof' to demonstrate the existence of personal jurisdiction. Id. at 619. However, **[*23]** the Court "accept[s] the plaintiff's (properly documented) evidentiary proffers as true" and construes those facts "in the light most congenial to the plaintiff's jurisdictional claim." Hannon, 524 F.3d at 279 (internal quotation marks and citations omitted).

In his Complaint, Shirokov stated that this Court had jurisdiction over the subject-matter of the dispute on the basis of both diversity of citizenship, 28 U.S.C. § 1332, and the existence of federal questions, 28 U.S.C. § 1343. (Complaint, ¶¶ 27-28). "When the district court's *subject-matter jurisdiction* rests wholly or in part on the existence of a federal question, the constitutional limits of the court's *personal* jurisdiction are drawn in the first instance with reference to the due process clause of the fifth amendment." Lorelei Corp. v. Cnty. of Guadalupe, 940 F.2d 717, 719 (1st Cir. 1991) (emphasis in original). In such circumstances, the Fifth Amendment requires only that the defendant have "minimum contacts" with the United States, rather than with the particular forum state (as would be required in a diversity case). Id.; United Elec., Radio and Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085 (1st Cir. 1992) **[*24]** (citations omitted).

"Nevertheless, while courts in federal question cases have found 'that sufficient contacts [to justify the assertion of personal jurisdiction] exist whenever the defendant is served within the sovereign territory of the United States,' the basis for service of process returnable to a particular court must be grounded within a federal statute or Civil Rule." United Elec., Radio and Mach. Workers of Am., 960 F.2d at 1085 (quotation omitted). "In other words, though personal jurisdiction and service of process are distinguishable, they are inextricably intertwined, since service of process constitutes the vehicle by which the court obtains jurisdiction." Id. (citations omitted).

Rule 4 of the Federal Rules of Civil Procedure is the principal mechanism for service of process in federal courts. Id. Under most circumstances, Rule 4(f) limits service of process "to the territorial limits of the state in which the court is held." Id. at 1085-86 (quoting Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1984)). However, "a number of federal laws provide for either nationwide or worldwide service, and Rule 4(e) authorizes extraterritorial service **[*25]** in such circumstances." Id. at 1086 (internal citations omitted).

The Racketeer Influenced and Corrupt Organizations Act ("RICO") allows broader service of process than Rule 4. 18 U.S.C. § 1965(d); see also Omni Video Games, Inc. v. Wing Co., Ltd., 754 F. Supp. 261, 263 (D.R.I. 1991). Here, Shirokov brings a RICO claim (Count 6). However, RICO authorizes nationwide, not international, service of process. In re Lupron Mktg. & Sales Practices Litig., *245 F. Supp. 2d 280, 288 n. 23 (D. Mass. 2003)*; Omni Video Games, Inc., 754 F. Supp. at 263. Defendant GuardaLey was served under the Hague Convention in the United Kingdom and Germany. (Docket Nos. 27-2, 27-3). Accordingly, RICO's nationwide service of process provision does not allow the Court to exercise jurisdiction over defendant GuardaLey. [4]

Hence, the Court's analysis comes full circle. "When insufficient statutory authorization for extraterritorial **[*26]** service exists, Rule 4(e) allows such service 'only to the extent permitted by the law of the state in which the district court sits.'" United Elec., Radio and Mach. Workers of Am., 960 F.2d at 1086. Because there is no federal statute permitting service of process on GuardaLey in Germany or the United Kingdom, the Court's inquiry must focus on Massachusetts law concerning personal jurisdiction, notwithstanding that this is a federal question case. Id. "And because state law is subject to Fourteenth Amendment limitations, the minimum contacts doctrine, while

[4] Shirokov also asserts claims under the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §§ 1030, et seq. (Count 4). However, the CFAA does not authorize nationwide service of process. Id.; see US Bioservices Corp. v. Lugo, No. 08-2342-JWL, 2008 U.S. Dist. LEXIS 85862, 2008 WL 4747473, at *1 (D. Kan. Oct. 23, 2008).

imposing no direct state-by-state constraint on a federal court in a federal question case, acts indirectly as a governing mechanism for the exercise of personal jurisdiction." Id. Accordingly, the Court's analysis must focus on GuardaLey's contacts with Massachusetts.

3. The Court Does Not Have General Jurisdiction Over GuardaLey

A court may exercise authority over a defendant by virtue of either general or specific jurisdiction. Mass. Sch. of Law, 142 F.3d at 34. Here, Shirokov argues that the Court has both general and specific jurisdiction over GuardaLey. (Docket No. 56 at 11). This Court disagrees.

General jurisdiction exists **[*27]** when the defendant has engaged in "continuous and systematic activity" in the forum, even if the activity is unrelated to the suit. United Elec., Radio & Mach. Workers of Am., 960 F.2d at 1088. "In evaluating whether the exercise of personal jurisdiction is warranted, courts concentrate on the 'quality and quantity of contacts between the potential defendant and the forum.'" Swiss Am. Bank, 274 F.3d at 619 (quoting Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999)). In addition to showing that the defendant has "continuous and systematic" contacts with the forum, the plaintiff must also show that the exercise of jurisdiction would be reasonable. Id. "As a threshold matter, 'the standard for evaluating whether these contacts satisfy the constitutional general jurisdiction test is considerably more stringent than that applied to specific jurisdiction questions.'" Id. (quotation omitted).

In arguing that GuardaLey's contacts are "continuous and systematic," Shirokov focuses on GuardaLey's contacts with the United States as a whole. However, as stated supra, the proper focus is on GuardaLey's contacts with Massachusetts. Shirokov only identifies the **[*28]** following contacts between GuardaLey and Massachusetts: that GuardaLey has tracked and identified "at least thirty [alleged infringers'] at 1P addresses located in Massachusetts" in connection with the Acthe Lawsuit and more than one hundred alleged infringers in cases other than the Achte Lawsuit. (Docket No. 56 at 13-14). The Court finds these contacts insufficient to satisfy general jurisdiction.

The Supreme Court's decision in Perkins v. Benguet Consol. Mining Co. [5] "remains '[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.'" Goodyear Dunlop Tires Ops. v. Brown, 131 S.Ct. 2846, 2856, 180 L. Ed. 2d 796 (2011) (citation omitted). Sued in Ohio, the defendant in Perkins was a Philippine mining corporation that had ceased activities in the Philippines during World War II. Perkins, 342 U.S. at 447-48. To the extent that the company was conducting any business, it was doing so in Ohio. The corporation's president maintained his office there, kept the company files in that office, and supervised from the Ohio office the limited activities of the company. Id. Although the claim-in-suit did not arise in Ohio, the Supreme **[*29]** Court ruled that it would not violate due process to submit the defendant to the jurisdiction of the Ohio court. Id. at 448.

Later, in Helicopteros Nacionales de Colombia. S.A. v. Hall, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984), the Supreme Court addressed the exercise of general jurisdiction over a Colombian corporation. In Helicopteros, survivors of United States citizens who died in a helicopter crash in Peru brought a wrongful death action in a Texas state court against the owner and operator of the helicopter, a Colombian corporation. 466 U.S. at 410. The Colombian corporation had no place of business in Texas and was not licensed to do business in Texas. Id. at 416. "[The company's] contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session, accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas enterprise] for substantial sums; and sending personnel to [Texas] for training." Id. The Supreme Court found that those contacts were not continuous and systematic and were insufficient to support the exercise of general jurisdiction over the **[*30]** defendant. Id. at 418-19.

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[5] 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952).

"For an individual, the paradigm focus for the exercise of general jurisdiction is the individual's domicile; for a corporation it is an equivalent place, one in which the corporation is fairly regarded as at home." *Goodyear Dunlop Tires Ops., 131 S.Ct. at 2853-54* (citation omitted). Shirokov has presented no evidence (or even unsupported allegations) that GuardaLey is a resident of Massachusetts, owns property in Massachusetts, regularly transacts business in Massachusetts, or has otherwise engaged in continuous and systematic activity in Massachusetts. "Measured against *Helicopteros* and *Perkins*, [Massachusetts] is not a forum in which it would be permissible to subject [GuardaLey] to general jurisdiction." *Id. at 2857*. GuardaLey is in no sense at home in Massachusetts. Therefore, this Court finds that GuardaLey's attenuated connections with Massachusetts fall short of the "continuous and systematic general business contacts" necessary to empower a federal court in Massachusetts to entertain a suit against it there.

4. The Court Does Not Have Specific Jurisdiction Over GuardaLey

"In the absence of general jurisdiction, a court's power depends upon the existence **[*31]** of specific jurisdiction." *Mass. Sch. of Law, 142 F.3d at 34*. To establish specific jurisdiction, Shirokov must demonstrate that the Massachusetts long-arm statute grants jurisdiction over GuardaLey and that the exercise of that jurisdiction comports with the *Due Process Clause of the Fourteenth Amendment*. *Lorelei Corp., 940 F.2d at 720*.

The Court need not pause to consider the particulars of the Massachusetts long-arm statute because even if that statute, correctly applied, would purport to grant jurisdiction over GuardaLey, Shirokov must still demonstrate that "the exercise of jurisdiction pursuant to that statute comports with the strictures of the Constitution." *Mass. Sch. of Law, 142 F.3d at 35*; see also *Hannon, 524 F.3d 275, 280 (1st Cir. 2008)* ("Because we have construed the Massachusetts long-arm statute to be coextensive with the limits allowed by the United States Constitution, we often 'sidestep the statutory inquiry and proceed directly to the constitutional analysis.'"). The constitutional analysis has three distinct components: "relatedness, purposeful availment (sometimes called 'minimum contacts'), and reasonableness." *Hannon, 524 F.3d at 282* (internal quotations and **[*32]** citations omitted).

To satisfy the relatedness component, Shirokov's claims must "arise out of, or be related to, the defendant's in-forum activities." *Hannon, 524 F.3d at 282*. This standard is flexible and focuses on the nexus between the defendant's contacts with the forum and the plaintiff's cause of action. Id. However, there are some constraints on its application. The First Circuit has described the relatedness standard as follows:

> The relatedness requirement is not an open door; it is closely read, and it requires a showing of a material connection. This court steadfastly rejects the exercise of personal jurisdiction whenever the connection between the cause of action and the defendant's forum-state contacts seems attenuated and indirect. Instead, the defendant's in-state conduct must form an important, or at least material, element of proof in the plaintiff's case. A broad but-for argument is generally insufficient. Because "but for" events can be very remote, due process demands something like a "proximate cause" nexus.

Harlow v. Children's Hosp., 432 F.3d 50, 61 (1st Cir. 2005) (internal citations, quotations and modifications omitted).

As described above, the only conceivable **[*33]** contacts with Massachusetts consist of GuardaLey's "tracking" of IP addresses of alleged infringers who happened to be located in Massachusetts. (Docket No. 56 at 13-14). Shirokov has presented no evidence that GuardaLey performed such tracking anywhere other than its place of business in the United Kingdom. Shirokov also alleges that GuardaLey provided that information to the Dunlap Defendants, who then used that information to file the Achte Lawsuit, obtain subpoenas, obtain the alleged infringers' contact information and, ultimately, send the Letter to Shirokov and others. (See generally Complaint at 4, 133-137, 156-160). The Court finds that such a chain of events does not satisfy the relatedness requirement. To be sure, it could be argued that the Achte Lawsuit and subsequent Letter would not have been possible without the information provided by GuardaLey. However, a "but-for" argument that DGW would not have sent a settlement demand letter to Shirokov had GuardaLey not documented his downloading of Far Cry is insufficient to satisfy the relatedness prong because it is too attenuated and too remote in the causation link. Although GuardaLey's alleged activities may have provided **[*34]** the other defendants with information that they in turn used to perpetrate the alleged copyright scheme, those activities are not a material element of Shirokov's case. Shirokov has provided no evidence (and has not even alleged) that GuardaLey itself knew of or participated in the copyright scheme. See Section III(B)(6) below.

Even if Shirokov could demonstrate that GuardaLey's contacts with Massachusetts were related to his cause of action, he must also show that GuardaLey's contacts "represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's presence before the state's courts foreseeable." *Hannon, 524 F.3d at 284*. This requirement "ensures that jurisdiction is not based on merely random, isolated or fortuitous contacts with the forum state, and is based upon the 'cornerstones of voluntariness and foreseeability.'" *Id*. (internal modifications and citations omitted). The defendant's contacts "must be voluntary and not based on the unilateral actions of another party" and "must be such that [the] defendant could reasonably anticipate being haled into court **[*35]** there." *Id*. (internal modifications omitted). "Even if a defendant's contacts with the forum are deemed voluntary, the purposeful availment prong of the jurisdictional test investigates whether the defendant benefitted from those contacts in a way that made jurisdiction foreseeable." *Id*. (citing *Phillips Exeter Acad., 196 F.3d at 292*).

Again, Shirokov alleges only that GuardaLey "tracked" the internet usage of alleged infringers. (Docket No. 56 at 13-14). He argues that such tracking constitutes purposeful availment because it was foreseeable that the effects of such tracking would be felt in each state, including Massachusetts, and GuardaLey did not make any efforts to exclude Massachusetts from its targeted conduct. (Docket No. 56 at 21). Shirokov states that in order to track infringement, GuardaLey had to actively participate in the infringement by offering files for download. (Docket No. 73 at 3). GuardaLey, on the other hand, characterizes its activities as simple observation and monitoring of infringement activity. (Docket No. 65 at 4, n. 3). Therefore, the key issue is whether GuardaLey purposefully availed itself of the privilege of conducting business in Massachusetts if its **[*36]** internet activities interacted with Massachusetts residents. In making their respective arguments for and against the exercise of personal jurisdiction, both parties rely on caselaw regarding website owners. (Docket No. 65 at 4; Docket No. 73 at 3). While that caselaw may not be directly on point, the Court nevertheless finds it useful for purposes of its analysis.

Most circuits and lower courts have adopted a test developed in Zippo Mfg. Co. v. Zippo Dot Com. Inc., a 1997 trademark infringement case involving an internet domain name. *952 F. Supp. 1119 (W.D. Pa. 1997)*; see also *Sportschannel New England Ltd. Partnership v. Fancaster, Inc., No. 09cv11884-NG, 2010 U.S. Dist. LEXIS 106272, 2010 WL 3895177, at *5 (D. Mass. Oct. 1, 2010)* (collecting cases); *Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 40 (D. Mass. 1997)* (collecting cases). One judge describes the Zippo test as follows:

> *Zippo* creates a sliding scale in which the likelihood of personal jurisdiction is 'directly proportionate' to the level of interactivity of the website. At one end of the spectrum, personal jurisdiction is clearly established where a defendant conducts regular business over the internet, for example by entering into contracts **[*37]** with foreign users to transmit files to their home computers for a fee. At the other end of the spectrum are passive websites that do no more than share information.
>
> And in the middle of the spectrum are interactive websites where a user exchanges information with a host computer. Here, the *Zippo* court examines the 'level of interactivity' and the 'commercial nature of the exchange of information' on the site. Mere interactivity is not enough. Something more is required.
>
> *Zippo* and its progeny do not provide much guidance to courts in determining what kind of 'something more' is required to render an interactive website subject to a court's personal jurisdiction. While courts have found that passive websites do not expose themselves to jurisdiction of every forum, they have been less clear about how much interactivity does.

*Sportschannel New England Ltd. Partnership, 2010 U.S. Dist. LEXIS 106272, 2010 WL 3895177 at * 5* (internal citations omitted).

Shirokov compares GuardaLey's activities to an interactive website, while GuardaLey compares it to a passive website. The activities appear to be somewhere in between. In any event, the Court finds that GuardaLey's activities are not sufficient to satisfy the purposeful availment **[*38]** requirement. In this case, GuardaLey is not selling a product or providing information to the public via the internet. Although it may be interacting in some sense with the alleged infringers, in doing so, it only identifies IP addresses and adds them to a list of copyright infringers. The fact that GuardaLey then provided that information to the Dunlap Defendants does not equate with purposeful availment of the benefits and protections of Massachusetts laws. Indeed, "[i]n the era of Facebook . . . most websites now allow users to 'share' an article, choose to 'like' a particular page, add comments, and email the site owners . . . If virtually every website is now interactive in some measure, it cannot be that every website subjects itself to litigation in any forum-unless Congress dictates otherwise." *2010 U.S. Dist. LEXIS 106272, [WL] at *6*. "Interactivity alone cannot be the linchpin for personal jurisdiction." *Id*.

Perhaps because GuardaLey's contacts with Massachusetts are so attenuated, Shirokov attempts to impute other defendants' activities in Massachusetts to GuardaLey by invoking the doctrine of piercing the corporate veil as a basis for its argument that the Court has personal jurisdiction over GuardaLey. **[*39]** (Docket No. 56 at 15). He also argues that USCG is an agent of GuardaLey. (Docket No. 73 at 7-8). In support of this argument, Shirokov points out that at least one of the managers of USCG, Benjamin Perino, is also a managing director of GuardaLey. In addition, Shirokov argues that GuardaLey and DGW are both partners in USCG. (Docket No. 56 at 15). Shirokov fails to recognize, however, that the mere existence of a business relationship between two corporate entities does not establish an agency relationship or a basis for disregarding the corporate form. *Am. Home Assurance Co. v. Sport Maska, Inc., 808 F. Supp. 67, 72 (D. Mass. 1992)*. In addition, Shirokov has not proffered sufficient evidence of an agency relationship between GuardaLey and any of the other defendants.

Although Shirokov argues in his brief that GuardaLey has been a primary participant in structuring the Achte Lawsuit and similar litigation and that USCG acts for GuardaLey (see Docket No. 56 at 14; Docket No. 73 at 8), he has put forth no competent evidence to support those arguments. In order to defeat a motion to dismiss for lack of personal jurisdiction, Shirokov "must do more than simply surmise the existence of **[*40]** a favorable factual scenario; he must verify the facts alleged through materials of evidentiary quality." *Barrett v. Lombardi, 239 F.3d 23, 27 (1st Cir. 2001)*. His lawyers' unsupported arguments in the opposition to the motion to dismiss are insufficient, even under the relaxed prima facie standard, to establish jurisdictional facts. *Id*. Accordingly, the Court finds that Shirokov has failed to show that GuardaLey substantially directed its activities to Massachusetts to constitute purposeful availment.

Because Shirokov has failed to establish the relatedness and purposeful availment components, this Court need go no further in its jurisdictional analysis. *Swiss Am. Bank, 274 F.3d at 625*. Accordingly, this Court recommends that the District Judge find that there is no jurisdiction over GuardaLey in this District Court.

5. Jurisdiction Under Rule 4(k)(2)

The Court's findings above do not end the matter. Shirokov also argues that GuardaLey is subject to the Court's jurisdiction under *Rule 4(k)(2) of the Federal Rules of Civil Procedure*. (Docket No. 73 at 4-5). *Rule 4(k)(2)* provides:

> (2) **Federal Claim Outside State-Court Jurisdiction.** For a claim that arises under federal law, serving a summons **[*41]** or filing a waiver of service establishes personal jurisdiction over a defendant if:
> (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
> (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Fed. R. Civ. P. 4(k)(2). *Rule 4(k)(2)* serves as "a species of federal long-arm statute." *Swiss Am. Bank, 191 F.3d 30, 40 (1st Cir. 1999)*. Before this rule was enacted, "foreign defendants who lacked single-state contacts sufficient to bring them within the reach of a given state's long-arm statute . . . but who had enough contacts with the United States as a whole to make personal jurisdiction over them in a United States court constitutional, could evade responsibility for civil violations of federal laws that did not provide specifically for service of process." Id. *Rule 4(k)(2)* closed that loophole. Id.

In order for *Rule 4(k)(2)* to apply, three requirements must be met: (1) the plaintiff's claim must be one arising under federal law; (2) the putative defendant must be beyond the jurisdictional reach of any state court of general jurisdiction; and (3) the federal court's exercise of personal jurisdiction over the defendant **[*42]** must not offend the Constitution or other federal law. *Id. at 38*.

Here, Shirokov has presented evidence that GuardaLey operates a sales division in Los Angeles, California since at least early 2010, headed by Barbara Mudge. (Docket No. 56 at 7, Docket No. 56-1, Docket No. 56-9 at 3-4). The presence of a business office in California would likely subject GuardaLey to personal jurisdiction there. Accordingly, Shirokov has failed to carry his burden of proving that *Rule 4(k)(2)* applies to this case.

For the foregoing reasons, this Court finds that it does not have personal jurisdiction over GuardaLey and recommends that the District Judge allow GuardaLey's motion to dismiss for lack of personal jurisdiction and dismiss all claims against GuardaLey. [6]

B. Motions To Dismiss For Failure To State A Claim

1. Standard Of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted **[*43]** as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

The Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiffs' favor. *Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000)*. While the court must accept as true all of the factual allegations contained in the complaint, that doctrine is not applicable to legal conclusions. *Iqbal, 129 S.Ct. at 1949*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id.; see also *Sanchez v. Pereira-Castillo, 590 F.3d 31, 48 (1st Cir. 2009)* ("In other words, a plaintiff must offer 'more than an unadorned, the-defendant-unlawfully-harmed-me **[*44]** accusation,' in order to claim a 'plausible entitlement to relief.'") (citations omitted). Accordingly, a complaint does not state a claim for relief where the well-pleaded facts fail to warrant an inference of any more than the mere possibility of liability. *Iqbal, 129 S.Ct. at 1950*.

2. The Plaintiff Has Standing To Bring This Action

The defendants argue that Shirokov has no standing to bring this action because he has not suffered any injury in fact. Specifically, they argue that because Shirokov did not pay to settle Achte's claims, he does not have an injury sufficient to confer Article III standing. (Docket No. 29 at 8-10; Docket No. 44 at 27-31; Docket No. 48 at 6-7). Shirokov argues that the threat of litigation and his subsequent incursion of attorneys' fees establishes standing. (Docket No. 32 at 5-7).

If Shirokov lacks standing to bring this matter before the Court, the Court lacks jurisdiction to decide the merits of the case. *Libertad v. Welch, 53 F.3d 428, 436 (1st Cir. 1995)* (citation omitted). "Thus, standing is a threshold issue, determining whether the court has the power to hear the case, and whether the putative plaintiff is entitled to have the court decide the merits **[*45]** of the case." *Id*.

[6] Although the Court finds that GuardaLey is not subject to personal jurisdiction in this Court, the Court also addresses GuardaLey's motion to dismiss based on the merits of Shirokov's claims should the District Judge disagree with this Court's conclusion regarding personal jurisdiction.

"Standing involves 'a blend of constitutional requirements and prudential considerations.'" New Hampshire Right to Life PAC v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996) (quoting Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464, 471, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)). A federal court is empowered only to decide "cases" and "controversies." Id. (citing U.S. Const. art. III). "Not every dispute is a case or controversy. 'The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements.'" Id. (citation omitted).

In order to establish standing, Shirokov must show that (I) he personally has suffered some actual or imminent injury as a result of the challenged conduct; (2) the injury can fairly be traced to that conduct; and (3) the injury likely will be redressed by a favorable decision from the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). An injury in fact must be concrete and particularized rather than conjectural or hypothetical. Summers v. Earth Island Inst., 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009).

The injury must be real but not necessarily economic. United States v. AVX Corp., 962 F.2d 108, 113-14 (1st Cir. 1992). **[*46]** "A mere interest in an event-no matter how passionate or sincere the interest and no matter how charged with public import the event-will not substitute for an actual injury." Id. at 114.

In a putative class action, the named plaintiff must individually fulfill the standing requirement at the time of the filing before he can represent class members. Cavallaro v. UMass Memorial Health Care, Inc., No. 09-40152-FDS, 2011 U.S. Dist. LEXIS 61003, 2011 WL 2295023, at * 2 (D. Mass. June 8, 2011). The fact that "a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 n. 20, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (quotations omitted). The plaintiff must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

Shirokov bears the burden of establishing Article III standing. Lujan, 504 U.S. at 561. "Since [the elements of standing] **[*47]** are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." Id.; see also AVX Corp., 962 F.2d at 114. The First Circuit has held that "where standing is at issue, heightened specificity is obligatory at the pleading stage." AVX Corp., 962 F.2d at 115. The complainant must set forth reasonably definite factual allegations regarding each material element needed to sustain standing. Id. Accordingly, "the facts necessary to support standing must clearly appear in the record and 'cannot be inferred argumentatively from averments in the pleadings.'" Id. (quotations omitted).

The Complaint alleges that the defendants' copyright scheme has caused damages to the class members in the form of payment of inflated settlements and/or related expenses in defending themselves against the copyright scheme. (Complaint, ¶ 324). However, Shirokov alleges that he did not pay anything to the defendants in response to the Letter. Instead, Shirokov alleges that **[*48]** he incurred legal costs "in reliance on the false allegations of the Letter and in order to determine the merits of its claims." (Complaint, ¶ 232). Shirokov also alleges that he would have avoided those costs had the Letter been truthful. (Id.).

Based on the allegations in the Complaint, Shirokov argues that three distinct "injuries" confer standing: (I) the threat of potential litigation against him; (2) the fees incurred by him in determining the merits of Achte's copyright claims; and (3) the legal fees incurred by him in this action. As detailed below, only the second category confers standing on Shirokov.

Shirokov argues that he has suffered an injury-in-fact based on the threat of potential litigation against him. He states that Achte, via DGW, "has already sued Plaintiff and the entire Class in 2010, and Moving Defendants threatened to sue each member of the Class individually." (Docket No. 32 at 5). However, the case cited by Shirokov to support this proposition arises out of the limited context of First Amendment rights that are inapplicable to the present case. See *Gardner, 99 F.3d at 11-12* (declaratory judgment action seeking ruling that state campaign finance statutes unlawfully **[*49]** abridged plaintiff's free speech rights).

In any event, any potential threat of litigation against Shirokov is speculative and too remote to support a finding of standing. [7] In order to comply with Article III's requirements, "a plaintiff must face a threat of injury that is both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 14 (1st Cir. 2008)* (citation omitted). Shirokov's own Complaint alleges that Achte abandoned its claims against 4,437 of the Class members. He does not allege that he is one of the remaining defendants in the Achte Lawsuit. (Complaint, ¶¶ 209-212). He has also alleged that the defendants' alleged scheme is based on obtaining settlements, not judgments, and that the defendants do not actually intend to prosecute the vast majority of the copyright claims they bring. (Complaint, ¶ 5, 8, 152-153). Indeed, eighteen months after receiving the Letter, Shirokov has not been named as a defendant in the Achte Lawsuit or any other lawsuit by Achte. [8]

To the extent that Shirokov claims that the legal fees incurred in this action constitute an injury sufficient to confer Article III standing, he is wrong. (Docket No. 32 at 6). "[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*. "The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An 'interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.'" *Id.* (citations omitted).

Nevertheless, Shirokov has standing to bring this action based on his allegations that he incurred legal fees in connection with the Letter. Shirokov's out-of-pocket loss of money is an injury. The natural and probable consequences of the defendants' alleged **[*51]** actions include the costs incurred in defending the copyright claims. As such, fees incurred in connection with the Letter would be considered compensatory damages, not attorneys' fees. See, e.g., *Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 645, 925 N.E.2d 513 (2010)* ("The 'natural and probable' consequences of an abuse of process lawsuit include the costs incurred in successfully defending the charge. As such, fees incurred for defending such a lawsuit are considered compensatory damages, not attorney's fees.") (citation omitted). Accordingly, the Court finds that Shirokov has standing to bring this suit.

3. The Noerr-Pennington Doctrine Does Not Bar Shirokov's Claims

The Dunlap Defendants and Achte rely on the Noerr-Pennington doctrine as a ground for dismissal of all of Shirokov's claims. (Docket No. 29 at 14-16; Docket No. 48 at 8-11). Although, as set forth below, the Court ultimately concludes that there are independent bases supporting dismissal of most of Shirokov's claims, the Court finds that the Noerr-Pennington doctrine does not bar Shirokov's claims.

The Noerr-Pennington doctrine, which derives from *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, and *Eastern R.R. Presidents Conference v. Noerr Motor Freight. Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, **[*52]** shields from antitrust liability entities who join together to influence government action, even if they seek to restrain competition or to damage competitors. *Davric Maine Corp. v. Rancourt, 216 F.3d 143, 147 (1st Cir. 2000)* (citations omitted). The doctrine applies to petitions before legislatures, administrative agencies, and the courts. Id. (citations omitted). In addition, some courts have extended the doctrine to pre-litigation activities, such as threats to sue and demand letters. See, e.g., *Primetime 24 Joint Venture v. Nat'l Broad. Co., Inc., 219 F.3d 92, 100 (2nd Cir. 2000)* (collecting cases).

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[7] At oral argument, the parties confirmed that Shirokov has not been named or otherwise identified as a defendant in the Achte Lawsuit, which was **[*50]** filed almost two years ago.

[8] In determining whether a plaintiff has standing, a court is required to look at the facts as they existed at the time when the lawsuit was filed. *Keene Corp. v. United States, 508 U.S. 200, 207, 113 S. Ct. 2035, 124 L. Ed. 2d 118 (1993)*; *Lujan, 504 U.S. at 571 n. 4*.

There is some debate, however, as to whether the Noerr-Pennington doctrine applies outside of the antitrust field. Compare *Sosa v. DirecTV, Inc., 437 F.3d 923, 931 (9th Cir. 2006)* (Noerr-Pennington is "a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause.") with *Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 891 (10th Cir. 2000)* (holding that prelitigation threats communicated solely between private parties are not afforded immunity from suit by the right of petition **[*53]** guaranteed by the *First Amendment*). Shirokov argues that the doctrine only applies to antitrust claims. (Docket No. 32 at 16-18). The First Circuit has not addressed the issue directly but its decisions indicate that it may view the Noerr-Pennington doctrine expansively. See, e.g., *Tomaiolo v. Mallinoff, 281 F.3d 1, 11 n. 9 (1st Cir. 2002)*. Nevertheless, this Court declines to extend the doctrine to include the conduct at issue here at this stage of the case. This Court finds the Tenth Circuit's analysis in *Cardtoons* persuasive.

The Noerr-Pennington doctrine, as originally formulated by the Supreme Court, rests on two separate grounds. First, it relies on a statutory interpretation of the Sherman Act that limits the scope of the Act so as to not reach activity associated with the political process. *Noerr, 365 U.S. at 137-38*. Second, it rests on the *First Amendment* right of citizens to petition the government. Id.

Because the instant dispute is not regulated by the Sherman Act, this Court is reluctant to apply the Noerr-Pennington doctrine. A number of courts have acknowledged the incongruity of applying the Noerr-Pennington doctrine outside of the antitrust context where immunity is **[*54]** cognizable only on *First Amendment* grounds. See generally *Cardtoons, 208 F.3d at 891*. In Cardtoons, the Tenth Circuit explained:

> While we do not question the application of the right to petition outside of antitrust, it is a bit of a misnomer to refer to it as the Noerr-Pennington doctrine; a doctrine which was based on *two* rationales. In our view, it is more appropriate to refer to immunity as Noerr-Pennington immunity only when applied to antitrust claims. In all other contexts . . . such immunity derives from the right to petition.

Cardtoons, 208 F.3d at 889-90 (emphasis in original). This Court therefore concludes that the clearest, if not most legally accurate, manner to examine the defendants' claim of immunity is under the Petition Clause of the *First Amendment*.

The *First Amendment* guarantees "the right of the people . . . to petition the Government for a redress of grievances." *U.S. Const. amend. I*. The right to petition "is implicit in '[t]he very idea of government, republican in form.'" *McDonald v. Smith, 472 U.S. 479, 482, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985)* (quotations omitted). The right to petition, however, is not absolute. The Petition Clause "neither enjoys 'special *First Amendment* status' nor confers **[*55]** an 'absolute immunity' for privilege.'" *We, Inc. v. City of Philadelphia, 174 F.3d 322, 327 (3rd Cir. 1999)* (quoting *McDonald, 472 U.S. at 484-85*). Accordingly, a claim of immunity under the Petition Clause must be evaluated under the same *First Amendment* principles that apply to other constitutionally protected activity.

In Cardtoons, the Tenth Circuit found that written, prelitigation threats between private parties are not entitled to immunity under the *First Amendment*. *Cardtoons, 208 F.3d at 891*. The plaintiff contracted with a printing company to create parody baseball cards containing images of major league players. The Major League Baseball Players Association ("MLBPA") sent cease and desist letters to both the plaintiff and the printing company. Upon receiving its letter, the printing company informed the plaintiff it would not print the cards. The plaintiff then filed suit alleging that the MLBPA had tortuously interfered with its printing contract. Both the district court and an appeals panel found the MLBPA was immune from liability under the Noerr-Pennington doctrine even though the case did not involve ***antitrust law***. *Cardtoons, L.C. v. Major League Baseball Players Ass'n, 182 F.3d 1132 (10th Cir. 1999)*. **[*56]** On rehearing, however, an en banc panel found the prelitigation threats in the cease and desist letter were not afforded immunity by either the *First Amendment* right to petition or the Noerr-Pennington doctrine. *Cardtoons, 208 F.3d at 886*. The Tenth Circuit reasoned that if the plaintiff had sued MLBPA for libel, the suit similarly would be allowed to proceed. *Id. at 891*. "Statements made in a letter threatening litigation are not absolutely protected by the petition clause of the *First Amendment* and are subject to the principles of state common law and state statutory law." *Id. at 892*. The court concluded by noting that "[w]hile there are many persuasive policy arguments in favor of granting immunity to private threats of litigation, these do not override the clear language of the *First Amendment*. Such arguments are best addressed to state legislative bodies." Id.

Here, it is difficult to see how subjecting the defendants to liability for their conduct, if appropriate, would satisfy the policy objectives of the doctrine. At issue in this motion is not the defendants' right to use demand letters as a means of encouraging settlement, but rather their use of false or misleading statements **[*57]** in the demand letters. If Shirokov's allegations were to be proven at trial, punishing the defendants will not deter future use of demand letters. At best, it will encourage the defendants to investigate carefully their accusations and to be precise in the language they use when attempting to settle with suspected infringers. Accordingly, this Court finds that the Noerr-Pennington doctrine does not apply under the circumstances of this case at this time.

Even if the Court were to find the Noerr-Pennington doctrine applicable to this case, the doctrine is also limited by the "sham" exception. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*. In order to qualify as a "sham," "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id*. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id*. In the Ninth Circuit, which has extended Noerr-Pennington to cases such as this one, the "sham exception" may apply in three circumstances: (1) where the lawsuit is objectively baseless and the defendant's motive in bringing **[*58]** it was unlawful; (2) where the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose; and (3) if the allegedly unlawful conduct consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy. *Sosa, 437 F.3d at 939* (citations omitted).

Under the Copyright Act, a person who violates the exclusive rights of a copyright owner is an infringer of the copyright or right of the owner. *17 U.S.C. § 501(a)*. The legal or beneficial owner of an exclusive right under a copyright "is entitled . . . to institute an action for any infringement of that particular right." *17 U.S.C. § 501(b)*. Achte is the holder of copyright of Far Cry, a fact that Shirokov does not dispute. Accordingly, Achte has the right to bring suit against an alleged infringer, assuming its copyright is valid.

Here, however, Shirokov alleges that DGW and Achte obtained a copyright registration for Far Cry by fraud. (Complaint, ¶¶ 90-125). Based on the fraudulently obtained copyright, **[*59]** they then filed the Achte Lawsuit knowing that Achte was not entitled to statutory damages. (Complaint, ¶¶ 134-155). Shirokov also alleges that the defendants used the process of the lawsuit, as opposed to the outcome of the lawsuit, to extort settlements from the class based on the threat of statutory damages. (Complaint, ¶ 156). They never intended to actually litigate the claims. (Complaint, ¶ 157). He has also alleged that the defendants acted in bad faith. (See generally Complaint at ¶¶ 24, 178, 236, 238). Therefore, Shirokov has alleged sufficient facts that, if proven, would establish that the Achte Lawsuit was a sham. Accordingly, at this early stage of the proceedings, the Court cannot conclude that the Noerr-Pennington doctrine, even if applicable, bars Shirokov's claims. Accordingly, the Court recommends that the District Judge deny the defendants' motions to dismiss to the extent that they are based on the Noerr-Pennington doctrine.

4. Shirokov's Claims Are Not Barred By The Massachusetts Litigation Privilege

The Dunlap Defendants and Achte argue that Shirokov's claims are also barred by the absolute litigation privilege covering attorneys' statements made in connection with **[*60]** the conduct of litigation. (Docket No. 29 at 17-21; Docket No. 48 at 15-16). On a motion to dismiss, the Court finds that the defendants cannot show on the face of the Complaint and other materials properly before the Court that the litigation privilege bars Shirokov's claims.

"Under Massachusetts law, [9] an attorney's statements are absolutely privileged 'where such statements are made by an attorney engaged in his function as an attorney whether in the institution or conduct of litigation or in

[9] It is not clear whether Massachusetts law applies to Shirokov's claims. Other than the fact that Shirokov is a Massachusetts resident and presumably received the Letter in Massachusetts, the conduct of which he complains did not occur here. Shirokov's claims involve alleged conduct by Virginia lawyers in connection with the Achte Lawsuit pending in the United States District Court for the District of Columbia. Although the plaintiff has briefly referenced this issue (see Docket No. 32 at 14, n. 13), neither he nor any of the defendants have engaged in a choice of law analysis. Normally, the first step in applying choice of law

conferences and other communications preliminary to litigation.'" *Blanchette v. Cataldo, 734 F.2d 869, 877 (1st Cir. 1984)* (quoting *Sriberg v. Raymond, 370 Mass. 105, 109, 345 N.E.2d 882 (1976))*. This doctrine was motivated by "the public policy of permitting attorneys complete freedom of expression and candor in communications in their efforts to secure justice for their clients." *Meltzer v. Grant, 193 F. Supp. 2d 373, 377 (D. Mass. 2002)* (quotation omitted). The privilege applies as a general bar to all civil liability based upon an attorney's statements, and it applies even if the offensive statements were uttered maliciously or in bad faith. *Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 140, 668 N.E.2d 1329 (1996)*. **[*61]** The litigation privilege applies not only to statements by attorneys but also to communications by a party as long as the other conditions for the privilege are present. *Giuffrida v. High Country Investor, Inc., 73 Mass. App. Ct. 225, 242, 897 N.E.2d 82 (2008)*.

The litigation privilege applies to communications made preliminary to proposed judicial proceedings if judicial proceedings are contemplated in good faith and under serious consideration. *Meltzer, 193 F. Supp. 2d at 381*. [10] If judicial proceedings are already underway, the privilege applies if the statements are "pertinent" to the litigation. *Id. at 378* (citing *Blanchette, 734 F.2d at 877*). In other words, the statements must have some reference to the subject matter of the litigation, although they need not be strictly relevant to any issue in the litigation. *Leavitt v. Bickerton, 855 F. Supp. 455, 456-57 (D. Mass. 1994)*.

"Whether an absolute privilege applies is determined on a case-by-case basis, after a fact-specific analysis." *Fisher v. Lint, 69 Mass. App. Ct. 360, 365-66, 868 N.E.2d 161 (2007)* (citation omitted). In addition, as the parties asserting the privilege, the defendants have the burden of establishing entitlement to the privilege. *Meltzer, 193 F. Supp. 2d at 381*. Here, Shirokov alleges that at the time that the Letter was written, litigation against him or the class members was not contemplated in good faith. Although DGW had filed the Achte Lawsuit on Achte's behalf, Shirokov alleges that it was filed for the improper purpose **[*64]** of extorting settlement and that the defendants never intended to actually prosecute the Achte Lawsuit. Cf. *Int'l Floor Crafts, Inc. v. Adams, 477 F. Supp. 2d 336, 340 (D. Mass. 2007)* (litigation privilege will not bar a claim for tortious interference on the basis of the filing of a lawsuit if it is alleged that the suit was filed for the ulterior purpose of interfering with a prospective business relationship). Indeed, in the twenty months since Shirokov received the Letter, he has not been sued.

Accordingly, in this case, the application of the privilege is not properly resolved on a motion to dismiss. On a motion to dismiss, the Court must take all of the plaintiff's allegations as true. Thus, a motion to dismiss on the basis of the litigation privilege only succeeds when the entitlement to the privilege is demonstrated by the complaint itself. If the complaint construed in the plaintiff's favor does not support the application of the privilege, the issue is more properly resolved on a motion for summary judgment or at trial. Here, viewing all of the Complaint's allegations as true, the Court cannot rule as a matter of law that the litigation privilege applies and bars Shirokov's **[*65]** claims. [11]

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principles is to ascertain whether the choice will affect the outcome; in other words, whether there is an actual conflict of laws. See *Williams v. Astra USA, Inc., 68 F. Supp. 2d 29, 36 (D. Mass. 1999)*. None of the parties have raised the substantive law of any jurisdiction other than Massachusetts. Given that the parties **[*62]** did not raise a conflict-of-laws issue, it is deemed that none exists. *Id.;* see also *Doricent v. Am. Airlines, Inc., No. 91-12084Y, 1993 U.S. Dist. LEXIS 15143, 1993 WL 437670, at *8 (D. Mass. Oct. 19, 1993)*.

[10] The Massachusetts Appeals Court's statement in *Doe, supra*, that the litigation privilege applies even if a communication is in bad faith applies only in cases where the litigation is already underway. See *Meltzer, 193 F. Supp. 2d at 379-80*. In Doe, the Appeals Court was dealing with a particular scenario in which the allegedly offending letter was written by an attorney for the defendants **[*63]** in reply to a letter from plaintiff demanding relief and threatening litigation if relief was not forthcoming. *41 Mass. App. Ct. at 141*. What the Appeals Court seems to have been saying is that in such situations, the reply is not subject to the test of whether the defendant was contemplating litigation in good faith and that litigation was under serious consideration. Rather, the test which is applies is the test applicable during the course of litigation, i.e., whether the communication was pertinent to the proceedings, or, in that case, pertinent to the demand which was made. Id.

[11] Even if the privilege applied, there remains an issue as to whether the privilege would bar anything more than Shirokov's state law causes of action. The Dunlap Defendants argue that all claims are barred. They further argue that the principle that a state privilege cannot bar a federal cause of action is limited to Fair Debt Collection Practices ("FDCPA") claims. See Docket No. 71 at 3. However, a number of cases undercut the Dunlap Defendants' arguments and refuse to apply state privileges to federal

Having found that Shirokov has standing and that the Noerr-Pennington Doctrine and the **[*66]** Massachusetts litigation privilege do not bar Shirokov's claims at this stage of the case, the Court now turns to the merits of each of the Counts of the Complaint.

5. Shirokov Has Failed To State A Claim Under The Computer Fraud And Abuse Act Because He Has Not Alleged Damage Or Loss Within The Meaning Of The Statute

In Count 4 of the Complaint, Shirokov pleads claims against the defendants under the Computer Fraud and Abuse Act, *18 U.S.C. §§ 1030, et seq.* (the "CFAA"). "The CFAA is the centerpiece of federal enforcement efforts against computer based crimes." *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey, 497 F. Supp. 2d 627, 646 (E.D. Pa. 2007)*. Shirokov bases his claims on three subsections of the statute: *Sections 1030(a)(4)*, *1030(a)(5)(C)*, and *1030(a)(2)(C)* (Complaint, ¶¶ 279, 283 and 284, respectively). The defendants move to dismiss Count 4 on the grounds that Shirokov has failed to plead that he has suffered "damage" or "loss" within the meaning of the statute. (Docket No. 29 at 23-26; Docket No. 44 at 25-27; Docket No. 48 at 18-20). This Court agrees.

Section 1030(a)(4) makes it unlawful to access a protected computer without, or beyond the scope of any, authorization, **[*67]** knowingly and with intent to defraud and as a result obtaining anything of value. *18 U.S.C. § 1030(a)(4)*. *Section 1030(a)(5)(C)* makes it a crime to "intentionally access[] a protected computer without authorization, and as a result of such conduct, [to] cause[] damage and loss." *18 U.S.C. § 1030(a)(5)(C)*. Finally, *Section 1030(a)(2)(C)* makes it a crime to "intentionally access[] a computer without authorization or exceed[] authorized access, and thereby obtain[] . . . information from any protected computer." *18 U.S.C. § 1030(a)(2)(C)*.

Although the CFAA is primarily a criminal statute, a person may bring a civil action against the violator so long as the person has suffered "damage or loss by reason of a violation" of the CFAA. *18 U.S.C. § 1030(g)*; see also *EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577, 584 (1st Cir. 2001)*. The CFAA defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." *18 U.S.C. § 1030(e)(8)*. "Loss" is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition **[*68]** prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." *18 U.S.C. § 1030(e)(11)*.

Shirokov's allegations that he suffered damage or losses as a result of the alleged CFAA violations constitute nothing more than "a formulaic recitation of the elements." *Bell Atlantic Corp., 550 U.S. at 555*. Shirokov has not alleged any damage to his computer or information or programs contained thereon, or loss of the use of his computer that fits within the statutory definition. See *18 U.S.C. § 1030(e)(8)*.

Similarly, he has not alleged any facts supporting a loss under the meaning of the CFAA. Courts have interpreted loss to include the cost of responding to a security breach, such as the cost of performing a computer system damage assessment and remedying the damage and any costs incurred because the computer cannot function while or until repairs are made. *NCMIC Fin. Corp. v. Artino, 638 F. Supp. 2d 1042, 1063-64 (S.D. Iowa 2009)*; *Wilson v. Moreau, 440 F. Supp. 2d 81,109-10 (D.R.I. 2006)*. "[T]here is nothing to suggest that the 'loss' or costs alleged can be unrelated to the computer." *Wilson, 440 F.Supp. 2d at 109-10*. Moreover, **[*69]** courts have held that legal fees do not constitute a loss under the CFAA. See *Wilson, 440 F. Supp. 2d at 110* (rejecting plaintiffs' argument that their loss met the $5,000 statutory threshold under the CFAA, because "plaintiff's litigation expenses are not directly attributable to Defendants' computer browsing, and are not economic damages in excess of $5,000

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claims besides FDCPA claims. See, e.g., *Steffes v. Stepan Co., 144 F.3d 1070, 1074 (7th Cir. 1998)* (citations omitted) ("A state absolute litigation privilege purporting to confer immunity from suit cannot defeat a federal cause of action"); *Kimes v. Stone, 84 F.3d 1121, 1127 (9th Cir. 1996)* (holding that the California absolute litigation privilege does not immunize attorneys from liability under *42 U.S.C. § 1983*); *Conditioned Ocular Enhancement, Inc. v. Bonaventura, 458 F. Supp. 2d 704, 708 (N.D. Ill. 2006)* (Illinois litigation privilege cannot confer immunity against Lanham Act claims).

as required by the statute"); see also *NCMIC Fin. Corp., 638 F. Supp. 2d at 1065*; *Healthcare Advocates, Inc., 497 F. Supp. 2d at 647*. [12] Shirokov has not alleged that his ability to use his computer has been affected or impaired, or that he was required to repair his computer in any way. As discussed elsewhere in this opinion, the only injury that Shirokov alleges in the Complaint as a result of the defendants' conduct is the incursion of legal fees in evaluating the Letter's claims. Shirokov's legal expenses are not directly attributable to the defendants' alleged access of his computer and, therefore, do not constitute a loss under the CFAA. [13]

Accordingly, this Court recommends that the District Court dismiss Count 4 of the Complaint.

6. Shirokov Has Failed To State A Claim Of Conspiracy And Aiding And Abetting Against GuardaLey But Those Claims Survive Against the Dunlap Defendants And Achte

Plaintiff brings a series of claims sounding in conspiracy: conspiracy to commit fraud (Count 3), aiding and abetting fraud (Count 5), and civil conspiracy (Count 13). The defendants have moved to dismiss these counts on a variety of bases. The Dunlap Defendants state that Shirokov has failed to state a claim **[*71]** for "true conspiracy." (Docket No. 29 at 28). They also argue that these claims all require liability for the predicate torts before liability can be apportioned to ultimate defendants, and, because the plaintiff's counts for the underlying torts fail, the plaintiff's claims for conspiracy or aiding and abetting must fail as well. (Docket No. 29 at 30-31). Achte argues that it may not be held vicariously liable for the acts of its attorneys and the Complaint fails to allege enough facts to impose vicarious liability on Achte as a knowing and intentional participant in the alleged copyright scheme. (Docket No. 48 at 11-14, 16-18). Finally, GuardaLey argues that the Complaint fails to allege any facts supporting that GuardaLey was a participant in the copyright scheme. (Docket No. 44 at 16-20). The Court finds that Shirokov has failed to state a claim of conspiracy and aiding and abetting against GuardaLey but these claims survive as to the Dunlap Defendants and Achte.

Massachusetts law recognizes two types of causes of action for civil conspiracy. The first, referred to as "true conspiracy," is a "rare" and "very limited" cause of action. *Aetna Cas. Sur. Co. v. P&B Autobody, 43 F.3d 1546, 1563 (1st Cir. 1994)*. **[*72]** In order to state a claim for true conspiracy, the plaintiff must allege and prove that by "mere force of numbers acting in unison," the defendants exercised "some peculiar power of coercion of the plaintiff which any individual standing in a like relation to the plaintiff would not have had." *Fleming v. Dane, 304 Mass. 46, 50, 22 N.E.2d 609 (1939)* (citations omitted). "This cause of action seems to have been applied principally to remedy direct economic coercion, as in 'the combined actions of groups of employers or employees, where through the power of combination pressure is created and results brought about different in kind from anything that could have been accomplished by separate individuals or in other kinds of concerted refusals to deal." *Mass. Laborers' Health & Welfare Fund v. Philip Morris, Inc., 62 F. Supp. 2d 236, 244 (D. Mass. 1999)* (quoting *Fleming, 304 Mass. at 50*).

The second type of conspiracy claim is "more akin to a theory of common law joint liability in tort." *Aetna Cas. Sur. Co., 43 F.3d at 1564*. To state a claim for this type of conspiracy, the plaintiff must allege "first, a common design or an agreement, although not necessarily express, between two or more persons to do **[*73]** a wrongful act and, second, proof of some tortious act in furtherance of the agreement." *Id*. The plaintiff need not prove the existence of an agreement by direct evidence but the agreement may be inferred from conduct of the parties suggesting that

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[12] Shirokov cites these cases, along with *ResDev, LLC v. Lot Builders Ass'n, Inc., No. 6:04-cv-1374, 2005 U.S. Dist. LEXIS 19099, at *10-12 (M.D. Fla. Aug. 10, 2005)* for the proposition **[*70]** that although "attorneys' fees in *prosecuting* a CFAA action do not count toward the $5,000 statutory threshold . . . attorneys' fees incurred *responding* to the CFAA violation do." (Docket No. 32 at 32 n. 54) (emphasis in original). These cases do not support Shirokov's argument. On the contrary, they all emphasize that a loss under the CFAA must be related to the computer itself.

[13] Because the Court finds that Shirokov has failed to plead enough facts to support a loss or damage under the CFAA, it is not necessary to address whether the conduct alleged constitutes access without authorization or exceeding authorization under the CFAA.

they had an implied meeting of the minds. Payton v. Abbott Labs, 512 F. Supp. 1031, 1035 (D. Mass. 1981) (citations omitted). Thus, the distinction between the two types of conspiracy claims has been described as follows:

> For 'true conspiracy,' the plaintiff must prove that concerted action gave the defendants a 'peculiar power of coercion' over the plaintiff enabling them to bring about results that are different in kind from what any of them could achieve individually. The exercise of this 'peculiar power of coercion' is itself the wrong, and no other tortious act need be shown. In contrast, the 'concerted action' version extends liability to those who assist or encourage others to commit torts without necessarily any proof either of a 'peculiar power of coercion' or even of an explicit agreement among the defendants. Of course, there can be no joint liability for a tort unless there has been a tort, so the 'concerted action' version depends **[*74]** on proof of underlying tortious conduct for which liability can be assigned. While the term 'civil conspiracy' apparently has been used loosely to apply to both versions, only the 'true conspiracy' version defines an independent cause of action; the 'concerted action' version simply defines who may be liable for other torts.

Mass. Laborers' Health & Welfare Fund, 62 F. Supp. 2d at 244 (internal citations omitted).

Finally, aiding and abetting is another variation of joint tort liability. "Under Massachusetts law liability for aiding and abetting a tort attaches where: (1) the defendant provides 'substantial assistance or encouragement to the other party;' and (2) the defendant has 'unlawful intent, i.e., knowledge that the other party is breaching a duty and the intent to assist that party's actions.'" Go-Best Assets Ltd. v. Citizens Bank of Mass., 79 Mass. App. Ct. 473, 947 N.E.2d 581, 592 (2011) (citations omitted). Plaintiff "must at least demonstrate some measure of 'active participation' and the knowing provision of substantial assistance . . . to the principal's . . . alleged fraud." Schultz v. R.I. Hosp. Trust Nat'l Bank, 94 F.3d 721, 730 (1st Cir. 1996) (citations omitted). A claim of aiding **[*75]** and abetting must meet the heightened pleading requirements of Fed. R. Civ. P. 9(b). Bamberg v. SG Cowen, 236 F. Supp. 2d 79, 91 (D. Mass. 2002).

In his Complaint, Shirokov appears to collapse "true" conspiracy with the "concerted action" theory of conspiracy. The Complaint alleges that the defendants "acted in concert and participated in a common plan to achieve" unlawful ends, and that the defendants, acting together, "exercise[d] coercive powers, over Shirokov and the Class, that they would not have had if acting independently." (Complaint, ¶¶ 385-386). Other than the conclusory mention of "coercive powers" (see Complaint at ¶ 386), Shirokov has not alleged any facts that would give rise to a plausible claim that by the force of their number, the defendants exercised some exceptional coercive power over him. He has not alleged that the defendants' combination was such that he was deprived of his ability to evaluate Achte's copyright claims against him. Indeed, he did not succumb to any coercive power because he did not pay to settle the claims. "There is no question that an allegation of a generally exerted and generally felt power of coercion is not sufficient to plead the independent **[*76]** tort of 'true conspiracy' as recognized in Massachusetts." Mass. Laborers' Health & Welfare Fund, 62 F. Supp. 2d at 245. Thus, the Court finds that Shirokov has failed to state a claim for true conspiracy.

The Dunlap Defendants have moved to dismiss the "concerted action" conspiracy claim on the basis that the underlying tort claims fail and therefore, the conspiracy claim must fail as well. (Docket No. 29 at 30-31). However, as explained in Sections III(B)(7) and (14) below, this Court has recommended that the District Court deny the defendants' motions to dismiss with respect to Shirokov's negligent misrepresentation and Chapter 93A claims. [14] Accordingly, the Court recommends that the District Court deny the Dunlap Defendants' motion to dismiss with respect to Shirokov's claim of conspiracy by concerted action.

Achte argues that it cannot be held vicariously **[*77]** liable for the acts of its attorneys and that Shirokov has failed to allege enough facts to show that Achte joined in the alleged copyright scheme. However, the Complaint alleges that Achte knew that its copyright registration contained false information and that Achte lied to the Copyright Office

[14] In addition, although the Dunlap Defendants moved to dismiss the entire Complaint on the basis of standing, the Noerr-Pennington Doctrine, and the litigation privilege, the Dunlap Defendants did not move to dismiss the fraud and fraudulent omissions/nondisclosure claims (Counts 1 and 2) on the basis that they fail to state a claim.

and the District Court for the District of Columbia in conjunction with its attorneys. See generally Complaint, ¶¶ 10-11, 22, 115, 156. Taking all facts in the Complaint as true and drawing all reasonable inferences in favor of Shirokov, as the Court must do at this stage, the Court finds that the Complaint alleges enough facts to make a plausible claim that Achte joined in the alleged copyright scheme or at least rendered substantial assistance to the Dunlap Defendants with knowledge of the fraudulent purpose of the scheme. Accordingly, the Court also recommends that the District Court deny Achte's motion to dismiss the conspiracy and aiding and abetting claims against it.

GuardaLey stands in different footing. The only allegations against GuardaLey are that: (1) GuardaLey monitors and records online instances of copyright infringement (Complaint, ¶ 4); (2) GuardaLey is a partner with DGW **[*78]** in managing USCG (Complaint, ¶ 38); (3) at least one of the managers of USCG, Benjamin Perino, is also a manager of GuardaLey (Complaint, ¶ 73); and (4) Achte engaged USCG and, in turn, USCG retained GuardaLey to document instances of purported infringement of Achte's copyright in the motion picture Far Cry. (Complaint, ¶ 133). Shirokov does not allege that GuardaLey had any role in the filing of Achte's copyright registration application, in the filing of the Achte Lawsuit, or in the drafting or sending of the Letter. He does not allege that GuardaLey made any representations to him. In sum, the Complaint sets forth no facts, apart from conclusory allegations, that GuardaLey entered into any agreement with the other defendants in connection with the alleged copyright scheme, or that GuardaLey knew about the copyright scheme. Therefore, the Court finds that Shirokov has failed to state a claim of civil conspiracy or aiding and abetting against GuardaLey. [15]

Accordingly, the Court recommends that the District Court dismiss Counts 3, 5 and 13 against GuardaLey but not against the remaining defendants.

7. Shirokov's Claims Of Fraudulent And Negligent Misrepresentation Survive Against The Dunlap Defendants And Achte But Not Against GuardaLey

Shirokov brings a number of claims based on the defendants' alleged misrepresentations and failure to provide certain information: fraudulent misrepresentation (Count 1), fraudulent omission/nondisclosure (Count 2), and negligent misrepresentations and omissions (Count 8). GuardaLey has moved to dismiss those counts on the basis that the Complaint does not allege that GuardaLey made any representations to Shirokov or any class member. (Docket No. 44 at 23-24). Although the Dunlap Defendants and Achte have moved to dismiss **[*80]** the entire Complaint on a number of grounds, they have not moved to dismiss Counts 1 and 2 on the basis that the Complaint fails to state a claim for fraudulent misrepresentations or fraudulent omissions. [16] They have moved to dismiss the negligent misrepresentation claim on the basis that they owe no duty to Shirokov. (Docket No. 29 at 31-33; Docket No. 48 at 21).

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[15] In his opposition to GuardaLey's motion to dismiss, Shirokov requests leave to amend the Complaint "as needed" to incorporate recent information that he alleges provides sufficient basis for GuardaLey's liability "if this court **[*79]** deems it necessary." (Docket No. 56 at 24). The Court notes that Shirokov has twice amended his Complaint in this action, and that he could have amended it as of right within 21 days of GuardaLey's filing of its motion to dismiss. See *Fed. R. Civ. P. 15(a)(1)(B)*. In any event, there is no present motion to amend the Complaint and all that is before this Court are certain specified motions.

[16] Although Achte states in its motion that all claims related to misrepresentations and omissions, including Counts 1 and 2 of the Complaint fail to state a claim, it provides no basis for the dismissal of the fraudulent misrepresentation claims. (Docket No. 48 at 21). It simply states that it "adopts and incorporates herein the additional grounds for dismissal of the misrepresentation and omission claims that are presented in Part III(G) of DGW's Memorandum of Law (Document No. 29 at pp. 24-26)." Id. However, DGW and the Dunlap Defendants did not move to dismiss Counts 1 and 2 on the basis that they fail to state a claim. At oral argument, counsel for the Dunlap Defendants suggested that they did not move to dismiss Counts 1 and 2 because of the twenty-page limit on legal briefs. However, the District Court granted them **[*81]** leave to file a brief in support of their motion to dismiss of thirty-five pages. (Docket No. 25). Under the circumstances, thirty-five pages was more than sufficient to set forth any arguments in support of their motion to dismiss, including any arguments regarding Counts 1 and 2. In the alternative, the Dunlap Defendants could have asked the District Court for a longer page limit.

To state a claim of fraud under Massachusetts law, the plaintiff must show that the defendants "made a false representation of a material fact with knowledge of its falsity for purposes of inducing the plaintiff to act thereon, and that the plaintiff actually relied on the representation." *Platten v. HG Bermuda Exempted, Ltd., 437 F.3d 118, 132 (1st Cir. 2006)* (citing *Slaney v. Westwood Auto, Inc., 366 Mass. 688, 322 N.E.2d 768 (1975))*. For a claim of misrepresentation, the plaintiff must show that the defendants (1) made false statements of material fact (2) to induce the plaintiff to settle the copyright claims, and (3) that the plaintiff reasonably relied on those statements to his detriment. *Id*. (citations omitted).

GuardaLey is correct that the Complaint fails to state a claim against it under Counts 1, 2 and 8 of the **[*82]** Complaint. (Docket No. 44 at 23-24). The Complaint contains no allegations of any representations by GuardaLey to Shirokov or any class member. There is no allegation that GuardaLey made any representations with respect to the copyright registration for Far Cry or brought or threatened to bring a lawsuit against Shirokov or anyone else. There is simply no allegation that GuardaLey made any statement to Shirokov upon which he could have relied. [17] The only basis for liability against GuardaLey appears to be that of joint liability under conspiracy or aiding or abetting theories. As discussed above, the Complaint fails to state a claim against GuardaLey under those theories. Accordingly, Shirokov has not stated a claim against GuardaLey under Counts 1, 2 or 8 of the Complaint.

The Dunlap Defendants move to dismiss the negligent misrepresentation and omissions claim on the basis that the defendant attorneys owed Shirokov no duty because there was no attorney-client relationship. (Docket No. 29 at 31). However, the Dunlap Defendants appear to confuse the torts of negligence and negligent misrepresentation. In their brief, the Dunlap Defendants only cite to cases regarding negligence and/or legal malpractice. (Docket No. 29 at 31-32). Those cases are inapposite.

Generally, negligent misrepresentation does require privity between the parties. *In re Bank of Boston Corp. Securities Litig., 762 F. Supp. 1525, 1536 (D. Mass. 1991)*. **[*84]** Absent privity, however, a plaintiff can state a claim for negligent misrepresentation so long as the defendant had actual knowledge that its statements were going to be used and relied on by the plaintiff. *Id.; Craig v. Everett M. Brooks Co., 351 Mass. 497, 501, 222 N.E.2d 752 (1967)*; *Bamberg, 236 F. Supp. 2d at 91* (citations omitted). In addition, a lawyer may held liable for negligent misrepresentation to a nonclient where he or she knows that his or her representation will be relied upon by the nonclient. *Nova Assignments, Inc. v. Kunian, 77 Mass. App. Ct. 34, 38, 928 N.E.2d 364 (2010)*; *Kirkland Constr. Co. v. James, 39 Mass. App. Ct. 559, 562-63, 658 N.E.2d 699 (1995)*.

Moreover, "although mere nondisclosure by itself generally will not support a cause of action for negligent misrepresentation, it is well settled under Massachusetts law that 'a party who discloses partial information that may be misleading has a duty to reveal all the material facts he knows to avoid deceiving the other party.'" *Barden v. HarperCollins Publishers, Inc., 863 F. Supp. 41, 43 (D. Mass. 1994)* (internal citations omitted). Here, Shirokov has alleged that the Dunlap Defendants made a number of false statements to him and others, including statements **[*85]** regarding the potential fees that may be incurred in connection with the defense of a copyright claim and statements regarding Achte's rights and the remedies Achte was entitled to receive were it to prevail on its claims. (Complaint, ¶¶ 337, 339). He also alleges that the information provided to him and other class members was materially incomplete. (Complaint, ¶ 337). At this stage of the litigation, the Court is not deciding liability but merely whether the Complaint contains enough allegations to state a plausible claim. The Dunlap Defendants grounds for dismissal of the negligent misrepresentation claim are incorrect and, accordingly, this Court recommends that the

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[17] Although Shirokov alleges that all of the defendants "made knowingly false statements in court concerning the copyright, the remedies available to Achte, and/or the basis for Achte's claims of jurisdiction over members of the Class, including Shirokov" (Complaint at ¶ 386), this is no more than a formulaic recitation of the elements of the cause of action in Count 13. Despite very detailed factual allegations **[*83]** in the rest of the Complaint with respect to the other defendants, Shirokov did not allege anywhere in the Complaint what false statements were made by GuardaLey. Again, other than the allegation that GuardaLey tracked the IP addresses of alleged infringers and provided that information to the other defendants, Shirokov has not made any factual allegations supporting GuardaLey's involvement in the alleged copyright scheme. See *Iqbal, 129 S.Ct. at 1949* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

District Judge deny the Dunlap Defendants' and Achte's motion to dismiss with respect to the negligent misrepresentation claim.

8. *Shirokov Has Failed To Allege A Sufficient Injury To Support A Claim Under RICO*

Defendants argue that Shirokov has no standing to bring a claim pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO") because he has not alleged an injury caused by racketeering activity. (Docket No. 29 at 26-27; Docket No. 44 at 24-25; Docket No. 48 at 22). This Court agrees.

RICO creates **[*86]** a private right of action for individuals suffering an injury resulting from "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. An essential element of a RICO claim is an injury to business or property. See *Hemi Group, LLC v. City of New York, 130 S.Ct. 983, 987, 175 L. Ed. 2d 943 (2010)*. "[T]o state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense 'not only was a 'but for' cause of his injury, but was the proximate cause as well.'" *Id. at 989* (quoting *Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992))*. "Proximate cause for RICO purposes . . . requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Id*. "A link that is 'too remote,' 'purely contingent,' or 'indirect' is insufficient." *Id*.

The Complaint alleges that the defendants' copyright scheme caused damages to the class members in the form of payment of inflated settlements and/or related expenses in defending themselves against the copyright scheme. (Complaint, ¶ 324-325). However, Shirokov alleges that he did not pay anything to the defendants in response to **[*87]** the Letter. Instead, Shirokov alleges that he incurred legal costs "in reliance on the false allegations of the Letter and in order to determine the merits of its claims." (Complaint, ¶ 232). Shirokov also alleges that he would have avoided those costs had the Letter been truthful. (Id.).

Shirokov has not alleged sufficient facts to establish that he suffered an injury under RICO. Shirokov claims that the defendants conspired to attempt to extort money out of individuals who may have infringed upon Achte's copyright. He alleges that Achte, through DGW, knowingly and intentionally made false representations to the Copyright Office in order to obtain a copyright registration. Then, based on the fraudulently procured copyright registration, DGW filed a copyright infringement claim and obtained a subpoena to obtain Shirokov and other Class members' identifying information. Using that information, DGW sent the Letter to Shirokov and other Class members in an effort to get Shirokov and the Class members to pay to settle the claims with the threat of statutory damages to which they knew Achte was not entitled. However, according to Shirokov's own allegations, he did not fall for the defendants' **[*88]** alleged scheme: he contacted an attorney, and afterwards did not pay to settle the claims. Instead, Shirokov filed this suit.

The only injury Shirokov alleges he suffered was the payment of legal fees to his attorney to determine the validity of DGW and Achte's claims. [18] (Complaint, ¶ 232). The expenditure of legal fees is ordinarily not considered an injury for RICO purposes, unless the legal fees were expended as an "intended consequence" of a defendant's racketeering activities. *Lemelson v. Wang Lab., 874 F. Supp. 430, 433 (D. Mass. 1994)* (citations omitted); [19] see

[18] Although Shirokov argues that the attorneys' fees incurred in this action are an injury sufficient to confer Article III standing (an argument that this Court rejected), he does not argue that attorneys' fees in this action are sufficient to satisfy the RICO injury requirement. In any event, such an argument would also be wrong. See, e.g., *Walter v. Palisades Collection, LLC, 480 F. Supp. 2d 797, 805 (E.D. Pa. 2007)* **[*90]** (citation omitted) ("It would be illogical to allow a plaintiff to have RICO standing based on damages incurred by the plaintiff in paying his attorney to file the RICO action. RICO's injury requirement would be a nullity if paying an attorney to initiate the RICO action itself sufficed as damage.").

[19] Shirokov cites this case as supporting his argument that the legal fees he spent in investigating the defendants' claims are sufficient to satisfy the RICO injury requirement. (Docket No. 32 at 34; Docket No. 77 at 13). In Lemelson, the Court found that the costs incurred in investigating and defending vexatious litigation constitute a sufficient RICO injury to survive a motion to dismiss. *874 F.Supp. at 433*. However, that case is distinguishable. First, the parties were competitors and the expenditure of attorneys' fees by the victim was an intended consequence of the alleged racketeering scheme. *Id. at 432-33*. Here, the

also Aramony v. United Way of America, 969 F. Supp. 226, 233 (S.D.N.Y. 1997) ("A plaintiff's prior expenditure on legal fees is only a sustainable RICO injury where defendant's underlying wrongful acts contemplate the victim responding in court."). Here, as alleged, the intended consequence of the racketeering activities was the payment of "inflated settlements." (Complaint, ¶ 324-325). While he may have spent money in the form of attorneys' fees in order to determine whether DGW and Achte's claims had any merit, those legal fees were not proximately caused by the defendants' alleged actions. He has not alleged **[*89]** that he incurred any fees in connection with the Achte Lawsuit itself, that he or his attorney entered an appearance in that case or that he did anything to defend Achte's claims against him. The object of the defendants' alleged wrongful is not a response in court and there is no allegation that the defendants intend or prefer that the alleged targets obtain legal representation and incur attorneys' fees. [20] Indeed, the alleged copyright scheme works because the victims generally settle the claims in order to avoid responding in court. See, e.g., Sanchez v. Triple-S Mgmt. Corp., 492 F.3d 1, 14 (1st Cir. 2007) ("The plaintiffs cannot press a RICO claim based on attempts at extortion that did not succeed in harming them."). Accordingly, the Court finds that Shirokov has failed to state a RICO claim. [21]

Because the Court finds that Shirokov's RICO claim fails, it also finds that his conspiracy to violate RICO must fail as well. "[I]f the pleadings do not state a substantive RICO claim upon which relief may be granted, then the conspiracy claim also fails." Efron v. Embassy Suites (Puerto Rico), Inc., 223 F.3d 12, 21 (1st Cir. 2000). This Court therefore recommends that the District Court dismiss Counts 6 and 7 of the Complaint.

9. Fraud On The Court Is Not An Independent Cause Of Action

Count 9 of the Complaint asserts a claim for fraud on the court. "A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989).

The defendants argue that fraud on the **[*93]** court is not an independent cause of action under Massachusetts law and should therefore be dismissed. (Docket No. 29 at 33). However, fraud on a federal court is governed by federal common law. See Davidson v. Cao, 211 F. Supp. 2d 264, 276-77 (D. Mass. 2002) (citing Aoude, 892 F.2d at 1117-18) ("Fraud on the court . . . has its genesis in the federal court's inherent power to regulate and control abusive litigation tactics effecting the institutional integrity of the court."). Nevertheless, the result is the same.

Fraud on the court is not a recognized independent cause of action in the First Circuit. See Barrett v. Ambient Pressure Diving, Ltd., No. 06-cv-240-SM, 2008 U.S. Dist. LEXIS 70471, 2008 WL 4280360, at * 4 (D.N.H. Sept. 16, 2008). The cases cited by Shirokov do not universally support his argument to the contrary. In Premier Homes &

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expenditure of attorneys' fees is not an intended consequence, but a byproduct, of the defendants' alleged scheme: the intended consequence was the payment of settlements to the defendants. (Complaint at ¶¶ 324-325). There are no allegations that the object of the defendants' **[*91]** action was the expenditure of legal fees. The object of the alleged scheme was the payment of settlement amounts. Second, that case was decided prior to Iqbal under the more lenient Rule 12(b)(6) standard of Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Id. at 433 ("I hold that the costs incurred in investigating and defending that litigation are a sufficient RICO injury to satisfy the indulgent pleading requirements of Rule 12(b)(6).").

[20] Although the Letter encourages class members to obtain legal representation, the object of the scheme was not the incursion of legal fees by class members. (Complaint, ¶¶ 324-25; Ex. N to Complaint).

[21] Although this Court has found that Shirokov has alleged an injury sufficient to confer him standing under Article III of the Constitution (see Section III(B)(2) above) and an injury sufficient to state a Chapter 93A claim (see Section III(B)(14) below), the RICO statute sets forth additional requirements for a showing of injury. See DeMauro v. DeMauro, 115 F.3d 94, 96 (1st Cir. 1997) ("There is plainly a case or controversy under Article III; but the statutory precondition of injury to business or property must also be met."); In re Neurontin Mktg. and Sales Practices Litig., 677 F. Supp. 2d 479, 497 (D. Mass. 2010) **[*92]** ("A showing of injury is generally necessary for the purposes of Article III standing . . ., but the RICO statute sets forth additional requirements for a showing of injury.").

Land Corp. v. Cheswell, Inc., the court granted the defendant's motion to dismiss the complaint based on fraud on the court and then assessed attorneys' fees against the plaintiff as a sanction. *240 F. Supp. 2d 97, 99-100 (D. Mass. 2002)*. In Leber-Krebs, Inc. v. Capitol Records, the circumstances were inapposite and involved a court's ability to vacate its own judgment. *779 F.2d 895, 900-01 (2d Cir. 1985)*. **[*94]** [22] Finally, in Canty v. Chase Home Finance, LLC, the alleged fraud on the Court had been perpetrated in the same court. *2010 Bankr. LEXIS 1519, 2010 WL 1880710, at *4 (N.D. Ala. May 7, 2010)*. [23]

Under federal common law, fraud on the court may form the basis for a motion to dismiss or for seeking relief from judgment. See *Davidson, 211 F. Supp. 2d at 277*. Here, Shirokov does not seek to have the Achte Lawsuit dismissed. Neither is there a judgment against Shirokov in the Achte Lawsuit that could form the basis for an action seeking relief from judgment.

Accordingly, the Court recommends that the District Court dismiss Count 9 of the Complaint.

10. Shirokov May Seek A Declaration That Achte's Copyright Is Invalid Based On Fraud On The Copyright Office But He May Not Seek Damages Against The Defendants

Shirokov has brought a claim for fraud on the Copyright Office (Count 11). He seeks a declaration that Achte's copyright in Far Cry is invalid. (Complaint, ¶ 373). He also seeks damages from the defendants. Id. The defendants seek dismissal of this claim on the grounds that fraud on the Copyright Office is not a recognized independent cause of action. (Docket No. 29 at 34; Docket No. 44 at 21; Docket No. 48 at 20-21). The Court finds that although Shirokov **[*96]** may seek a declaration that Achte's copyright is invalid based on fraud on the Copyright Office, he cannot seek damages against the defendants on that basis.

A party seeking to establish fraud on the Copyright Office must establish that the application for copyright registration is factually inaccurate, that the inaccuracies were willful or deliberate, and that the Copyright Office relied on those representations. *Lennon v. Seaman, 84 F. Supp. 2d 522, 525 (S.D.N.Y. 2000)* (citations omitted). Some courts also require that a party alleging fraud on the Copyright Office prove that it has been prejudiced, or suffered some damage, as a result of the alleged fraud. Id. (citations omitted). Ordinarily, fraud on the Copyright Office is an affirmative defense to copyright infringement, not a cause of action. Id. To the extent that courts have allowed infringers to assert such a claim, they have done so as a declaratory judgment action against the copyright holder. See, e.g., *Crew Knitwear, Inc. v. U.S. Textile Printing, Inc., No. 07-7658, 2009 U.S. Dist. LEXIS 12180, 2009 WL 305526, at * 2-3 (C.D. Cal. February 6, 2009)*.

Here, in addition to declaratory relief, Shirokov seeks damages against the defendants for allegedly **[*97]** providing false information to the Copyright Office. Claims for damages are not available to an alleged infringer who claims that the copyright holder committed fraud on the Copyright Office. See, e.g., *Chivalry Film Prods. v. NBC Universal, Inc., No. 05 Civ. 5627 (GEL), 2006 U.S. Dist. LEXIS 1177, 2006 WL 89944, at *3 (S.D.N.Y. Jan. 11, 2006)* (alleged infringer cannot state a claim for damages for fraud on the Copyright Office). Accordingly, the Court recommends that the District Court dismiss Count 11 of the Complaint except to the extent that it seeks a declaration of invalidity against Achte.

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[22] In that case, the plaintiff obtained an ex parte attachment order against the debtor's property in attempts to garnish assets of the debtor in the hands of a third party. *779 F.2d at 896*. The plaintiff alleged that its rights to enforce the judgment against the debtor were lost because the garnishee falsely denied holding any of the debtor's property. Id. As a result, when the plaintiff moved to confirm the attachment, the district court denied the motion. The plaintiff then filed an action against the defendant claiming that defendant's failure to reveal debtor's property in its hands was a damaging lie constituting fraud on the court and causing it damage. Id. The Second Circuit reversed the district court's order dismissing the action and remanded the case for an evidentiary hearing to examine whether the defendant's garnishee statement was fraudulent. *Id. at 901*. If so, the district court was free to enter a judgment in the amount plaintiff would have obtained if the defendant had filed an accurate statement. **[*95]** Id.

[23] Although that case states that fraud on the court may be an independent cause of action, this Court declines to follow it.

11. Copyright Misuse Is Not An Independent Cause Of Action In This Circuit

Count 12 of the Complaint asserts a claim of copyright misuse by which Shirokov seeks a declaration that Achte's copyright is invalid. (Complaint, ¶ 383). The defendants have moved to dismiss this Count on the grounds that copyright misuse has not been recognized as an independent cause of action. (Docket No. 29 at 35; Docket No. 44 at 21; Docket No. 48 at 20-21). This Court agrees.

"Copyright misuse occurs when a copyright owner restrains competition in the sale of an item that is not within the scope of the privilege granted under the copyright." **[*98]** *Broad. Music, Inc. v. Hampton Beach Casino Ballroom, Inc., No. CV-94-248-B, 1995 U.S. Dist. LEXIS 13103, 1995 WL 803576, at *5 (D.N.H. Aug. 30, 1995)* (citing *Lasercomb Am. Inc. v. Reynolds, 911 F.2d 970, 975 (4th Cir. 1990))*. A party may prove copyright misuse by either proving (1) violation of the antitrust laws, or (2) that the copyright holder otherwise illegally extended its monopoly or violated the public policies underlying the copyright laws. Id. Like fraud on the copyright office, copyright misuse is normally an affirmative defense to copyright infringement, not a cause of action. See, e.g., *Amaretto Ranch Breedables, LLC v. Ozimals, Inc., 790 F. Supp. 2d 1024, 1033 (N.D. Cal. 2011)*. Unlike a claim of fraud on the Copyright Office, a finding of copyright misuse does not invalidate the copyright but precludes its enforcement during the period of misuse. Id. (citing *Practice Mgmt. Info. Corp. v. AMA, 121 F.3d 516, 520 (9th Cir. 1997))*.

Although the First Circuit has not rejected the defense of copyright misuse, it has not yet recognized it either. See *Garcia-Goyco v. Law Envtl. Consultants, Inc., 428 F.3d 14, 21 n. 7 (1st Cir. 2005)*. Other circuits have recognized misuse of a copyright as a defense **[*99]** to infringement. See *Broad. Music, Inc., 1995 U.S. Dist. LEXIS 13103, 1995 WL 803576 at *8 n. 7* (collecting cases).

Shirokov argues that copyright misuse can be brought as a claim for affirmative declaratory relief. (Docket No. 32 at 38-40). The courts that have addressed this issue are divided on the matter. Some courts have found that copyright misuse may not be affirmatively asserted as a declaratory judgment action because pleading an affirmative defense as an independent claim seeks an illegitimate litigation advantage. See *Nielsen Co., LLC v. Truck Ads, LLC, No. 08 C 6446, 2011 U.S. Dist. LEXIS 6453, 2011 WL 221838, at * 7 (N.D. Ill. January 24, 2011)* (collecting cases); see also *Amaretto Ranch Breedables, LLC, 790 F. Supp. 2d at 1033* ("There is no consensus on whether copyright misuse can be brought as an independent claim (as opposed to as an affirmative defense) and district courts come down on both sides of the issue."). Other courts have recognized copyright misuse as a claim, noting the analogous doctrine of patent misuse and recognizing that defendants may have reasons for seeking a declaration of their rights aside from the infringement claim they are defending. See *Nielsen Co., LLC, 2011 U.S. Dist. LEXIS 6453, 2011 WL 221838 at *7* (collecting cases).

This **[*100]** Court agrees with those courts that have found that copyright misuse may not be brought as an independent cause of action, especially in light of the fact that the First Circuit has not yet recognized the doctrine even as a defense to copyright infringement claims. [24]

Accordingly, this Court recommends that Count 12 be dismissed.

12. Shirokov Has Failed To State A Claim For Abuse Of Process And Malicious Prosecution

The defendants argue that Shirokov has not pled facts which would establish abuse of process (Count 10) or malicious prosecution (Count 19) (Docket No. 29 at 36-38; Docket No. 44 at 21; Docket No. 48 at 21). The Court agrees.

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[24] In addition, the Court notes that Shirokov seeks a declaration of invalidity based on copyright misuse, which is not available to him under such a claim. *Amaretto Ranch Breedables, LLC, 790 F. Supp. 2d at 1033*.

To sustain an abuse of process claim, Shirokov must establish that "process was used 'to accomplish some ulterior purpose for which it was not designed or intended, or which was not the legitimate purpose of the particular process employed.'" *Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 636, 925 N.E.2d 513 (2010)* (quoting *Quaranto v. Silverman, 345 Mass. 423, 426, 187 N.E.2d 859 (1963))*. **[*101]** Thus, the three elements of abuse of process are (1) "process" was used, (2) for an ulterior or illegitimate purpose, (3) resulting in damage. *Id*. (citations omitted); *Gutierrez v. Mass. Bay Transp. Auth., 437 Mass. 396, 407, 772 N.E.2d 552 (2002)* (citations omitted); *Jones v. Brockton Pub. Mkts., Inc., 369 Mass. 387, 389, 340 N.E.2d 484 (1975)*.

"Process" refers to "the papers issued by a court to bring a party or property within its jurisdiction." *Jones, 369 Mass. at 390*. Massachusetts courts have limited process to three types: writs of attachment, the process used to institute a civil action, and the process related to the bringing of criminal charges. *Id. at 389-90*.

Here, Shirokov has not alleged sufficient facts to support an abuse of process claim. Process never issued against him because he was never named in the Achte Lawsuit. The term process does not encompass a courtesy copy of the complaint and a settlement demand. See Complaint at ¶ 359 ("Defendants provided (without serving) the operative compliant to the class members by mailing them letter that direct them to the *Far Cry* website, where the complaint was posted."). Accordingly, he has failed to state a claim for abuse of process.

Similarly, he cannot **[*102]** maintain a malicious prosecution claim. In order to state a claim for malicious prosecution, Shirokov must allege that an action was brought maliciously and without probable cause and was terminated in his favor. *Hubbard v. Beatty & Hyde, Inc., 343 Mass. 258, 261, 178 N.E.2d 485 (1961)*; *MHA Financial Corp. v. Varenko Invs. Ltd., 583 F. Supp. 2d 173, 181 (D. Mass. 2008)* (citing *Chervin v. Travelers Ins. Co., 448 Mass. 95, 103, 858 N.E.2d 746 (2006))*.

Unlike abuse of process, service of process is not an element of a malicious prosecution claim. *MHA Fin. Corp., 583 F. Supp. 2d at 181*. "An action can be 'commenced,' for purposes of a malicious prosecution claim, by the filing of a complaint without the service of process." Id. Nevertheless, Shirokov has failed to state a malicious prosecution claim. No action was ever commenced against Shirokov. Although he presumably was one of the John Doe Defendants, he was never named in the Achte Lawsuit. See *Cuddy v. Sweeney, 7 Mass. App. Ct. 880, 386 N.E.2d 805 (1979)* (plaintiff who was never a party to a lawsuit could not show that a claim was brought against her which was terminated in her favor).

Even if the Court were to hold that being one of the John Does is sufficient to establish that an action **[*103]** was commenced against Shirokov, he also could not establish that the action terminated in his favor. Achte dismissed its claims against most of the John Doe Defendants, including Shirokov, without prejudice. Thus, Achte could refile copyright infringement claims against Shirokov. As such, the Court finds that the Achte Lawsuit was not terminated in Shirokov's favor. Cf. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* (dismissal without prejudice does not operate as an adjudication upon the merits).

Accordingly, the Court recommends that the District Court dismiss Counts 10 and 19 of the Complaint.

13. Shirokov's Claims Of Unjust Enrichment, Money Had And Received, Conversion, And Constructive Trust Fail Because He Has Not Alleged That He Paid Any Money To The Defendants

Shirokov brings four claims based on the alleged settlement payments by some members of the proposed class. These claims are as follows: unjust enrichment (Count 14); money had and received (Count 15); conversion (Count 16); and constructive trust (Count 17). Shirokov states that he has not paid to settle any claims. (Complaint, ¶ 232). Accordingly, defendants argue that because payment of funds from Shirokov **[*104]** to one or more of the defendants is an element of each of these claims, all of these claims are subject to dismissal for failure to state a claim. (Docket No. 29 at 39-40; Docket No. 48 at 21-22; Docket No. 44 at 24). Shirokov does not defend these claims on the merits but argues that he has sufficient standing to maintain these counts because he is not required to have standing to bring every count as long as he has standing for multiple counts. [25] (Docket No. 32 at 17). The Court finds that Shirokov has failed to state a claim under these counts.

In Massachusetts, in order for a party to prevail on a claim for unjust enrichment, there must be "unjust enrichment of one party and unjust detriment to another party." *Mass. Eye and Ear Infirmary v. QLT Phototherapeutics, Inc., 552 F.3d 47, 57 (1st Cir. 2009)* (internal citations omitted). Unjust enrichment requires: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance **[*106]** or retention by the defendant of the benefit under the circumstances would be inequitable without payment for its value." *Id*. In addition, as unjust enrichment is an equitable remedy, it is not available to parties with an adequate remedy at law. See *Santagate v. Tower, 64 Mass. App. Ct. 324, 329, 833 N.E.2d 171 (2005)*. Here, there is no evidence of a benefit conferred upon the defendants by Shirokov. Without proof of a benefit, it is not necessary to analyze the remaining elements of unjust enrichment. See, e.g., *Kerr v. Vince, No. 07-30021-MBB, 2010 U.S. Dist. LEXIS 33161, 2010 WL 1416511, at *19 (D. Mass. April 1, 2010)*.

Money had and received is essentially the same claim as unjust enrichment except that unjust enrichment is not limited to enrichment by money or its equivalent. *Jelmoli Holding, Inc. v. Raymond James Fin. Servs., Inc., 470 F.3d 14, 17 n. 2 (1st Cir. 2006)*. Again, the Complaint contains no allegations that the defendants received any money from Shirokov.

In order to state a claim for conversion, a plaintiff must show:

> (1) the defendant intentionally and wrongfully exercised control or dominion over the [plaintiff's] personal property; (2) the plaintiff had an ownership or possessory interest in the property at **[*107]** the time of the alleged conversion; (3) the plaintiff was damaged by the defendant's conduct; and (4) if the defendant legitimately acquired possession of the property under a good-faith claim of right, the plaintiff's demand for its return was refused.

Evergreen Marine Corp. v. Six Consignments of Frozen Scallops, *4 F.3d 90, 95 (1st Cir. 1993)*; see *In re Brauer, 452 Mass. 56, 67, 890 N.E.2d 847 (2008)*. Shirokov has not alleged that the defendants exercised control or dominion over any of his property. Therefore, Count 16 fails.

Finally, a constructive trust is not a theory of liability but rather an equitable remedy fashioned by courts to right a perceived wrong. See *Maffei v. Roman Catholic Archbishop of Bos., 449 Mass. 235, 246-47 n. 23, 867 N.E.2d 300 (2007)*. "A constructive trust is 'a device employed in equity, in the absence of any intention of the parties to create a trust, in order to avoid the unjust enrichment of one party at the expense of the other where the legal title to the property . . . was obtained by fraud or in violation of a fiduciary relation or arose where information confidentially given or acquired was used to the advantage of the recipient at the expense of the one who disclosed the information.'" **[*108]** *Cox v. Cox, 247 B.R. 556, 571 (Bankr. D. Mass. 2000)* (quotations omitted). In order to establish grounds for the imposition of a constructive trust, the plaintiff must be able to trace the proceeds or profits of the corpus. *Id*. (citation omitted). Here again, there is no allegations that the defendants obtained any property

[25] Shirokov's claim in this respect is wrong, particularly because he is the only named plaintiff. At this stage of the litigation, the District Court must dismiss his claims if he has not stated a cause of action on his own right. See *Katz v. Pershing, LLC, 672F.3d 64, 2012 U.S. App. LEXIS 4024 , 2012 WL 612793, at * 3 (1st Cir. 2012)* (citation omitted) ("Because no class was certified below, we evaluate only whether the plaintiff herself has constitutional and statutory standing to pursue the action."); *Booklocker.com, Inc. v. Amazon.com, Inc., 650 F. Supp. 2d 89, 97 n. 3 (D.Me. 2009)* ("As a consequence of the precertification nature of the matter, for the purposes **[*105]** of assessing the pending motion to dismiss, 'the potential claims of putative class members other than the named plaintiff are simply not before the court.'") (citations omitted); *Simonet v. Smithkline Beecham Corp., 506 F. Supp. 2d 77, 81 (D.P.R. 2007)* ("A named plaintiff who cannot establish her own case may not seek relief on behalf of other class members.") (citations omitted); *Evans v. Taco Bell Corp., No. 04CV103JD, 2005 U.S. Dist. LEXIS 20997, 2005 WL 2333841, at * 4 (D.N.H. Sept. 23, 2005)* ("To be sure, [plaintiff] has filed the case as a putative class action ... But unless and until the court certifies such a class, the potential claims of putative class members other than the named plaintiff are simply not before the court.") (citations omitted).

from Shirokov and thus, he has not alleged sufficient facts that would entitle him to the imposition of a constructive trust.

Accordingly, the Court recommends that the District Court dismiss Counts 14 to 17 of the Complaint.

14. The Complaint States A Claim Under Chapter 93A

Shirokov asserts a claim in Count 18 for unfair and/or deceptive acts and practices in violation of the Massachusetts Consumer Protection Act, M.G.L. c. 93A, § 9 ("Chapter 93A"). The defendants have moved to dismiss this count on the grounds that the defendants' alleged actions were not in connection with trade or commerce as required to support a claim under Chapter 93A. (Docket No. 29 at 40-41; Docket No. 48 at 22). In addition, the defendants argue that Shirokov cannot maintain a Chapter 93A action because he has not alleged an actual loss. (Docket No. 29 at 41-42; Docket No. 44 at 27; Docket **[*109]** No. 48 at 22). This Court disagrees.

Chapter 93A prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws ch. 93A, §2(a) (emphasis added). A successful claim under Chapter 93A requires a showing of (1) a deceptive act or practice on the part of the defendant; (2) an injury or loss suffered by the consumer, and (3) a causal connection between the defendant's deceptive act or practice and the consumer's injury. Casavant v. Norwegian Cruise Line, Ltd., 76 Mass. App. Ct. 73, 76, 919 N.E.2d 165 (2009), aff'd, 460 Mass. 500, 952 N.E.2d 908 (2011) (citing G.L. c. 93A, § 9); Hershenow v. Enterprise Rent-A-Car Co. of Bos., Inc., 445 Mass. 790, 797, 840 N.E.2d 526 (2006)). "Chapter 93A liability is decided case-by-case, and Massachusetts courts have consistently emphasized the 'fact-specific nature of the inquiry.'" Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d 47, 55 (1st Cir. 1998) (citation omitted). "Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact, the boundaries of what may qualify for consideration as a Chapter 93A violation is a question of law." Id. at 54 (quoting Ahern v. Scholz, 85 F.3d 774, 797 (1st Cir. 1996)).

Though **[*110]** Chapter 93A provides a broad remedy, it is only directed at unfair or deceptive acts that arose "in the course of trade or commerce." [26] St. Paul Fire and Marine Ins. Co. v. Ellis & Ellis, 262 F.3d 53, 66 (1st Cir. 2001); (citing Lantner v. Carson, 374 Mass. 606, 607-08, 373 N.E.2d 973 (1978); First Enters., Ltd. v. Cooper, 425 Mass. 344, 680 N.E.2d 1163 (1997)). Thus, before liability may be imposed for an allegedly unfair or deceptive act, the plaintiff must establish that the act occurred in the conduct of trade or commerce. "'Unfair or deceptive acts or practices' . . . can only form the basis of a ch. 93A claim if those acts 'are perpetrated in a business context.'" Id. To determine whether a defendant is engaged in trade or commerce for Chapter 93A purposes, the court should consider (1) the nature of the transaction; (2) the character of the parties involved; (3) the activities engaged in by the parties; and (4) whether the transaction was motivated by business or personal reasons. Feeney v. Dell, Inc., 454 Mass. 192, 212, 908 N.E.2d 753 (2009) (citations omitted).

The defendants argue that any allegedly unfair or deceptive acts were not perpetrated in a business context because there was no commercial relationship between the parties and their only contacts occurred in the context of litigation. The Dunlap Defendants specifically argue that an attorney or law firm may not be liable to his client's adversary under Chapter 93A for acts performed on the client's behalf. [27] (Docket No. 29 at 33-34). The defendants

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[26] The statute defines trade and commerce as:

> . . . the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and **[*111]** any property, tangible or intangible, real, personal or mixed, any security . . . and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

M.G.L. c. 93A, § 1(b).

[27] Shirokov argues that not all defendants are attorneys and therefore may not avail themselves of this argument. (Docket No. 32 at 33, 43).

are correct that the mere filing of litigation, without more, does not constitute trade or commerce. See *Arthur D. Little, Inc. v. East Cambridge Sav. Bank, 35 Mass. App. Ct. 734, 743, 625 N.E.2d 1383 (1994)*. The Dunlap Defendants are also correct that, ordinarily, a lawyer is not liable under Chapter 93A for acts performed on the client's behalf. Id.; *First Enters. v. Cooper, 425 Mass. 344, 347, 680 N.E.2d 1163 (1997)*. However, the **[*112]** allegations here are more textured: Shirokov's Chapter 93A claim is based on allegations that the defendants were engaged in a scheme to defraud him and others and used the Achte Lawsuit to add a veneer of legitimacy to their claims that Achte was entitled to statutory damages. (Complaint, ¶¶ 12-15, 156-57; see generally id. at ¶¶ 195-217). In addition, Shirokov alleges that the Dunlap Defendants were not only knowing participators in the alleged scheme, but in fact designed it. (Complaint, ¶¶ 2-3, 6-8, 72, 76-78). Under those circumstances, the Court cannot conclude that Shirokov has failed to allege enough facts to establish the trade and commerce requirement.

Indeed, the First Circuit has held that conduct in the context of litigation may form the basis for a Chapter 93A claim. In Ellis & Ellis, a workers' compensation insurer brought suit against an attorney and his law firm who had represented a claimant, asserting, inter alia, a Chapter 93A claim. *262 F.3d at 56*. The plaintiff argued that the attorney had knowingly concealed the claimant's **[*113]** prior back injury. *Id. at 60-61*. The defendants argued that any misrepresentations were made in the context of litigation and, as such, were not made in the conduct of trade or commerce and could not form the basis for a Chapter 93A claim. After the conclusion of the plaintiff's case-in-chief at trial, the defendants moved for judgment as a matter of law and the District Court granted the motion. *Id. at 61*. The District Court based its decision on the finding that any allegedly unfair acts were not perpetrated in a business context: "In this case, any representations made by the defendants to St. Paul were pursuant to a legal action, namely the adversarial workers' compensation litigation in which Formoso's benefits were determined." *Id. at 67*.

The First Circuit reversed the District Court's decision. In so doing, the First Circuit stated:

> We disagree with the court's characterization of the events at issue here. To be sure, the 'adversarial workers' compensation litigation' formed a backdrop to Ellis's actions. The jury could have easily concluded, however, that those actions were not vigorous advocacy in pursuit of Formoso's workers' compensation claim. Instead, the jury could have **[*114]** found that Ellis used the workers' compensation litigation to add a veneer of legitimacy to a fraudulent scheme to dupe St. Paul into paying benefits to which Formoso was not entitled. Such a scheme affects trade or commerce and can be a basis for ch. 93A liability.

Id. at 67 (citations omitted).

In addition, an attorney or law firm may incur Chapter 93A liability to a nonclient or adversary if it joins its client in marketplace communications to the adversary rather than merely relays its client's positions, and those communications knowingly or carelessly turn out to be false, misleading, and harmful. See *Kirkland Constr. Co. v. James, 39 Mass. App. Ct. 559, 561-564, 658 N.E.2d 699 (1995)* (reversing *Rule 12(b)(6)* dismissal of 93A claim against a lawyer and firm). "In such situations the attorney has arguably crossed from traditional representation into active participation in trade and commerce. If the attorney or law firm confines itself to the functions of traditional representation, such as the commencement of litigation against the adversary or the counseling about and drafting of testamentary documents, it has not acted in a 'business context' or injected itself into trade or commerce so as to **[*115]** have Chapter 93A exposure." *Coggins v. Mooney, No. Civ. A 94-0844, 1998 Mass. Super. LEXIS 320, 1998 WL 156998, at *5 (Mass. Super. Apr. 3, 1998)*, aff'd, *431 Mass. 57, 725 N.E.2d 545 (2000)*. Again, here the Complaint alleges that the Dunlap Defendants not only knowingly made false representations on behalf of their clients but that they in fact designed the allegedly fraudulent copyright scheme described in the Complaint. (Complaint, ¶¶ 2-3, 6-8, 72, 76-78). Accordingly, the Court finds that the Complaint alleges sufficient facts to survive a motion to dismiss based on the trade or commerce requirement.

The Court also finds that Shirokov has sufficiently alleged an injury cognizable under *Chapter 93A*. The defendants argue that the plaintiff cannot bring a claim under *Chapter 93A* because he claims no actual damages. (Docket No.

29 at 34). They further argue that the plaintiff must prove "reliance as 'an essential link in the proof of causation,'" and that he cannot do so because he has admittedly did not settle the Achte Lawsuit. (Id.). The Court disagrees.

As stated above, to state a claim under *Chapter 93A*, Shirokov must allege sufficient facts to establish an injury. *Casavant v. Norwegian Cruise Line Ltd., 460 Mass. 500, 503, 952 N.E.2d 908 (2011)*. **[*116]** In addition, there must be a causal connection between the alleged deceptive act and the consumer's injury or loss. *Id*. "If any person invades a consumer's legally protected interests, and if that invasion causes the consumer a loss—whether that loss be economic or noneconomic—the consumer is entitled to redress under our consumer protection statute." *Id*. (quoting *Hershenow, 445 Mass. at 802*.). However, contrary to the defendants' arguments, "the plaintiffs need not show proof of actual reliance on a misrepresentation in order to recover damages under G.L. c. 93A, but rather must show a causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception." *Id*. (quoting *Iannacchino v. Ford Motor Co., 451 Mass. 623, 630-31 n. 12, 888 N.E.2d 879 (2008)* (internal modifications omitted)); cf. *Advanced Sys. Consultants Ltd. v. Eng'g Planning and Mgmt., Inc., 899 F. Supp. 832, 834 (D. Mass. 1995)* (finding *Chapter 93A* violation and awarding attorneys' fees to target of unfair or deceptive act or practice that incurred legal expenses in obtaining and defending injunctive relief to safeguard itself against economic loss).

Here, Shirokov has alleged that he was the **[*117]** target of a fraudulent scheme by the defendants. Although he did not pay any money to the defendants as a result of receiving the Letter, he did consult an attorney and paid legal fees in connection with the attorney's review and evaluation of the Letter. He is now worse off by having paid legal fees to evaluate the allegedly fraudulent claims. For purposes of *Chapter 93A*, it would be reasonably foreseeable to the defendants that Shirokov could incur legal fees in evaluating the allegedly false claims. Indeed, the Letter invites its recipient to seek legal advice. Accordingly, the Court finds that Shirokov has sufficiently alleged an injury and a causal connection between the injury and the allegedly deceptive conduct and recommends that the District Court deny the defendants' motions to the extent that they seek dismissal of Shirokov's Chapter 93A claims.

IV. RECOMMENDATION

For the reasons stated herein, this Court recommends to the District Judge to whom this case is assigned that the defendants' motions to dismiss be ALLOWED in part and DENIED in part as follows:

1. This Court recommends that the District Judge dismiss all Counts of the Complaint Against GuardaLey;

2. This Court recommends **[*118]** that the District Judge dismiss Counts 4, 6-7, 9-10, 12, 14-17, and 19 of the Complaint against the Dunlap Defendants and Achte;
3. This Court recommends that the District Judge dismiss Count 11 of the Complaint to the extent that Shirokov seeks damages against the Dunlap Defendants and Achte; and
4. Counts 1-3, 5, 8, 11 (to the extent that it seeks declaratory relief), 13, and 18 of the Complaint should survive against the Dunlap Defendants and Achte.

V. REVIEW BY DISTRICT JUDGE

The parties are hereby advised that under the provisions of *Fed. R. Civ. P. 72(b)*, any party who objects to these proposed findings and recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. See *Fed. R. Civ. P. 72*. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with *Fed. R. Civ. P. 72(b)* will preclude further appellate review of the District **[*119]** Court's order based on this Report and Recommendation. See *Phinney v. Wentworth Douglas Hosp., 199 F.3d 1 (1st Cir. 1999)*; *Sunview Condo. Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962 (1st Cir. 1997)*; *Pagano v. Frank, 983 F.2d 343 (1st Cir.1993)*.

/s/ Jennifer C. Boal

JENNIFER C. BOAL

United States Magistrate Judge

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White v. Fannie Mae

United States District Court for the Central District of California

March 1, 2012, Decided; March 1, 2012, Filed

CV 12-00017-RGK (Ex)

Reporter

2012 U.S. Dist. LEXIS 200102 *

BENJAMIN WHITE v. FEDERAL NATIONAL MORTGAGE ASSOCIATION et al.

Core Terms

allegations, unfair, fails, accounting, fraudulent, Deed, covenant, Notice, pleading requirements, business practice, misrepresentation, conclusory, agrees, argues, aiding and abetting, judicial notice, fair dealing, good faith, prescription, occupancy, recorded, quiet

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

Attorneys Present for Defendants: Not Present.

Judges: R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE.

Opinion by: R. GARY KLAUSNER

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS) Order Re: Defendant's Motion to Dismiss (DE 4)

I. INTRODUCTION

On December 2, 2011, Benjamin White ("Plaintiff") filed a Complaint in Los Angeles Superior Court ("Complaint") against Federal National Mortgage Association ("Defendant") and Quality Loan Service Corporation ("Quality Loan") for (1) quiet title, (2) breach of the implied covenant of good faith and fair dealing, (3) an accounting, (4) unfair business practices under California law, (5) aiding and abetting, and (6) fraud. Plaintiff also filed an accompanying notice of pendency of action.

On December 21, 2011, Quality Loan filed a declaration of nonmonetary status in Los Angeles Superior Court pursuant to *California Civil Code § 2924l(d)*. (Def.'s Notice of Removal at 3; Ex. C, at 1-2.) None of the other parties objected, and therefore Quality Loan as trustee was completely excused from further participation in this case. *Cal. Civ. Code § 2924l(d)*. (Quality Loan's Notice of Non-Opp. to Quality Loan Service Corp.'s Decl. of Nonmonetary Status 2.) As a nonmonetary party, Quality **[*2]** Loan will be bound by any judgment, as long as the judgment does not provide for any monetary damages against Quality Loan. *Cal. Civ. Code § 2924(b)*. (*Id.*)

On January 3, 2012, Defendant removed the action to this Court on the basis of diversity jurisdiction.

On January 10, 2012, Defendant filed the current Motion to Dismiss ("Motion") pursuant to *Federal Rule of Civil Procedure ("Rule") 12(b)(6)*. To date, Plaintiff has failed to file an Opposition. *Local Rule 7-9* requires parties to file an opposition to any motion filed. *Local Rule 7-12* states that failure to file any required paper may be deemed consent to granting the motion.

For the following reasons, the Court **GRANTS** Defendant's Motion.

II. FACTUAL BACKGROUND

The property at issue in this lawsuit is located at 9131 South Wilton Place, Los Angeles, California, 90047 (the "Property").

Spencer Stacy acquired the Property in 1972. (Def.'s RJN, Ex. 1.) On May 31, 2006, Stacy refinanced the Property with a loan ("Loan") secured by a Deed of Trust on the Property. (*Id.*, Ex. 2.)

Stacy fell behind in his payments on the Loan and a Notice of Default was filed against him in November 2009. (*Id.*, Ex. 3.) In December 2009, Quality Loan substituted as trustee under the Deed of Trust. (*Id.*, Ex. 4.) When Stacy failed to cure his default, Quality Loan **[*3]** recorded a Notice of Trustee's Sale in March 2010. (*Id.*, Ex. 5.) Quality Loan recorded a second and operative Notice of Trustee's Sale in March 2011. (*Id.*, Ex. 6.)

In April 2011, Quality Loan foreclosed on the Property and conveyed legal title to Defendant. (*Id.*, Ex. 8.) In addition, all equitable interest under the Deed of Trust was assigned to Defendant. (*Id.*, Ex. 7.)

On December 2, 2011, Plaintiff began occupying the Property. (Compl. ¶ 10.) On the same day, Plaintiff filed the current action in state court, alleging that he obtained title to the Property through his occupancy. (*Id.* ¶ 7.) Plaintiff also alleges that Quality Loan and Defendant recorded a bad faith deed in an attempt to deceive Plaintiff. (*Id.* ¶ 8.) However, at no time was Plaintiff a party to the Loan or to the Deed of Trust. (*See* Def.'s RJN, Exs. 1-8.)

III. JUDICIAL STANDARD

A party may move to dismiss for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. In deciding a *Rule 12(b)(6)* motion, the Court must take the allegations in the challenged complaint as true and construe the complaint in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. However, a court need not accept as true unreasonable inferences, unwarranted **[*4]** deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See* *W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)*. A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The complaint need not contain detailed factual allegations, but it must provide more than "a formulaic recitation of the elements of a cause of action." *Id. at 555*.

When a plaintiff alleges a claim for fraud, the complaint must meet the heightened pleading requirements of *Rule 9(b)* to survive dismissal. *Rule 9(b)* requires that "the circumstances constituting fraud or mistake shall be stated with particularity" but intent "may be averred generally." In the Ninth Circuit, *Rule 9(b)* has been interpreted to require allegations of fraud to "state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)*.

IV. REQUEST FOR JUDICIAL NOTICE

Defendant asks the Court to take judicial notice of publicly recorded documents pertaining to the Property. In deciding a *Rule 12(b)(6)* motion, a court may consider judicially noticed documents without converting the motion into a motion for summary judgment. *Mack v. S. Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986)*, *abrogated on other grounds by* *Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991)*. A court may take judicial notice of public records, such as **[*5]** properly recorded deeds of trust and notices of default. *Grant v. Aurora Loan Servs., Inc., 736 F. Supp. 2d 1257, 1263-64 (C.D. Cal. 2010)*. To the extent the Court relies on such public records in ruling on Defendant's Motion, the Court **grants** Defendant's Request for Judicial Notice.

V. DISCUSSION

A. Quiet Title

First, Defendant argues that Plaintiff has no legal right to quiet title to the Property. The Court agrees.

In California, occupancy gives a right to possession, but such right is not sufficient against the state or those who have title by prescription, accession, transfer, will, or succession. *Cal. Civ. Code § 1006*. An occupant may not bring a quiet title action "unless the occupancy has ripened into title by prescription." *Id.*

Under California law, an occupant may obtain title by prescription in two ways. A person may claim under color of title—i.e., pursuant to a written deed purporting to grant title. *Cal. Civ. Proc. Code § 322*. Alternatively, a person may obtain title through adverse possession. *Cal. Civ. Proc. Code § 324*. In either situation, a claimant acquires title by prescription only after five years of occupancy. *Cal. Civ. Proc. Code §§ 322*, *325*.

Here, Plaintiff began occupying the Property on December 2, 2011, the same day he filed his Complaint. (Compl. ¶ 10.) Based on these facts, Plaintiff occupied the Property for zero days before asserting his **[*6]** ownership interest. Because Plaintiff has not met the five-year statutory minimum for title by prescription, Plaintiff's occupancy has not ripened into a possible claim for title. Without title to the Property, Plaintiff has no legal right to bring a quiet title claim.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

Second, Defendant argues that Plaintiff's claim for breach of the implied covenant of good faith and fair dealing fails because Plaintiff has not alleged the existence of a contract. The Court agrees.

In California, every contract includes "an implied covenant of good faith and fair dealing that neither party will . . . injure the right of the other party to receive the benefits of the agreement." *Merritt v. J.A. Stafford Co., 68 Cal. 2d 619, 626, 68 Cal. Rptr. 447, 440 P.2d 927 (1968)*. However, a plaintiff cannot state a claim for breach of the implied covenant in the absence of a valid underlying contract. *Pac. States Enters., Inc. v. City of Coachella, 13 Cal. App. 4th 1414, 1425, 17 Cal. Rptr. 2d 68 (1993)*.

Here, Plaintiff was never a party to the Loan or to the Deed of Trust to the Property; neither of these contracts could support a claim for breach of the implied covenant of good faith and fair dealing. Because Plaintiff has not alleged the existence of a valid contract to which he is a party, Plaintiff's implied covenant claim fails as a **[*7]** matter of law.

C. Accounting

Third, Defendant argues that Plaintiff is not entitled to an accounting. The Court agrees.

To state an equitable claim for an accounting, a plaintiff must show that (1) plaintiff and defendant are in a relationship that requires an accounting, and (2) defendant owes plaintiff an amount that can only be ascertained by an accounting. *Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179, 92 Cal. Rptr. 3d 696 (2009)*.

Here, Plaintiff's demand for an accounting is unwarranted. Plaintiff cannot allege that a relationship existed between himself and Defendant or that Defendant owes him money, because Plaintiff was not a party to any contract.[1] Therefore, Plaintiff's demand for an accounting fails as a matter of law.

D. Fraud

Fourth, Defendant argues that Plaintiff fails to state a claim for fraud. The Court agrees.

In California, to state a claim for fraud, a plaintiff must allege that: (1) defendant made a misrepresentation; (2) defendant knew the misrepresentation was false; (3) defendant made the misrepresentation with the intent to induce plaintiff's reliance on the misrepresentation; (4) plaintiff's reliance was justified; and (5) plaintiff suffered damage. *Conroy v. Regents of Univ. of Cal., 45 Cal. 4th 1244, 1255, 91 Cal. Rptr. 3d 532, 203 P.3d 1127 (2009)*. A plaintiff alleging fraud in federal court must also satisfy the heightened pleading **[*8]** requirements of *Rule 9(b)*.

Here, Plaintiff fails to plead the elements of fraud with sufficient specificity and merely makes conclusory allegations that Defendant engaged in fraudulent activities. Moreover, Plaintiff has pled no facts to show any justifiable reliance on Defendant's alleged misrepresentation. Thus, because Plaintiff has neither alleged the elements of fraud nor met the *Rule 9(b)* pleading requirements, Plaintiff's fraud claim fails.

E. Unfair Business Practices

Fifth, Defendant argues that Plaintiff's unfair business practices claim is conclusory. The Court agrees.

To bring a claim under *California Business and Professions Code § 17200*, a plaintiff must allege either an "unlawful, unfair, or fraudulent business act or practice" or "unfair, deceptive, untrue, or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. *Section 17200* "borrows" violations of federal, state, or local law and treats them as unlawful practices independently actionable under *§ 17200*. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. "Unfair" practices include "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 187*. "Fraudulent" business practices under *§ 17200* are **[*9]** acts that are likely to deceive the public. *Kowalsky v. Hewlett-Packard Co., 771 F. Supp. 2d 1156, 1159 (N.D. Cal. 2011)* (citing *In re Tobacco II Cases, 46 Cal. 4th 298, 312, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009))*.

Similarly, to bring a false advertising claim under *§ 17500*, a plaintiff must allege that "members of the public are likely to be deceived." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig., 754 F. Supp. 2d 1145, 1176 (C.D. Cal. 2010)* (quoting *In re Tobacco II, 46 Cal. 4th at 312*).

A plaintiff alleging business practices that violate *§§ 17200* and *17500* "must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708 (1993)*. In addition, a plaintiff in federal court alleging fraudulent conduct in violation of *§§*

[1] Plaintiff claims that Defendant failed to furnish him with information about the servicing of the Loan pursuant to the Real Estate Settlement and Procedures Act ("RESPA"), *12 U.S.C. § 2605(e)*. However, Plaintiff was never a party to the Loan and Defendant owed him no duty under RESPA. Therefore, Plaintiff cannot allege a relationship that would support a claim for an accounting in this way.

17200 and 17500 must satisfy the heightened pleading requirements of Rule 9(b). Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003).

Here, Plaintiff has not identified with sufficient particularity any of Defendant's acts that are unlawful, unfair, or fraudulent. First, Plaintiff fails to allege any unlawful conduct as his other claims in this case fail. Although Plaintiff additionally alleges that Defendant's conduct "threatens an incipient violation of" California Business and Professions Code § 10130, Title 15 of the United States Code, and 12 C.F.R. § 226.1, this allegation is conclusory. (Compl. ¶ 22.) Second, Plaintiff fails to allege sufficient facts to support an unfair or fraudulent practices claim under § 17200 or a false advertising claim under § 17500. Instead, Plaintiff merely makes conclusory allegations about unfair practices that fail to meet the pleading requirements **[*10]** of § 17200, and conclusory allegations about fraudulent acts that fail to meet the pleading requirements of § 17200, § 17500, or Rule 9(b).

Therefore, Plaintiff fails to state an unfair business practices claim under California law.

F. Aiding and Abetting

Finally, Defendant argues that Plaintiff fails to state a claim for aiding and abetting. The Court agrees.

In California, a person aids and abets an intentional tort if he (1) knew that a tortfeasor's conduct was wrongful and gave substantial assistance or encouragement to such conduct; or (2) gave substantial assistance to a tortfeasor with conduct that independently breached a duty to the plaintiff. Saunders v. Super. Ct., 27 Cal. App. 4th 832, 846, 33 Cal. Rptr. 2d 438 (1994).

Here, Plaintiff alleges that Defendant engaged in fraudulent activities, yet fails to plead enough specific facts to satisfy the heightened pleading standard of Rule 9(b). As a threshold matter, Plaintiff fails to properly allege fraud or any other underlying intentional tort. Morover, Plaintiff does not allege that Defendant substantially assisted or encouraged a tort, nor does Plaintiff allege that Defendant substantially assisted a tort with its own tortious conduct. Therefore, Plaintiff fails to state a claim for aiding and abetting.

VI. CONCLUSION

In light of the foregoing, **[*11]** the Court **GRANTS** Defendant's Motion.

IT IS SO ORDERED.

End of Document

[Carrier Corp. v. Outokumpu Oyj]

United States Court of Appeals for the Sixth Circuit

October 13, 2009, Argued; March 2, 2012, Decided; March 2, 2012, Filed

File Name: 12a0065p.06

Nos. 07-6052/6114

Reporter
673 F.3d 430 *; 2012 U.S. App. LEXIS 4283 **; 2012 FED App. 0065P (6th Cir.) ***; 2012-1 Trade Cas. (CCH) P77,814; 2012 WL 678151

CARRIER CORPORATION; CARRIER SA; CARRIER ITALIA S.P.A., Plaintiffs-Appellants/Cross-Appellees, v. OUTOKUMPU OYJ; OUTOKUMPU COPPER PRODUCTS OY; OUTOKUMPU COPPER FRANKLIN, INC.; OUTOKUMPU COPPER (U.S.A.), INC., Defendants-Appellees/Cross-Appellants, MUELLER INDUSTRIES, INC.; MUELLER EUROPE LTD; EUROPA METALLI SPA; TREFIMETAUX SA, Defendants.

Subsequent History: As Amended April 4, 2012.

Rehearing denied by [Carrier Corp. v. Outokumpu Oyj, 2012 U.S. App. LEXIS 11815 (6th Cir., Apr. 30, 2012)]

Prior History: [1]** Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 06-02186ùBernice Bouie Donald, District Judge.

Core Terms

allegations, district court, conspiracy, tubing, Copper, subsidiaries, personal jurisdiction, entities, Sherman Act, markets, quotation, marks, subject-matter, motion to dismiss, decisions, cartel, conspirators, contacts, prices, cause of action, argues, facial, fraudulent concealment, co-conspirators, concealment, diligence, meetings, global, forum state, insubstantial

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

International Trade Law > International Commerce & Trade > Federal Legislation

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

HN1[ ] **Scope, Exemptions**

The Foreign Trade Antitrust Improvements Act of 1992 (FTAIA) specifically exempts from its reach "import commerce" with foreign entities. *15 U.S.C.S. § 6a*. The FTAIA initially lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach and then selectively brings some categories of that excluded conduct back within the Sherman Act's strictures. Case law, in turn, has indicated that foreign import commerce involves transactions in which the seller is located abroad while the buyer is domestic and the goods flow into the United States. Where a claim is limited to a plaintiff's domestic purchases, it does not involve the type of foreign commerce that would be implicated by the FTAIA.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

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

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN2[] **International Aspects, Commerce With Foreign Nations**

It has been generally established that the so-called "effects test" limits the Sherman Act to those acts (1) that "significantly" or "directly" affect United States commerce, or (2) that are intended to have an effect, or (3) that are both intended to have and do have such an effect. Indeed, it is well established that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

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

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

HN3[] **Standards of Review, Clearly Erroneous Review**

Challenges to subject-matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)* come in two varieties: a facial attack or a factual attack. Under a facial attack, all of the allegations in the complaint must be taken as true, much as with a *Rule 12(b)(6)* motion. When the district court relies on a facial analysis, an appellate court reviews its findings de novo. Under a factual attack, however, the court can actually weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction. When the district court does so, the appellate court reviews its findings for clear error.

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

HN4[] **Complaints, Requirements for Complaint**

In order for a complaint to allege jurisdiction adequately, it must contain non-conclusory facts which, if true, establish that the district court has jurisdiction over the dispute.

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

HN5[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Ordinarily, documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim. The general rule is that if inconsistent with the allegations of the complaint, the exhibit controls. Courts have recognized, however, that it is not always appropriate to assume everything in an exhibit is true. In particular, although a blanket adoption rule makes sense in the context of an attached contract or loan agreement because the contract represents an agreement between two or more parties to which the law binds them, the rule makes much less sense when the exhibit is not a legally dispositive document.

Evidence > Judicial Notice > Adjudicative Facts > General Overview

HN6[] **Judicial Notice, Adjudicative Facts**

Judicial notice of a fact is generally only appropriate when there is no dispute regarding the fact.

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

HN7[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A district court engages in a factual inquiry regarding the complaint's allegations only when the facts necessary to sustain jurisdiction do not implicate the merits of the plaintiff's claim. In other words, the district court is prohibited from making factual findings with respect to a jurisdictional issue when such a finding would adversely affect the merits of the plaintiff's case. When an attack on subject-matter jurisdiction also implicates an element of the cause of action, then the district court should find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's claim.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > Sherman Act > Jurisdiction

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

HN8[] **Sherman Act, Claims**

In the context of Sherman Act claims against foreign defendants, the extent of United States-market impact affects more than a court's jurisdiction; it also speaks to whether there is sufficient injury or anticompetitive effect to establish liability. Thus, the "jurisdictional" and "substantive" inquiries are not wholly independent. That being the case, to the extent a district court renders a factual finding, any such finding is improper.

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

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

HN9[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's decision to grant a *Fed. R. Civ. P. 12(b)(6)* motion. The appellate court construes the complaint in the light most favorable to the plaintiff, accepts its allegations as true, and draws all reasonable inferences in favor of the plaintiff.

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

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

HN10[] **Motions to Dismiss, Failure to State Claim**

To survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. However, it is not enough merely to plead a set of facts "consistent with" a claim to relief; there must also be enough "factual enhancement" to nudge the claim across the line from conceivable to plausible. To conduct this analysis, a court should first identify factual allegations that are entitled to a presumption of truth -- that is, those allegations that are more than just legal conclusions. Then the court should consider the factual allegations in the complaint to determine if they plausibly suggest an entitlement to relief.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

Section 1 of the Sherman Act prohibits conspiracies in restraint of trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN12[] **Sherman Act, Claims**

A complaint attempting to establish a Sherman Act violation by alleging an explicit agreement to restrain trade must plausibly suggest, rather than be merely consistent with, an agreement to restrain trade in violation of the Sherman Act. To survive a motion to dismiss, these allegations must be specific enough to establish the relevant "who, what, where, when, how or why." Furthermore, they must specify how each defendant was involved in the alleged conspiracy.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN13[] **Reviewability of Lower Court Decisions, Preservation for Review**

It is the general rule that a federal appellate court does not consider an issue not passed upon below. Appellate courts make an exception, however, for cases in which the issues are presented with sufficient clarity and completeness and their resolution will materially advance the progress of already protracted litigation.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Defenses

HN14[] **Sherman Act, Claims**

A Sherman Act claim must be brought within four years after the cause of action accrued. *15 U.S.C.S. § 15b*.

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Tolling

HN15[] **Statute of Limitations, Pleadings & Proof**

Three elements must be pleaded in order to establish fraudulent concealment for purposes of tolling a statute of limitations: (1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts. A plaintiff must plead the factual allegations underlying a claim of fraudulent concealment with particularity. With regard to the "wrongful concealment" element, the plaintiff must point to affirmative acts of concealment. Mere silence or unwillingness to divulge wrongful activities is not sufficient. Instead, there must be some trick or contrivance intended to exclude suspicion and prevent inquiry. Furthermore, in evaluating the due-diligence element, the court should evaluate such acts of active concealment as a factor in determining whether the plaintiff's investigation was reasonable under the circumstances. Thus actions such as would deceive a reasonably diligent plaintiff will toll the statute; but those plaintiffs who delay unreasonably in investigating circumstances that should put them on notice will be foreclosed from filing, once the statute has run.

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Time Limitations

HN16[] **Statute of Limitations, Pleadings & Proof**

An unwillingness to provide information is not an "affirmative act" establishing fraudulent concealment for purposes of tolling a statute of limitations.

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Tolling

HN17[] **Statute of Limitations, Pleadings & Proof**

Fraudulent concealment for purposes of tolling a statute of limitations may be established through the acts of co-conspirators.

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Tolling

HN18[] **Statute of Limitations, Pleadings & Proof**

Although a court may dismiss a claim of fraudulent concealment for purposes of tolling a statute of limitations when it is obvious from the complaint that the plaintiff conducted absolutely no investigation with regard to due diligence, when there is some question as to the depth and scope of that investigation, a plaintiff should be allowed to proceed forward. Courts utilize a fact-based approach to the question whether reliance on oral assurances is a reasonable investigation under the circumstances.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN19[] **In Rem & Personal Jurisdiction, Constitutional Limits**

To comply with due process, a court's exercise of its power over an out-of-state defendant must not offend traditional notions of fair play and substantial justice. Personal jurisdiction comes in two varieties: specific jurisdiction, which is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction, and general, all-purpose jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Civil Procedure > Appeals > Standards of Review > General Overview

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

HN20[] **In Personam Actions, Challenges**

The plaintiff bears the burden of establishing that personal jurisdiction exists. In the face of a properly supported motion for dismissal, the plaintiff may not stand on his pleading but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction. A district court, in its discretion may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion, or it may conduct an evidentiary hearing to resolve any apparent factual questions. Where a district court never addresses personal jurisdiction, only the first option is available on appeal, in which case the plaintiff's burden is "relatively slight," and the appellate court must construe the facts in a light most favorable to the plaintiff. In addition, because weighing any controverted facts is inappropriate at the appellate stage, dismissal is proper only if the plaintiff's alleged facts collectively fail to state a prima facie case for jurisdiction.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN21[] **Sherman Act, Jurisdiction**

For Sherman Act claims, *15 U.S.C.S. § 22* authorizes service of process over an antitrust defendant wherever it may be found. When Congress has enacted such nationwide service of process statutes, personal jurisdiction exists whenever the defendant has sufficient minimum contacts with the United States to satisfy the due process requirements under the *Fifth Amendment*. This inquiry parallels the more traditional personal-jurisdiction analysis under which a defendant must have "minimum contacts" with the forum state pursuant to the state's long-arm statute.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN22[] In Personam Actions, Purposeful Availment

To establish specific personal jurisdiction, a plaintiff must adequately show the following elements: (1) the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action must arise from the defendant's activities there; and (3) the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN23[] Piercing the Corporate Veil, Alter Ego

The United States Court of Appeals for the Sixth Circuit has adopted the alter-ego theory of personal jurisdiction, which provides that a non-resident parent corporation is amenable to suit in the forum state if the parent company exerts so much control over the subsidiary that the two do not exist as separate entities but are one and the same for purposes of jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

Torts > Procedural Matters > Commencement & Prosecution > In Personam Jurisdiction

HN24[] In Personam Actions, Purposeful Availment

A plaintiff can establish personal jurisdiction when it alleges that the defendant "expressly aimed" tortious conduct at the forum in question and the "brunt of the harm" is felt there.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

Torts > Procedural Matters > Commencement & Prosecution > In Personam Jurisdiction

HN25[] In Personam Actions, Purposeful Availment

To satisfy the factor that a cause of action "arises from" a defendant's contacts with the forum, courts require only that the cause of action, of whatever type, have a substantial connection with the defendant's in-forum activities.

Counsel: ARGUED: David M. Schnorrenberg, CROWELL & MORING LLP, Washington, D.C., for Appellants.

William H. Rooney, WILLKIE FARR & GALLAGHER LLP, New York, New York, Eric Mahr, WILMER HALE, Washington, D.C., for Appellees.

ON BRIEF: David M. Schnorrenberg, CROWELL & MORING LLP, Washington, D.C., for Appellants.

William H. Rooney, WILLKIE FARR & GALLAGHER LLP, New York, New York, Eric Mahr, Caroline T. Nguyen, WILMER HALE, Washington, D.C., Robert L. Crawford, WYATT, TARRANT & COMBS, LLP, Memphis, Tennessee, for Appellees.

Judges: Before: MOORE and COOK, Circuit Judges; LUDINGTON, District Judge.*

Opinion by: KAREN NELSON MOORE

Opinion

[*434] **[***2]** KAREN NELSON MOORE, Circuit Judge. Plaintiffs-Appellants Carrier Corporation, Carrier SA, and Carrier Italia S.p.A. **[*435]** (collectively "Carrier") appeal the district court's dismissal of their claims under the Sherman Act and the Tennessee Trade Practices Act for lack of subject-matter jurisdiction and for failure to state a claim. **[**2]** Defendants-Appellees Outokumpu Oyj ("OTO"), Outokumpu Copper Products Oy ("OCP"), Outokumpu Copper (U.S.A.), Inc. ("Outokumpu U.S.A."), and Outokumpu Copper Franklin, Inc. ("Outokumpu Franklin") (collectively "Outokumpu"), and Mueller Industries, Inc. and Mueller Europe LTD cross-appealed, arguing that the district court's ruling can be affirmed on the alternative bases that Carrier's complaint is time-barred and that the district court lacked personal jurisdiction over Mueller Europe, OTO, and OCP. Carrier has since settled its claims with the two Mueller entities, and those defendants have been dismissed from this appeal. As to the remaining parties, we conclude that the district court had subject-matter jurisdiction over the present dispute and that Carrier's complaint is not time-barred. We further conclude that Carrier's complaint adequately states a Sherman Act claim against all of the Outokumpu Defendants and that the district court had personal jurisdiction over OTO and OCP individually. We therefore **REVERSE** district court's judgment as to all Outokumpu Defendants and **REMAND** for proceedings consistent with this opinion.

I. BACKGROUND

A. The Copper Tubing Market

Copper tubing normally **[**3]** is "divided into two main product groups." Joint Appendix ("J.A.") at 0036 (Am. Compl. ¶ 41). First, there are "plumbing tubes . . . which are used for water, oil, gas, and heating installations." *Id*. Second, there are **[***3]** "higher value-added industrial tubes." *Id*. The latter category is divided into several subgroups, the "most significant [of which] in terms of volume is tubing for airconditioning and refrigeration ("ACR") applications." *Id*. The present litigation concerns the market for ACR copper tubing.

Plaintiff Carrier Corporation is a Delaware corporation and Plaintiffs Carrier France SA and Carrier Italia S.p.A. are both subsidiaries of Carrier. Carrier, along with its affiliates, is "the world's largest manufacturer of air-conditioning and commercial refrigeration equipment" and consequently, one of the world's largest purchasers of ACR copper tubing. *Id*. ¶ 1. According to Carrier's complaint, Defendant OTO and its wholly owned subsidiary OCP are two Finnish companies that, during the relevant time period, produced or sold ACR copper tubing and, either directly or through their subsidiaries, imported it into the United States to sell to U.S. customers. *Id*. ¶¶ 22, 26. Carrier's **[**4]** complaint further states that Defendants Outokumpu U.S.A. and Outokumpu Franklin, both American subsidiaries of OCP, were "engaged in the production or sale of ACR Copper Tubing in the United States." *Id*. ¶ 23-24. And Outokumpu Franklin in particular allegedly sold "substantial quantities of ACR Copper Tubing to Carrier in

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* The Honorable Thomas L. Ludington, United States District Judge for the Eastern District of Michigan, sitting by designation.

the United States." *Id*. ¶ 24. The complaint further alleges that OTO "had effective control over the commercial policy and business decisions of its subsidiaries, and did business through its subsidiaries." *Id*. ¶ 25.[1]

B. The European Commission's 2003 and 2004 Decisions

Much of this lawsuit revolves around two decisions issued by the Commission of **[*436]** the European Communities ("EC"). The first **[**5]** came in December 2003, when the EC found that OTO and OCP, along with several other companies, participated in a conspiracy in which they "agreed on price targets and other commercial terms for industrial tubes, coordinated price increases, [and] allocated customers and market **[***4]** shares" in violation of European law. J.A. at 0283 (EC ACR Decision ¶ 2). The EC determined that this conspiracy lasted from at least May 3, 1988 to March 22, 2001. The EC's findings, however, do not identify any conspiratorial agreements with respect to U.S. markets.

In September 2004, a separate EC decision found a similar violation of European law in the market for plumbing tubes. The EC again found OTO and OCP liable, this time along with with Mueller Industries and Mueller Europe. J.A. at 0072 (EC Plumbing Decision ¶¶ 1-2). The EC decision emphasized, however, that "the arrangements pertaining to plumbing tubes on the one hand and those relating to industrial tubes on the other hand involved different companies (and employees), and were organised in a different way." *Id*. ¶ 5. Once again, the decision did not address any whether any conspiracy extended beyond the European markets.

C. The Present Litigation

In **[**6]** its amended complaint, Carrier essentially alleges that the European conspiracy uncovered by the EC was also directed at the U.S. market for ACR industrial tubes, thereby violating the Sherman Act and the Tennessee Trade Practices Act. Carrier is not the first plaintiff to make this allegation—the district judge in this case has also dismissed two similar cases involving essentially the same defendants. *See Am. Copper & Brass, Inc. v. Boliden AB*, No. 04-2771 DV (W.D. Tenn. Oct. 10, 2006) (unpublished opinion); *In re ACR Copper Tubing Litig*., No. 06-2207 (W.D. Tenn. July 26, 2007) (unpublished opinion).

Carrier specifically alleges that between 1988 and 2001, the Defendants conspired to raise the price for ACR tubing by developing "a customer and market allocation scheme" under which "Carrier's business in the United States was allocated to the Outokumpu defendants." J.A. at 21 (Am. Compl. ¶ 4). The other conspirators, including Wieland-Werke AG ("Wieland") and KM Europa Metal AG ("KME"), "agreed not to pursue" Carrier's U.S. business. *Id*. In return, Wieland and KME received Carrier's European business and the Outokumpu Defendants agreed not to aggressively pursue it. As a result of **[**7]** these agreements, Carrier maintains that it "paid **[***5]** artificially inflated and supra-competitive prices for ACR Copper Tubing in the United States, Europe and elsewhere." *Id*. ¶ 2.[2] Outokumpu, Wieland, and KME were able to do this, Carrier alleges, because "they were the three largest producers of ACR Copper Tubing in the world," which resulted in "circumstances [that] facilitated the conspiracy." *Id*. ¶ 5. Carrier also explains that Outokumpu, Wieland, and KME were eager to preempt alternative suppliers that could undercut their prices. To that end, "[t]hey enlisted the support of others in the conspiracy," including **[*437]** Mueller Industries and Mueller Europe. *Id*. ¶ 6. The Mueller entities agreed not to pursue Carrier's business in the ACR tubing market, and in return, the other conspirators allocated different markets to Mueller.

Carrier substantiates these claims in part by drawing from details found in the EC industrial-tubes decision. For instance, like the EC decision, the complaint alleges that Outokumpu and the other co-conspirators coordinated

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[1] As this case was pending, Carrier reached a settlement agreement with both of the Mueller entities. Thus, in accordance with ***Sixth Circuit Rule 33(b)*** and ***Federal Rule of Appellate Procedure 42(b)***, Mueller Industries, Inc. and Mueller Europe LTD have been dismissed from this appeal. *Carrier Corp. v. Outokumpu Oyj*, Nos. 07-6052, 07-6114 (6th Cir. Nov. 15, 2011) (unpublished orders). Cases Nos. 07-6115 and 07-6116 have also been dismissed. (6th Cir. Nov. 10, 2011) (unpublished order).

[2] On appeal, Carrier has limited its claims to purchases made within the United States. Carrier Br. 1 at 23 n.2.

their conspiracy through the biannual **[**8]** meetings of the trade association known as the Cuproclima Quality Association. In doing so, the complaint quotes various incriminating documents uncovered by the EC investigation, details the time and place of specific meetings, and also describes specific price targets set by the alleged conspirators.

Carrier's complaint also includes allegations that were not drawn from the EC decisions. Carrier argues that these allegations provide circumstantial evidence that the market-allocation scheme reached beyond the European markets and into the United States. Indeed, Carrier maintains that the market for ACR copper tubing was global in scope and, as further evidence of such an arrangement, points to an Outokumpu document uncovered in the EC investigation that references a "Global Agreement" between the co-conspirators. Along these lines, Carrier also reasons that any successful conspiracy must have involved the United States so as to prevent a multinational corporation like Carrier from "purchas[ing] all of the corporation's world-wide demand for ACR Copper Tubing in the United States and then ship[ping] those products to **[***6]** facilities world-wide." *Id*. ¶ 59. Thus, Carrier maintains that "Defendants **[**9]** and their co-conspirators singled out Carrier and other similarly situated companies by devising a unique global approach for fixing the prices of ACR Copper Tubing offered to Carrier." *Id*. ¶ 61. In support of this global conspiracy, Carrier further contends that Outokumpu scheduled yearly contract negotiations with U.S. customers that occurred after the fall Cuproclima meetings and during which the target prices and market allocations were set. Carrier also alleges that prices in the U.S. remained similar to those in other regions, which facilitated consistent pricing levels across the relevant markets. Likewise, Carrier claims that during the period between 1988 and 2001, none of Outokumpu's co-conspirators aggressively pursued business in one another's markets. But around 2003, after the cartel disbanded, Wieland and KME suddenly began soliciting Carrier's U.S. business.

In December 2006, Outokumpu moved to dismiss the amended complaint under *Federal Rules of Civil Procedure 12(b)(1)*, *12(b)(2)*, and *12(b)(6)*. The district court granted the motions on the basis that it lacked subject-matter jurisdiction over Carrier's Sherman Act claims. The district court justified the dismissal by **[**10]** observing that the complaint merely "'cut-and-pasted,'" J.A. at 926 (July 27, 2006 Dist. Ct. Order at 6), facts from the EC decisions in a manner that rendered it "'wholly insubstantial.'" *Id*. at 928. The district court was also troubled by the complaint's use of "facts from the plumbing tubing and ACR tubing investigations as if they described a single conspiracy," which the district court concluded "undermined any credibility the complaint otherwise possessed." *Id*. at 927. According to the district court, the plaintiffs did "further injury to their argument" by drawing facts from the EC's decisions when they supported Carrier's claims while disregarding contradictory information, such as the fact that "the EC findings were limited to European conduct." *Id*. Apparently for the same reasons that it lacked subject-matter **[*438]** jurisdiction, the district court also concluded that the case "lack[ed] a legitimate factual foundation" and therefore warranted dismissal under *Federal Rule of Civil Procedure 12(b)(6)*. *Id*. at 931. Carrier appealed, and the Defendants cross-appealed, raising additional grounds on which to uphold the district court's judgment.

[***7] II. ANALYSIS

A. Jurisdictional Prerequisites

Outokumpu **[**11]** first argues that the district court correctly found subject-matter jurisdiction lacking because Carrier's complaint was "wholly insubstantial." *See* Outokumpu Br. at 26. Although the district court's reasoning was premised on its determination that the complaint had no substance of its own, Outokumpu's argument extends that focus and also maintains that Carrier fails to allege any substantial U.S.-market involvement, a required element for extraterritorial jurisdiction under the Sherman Act.[3] We conclude that under either theory, Carrier's allegations were sufficient to demonstrate the court's jurisdiction for purposes of a motion to dismiss.

[3] Outokumpu also argues that the district court lacked subject-matter jurisdiction because the alleged conspiracy did not have a "direct, substantial, and reasonably foreseeable effect" on United States commerce as is required under the Foreign Trade Antitrust Improvements Act of 1992 ("FTAIA"). *15 U.S.C. § 6a*. ***HN1***[] The FTAIA, however, specifically exempts from its reach

1. Jurisdiction Under the Sherman Act

Since Judge Learned Hand's leading opinion in *United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945)*, which proposed the need for practical limitations on the Sherman Act that would avoid global overreaching, ***HN2***[] it has been generally established that the so-called "effects test" limits the Sherman Act "to those acts (1) that 'significantly' or 'directly' affect United States commerce, or (2) that are intended to have an effect, or (3) that are both intended to have and do have such an effect." IB Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 272d, at 279-80 (3d **[***8]** ed. 2006) (citing *Alcoa, 148 F.2d at 443-44*). These standards have since been widely incorporated into U.S. jurisprudence. Indeed, "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." **[*439]** *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*. The Supreme Court, however, has not delineated the precise bounds of the effects **[**14]** test, and lower courts are not in agreement as to its exact scope. *Cf. generally* *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd., 299 F.3d 281, 286 (4th Cir. 2002)* (addressing the scope of the effects test and discussing the complexities inherent in applying the test in cases such as this one, which involve a "mixture of foreign and domestic elements"). Nonetheless, we need not undertake that task at present because, regardless of the precise standard, Carrier has sufficiently alleged any threshold effect on U.S. commerce necessary to survive a motion to dismiss.

Hartford Fire involved Sherman Act claims by U.S. states and private domestic insurers alleging that a group of mainly foreign reinsurers conspired to limit coverage of certain casualty risks in a manner that would effectively prevent the domestic insurers from offering coverage for those risks in certain state markets. *509 U.S. at 795*. Without laying out its reasoning, the Court accepted the reinsurers' concession that jurisdiction existed under the Sherman Act, even though the claims plainly involved "foreign conduct." *Id. at 796-97*.[4] **[*440]** The alleged impact

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"import commerce" with foreign entities. *Id*. According to *F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 162, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*, the FTAIA "initially lays down a general rule placing all **[**12]** (non-import) activity involving foreign commerce outside the Sherman Act's reach" and then selectively brings some categories of that excluded conduct back within the Sherman Act's strictures. *See also* IB Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 272i4, at 307-08 (3d ed. 2006). Areeda and Hovenkamp, in turn, have indicated that "[f]oreign import commerce involves transactions in which the seller is located abroad while the buyer is domestic and the goods flow into the United States." *Id*. at 290.

Carrier's claim here is limited to its domestic purchases, and thus, does not involve the type of foreign commerce that would be implicated by the FTAIA. As a result, even if the FTAIA does present a jurisdictional limitation—a question that we do not decide here—it does not apply to this case. *Cf.* *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd., 299 F.3d 281, 287 (4th Cir. 2002)* (concluding, in a case involving mainly foreign producers selling rubber thread in the United States and elsewhere, that the FTAIA did not apply "[b]ecause this case involves importation of foreign-made goods, . . . conduct Congress *expressly exempted* from FTAIA coverage as 'involving . . . import trade or import **[**13]** commerce . . . with foreign nations'" (third and fourth alterations in original)), *cert. denied*, ***539 U.S. 969, 123 S. Ct. 2638, 156 L. Ed. 2d 675 (2003)***.

[4] We note that there is some confusion whether the Sherman Act's requirements in fact speak to subject-matter jurisdiction. The genesis of this confusion arises from the Supreme Court's description of the extraterritorial scope of the Sherman Act in *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n.22, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*, as relating to "jurisdiction." At the time, Justice Scalia's dissent disputed that characterization and sought to clarify that the term did not refer to the court's subject-matter jurisdiction and instead referenced the prerequisites for stating a claim on the merits. *See* *id. at 813* (Scalia, J. dissenting); *cf.* *Restatement (Third) of Foreign Relations Law § 401 cmt. c* **[**16]** (1987) (indicating that the term "subject matter jurisdiction" may be used both in the context of Congress's power to prescribe legislation and in the context of a court's "jurisdiction to adjudicate"). Although *Hartford* did not squarely address the issue, many lower courts nonetheless continue to treat the Sherman Act's extraterritorial limitations as jurisdictional rather than as elements of a federal antitrust claim. *See, e.g.,* *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1268-69, 368 U.S. App. D.C. 18 (D.C. Cir. 2005)*, *cert. denied*, ***546 U.S. 1092, 126 S. Ct. 1043, 163 L. Ed. 2d 857 (2006)***; *United States v. LSL Biotechnologies, 379 F.3d 672, 677-79 (9th Cir. 2004)*; *United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 948 (7th Cir.)*, *cert. denied*, ***540 U.S. 1003, 124 S. Ct. 533, 157 L. Ed. 2d 408 (2003)***. Recent Supreme Court decisions, however, raise significant questions about the wisdom of that approach.

on U.S. markets in this case is equally, **[***9]** if not more, direct. Carrier alleges **[**15]** that the U.S. market was intertwined in the conspirators' allocation efforts and that the result of that agreement was to raise prices artificially for ACR copper tubing for transactions between the co-conspirators and buyers in the United States. J.A. at 0039-40 (Am. Compl. ¶¶ 51, 54). Taking those allegations as true, as we must do at this stage in the litigation, we have no hesitation in concluding that Carrier's complaint meets any threshold jurisdictional requirement imposed by the Sherman Act on claims involving foreign conduct.

2. Subject-Matter Jurisdiction

Because Carrier has met any required threshold for stating a claim against a foreign entity under the Sherman Act, we proceed to consider whether the complaint **[**18]** can survive Outokumpu's and the district court's assertion that the allegations were insufficient to survive Outokumpu's *Federal Rule of Civil Procedure 12(b)(1)* challenge.

HN3[] Challenges to subject-matter jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)* "come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prods. v. Sherwin-Williams Co., 491 F.3d 320, 330 (6th Cir. 2007)*. Under a facial attack, all of the allegations in the complaint must be taken as true, much as with a *Rule 12(b)(6)* motion. *Id.* When the district court relies on a facial analysis, we review its findings de novo. *Lovely v. United States, 570 F.3d 778, 781 (6th Cir. 2009)*, *cert. denied*, *130 S. Ct. 1054, 175 L. Ed. 2d 883 (2010)*. Under a factual attack, however, the court can actually weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction. *RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1134 (6th Cir. 1996)*; *see also* 2 James Wm. Moore, *Moore's Federal Practice § 12.30[4]* (3d ed. 2000) ("[W]hen a court reviews a complaint under a factual attack, the allegations have no presumptive truthfulness, and the court that **[**19]** must **[***10]** weigh the evidence has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts."). When the district court does so, we review its findings for clear error. *Lovely, 570 F.3d at 781-82*. Outokumpu has presented arguments for both a facial and factual challenge to subject-matter jurisdiction, and we address each in turn.

a. Outokumpu's Facial Attack

HN4[] In order for Carrier's complaint to allege jurisdiction adequately, it must contain non-conclusory facts which, if true, establish that the district court had jurisdiction over the dispute. *O'Bryan v. Holy See, 556 F.3d 361, 375-76 (6th Cir.)*, *cert. denied*, *130 S. Ct. 361, 175 L. Ed. 2d 27 (2009)*. The district court dismissed Carrier's complaint on the basis that it is "wholly insubstantial." J.A. at 0930 (Dist. Ct. Op. at 10). We, however, disagree that this case presents one of the rare instances that permit a district court to dismiss a complaint because "the plaintiff's claims are clearly immaterial, made solely for the purpose of obtaining jurisdiction or are wholly unsubstantiated and frivolous." *Gentek, 491 F.3d at 332* (internal quotation marks omitted).

After *Hartford*, the Supreme Court has been much more wary of labeling statutory requirements as "jurisdictional." Seeking to create a "readily administrable bright line," the Court has since set out the general rule that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional **[**17]** in character." *Arbaugh v. Y & H Corp., 546 U.S. 500, 516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)*; *see also* *Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1244, 176 L. Ed. 2d 18 (2010)*. Moreover, in *Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2877, 177 L. Ed. 2d 535 (2010)*, the Court determined that questions concerning the extraterritorial application of *§ 10(b)* of the Securities Exchange Act of 1934, which has language that somewhat mirrors that in the Sherman Act, were not jurisdictional. These decisions have thus questioned the precedential value of the types of "drive-by jurisdictional rulings," *Arbaugh, 546 U.S. at 511* (internal quotation marks omitted), seen in cases like Hartford. *Cf. generally Howard* M. Wasserman, Colloquy Essay, *The Demise of "Drive-By Jurisdictional Rulings*," *105 NW. U. L.REV. 947 (2011)*. Nonetheless, because the parties have not addressed this issue directly, and because our decision does not hinge on further elucidation of the meaning of "jurisdiction" in this context, we will save the resolution of this issue for another day.

Carrier's complaint describes, **[**20]** in some detail, an elaborate worldwide conspiracy in which the U.S. market for ACR copper tubing was assigned to Outokumpu. Furthermore, Carrier alleges that this conspiracy caused the price of goods purchased within the United States to increase, which in turn caused a direct antitrust injury. In support of these allegations, the complaint references numerous specific dates **[*441]** during which the Cuproclima cartel met and the various agreements its members entered into. Assuming that these allegations are true, as we must, we conclude that Carrier has met any applicable requirement that it allege a non-conclusory effect on U.S. commerce. *Cf. Hartford, 509 U.S. at 795-97* (finding jurisdictional requirements easily satisfied when complaint alleged that "London reinsurers . . . conspired to coerce primary insurers in the United States to offer" certain forms of coverage—a claim that alleged both an impact on the U.S. insurance market and that the reinsurers' "conduct in fact produced substantial effect").

[*11]** Outokumpu, which attached the full EC decision to its motion to dismiss, counters that many of the details contained in the complaint are drawn from the EC industrial-tube decision that found **[**21]** no evidence that the cartel's focus extended beyond Europe. Like the district court, Outokumpu argues that Carrier's complaint includes misleading quotes from the EC decision and omits language explaining that the conspiracy applied only to European markets. As a consequence, Outokumpu argues that any details regarding specific meetings and agreements occurring during the Cuproclima meetings are of no assistance to Carrier because they relate only to a European conspiracy. Furthermore, when those portions of the complaint are excluded, as Outokumpu insists they must be, Carrier is left with nothing more than conclusory allegations.

We are unpersuaded by this argument. Initially, Outokumpu overstates the degree to which Carrier's complaint conflicts with the EC decision. For instance, as Carrier points out, the EC industrial-tubes decision clearly states that "[i]nsofar as the activities of the cartel relate[] to sales in countries that are not members of the Community . . . they lie outside the scope of this Decision." J.A. at 0332 (EC ACR Decision ¶ 229). Thus, any silence on the part of the EC decision as to U.S. markets may simply reflect the limited scope of the decision. Outokumpu **[**22]** responds that "even a cursory review of the EC's cartel decisions makes clear that Commission decisions addressing cartels that extend beyond Europe regularly describe the entire geographic scope of the cartel." Outokumpu Br. 2 at 47. But the mere fact that the EC does at times look beyond Europe should not trump its otherwise explicit statement that it is not concerned with outside markets.[5]

In addition, to the extent that there is a conflict between Carrier's allegations and the EC decision, we do not agree that Carrier is bound by the EC's findings. ***HN5***[] Ordinarily, "[d]ocuments that a defendant attaches to a motion to dismiss are considered **[***12]** part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997)* **[**23]** (alteration in original) (internal quotation marks omitted). The general rule is that "[i]f inconsistent with the allegations of the complaint, the exhibit controls." *Mengel Co. v. Nashville Paper Prod. & Specialty Workers Union, No. 513, 221 F.2d 644, 647 (6th Cir. 1955)*. We have recognized, however, that it is not always appropriate to "assume everything [in an exhibit] is true." *Jones v. City of Cincinnati, 521 F.3d 555, 561 (6th Cir. 2008)*, *cert. denied*, *555 U.S. 1099,* ***[*442]*** *129 S. Ct. 909, 173 L. Ed. 2d 109 (2009)*. In particular, although "[a] blanket adoption rule makes sense in the context of an attached contract or loan agreement because the contract represents an agreement between two or more parties to which the law binds them," the rule makes much less sense when, as is the case here, the exhibit is not a legally dispositive document. *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 455 (7th Cir. 1998)*. When an exhibit is a contract, it is reasonable to consider the entire document because the contract has independent legal significance. Here, however, Outokumpu is citing the EC's findings not merely to prove their existence but rather to prove the truth of the matters asserted within them. **[**24]** *See Jones, 521 F.3d at 561* (finding that transcripts of an interview attached to the plaintiff's complaint could be considered as an allegation that those statements were made, but the truth of those statements could not be considered on a motion to dismiss). To permit such a tactic would allow Outokumpu impermissibly to question the evidentiary foundation of Carrier's

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[5] The Defendants further argue that, in any event, the EC decision provides no "positive" support for a finding of a U.S. conspiracy. Outokumpu Br. 4 at 10. But Carrier need not provide any additional support for its assertions. Carrier has directly alleged that the Defendants engaged in an unlawful U.S.- focused market-allocation scheme; it need not offer any additional evidentiary support at the pleading stage.

complaint, thereby depriving Carrier of the presumption of truth to which it is entitled at this stage of litigation. Indeed, Carrier should be free to draw facts from the EC decision to provide a "starting point" and then use those facts to construct a theory that differs from or even contradicts that of the EC. Carrier Br. 3 at 10 (emphasis omitted).[6]

[*13]** Furthermore, Carrier offers additional circumstantial allegations that corroborate its claim that the market-allocation scheme extended to the United States. Although Carrier's complaint provides numerous circumstantial allegations, of particular interest is its claim that Wieland and KME initially refrained from aggressively competing for Carrier's U.S. business until 2003, and then suddenly began doing so at that time. It is true that the mere fact that competitors do not intrude upon one another's markets does not necessarily mean that an illegal market-allocation scheme is taking place. *See* *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 567-78, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. When two companies refrain from entering a market and then suddenly do so after a cartel dissolves, however, there are good grounds for suspicion. Defendants question why it is that KME and Wieland waited until two years after the Cuproclima conspiracy dissolved to enter **[**26]** the United States if all that was stopping them was a supposed allocation conspiracy. It is certainly plausible, however, that these two companies would require time to reconfigure their operations so as to enable themselves to enter a new market. Similarly, 2003 is the year in which the EC's industrial-tubes investigation came to a close, and it is plausible for KME and Wieland to wait until that moment before engaging in what could be viewed as suspicious activity.

This analysis demonstrates that, contrary to Outokumpu's argument— **[*443]** and the district court's conclusion—Carrier's complaint does not fall within the rare exception created by *Bell v. Hood, 327 U.S. 678, 682-83, 66 S. Ct. 773, 90 L. Ed. 939 (1946)*, which permits district courts to dismiss complaints that are "wholly insubstantial and frivolous." *See also* *Musson Theatrical, Inc. v. Fed. Express Corp., 89 F.3d 1244, 1248 & n.1 (6th Cir. 1996)* (stating that "[w]hen a 12(b)(1) motion attacks the face of a complaint . . . [t]he plaintiff must show only that the complaint alleges a claim under federal law, and that the complaint is "substantial," and defining "substantial" as "non-frivolous"). The exception on which Outokumpu and the district court relied is **[**27]** quite narrow and ordinarily reserved for extremely weak claims. *See, e.g.,* *Moore v. Lafayette Life Ins. Co., 458 F.3d 416, 444 (6th Cir. 2006)* (explaining that the rule from *Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946)*, should apply "only where the plaintiff's claim has no plausible foundation or is clearly foreclosed by a prior Supreme Court decision" (internal quotation marks omitted)); **[***14]** *Apple v. Glenn, 183 F.3d 477, 478-79 (6th Cir. 1999)*, *cert. denied*, *528 U.S. 1198, 120 S. Ct. 1263, 146 L. Ed. 2d 118 (2000)* (affirming dismissal due to lack of jurisdiction in a case in which the plaintiff "sued Senator John Glenn, Chief Justice William Rehnquist, and other top government officials, claiming that the defendants violated his *First Amendment* right to petition the government because they did not answer his many letters or take the action requested in those letters.").

The district court concluded that Carrier's complaint falls within the exception because it "cut-and-pasted" many sections of the EC decisions. As explained above, however, the mere fact that the complaint borrows its substance from the EC decision and then builds on the EC's findings does not render its allegations any less valid. Furthermore, even if all of the facts **[**28]** taken from the EC decisions were stripped from the complaint, Carrier's complaint still offers additional allegations, such as its claims regarding KME and Wieland's sudden entry into the U.S. market. As even the district court noted, portions of Carrier's complaint "create[d] a close approximation of [the] factual predicate" needed to establish its claim. J.A. at 927 (Dist. Ct. Order at 7). Under such circumstances, Carrier's complaint comes nowhere near the level of frivolity required by the "wholly insubstantial and frivolous" exception, and the district court erred in dismissing the case on that basis.

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[6] The Defendants maintain that the district court was permitted to take judicial notice of the EC decisions. They also argue that judicial notice is a permissible basis for considering a letter submitted by EC Director Kirtikumar Mehta, which reiterated that the scope of the EC industrial-tubes decision was "limited to the European territory." J.A. at 0919 (Mehta Letter at 1). But here again, judicial notice would be appropriate only to prove the fact that the decisions **[**25]** and the letter existed, not the truth of the matters stated therein. *Scotty's Contracting & Stone, Inc. v. United States, 326 F.3d 785, 790 n.1 (6th Cir. 2003)* (***HN6***[]) "[J]udicial notice of a fact is generally only appropriate when there is no dispute regarding the fact.").

b. Outokumpu's Factual Attack

Outokumpu further argues that, even if Carrier's complaint facially appears to plead a U.S.-focused conspiracy, to the extent that the district court made factual findings in applying the "wholly insubstantial" standard and making its determination that the allegations lacked the requisite "U.S. nexus," we should review that analysis using the standards for a factual attack. Outokumpu Br. 2 at 55 n.17.

We first note that it is unclear whether the district court here made any findings of fact. Indeed, the court never explicitly stated that it was doing so. **[**29]** The court did, however, assess the complaint's "credibility," J.A. at 927 (Dist. Ct. Op. at 7), and referenced its own power to "mak[e] reasonable inquiry into the facts," *id*. at 929 (Op. **[***15]** at 9). Therefore, we assume that the district court found, as a matter of fact, that the conspiracy alleged in Carrier's complaint did not target U.S. markets.

HN7[] "[A] district court engages in a factual inquiry regarding the complaint's allegations only when the facts necessary to sustain jurisdiction do not implicate the merits of the plaintiff's claim." *Gentek, 491 F.3d at 330*. In other words, the **[*444]** district court is prohibited from making factual findings with respect to a jurisdictional issue when such a finding would adversely affect the merits of the plaintiff's case. *Id. at 331*. When "an attack on subject-matter jurisdiction also implicates an element of the cause of action, then the district court should *find that jurisdiction exists* and deal with the objection as a direct attack on the merits of the plaintiff's claim." *Id. at 330* (internal quotation marks omitted).

HN8[] In the context of Sherman Act claims against foreign defendants, the extent of U.S.-market impact affects more than a court's jurisdiction; **[**30]** it also speaks to whether there is "sufficient injury or anticompetitive effect to establish liability." *Restatement (Third) of Foreign Relations Law § 415*, reporter's note 3 (1987). Thus, as Areeda and Hovenkamp have observed, the "'jurisdictional' and 'substantive' inquiries are not wholly independent." IB Areeda & Hovenkamp ¶ 273, at 326. That being the case, to the extent that the district court did render a factual finding, any such finding was improper. *Cf. Hartford, 509 U.S. at 796 n.21* (explaining that the court was "bound to credit" allegations that foreign defendants conspired to coerce American insurers, the very conduct upon which the court found the requisite "substantial effect" to be based).

In conclusion, we hold that the district court did not lack subject-matter jurisdiction over Carrier's complaint. We therefore proceed to an evaluation of the merits of Outokumpu's *Federal Rule of Civil Procedure 12(b)(6)* motion to dismiss for failure to state a claim.

[*16] B. The Outokumpu Defendants' *Rule 12(b)(6)* Motion**

The Defendants next argue that Carrier's complaint fails to state a claim. ***HN9***[] We review de novo a district court's decision to grant a *Rule 12(b)(6)* motion. *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc., 648 F.3d 452, 456 (6th Cir. 2011)*. **[**31]** "We 'construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Id. at 456* (quoting *In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 902 (6th Cir. 2009)*, *cert. denied*, *131 S. Ct. 896, 178 L. Ed. 2d 746 (2011))*.

HN10[] To survive a motion to dismiss under *Rule 12(b)(6)*, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. In *Bell Atlantic Corp. v. Twombly*, however, the Supreme Court emphasized that it is not enough merely to plead a set of facts "consistent with" a claim to relief; there must also be enough "factual enhancement" to "nudge [the] claim[] across the line from conceivable to plausible." *550 U.S. at 557, 570*. To conduct this analysis, a court should first identify factual allegations that are entitled to a presumption of truth—that is, those allegations that are more than just legal conclusions. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1950-51, 173 L. Ed. 2d 868 (2009)*. Then the court should "consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." **[**32]** *Id. at 1951*.

Carrier's claim falls under **HN11**[] § 1 of the Sherman Act, which prohibits conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Here, the parties focus on the existence of a conspiracy impacting U.S. markets. Carrier's **HN12**[] complaint attempts to establish a Sherman Act violation by alleging "an explicit agreement to restrain trade," and therefore must "'plausibly **[*445]** suggest[],' rather than be 'merely consistent with,' an agreement to restrain trade in violation of the Sherman Act." *Watson, 648 F.3d at 457* (quoting *In re Travel Agent Comm'n Antitrust Litig., 583 F.3d at 908*). To survive a motion to dismiss, these allegations must be specific enough to establish the relevant "who, what, where, when, how or why." *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 437 (6th Cir. 2008)* **[***17]** (internal quotation marks omitted). Furthermore, they must "specify how [each] defendant [was] involved in the alleged conspiracy." *In re Travel Agent Comm'n Antitrust Litig., 583 F.3d at 905*.

Outokumpu first reiterates its previous argument that the alleged conspiracy had no effect on the United States. That argument, **[**33]** however, fails for the same reasons as did Outokumpu's challenge to this court's subject-matter jurisdiction under the Sherman Act's effects test. Furthermore, as was also detailed above, the allegations extend well beyond the conclusory "if it happened there, it could have happened here" argument that has been rejected in other courts. *In re Elevator Antitrust Litig., 502 F.3d 47, 52 (2d Cir. 2007)*.

Outokumpu's U.S. entities—Outokumpu U.S.A. and Outokumpu Copper Franklin—then argue that there are insufficient allegations as to their specific involvement in the conspiracy. The two U.S. entities' argument stems from Carrier's frequent use of blanket references to the "Outokumpu defendants," without always specifying the role that each corporate entity played in the conspiracy. Outokumpu U.S.A. and Outokumpu Copper Franklin further note that neither EC decision mentions their involvement. In addition, the complaint does not specifically identify either company as a member of the Cuproclima conspiracy.

Even in the absence of direct allegations that Outokumpu's U.S. entities were coconspirators at Cuproclima, however, the court may look beyond those entities' corporate forms if the complaint **[**34]** presents facts to support a determination that the subsidiaries were alter egos of the parent corporation. *Cf. Opdyke Inv. Co. v. City of Detroit, 883 F.2d 1265, 1272 (6th Cir. 1989)* ("It is true that the parent and subsidiary companies . . . were separately incorporated, but they must be treated as a single entity under the antitrust laws." (citing *Copperweld Corp. v. Independence Tube Corp, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*); *Bhd. of Locomotive Engineers v. Interstate Commerce Comm'n, 909 F.2d 909, 914 (6th Cir. 1990)* (indicating that a wholly controlled subsidiary may be an "alter ego" of the parent company depending on the facts of a particular case). Thus, the **[***18]** question becomes whether OTO and OCP's control over the U.S. entities was sufficiently extensive to permit imputation of the conspiracy to the U.S. entities.

For purposes of the motion to dismiss, Carrier's allegations are sufficient to support such a determination. The complaint identifies that the U.S. entities are responsible for selling the overpriced tubing directly to Carrier, stating, for instance, that "[d]uring the Relevant Period, [Outokumpu Copper Franklin] sold substantial quantities of ACR Copper Tubing to Carrier in the **[**35]** United States." J.A. at 0028 (Am. Compl. ¶ 24). The complaint also identifies Outokumpu U.S.A. as "engaged in the production or sale of ACR Copper Tubing in the United States, Europe, and elsewhere, directly and/or through its affiliates and/or wholly-owned subsidiaries during the Relevant Period." *Id*. ¶ 23. More importantly, however, Carrier has alleged **[*446]** that the various Outokumpu entities were operated and deliberately portrayed to the outside world as a "single global enterprise" in which key executives overlapped between the U.S. and European entities and vital management personnel rotated through positions on both sides of the Atlantic. *Id*. ¶¶ 27-30. Under such circumstances, requiring Carrier to delineate in the complaint the role each subsidiary played in the conspiracy is unnecessary,[7] and Carrier's allegations against Outokumpu's U.S. entities are sufficient to survive the motion to dismiss.

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[7] Outokumpu again reiterates its argument that Carrier's allegations are inconsistent with the findings in the EC decision. Specifically, Outokumpu points to statements limiting the Cuproclima cartel to European customers. As discussed above, this is unsurprising given that the scope of the **[**36]** EC's decision was limited to Europe and therefore did not implicate Outokumpu's U.S. entities. Thus, as stated in Section II.A.1, our review is not constrained by the EC's decision to refrain from considering the existence of agreements beyond the European markets.

C. Statute of Limitations and Personal Jurisdiction

Turning to the cross-appeal, Outokumpu next argues that Carrier's complaint is time-barred and that the district court lacked personal jurisdiction over OTO and OCP. Because it decided the case on other grounds, the district court did not address either of these issues in its dismissal order.

[*19]** As an initial matter, ***HN13***[] "[i]t is the general rule . . . that a federal appellate court does not consider an issue not passed upon below." *Katt v. Dykhouse, 983 F.2d 690, 695 (6th Cir. 1992)* (alteration in original) (quoting *Singleton v. Wulff, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976))*. We make an exception, however, for cases such as this one in which "the issue[s are] presented with sufficient clarity and completeness and [their] resolution will materially advance the progress of . . . already protracted litigation." *Id*. (internal quotation marks omitted). This litigation has been ongoing since 2006, **[**37]** and both Outokumpu and Carrier have fully briefed the statute-of-limitations and personal-jurisdiction issues. We therefore think it appropriate to address Outokumpu's arguments.

1. Statute of Limitations

HN14[] A Sherman Act claim must be brought "within four years after the cause of action accrued." *15 U.S.C. § 15b*. The Amended Complaint indicates that the conspiracy ended in 2001. Carrier did not file its first complaint, however, until March 2006. Nonetheless, Carrier argues that the statute of limitations should be tolled under the doctrine of fraudulent concealment.

HN15[] "Three elements must be pleaded in order to establish fraudulent concealment: (1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)*. A plaintiff must plead the factual allegations underlying a claim of fraudulent concealment with particularity. *Friedman v. Estate of Presser, 929 F.2d 1151, 1160 (6th Cir. 1991)*. With regard to the "wrongful concealment" **[**38]** element the plaintiff must point to "affirmative acts of concealment." *Hamilton Cnty. Bd. of Comm'rs v. Nat'l Football League, 491 F.3d 310, 319 (6th Cir. 2007)*. "[M]ere silence or unwillingness to divulge wrongful activities is not sufficient." *Browning v. Levy, 283 F.3d 761, 770 (6th Cir. 2002)*. Instead, there must be some "'trick or **[*447]** contrivance intended to exclude suspicion and prevent inquiry.'" *Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1467 (6th Cir.)*, *cert. denied*, *488 U.S. 880, 109 S. Ct. 196, 102 L. Ed. 2d 166 (1988)* (quoting *Wood v. Carpenter, 101 U.S. (11 Otto) 135, 143, 25 L. Ed. 807 (1879))* **[***20]** . Furthermore, in evaluating the due-diligence element, the court should evaluate such acts of active concealment as a factor in determining whether the plaintiff's investigation was reasonable under the circumstances. *Campbell v. Upjohn Co., 676 F.2d 1122, 1128 (6th Cir. 1982)*. Thus "[a]ctions such as would deceive a reasonably diligent plaintiff will toll the statute; but those plaintiffs who delay unreasonably in investigating circumstances that should put them on notice will be foreclosed from filing, once the statute has run." *Id*.

Here, Carrier's complaint points to numerous instances in which the conspirators[8] **[**39]** actively tried to hide their conduct. Some of these allegations lack any specificity, and therefore fall short of meeting the standard required to support a claim of fraudulent concealment. For instance, the complaint alleges that in 2001, after the EC began investigating Outokumpu, Outokumpu denied any wrongdoing. As stated above, however, ***HN16***[] an unwillingness to provide information is not an "affirmative act." Furthermore, the complaint alleges that the Defendants "utiliz[ed] covert meetings" and "[gave] false and pretextual reasons for the pricing of ACR Copper Tubing sold . . . during the Relevant Period and [described] such pricing falsely as being the result of competitive

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[8] Although Carrier does not always specify whether Outokumpu engaged in the relevant concealment, this is irrelevant because ***HN17***[] "[f]raudulent concealment . . . may be established through the acts **[**40]** of co-conspirators." *In re Scrap Metal Antitrust Litig., 527 F.3d 517, 538 (6th Cir. 2008)*, *cert. denied*, ***556 U.S. 1152, 129 S. Ct. 1673, 173 L. Ed. 2d 1037 (2009)***.

factors rather than collusion." J.A at 0051-52 (Am. Compl. ¶ 104(a), (c)). This also lacks the requisite particularity, as it fails to specify "the time, place, and content of the alleged" fraudulent acts. U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 505 (6th Cir. 2007) (internal quotation marks omitted).

Other portions of the complaint, however, provide specific details regarding the nature of the alleged cover-up. For example, the complaint quotes the EC's findings that the conspirators "'established security rules to prevent a paper trail . . . and used a coding-system to hide the identity of the producers in their documents and spreadsheets.'" J.A. at 0052 (Am. Compl. ¶ 105). In contrast to those discussed above, these allegations—especially when coupled with the details referenced in the cited **[***21]** portion of the EC decision and associated cross-references—are sufficiently particular to meet the pleading standard for fraudulent concealment. *See* J.A. at 0330 (EC ACR Dec. ¶ 218); *In re Elec. Carbon Prods. Antitrust Litig., 333 F. Supp. 2d 303, 316 (D.N.J. 2004)* (concluding that a plaintiff "injected precision" into its fraudulent-concealment claim "by pleading the findings of the United States Department of Justice and the European Commission" (internal quotation marks omitted)). Furthermore, such conduct is sufficiently affirmative for purposes of satisfying **[**41]** the "wrongful concealment" element because the alleged actions involved taking active steps to hide evidence, as opposed to simply meeting in secret. *See* Bridgeport Music, Inc. v. Diamond Time, Ltd., 371 F.3d 883, 891 (6th Cir. 2004) (explaining that "hiding evidence" can constitute affirmative concealment). Finally, Carrier alleges that because of the co-conspirators' **[*448]** misstatements and attempts at suppressing evidence of illegal conduct, it had no knowledge of the Defendants' conspiracy until the release of the EC decision on December 16, 2003. Taken as true, these actions would have both concealed from Carrier the very "means of discovering [its] cause of action," Campbell, 676 F.2d at 1127, and prevented Carrier from discovering the basis for its antitrust claim within the limitations period. Carrier has thus adequately pleaded the first two prongs of a fraudulent-concealment claim.

As for the third prong of Dayco—Carrier's due diligence—Carrier's complaint acknowledges that it was aware that the EC was investigating Outokumpu for antitrust violations as early as 2001. This would appear to be enough to place Carrier on inquiry notice, which in turn would require Carrier diligently **[**42]** to investigate its possible claim. Dayco, 523 F.2d at 394 (holding that government investigation into alleged antitrust violations prompted duty to investigate). Despite Carrier's failure to uncover the cartel, however, Carrier's complaint sufficiently alleges "reasonable diligence" in the investigation it undertook upon learning of the possible conspiracy. Indeed, this is not a instance in which the plaintiff presented a "mere allegation of due diligence without asserting what steps were taken." *Id*. Rather, Carrier alleges that prior to December 2003, an employee with the Global Purchasing Department named Fred Benedict contacted several copper tubing suppliers to ask them about the alleged conspiracy, but was unable to procure any information. Carrier's examination of the defendants' public **[***22]** statements and filings also turned up no information relating to a possible cartel or other anticompetitive conduct. Later, after acquiring additional information from the EC decision, which Carrier asserts "provided the first means for beginning an analysis of cartel behavior and its effect on Carrier," Carrier alleges that it retained both outside counsel and an economic consultant to conduct **[**43]** a more thorough investigation. J.A. at 0055 (Am. Compl. ¶ 111). We are not prepared to conclude that such efforts were insufficient to satisfy *Dayco*'s "due diligence" requirement at such an early stage of litigation and without the benefit of discovery. *Cf.* Jones v. TransOhio Sav. Ass'n, 747 F.2d 1037, 1043 (6th Cir. 1984) (noting the panel's reluctance to dismiss fraudulent-concealment allegations prior to discovery); Duncan v. Leeds, 742 F.2d 989, 993 (6th Cir. 1984) (addressing the need to construe allegations of fraudulent concealment liberally and in the plaintiff's favor at such an early stage in the litigation). **HN18**[] Although we may dismiss a claim of fraudulent concealment when it is obvious from the complaint that the plaintiff conducted absolutely no investigation, *see, e.g.,* Ruth v. Unifund CCR Partners, 604 F.3d 908, 911-14 (6th Cir. 2010), when there is some question as to the depth and scope of that investigation, a plaintiff should be allowed to proceed forward.[9] We therefore conclude **[*449]** that, taking the allegations in Carrier's favor

[9] Outokumpu argues that the panel's decision in Gumbus v. United Food & Commercial Workers Int'l Union, Nos. 93-5113, 93-5235, 1995 U.S. App. LEXIS 523, 1995 WL 5935 (6th Cir. Jan. 6, 1995), *cert. denied*, ***516 U.S. 811, 116 S. Ct. 61, 133 L. Ed. 2d 24 (1995)***, is to the contrary. We are not bound by *Gumbus*, however, as it is an unpublished decision. Moreover, our previous cases—including Campbell v. Upjohn Co., 676 F.2d 1122 (6th Cir. 1982), which *Gumbus* cites in support of the proposition that inquiry to company officials is insufficient to constitute due diligence—have not suggested that reliance on

as we must at this stage in the litigation, Carrier has adequately pleaded its fraudulent-concealment claim, and its cause of action should not **[**44]** be dismissed as time-barred.

[*23] 2. Personal Jurisdiction**

Finally, we address OTO and OCP's argument concerning personal jurisdiction. ***HN19***[] "To comply with due process, a court's exercise of its power over an out-of-state defendant must not offend traditional notions of fair play and substantial justice." *Indah v. U.S. Sec. & Exchange Comm'n, 661 F.3d 914, 920 (6th Cir. 2011)* (quoting *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945))* (internal quotation marks omitted). Personal jurisdiction comes in two varieties: specific jurisdiction, which "'is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction,'" and "'general, all-purpose jurisdiction.'" *Id*. (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown, __ U.S. __, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011))*.

HN20[] "The plaintiff bears the burden of establishing that [personal] jurisdiction exists." *Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991)*. "[I]n the face of a properly supported motion for dismissal, the plaintiff may not stand on his pleading but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." *Id*. A district court, **[**46]** in its discretion "may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions." *Id*. Given that the district court here never addressed personal jurisdiction, only the first option is available on appeal. Thus, Carrier's burden is "relatively slight," *Third Nat'l Bank in Nashville v. WEDGE Group, Inc., 882 F.2d 1087, 1089 (6th Cir. 1989)* (internal quotation marks omitted), *cert. denied*, *493 U.S. 1058, 110 S. Ct. 870, 107 L. Ed. 2d 953 (1990)*, and we must "construe the facts in a light most favorable" to *Carrier, Bird v. Parsons, 289 F.3d 865, 871 (6th Cir. 2002)* (internal quotation marks omitted). In addition, because weighing any controverted facts is inappropriate at this stage, dismissal is proper only if Carrier's alleged facts "collectively fail[] to state a *prima facie* case for jurisdiction." *Theunissen, 935 F.2d at 1459*.

HN21[] For Sherman Act claims, *15 U.S.C. § 22* authorizes service of process over an antitrust defendant "wherever it may be found." When Congress has enacted such nationwide service of process statutes, personal jurisdiction exists whenever the **[***24]** defendant has "sufficient minimum **[**47]** contacts with the *United States*" to satisfy the due process requirements under the *Fifth Amendment*. *Med. Mut. of Ohio v. deSoto, 245 F.3d 561, 566-67 (6th Cir. 2001)* (emphasis added); *cf. Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237-39 (6th Cir. 1981)* (indicating without expressly deciding that *15 U.S.C. § 22* permits nationwide process). This inquiry parallels the more traditional personal-jurisdiction analysis under which a defendant must have "'minimum contacts'" with the forum state pursuant to the **[*450]** state's long-arm statute. *See Med. Mut. of Ohio, 245 F.3d at 566-67*.

Because Carrier appears to assert only specific jurisdiction, our minimum-contacts analysis is likewise limited to that issue. Thus, ***HN22***[] to establish personal jurisdiction in this case, Carrier must adequately show the following elements in accordance with the well-established test set forth in *Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 381 (6th Cir. 1968)*:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of **[**48]** the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

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company assurances as a matter of law always falls short of demonstrating the requisite due diligence. *Campbell* instead utilizes a more fact-based approach to the question whether reliance on oral assurances was a reasonable investigation under the circumstances. Although we determined that such reliance was not reasonable in that case given that the plaintiff already knew that he had substantial cause to mistrust the words and intentions of the officers on whose assurances he claimed to rely, *id. at 1128*, that conclusion does not compel recognition of a per se rule barring the use of direct inquiries to a company as **[**45]** a reasonable means of investigation.

Applying that test here but analyzing contacts with the United States, we conclude that the district court had specific jurisdiction over the Finnish Outokumpu entities based on their ties to the United States.

Looking first to purposeful availment, we must determine whether OCP and OTO have "engaged in some overt actions connecting [them] with the forum state." *Fortis Corporate Ins. v. Viken Ship Mgmt., 450 F.3d 214, 218 (6th Cir. 2006)* (internal quotation marks omitted). With respect to OCP, Carrier argues that the company had sufficient contacts with the United States both independently and through its subsidiaries. In support of OCP's independent contacts, Carrier points to exhibits indicating that certain OCP officers lived in the United States and that OCP also sent personnel from Finland to work on the Carrier account on its behalf. Carrier also points **[***25]** to an affidavit indicating at least one instance in which OCP employees traveled to the United States to conduct business with Carrier and to reports **[**49]** indicating that OCP imported a certain amount of copper tubing into the United States. Similar facts support Carrier's claim that, because of the close interrelationship between OCP and its U.S. subsidiaries, the contacts of the U.S. subsidiaries can be attributed to OCP. Specifically, Carrier asserts that in addition to residing in the United States, many high-ranking OCP executives held day-to-day management responsibilities within the U.S. subsidiaries, and that the subsidiaries' boards of directors were dominated by OCP personnel. Carrier also points to evidence suggesting that OCP used its subsidiaries as agents responsible for forwarding copper tubing imports to customers like Carrier in the United States.

In contrast to its argument regarding OCP, Carrier's argument for personal jurisdiction over OTO rests entirely on the assertion that OCP's jurisdictional contacts can be attributed to OTO. In its complaint, Carrier alleged that OTO had "effective control over the commercial policy and business decisions of its subsidiaries, and did business through its subsidiaries." J.A. at 0028 (Am. Compl. ¶ 25). This was possible because of OCP's status as a wholly owned subsidiary of OTO **[**50]** over which OTO publicly claimed to retain full operational control. R. 61-3 (Resp. in Opp'n to Mot. to Dismiss Am. Compl., Ex. 10 at 64). Such control is further supported by Carrier's allegation that OTO executives continue to dominate OCP's board of directors and by the EC's finding that OCP lacked any "real business autonomy." *Id*. ¶ 27.

HN23[] This circuit has adopted the alter-ego theory of personal jurisdiction, which "provides that a non-resident parent corporation is amenable to suit in the forum state if the parent company exerts so **[*451]** much control over the subsidiary that the two do not exist as separate entities but are one and the same for purposes of jurisdiction." *Estate of Thomson v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 362 (6th Cir. 2008)*. Taking Carrier's pleadings and supporting affidavits in its favor, we conclude that the above allegations facially support the application of this theory with respect to both OCP and OTO. *Cf. Third Nat'l Bank, 882 F.2d at 1090* (finding personal jurisdiction over a **[***26]** parent company that, among other things, was a 100% owner of the subsidiary and had directors serving on the subsidiary's board).

Furthermore, to the extent that the allegations **[**51]** relate specifically to Outokumpu's anti-competitive conduct toward Carrier, the contacts are "enhanced" by the Calder-effects doctrine. *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc., 503 F.3d 544, 552-53 (6th Cir. 2007)*. In *Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)*, the Supreme Court held that ***HN24***[] a plaintiff can establish personal jurisdiction when it alleges that the defendant "expressly aimed" tortious conduct at the forum in question and the "brunt of the harm" is felt there. *Calder, 465 U.S. at 789*; *see also Neal v. Janssen, 270 F.3d 328, 331 (6th Cir. 2001)* ("[E]ven a single act by [a] defendant directed toward [the relevant forum] that gives rise to a cause of action can support a finding of minimum contacts sufficient to exercise personal jurisdiction without offending due process.").

Here, the conspiracy in which OCP and OTO allegedly participated had an explicit geographical focus. According to the complaint, one of the main pillars of the conspiracy was allocating Carrier's U.S. business to the Outokumpu defendants, thereby forcing Carrier to pay higher prices in the United States. Such conduct serves as a paradigmatic example of "expressly aiming" tortious conduct. Carrier **[**52]** has thus sufficiently alleged purposeful availment under the *Southern Machine* test. As for the second part of the *Southern Machine* test, we conclude that Carrier's cause of action "arises from" its U.S. contacts. ***HN25***[] To satisfy this factor, we "require[] only that the cause of action, of whatever type, have a substantial connection with the defendant's [inforum] activities." *Bird, 289*

F.3d at 875. Insofar as the complaint is premised on the alleged harm that Outokumpu "expressly aimed" at Carrier, that lenient standard is easily met. *See Air Prods., 503 F.3d at 552*.

Finally, although we recognize the need to use particular caution when extending personal jurisdiction to foreign defendants, *see Fortis, 450 F.3d at 223*, because OTC and OCP have not argued that exercising jurisdiction over them would be "unreasonable" under the third prong of the *Southern Machine* test, they have not rebutted the "inference of reasonableness" that arises when the plaintiff sufficiently **[***27]** demonstrates the first two prongs of that test. *Air Prods., 503 F.3d at 554* (internal quotation marks omitted). We therefore conclude that the district court had personal jurisdiction over OTO and OCP.[10] We emphasize however, **[**53]** that our holding is based only on a facial analysis of Carrier's pleadings and exhibits. OTO and OCP are free to seek an evidentiary hearing or to raise this issue again at the summary-judgment stage. *See Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 893 (6th Cir. 2002)*.

[*452] III. CONCLUSION

For the reasons stated above, we **REVERSE** the district court's judgment with respect to Outokumpu Oyj, Outokumpu Copper Products Oy, Outokumpu Copper (U.S.A.), Inc., and Outokumpu Copper Franklin, Inc. and **REMAND** for further proceedings.

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[10] In the related *American Copper* case, the district court also determined that it had personal jurisdiction over OTO and OCP. No. 04-2771-DV (W.D. Tenn. June 1, 2006) (unpublished opinion).

Select Comfort Corp. v. Sleep Better Store, LLC

United States District Court for the District of Minnesota

March 2, 2012, Decided; March 2, 2012, Filed

Civil No. 11-621 (JNE/JSM)

Reporter

838 F. Supp. 2d 889 *; 2012 U.S. Dist. LEXIS 27814 **; 2012 WL 716667

Select Comfort Corp., Plaintiff, v. The Sleep Better Store, LLC, Defendant.

Prior History: *Select Comfort Corp. v. Sleep Better Store, LLC, 796 F. Supp. 2d 981, 2011 U.S. Dist. LEXIS 65147 (D. Minn., June 17, 2011)*

Core Terms

Overstock, immunity, infringement, cease-and-desist, Air, demand letter, registered, Mattress, trademark, pre-suit, rights, letters, beds, sham, right of petition, dilution, lawsuit, counterclaim, asserts, tortious interference, website, courts, intellectual property rights, petitioning, procured, argues, notice, antitrust claim, likely to cause, unjustified

LexisNexis® Headnotes

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

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

When ruling on a motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, a court must accept the facts alleged in the complaint as true and grant all reasonable inferences in favor of the plaintiff. Although a pleading is not required to contain detailed factual allegations, a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The court generally may not consider materials outside the pleadings, but it may consider some public records, materials that do not contradict the complaint, or materials that are necessarily embraced by the pleadings.

Torts > ... > Contracts > Intentional Interference > Elements

HN2[] **Intentional Interference, Elements**

Under Minnesota law, a cause of action for tortious interference with contract requires a plaintiff to prove: (1) the existence of a contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant intentionally procured the breach of the plaintiff's contract; (4) the defendant's procurement was without justification; and (5) resulting damages.

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

HN3[] Motions to Dismiss, Failure to State Claim

Although justification is an affirmative defense, under certain circumstances it may nevertheless provide the basis for a dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)*. If an affirmative defense such as a privilege is apparent on the face of the complaint that privilege can provide the basis for dismissal under *Rule 12(b)(6)*. This means simply that the district court is limited to the materials properly before it on a motion to dismiss, which may include public records and materials embraced by the complaint.

Torts > ... > Contracts > Intentional Interference > Defenses

HN4[] Intentional Interference, Defenses

Generally, a defendant's actions are justified if it pursues its legal rights via legal means. The general rule with which the courts are concerned is that one has the right to be secure in his contracts and to pursue his business, free from the interference of others except where such others act in pursuance of a superior or equal right. Interference with a contract is unjustified, however, when it is done for the indirect purpose of injuring the plaintiff or benefitting the defendant. Ordinarily, whether interference is justified is an issue of fact, and the test is what is reasonable conduct under the circumstances.

Trademark Law > Trademark Cancellation & Establishment > General Overview

HN5[] Trademark Law, Trademark Cancellation & Establishment

Trademark law protects against not only the impermissible use of a specific registered mark, but also against the use of a similar mark that is likely to cause confusion among consumers or dilution of the registered mark. *15 U.S.C.S. §§ 1114* and *1125(a)* and *(c)*.

Trademark Law > ... > Similarity of Marks > Appearance, Meaning & Sound > General Overview

HN6[] Similarity of Marks, Appearance, Meaning & Sound

An infringing mark need only resemble the registered mark so that its use is likely to cause confusion, or to cause mistake, or to deceive.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

HN7[] Infringement Actions, Determinations

It has long been established that the owner of an intellectual property right may notify infringers of his claims, and warn them that, unless they desist, suits will be brought to protect him in his legal rights. The only limitation on the right to issue such warnings is the requirement of good faith. Pre-suit warning letters are a common, if not universal, feature of modern litigation, especially in the context of enforcing intellectual property rights. Such pre-suit warning letters are not only permissible, but in some cases they may actually be required. For example, trademark law requires that a defendant in a trademark infringement action have notice of the registered trademark. *15 U.S.C.S. § 1111*.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN8[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine immunizes acts related to the constitutional right to petition the courts for grievance, unless the act is a mere sham. The *First Amendment* provides that Congress shall make no law abridging the right to petition the government for a redress of grievances. *U.S. Const. amend. I*. The Noerr-Pennington doctrine, which arose in the context of antitrust claims, provides immunity from claims that are based on the filing of lawsuits. The right of access to the courts is indeed but one aspect of the right of petition. This immunity has been extended to all claims, beyond federal antitrust claims, which are based on the petitioning of the courts or other governmental entities. The United States Court of Appeals for the Eighth Circuit has explicitly stated that the Noerr-Pennington doctrine applies to tortious interference with contract claims. Because the right to petition means more than simply the right to communicate directly with the government, protection under the doctrine necessarily includes those activities reasonably and normally attendant to effective petitioning.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN9[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Of the seven circuit courts that have encountered the question, six have found that the Noerr-Pennington doctrine immunizes pre-suit demand letters, so long as those demand letters are not a sham.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN10[] **Fundamental Freedoms, Freedom to Petition**

In determining whether the burdened conduct falls under the protection of the Petition Clause, the United States Court of Appeals for the Ninth Circuit must give adequate breathing space to the right of petition.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN11[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The United States Court of Appeals for the Ninth Circuit recognized that the Noerr-Pennington doctrine protects conduct incidental to the prosecution of a lawsuit and stated that where the underlying litigation fell within the protection of the Petition Clause, such incidental conduct would also be protected. While responding to demands to settle unfounded claims is burdensome, it is likely less burdensome than if the opposing party, fearing liability in tort for demanding settlement of a possibly weak claim, proceeded directly to litigation. Moreover, the established sham exception to the Noerr-Pennington doctrine provides adequate protection against baseless claims asserted in pre-litigation settlement letters. The court concluded that restrictions on pre-suit demand letters may therefore raise substantial Petition Clause issues.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN12[] **Noerr-Pennington Doctrine, Sham Exception**

The sham exception to the Noerr-Pennington doctrine applies when a lawsuit (or threatened lawsuit) is so objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. But if an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr. Even when the litigation is objectively meritless, the inquiry does not end there; the court must then examine the litigant's subjective motivation. To defeat a claim of Noerr immunity, a party must demonstrate both the objective and the subjective components of a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN13[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A defendant's invocation of adjudicative process to press legitimate claims is protected even though its purpose in doing so is to eliminate competition. It is only where a defendant's resort to the courts is accompanied or characterized by illegal and reprehensible practices such as perjury, fraud, conspiracy with or bribery of government decision makers, or misrepresentation, or is so clearly baseless as to amount to an abuse of process, that the Noerr-Pennington cloak of immunity provides no protection.

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For The Sleep Better Store, LLC, Defendant, Counter Claimant: David T Schultz, LEAD ATTORNEY, Bradley M Orschel, Nadege J Souvenir, Maslon Edelman Borman & Brand, LLP, Mpls, MN.

Judges: JOAN N. ERICKSEN, United States District Judge.

Opinion by: JOAN N. ERICKSEN

Opinion

[*890] ORDER

Plaintiff Select Comfort Corporation ("Select Comfort") brought this action against Defendant The Sleep Better Store, LLC ("Sleep Better"), alleging various unfair competition and trademark infringement claims. In its Answer, Sleep Better alleged a counterclaim of tortious interference with contract (Count II), based upon a cease-and-desist letter that Select Comfort sent to third-party Overstock.com. Now before the Court is Select Comfort's 12(b)(6) Motion to Dismiss Count II of Defendant's Amended Answer and Counterclaim.

[*891] I. BACKGROUND

Select Comfort sells adjustable air beds under the Sleep Number® and Select Comfort® trademarks. Sleep Better, which recently changed its name to Dream Number, also sells adjustable air beds. Sleep Better contracted with Overstock.com to sell Sleep Better's beds on the Overstock.com **[**2]** website. On June 30, 2011, Select Comfort sent a cease-and-desist letter to Overstock.com. The letter stated, in relevant part:

> It has recently come to our attention that Overstock.com is infringing Select Comfort's trademark rights under the federal Lanham Act and under state laws by using "Number Air Mattress" on its website located at *www.overstock.com* regarding the sale of adjustable air beds/mattresses. It is also using this term in advertisements on Nextag.com. We believe Overstock.com's use of the term "Number Air Mattress" is likely to cause confusion or mistake among consumers, or to deceive consumers as to the origin of Overstock.com's goods or as to Select Comfort's affiliation or connection with, or sponsorship or approval of, Overstock.com's goods and/or services or commercial activities. Furthermore, your use of the mark "Number Air Mattress" dilutes Select Comfort's famous and distinctive Sleep Number mark and creates an association with Select Comfort's mark that impairs its distinctiveness.
>
> Select Comfort has been vigorous in protecting its marks, and has successfully prevented registration and use of other "Number" marks for beds, adjustable beds and the like. Select **[**3]** Comfort believes the likelihood for confusion and dilution is high when Overstock.com uses "Number Air Mattress" in connection with the promotion and sale of products on Overstock.com and Select Comfort will continue to protect its valuable Sleep Number mark in these instances.
> Select Comfort demands that Overstock.com immediately cease and desist from further use in any medium of the term "Number Air Mattress" or any similar term that would unlawfully cause confusion among consumers or dilute Select Comfort's marks.

Sleep Number has not registered the phrases "Number Air Mattress" or "Number Bed" with the U.S. Patent and Trademark Office. Nevertheless, in response to the cease-and-desist letter, Overstock.com agreed to stop using the phrase on its website. Although Select Comfort did not specifically request that Overstock.com remove any products from its website, Overstock.com also chose to remove Sleep Better's beds from sale on its website.

Sleep Better contends that Select Comfort's cease-and-desist letter constituted tortious interference with Sleep Better's contract with Overstock.com. In its Answer to First Amended Complaint and Counterclaim, Sleep Better alleged that Select Comfort's **[**4]** cease-and-desist letter was an improper and unjustified demand, which "intentionally procured the breach of Sleep Better's contract with Overstock.com because Plaintiff's conduct resulted in Overstock.com's removal of Sleep Better's Number Beds from sale on Overstock.com's website." Answer to First Am. Comp. & Countercl. ¶¶ 13, 15. Select Comfort argues that the Court should dismiss the counterclaim because: (1) Sleep Better failed to plead the element that Select Comfort's demand letter procured an actual breach of contract between Sleep Better and Overstock.com; (2) Select Comfort was justified in sending the demand letter to protect its federally registered Sleep Number® trademarks; (3) the *Noerr-Pennington* doctrine immunizes the pre-suit demand letter from tort liability; and (4) Minnesota's anti-SLAPP statutes **[*892]** protect Select Comfort from tort liability as a matter of law.

II. DISCUSSION

HN1[] When ruling on a motion to dismiss for failure to state a claim pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, a court must accept the facts alleged in the complaint as true and grant all reasonable inferences in favor of the plaintiff. *Mulvenon v. Greenwood, 643 F.3d 653, 656 (8th Cir. 2011)*. **[**5]** Although a pleading is not required to contain detailed factual allegations, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The court "generally may not consider materials outside the pleadings," but "[i]t may . . . consider some public records, materials that do not contradict the complaint, or materials that are 'necessarily embraced by the pleadings." *Noble Sys. Corp. v. Alorica Cent., LLC, 543 F.3d 978, 982 (8th Cir.2008)* (quoting *Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir.1999))*. The cease-and-desist letter was attached to the Answer to the First Amended Complaint and Counterclaim, **[**6]** and thus may be considered. *See, e.g., Bradford v. Huckabee, 394 F.3d 1012, 1015 (8th Cir. 2005)* (considering exhibits attached to the complaint as part of the complaint).

A. Failure to Plead the Essential Elements of a Tortious Interference with Contract Claim

HN2[] Under Minnesota law, a cause of action for tortious interference with contract requires Sleep Better to prove: (1) the existence of a contract between Sleep Better and a third party; (2) Select Comfort's knowledge of the contract; (3) Select Comfort intentionally procured the breach of Sleep Better's contract; (4) Select Comfort's procurement was without justification; and (5) resulting damages. *Kallok v. Medtronic, Inc., 573 N.W.2d 356, 362 (Minn. 1998)*. Select Comfort asserts that Sleep Better failed to plead the essential element that Select Comfort's demand letter procured an actual breach of contract between Sleep Better and third-party Overstock.com. Select Comfort further asserts that it was justified in sending a letter to Overstock.com to protect its federally registered and incontestable Sleep Number® trademarks.

1. Intentional Procurement of Breach

Select Comfort argues that Sleep Better merely alleges that after Select **[**7]** Comfort sent its cease-and-desist letter, Overstock.com removed Defendant's products from sale on its website— but Sleep Better "does not claim, or even suggest, that Overstock.com's decision to 'remove' its products was a breach of contract." Pl.'s Mem. Supp. 6. Select Comfort suggests that Overstock.com may have had the unilateral right to remove Sleep Better's products from its website, and so there may not have even been a breach of contract at all. Although Sleep Better's pleading does not directly allege that Overstock.com breached its contract with Sleep Better, it does allege that Select Comfort "intentionally procured the breach of Sleep Better's contract with Overstock.com because Plaintiff's conduct resulted in Overstock.com's **[*893]** removal of Sleep Better's Number Beds from sale on Overstock.com's website." Answer to First Am. Compl. & Countercl. ¶ 15. When granting all reasonable inferences in favor of Sleep Better, a fair reading of this paragraph adequately alleges an actual breach of contract.

2. Justification

Select Comfort asserts that it was justified in sending a letter to Overstock.com to protect its federally registered and incontestable Sleep Number® trademarks. ***HN3***[] Although **[**8]** justification is an affirmative defense, under certain circumstances it may nevertheless provide the basis for a dismissal pursuant to *Rule 12(b)(6)*. *Noble Sys. Corp. v. Alorica Central, LLC, 543 F.3d 978, 982-83 (8th Cir. 2008)*. "If an affirmative defense such as a privilege is apparent on the face of the complaint . . . that privilege can provide the basis for dismissal under *Rule 12(b)(6)*." *Id. at 983*. "[T]his means simply that the district court is limited to the materials properly before it on a motion to dismiss, which may include public records and materials embraced by the complaint." *Id.*

HN4[] "Generally, a defendant's actions are justified if it pursues its legal rights via legal means." *Id.* (citing *Langeland v. Farmers State Bank of Trimont, 319 N.W.2d 26, 32-33 (Minn. 1982))*; *Kjesbo v. Ricks, 517 N.W.2d*

585, 588 (Minn. 1994) ("There is no wrongful interference with a contract where one asserts in good faith a legally protected interest of his own * * * believ[ing] that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction." (internal quotation marks omitted)). "The general rule with which we are concerned is that one has the right **[**9]** to be secure in his contracts and to pursue his business . . . free from the interference of others except where such others act in pursuance of a superior or equal right." Noble Sys. Corp., 543 F.3d at 983 (quoting Bennett v. Storz Broad. Co., 270 Minn. 525, 134 N.W.2d 892, 897 (Minn. 1965)); Bennett, 134 N.W.2d at 897 ("Liability for wrongful interference may be avoided by showing that the defendant was justified by a lawful object which he had a right to assert."). Interference with a contract is unjustified, however, "when it is done for the indirect purpose of injuring the plaintiff or benefitting the defendant." Furlev Sales & Assoc., Inc. v. N. Am. Auto. Warehouse, Inc., 325 N.W.2d 20, 27 (Minn. 1982). "Ordinarily, whether interference is justified is an issue of fact, and the test is what is reasonable conduct under the circumstances." Kjesbo, 517 N.W.2d at 588 (citing Bennett, 134 N.W.2d at 900). Select Comfort has the burden of proving justification. *See id.*

It is undisputed that Select Comfort has a legally protected interest in protecting its registered trademarks. Sleep Better concedes that it would have been reasonable for Select Comfort to "alert Overstock.com as to Plaintiff's 'Sleep **[**10]** Number' mark." Def.'s Resp. Mem. 10. Sleep Better argues, however, that it was not reasonable for Select Comfort "to claim that Overstock.com's use of the term 'Number Air Mattress' constituted infringement or that the use of this term might cause consumer confusion or dilution of Plaintiff's 'Sleep Number' marks." *Id.* Sleep Better asserts that Select Comfort's demand letter was unjustified because Select Comfort had not registered the specific phrase "Number Air Mattress," and because, at least according to Sleep Better, the phrase "Number Air Mattress" is a purely descriptive term, which Sleep Better has been using since 2002. Sleep Better further argues that Select Comfort failed to provide any evidence of actual consumer confusion. Thus, Sleep Better contends that Select Comfort was unjustified because its motives were purely "designed **[*894]** to injure Sleep Better and benefit [Select Comfort]." *Id.*

The crux of Sleep Better's argument appears to be that Select Comfort was unjustified because, having not registered the specific phrase "Number Air Mattress," it could not reasonably assert that use of that phrase infringed its registered trademarks. To the extent that this is the argument, **[**11]** Sleep Better misconstrues the protections afforded by trademark law. ***HN5***[] Trademark law protects against not only the impermissible use of a specific registered mark, but also against the use of a similar mark that is likely to cause confusion among consumers or dilution of the registered mark. *See* 15 U.S.C. § 1114 (prohibiting the commercial use of "any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale . . . or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive"); *Id.* § 1125(a) (prohibiting the "use[] in commerce [of] any word, term, name, symbol, or device, or any combination thereof . . . which is likely to cause confusion, or to cause mistake, or to deceive"); *Id.* § 1125(c) (providing that "the **[**12]** owner of a famous mark that is distinctive . . . shall be entitled to an injunction against another person who . . . commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, or of actual economic injury"); SquirtCo v. Seven-Up Co., 628 F.2d 1086, 1091 (8th Cir.1980) (affirming the district court's holding that use of the "QUIRST" mark infringed on the well-established "SQUIRT" mark); Roederer v. J. Garcia Carrión, S.A., 732 F. Supp. 2d 836 (D. Minn. 2010) (finding trademark infringement and unfair competition where the defendant's unregistered "CRISTALINO" mark was similar to the plaintiffs registered "CRISTAL" mark and created a likelihood of confusion).

HN6[] An infringing mark need only "resemble the registered mark" so that its use is "likely to cause confusion, or to cause mistake, or to deceive." SquirtCo, 628 F.2d at 1091. There is no support for Sleep Better's proposition that a cease-and-desist letter is only justified where the allegedly infringing term is identical to the registered mark. Moreover, Select Comfort need not be correct **[**13]** in its assertion that use of the term "Number Air Mattress" infringed or diluted its "Sleep Number" mark—it must only have "a good faith belief that its rights were being infringed." *Kemp v. Tyson Foods, Inc.*, No. CIV 96-173 JRT/RLE, 2001 WL 391552, at *7 (D. Minn. Mar. 31, 2001); *see also* Celotex Co. v. Insulite Co., 39 F.2d 213, 217 (D. Minn. 1930) (explaining that when examining the propriety of pre-suit demand letters alleging patent infringement, the court need not determine whether infringement actually exists, but instead should only examine "whether the owner of such patent might believe in good faith" that infringement existed).

Here there is no indication that the demand letter was sent in bad faith or with an improper motive. First, despite Sleep Better's assertions, Select Comfort's letter did not falsely claim or misrepresent that Select Comfort had trademark rights to the phrase "Number Air Mattress"—it only claimed that use of such phrase caused confusion with or dilution of its registered "Sleep Number" mark. Second, any contention that Select Comfort's position was so incorrect on the face of the letter as to demonstrate bad faith is without merit. In fact, in its counterclaim, **[**14]** Sleep Better acknowledges that one of the issues in this current litigation is Select Comfort's belief that the term "Number **[*895]** Bed" infringes its "Sleep Number" trademark. Answer to First Am. Compl. & Countercl. ¶ 9. This is essentially the same type of alleged infringement as described in the letter to Overstock.com. If, as Sleep Better asserts, use of the phrase "Number Air Mattress" or "Number Bed" so clearly does not infringe Select Comfort's registered trademark, then Sleep Better could have brought its own motion to dismiss for failure to state a claim. It has not done so. The fact that Select Comfort's lawsuit against Sleep Better is based upon the same type of infringement as described in the cease-and-desist letter to Overstock.com is only further support that Select Comfort's demand was not made in bad faith.

Nor did Select Comfort employ any improper, illegal, or otherwise reprehensible means in sending the cease-and-desist letter to Overstock.com. [1] ***HN7***[] It has long been established that the owner of an intellectual property right "may notify infringers of his claims, and warn them that, unless they desist, suits will be brought to protect him in his legal rights." *Virtue v. Creamery Package Mfg. Co., 179 F. 115, 120 (8th Cir. 1910)*. **[**15]** "The only limitation on the right to issue such warnings is the requirement of good faith." *Id.* Pre-suit warning letters are "a common, if not universal, feature of modern litigation," especially in the context of enforcing intellectual property rights. *Sosa v. DIRECTV, Inc., 437 F.3d 923, 936 (9th Cir. 2006)*; *see also* *Cardtoons v. Major League Baseball Players Ass'n, 208 F.3d 885, 894 (10th Cir. 2000)* (Lucero, J., dissenting) (noting "the reality of intellectual property law, in which the enforcement of legal rights, and thus the invocation of the legal process, is customarily commenced by a cease-and-desist letter"). Such pre-suit warning letters are not only permissible, but in some cases they may actually be required. For example, trademark law requires that a defendant in a trademark infringement action have notice of the registered trademark. *See* *15 U.S.C. § 1111 (2006)*. Further, it is sound public policy to encourage the use of pre-suit warning letters, rather than mandate a straight line to the court whenever a potential dispute arises. As the Eighth Circuit noted, the issuance of such a warning "would seem to be an act of prudence, if not of kindness." *Virtue, 179 F. at 120* **[**16]** (internal quotation marks omitted). Often such warnings result in final resolution of the dispute without the intervention of the courts. Even if they do not, they still can "streamlin[e] any subsequent litigation" and "reduc[e] legal costs and facilitat[e] access to the courts." *Sosa, 437 F.3d at 936*.

It is apparent on the face of the cease-and-desist letter that Select Comfort was seeking to protect its registered "Sleep **[**17]** Number ® " trademark from confusion and dilution. There are no factual allegations in the pleadings to support any claims that Select Comfort acted with bad faith or employed improper means. Sleep Better's mere conclusory assertions that Select Comfort's conduct in sending the cease-and-desist letter was "improper," "unjustified," "intentional," and "willful" do not **[*896]** create a plausible claim of bad faith. *See* *Iqbal, 129 S.Ct. at 1949* ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Twombly, 550 U.S. at 570*)). For that reason, Sleep Better's tortious interference with contract counterclaim must be dismissed.

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[1] Sleep Better does not appear to argue that Select Comfort employed improper means by sending a cease-and-desist letter. In fact, Sleep Better contends that had Overstock.com merely learned about its possible infringement by reading about this publicly-filed lawsuit between Select Comfort and Sleep Better, and as a result of obtaining that information chosen to remove Sleep Better's products from its website, then that, too, would have been unjustified interference by Select Comfort with the Sleep Better-Overstock.com contract. Thus, according to Sleep Better, *any* action performed by Select Comfort, no matter how remote or how lawful, that resulted in the Overstock.com's decision to remove Sleep Better's beds from its website would constitute tortious interference.

B.* Noerr-Pennington *Immunity

HN8[] The *Noerr-Pennington* doctrine immunizes acts related to the constitutional right to petition the courts for grievance, unless the act is a mere sham. The *First Amendment to the United States Constitution* provides that Congress shall make no law abridging the right "to petition the Government for a redress of grievances." *U.S. Const. amend. I*. The *Noerr-Pennington* doctrine, which arose in the context of antitrust claims, provides immunity **[**18]** from claims that are based on the filing of lawsuits. "The right of access to the courts is indeed but one aspect of the right of petition." *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. This immunity has been extended to all claims, beyond federal antitrust claims, which are based on the petitioning of the courts or other governmental entities. *See, e.g., Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1080 n.4 (8th Cir. 1999)* ("In addition, the *First Amendment* generally immunizes the act of filing a lawsuit from tort liability under the *Noerr-Pennington* doctrine."); *Hinshaw v. Smith, 436 F.3d 997, 1003 (8th Cir. 2006)* (stating that the *Noerr-Pennington* doctrine "is a defense to liability premised on the defendant's actions of exercising his own private rights to free speech and to petition the government"); *Kellar v. VonHoltum, 568 N.W.2d 186, 192-93 (Minn. Ct. App. 1997)* (holding that the *Noerr-Pennington* doctrine applies outside of the antitrust context and applying it to Minnesota tort claims). The Eighth Circuit has explicitly stated that the *Noerr-Pennington* doctrine applies to tortious interference with contract claims. *See Hufsmith v. Weaver, 817 F.2d 455, 459 (8th Cir. 1987)*. **[**19]** Because "[t]he right to petition means more than simply the right to communicate directly with the government," protection under the doctrine "necessarily includes those activities reasonably and normally attendant to effective petitioning." *In re IBP Confidential Bus. Documents Litig., 755 F.2d 1300, 1310 (8th Cir. 1985)*.

Select Comfort argues that the *Noerr-Pennington* doctrine immunizes pre-suit demand letters, since such letters are "reasonably attendant to effective petitioning." Sleep Better contends that the doctrine does not apply in this context, since this case involves no antitrust claim and the demand letter was not sent to the government, does not ask the government for any "redress of grievances," and has not resulted in litigation against Overstock.com. Thus, Sleep Better asserts that there was no petition of the government, and "purely private threats of litigation" are not afforded immunity under the doctrine.

Although the Eighth Circuit Court of Appeals has not addressed this issue, this Court is not without guidance. ***HN9***[] Of the seven other circuit courts that have encountered this question, six have found that the *Noerr-Pennington* doctrine immunizes pre-suit demand letters, **[**20]** so long as those demand letters are not a "sham." *See Sosa v. DIRECTV, Inc., 437 F.3d 923, 935 (9th Cir. 2006)*; *Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 100 (2d Cir. 2000)*; *Glass Equip. Dev., Inc. v. Besten, Inc., 174 F.3d 1337, 1343-44 (Fed. Cir. 1999)*; *McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1560 (11th Cir. 1992)*; *CVD, Inc. v. Raytheon Co., 769 F.2d 842, 850-51* ***[*897]*** *(1st Cir. 1985)*; *Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1366-67 (5th Cir. 1983)*.

In *Sosa*, a satellite television broadcaster sent more than 100,000 letters accusing the recipients of signal theft and violations of federal criminal statutes and threatening civil legal action unless the recipients agreed to pay an unspecified sum to settle the claim. *437 F.3d at 926*. Although a number of recipients claimed to be innocent of the alleged conduct, the broadcaster would not withdraw its accusations or threats of litigation. *Id. at 926-27*. To avoid the costs of litigation, the recipients agreed to the settlement. *Id. at 927*. Subsequently, some of these recipients filed a class action lawsuit, claiming that the broadcaster violated the Racketeer Influenced and Corrupt Organizations Act (RICO) **[**21]** through its mailing of baseless pre-suit demand letters. The district court dismissed the suit based on the *Noerr-Pennington* doctrine, and plaintiffs appealed. The Ninth Circuit affirmed the district court's dismissal, holding that *Noerr-Pennington* immunity extended to pre-litigation demand letters that were not a sham. ***HN10***[] "In determining whether the burdened conduct falls under the protection of the Petition Clause, we must give adequate 'breathing space' to the right of petition." *Id. at 931-32* (quoting *BE&K Constr. Co. v. NLRB, 536 U.S. 516, 531, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002))*. "Although the letters were not themselves petitions, the Petition Clause may nevertheless preclude burdening them so as to preserve the breathing space required for the effective exercise of the rights it protects." *Id. at 933*. ***HN11***[] The court recognized that the *Noerr-Pennington* doctrine protects "conduct incidental to the prosecution" of a lawsuit and stated that "where the underlying litigation fell within the protection of the Petition Clause, such incidental conduct would also be protected." *Id. at 935*. "While responding to demands to settle unfounded claims is burdensome, it is likely less burdensome than if the opposing party, fearing **[**22]** liability in tort for demanding settlement of a possibly weak claim, proceeded directly to litigation. Moreover, the established sham exception to the *Noerr-Pennington* doctrine provides adequate protection against baseless claims asserted in prelitigation settlement letters." *Id. at 935-36*. The court concluded that restrictions on pre-suit demand letters may therefore raise substantial Petition Clause issues.

Only one circuit court has held otherwise. In *Cardtoons v. Major League Baseball Players Ass'n, 208 F.3d 885 (10th Cir. 2000)* (en banc), the Tenth Circuit held 7-3 that the *First Amendment* right to petition does not provide immunity from tort claims that are triggered by a pre-litigation cease-and-desist letter communicated between private parties. The court distinguished its case, which involved tort claims, from the other circuits' cases that had involved antitrust claims. In the context of non-antitrust claims, the court stated that "[a] letter from one private party to another private party simply does not implicate the right to petition, regardless of what the letter threatens." Because the letter was not sent to the government, did not ask the government for redress of grievances, **[**23]** and was not known to the government prior to the lawsuit, the court found that *Noerr-Pennington* immunity did not apply.

The dissent in *Cardtoons*, however, rejected any distinction between antitrust cases and tort cases, explaining that although the doctrine arose in the antitrust context, the Supreme Court has focused its *Noerr-Pennington* analysis on the right to petition. *Id. at 895-96* (Lucero, J., dissenting) ("Because of its foundation in the *First Amendment* right to petition, the Supreme Court has applied the *Noerr-Pennington* **[*898]** doctrine, by analogy, outside of it aborigine roots in ***antitrust law***. . . . In light of [Supreme Court decisions], there can be little doubt that *Noerr-Pennington* immunity . . . is mandated by the *First Amendment* right to petition, irrespective of any independent statutory basis it might also have, and '*Noerr-Pennington* immunity' has evolved into an umbrella term for *First Amendment* petitioning immunity."). [2] The dissent explained that cease-and-desist letters promote the interests served by the right to petition the courts—"[t]hey vindicate legal rights and promote adherence to important laws of commerce" and "are frequently used . . . to protect and vindicate **[**24]** [] intellectual property rights." *Id. at 897*. Because "such letters are often the first formal step in the process of enforcing the law of intellectual property and vindicating economic interests," the denial of *Noerr-Pennington* immunity to such letters would "chill[] the right to petition the courts by handicapping activity immediately precedent to, and intimately associated with, recourse to the judicial process." *Id. at 898*.

The Court finds the reasoning articulated by the overwhelming majority of circuits and the dissent in *Cardtoons* to be persuasive. Sleep Better's argument that the Court should disregard the circuit court opinions dealing with antitrust claims is unavailing—the distinction between antitrust and non-antitrust cases is not relevant to the *Noerr-Pennington* analysis, given the Supreme Court's focus on the *First Amendment* right to petition, **[**25]** rather than a statutory construction of the Sherman Act. *See* *Cal. Motor Transport Co., 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642*; *In re IBP Confidential Bus. Documents Litig., 755 F.2d at 1311* (stating that in *California Motor Transport Co.*, the Supreme Court "explained the [*Noerr*] decision as resting squarely on the constitutionally guaranteed right to petition the government"); *Hufsmith, 817 F.2d at 460* (holding that where *Noerr-Pennington* immunized conduct that formed the basis of an antitrust claim, the doctrine also extended to bar a tortious interference with contract claim based on the same conduct).

Moreover, *Cardtoons* simply does not apply where the statute creating the very rights to be protected provides for notice to potential litigants. *See, e.g., Keystone Retaining Wall Sys., Inc. v. Rockwood Retaining Walls, Inc.*, No. 00-496, 2001 WL 951582, at *11 (D. Minn. Aug. 22, 2001) (distinguishing its facts from *Cardtoons* by noting that the patent statutes require notification of infringement prior to recovering damages, and that "the notice requirement of *35 U.S.C. § 287* put [plaintiff]'s actions within the ambit of immunized activity under the *Noerr-Pennington* doctrine."). [3] Like patent statutes, the trademark **[**26]** statutes also require such notice. *See* *15 U.S.C. § 1111*

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[2] The dissent explained that in *California Motor Transport Co., 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642*, the Supreme Court extended *Noerr-Pennington* immunity to the petitioning of courts. *Cardtoons, 208 F.3d at 894*. In doing so, "the Court relied primarily on the constitutional underpinnings of the doctrine," not the statutory basis in ***antitrust law***. *Id. at 894-95*.

(2006) ("[I]n any suit for infringement . . . by such a registrant failing to give such notice of registration, no profits and no damages shall be recovered . . . unless the defendant had actual notice of the registration."). Therefore, even if the Court were to adopt the reasoning in *Cardtoons*, it would nevertheless be inapplicable to the case at hand.

[*899] In practice, the enforcement of intellectual property rights often begins with a cease-and-desist letter. Accepting Sleep Better's argument would mean "that the First Amendment protects an owner of intellectual property rights who blindsides an adversary with a lawsuit claiming infringement of those rights, but fails to shield that same owner when a more civilized notice and demand letter is sent in advance." Cardtoons, 208 F.3d at 894 **[**27]** (Lucero, J., dissenting); *see also* Coastal States Mktg., Inc., 694 F.2d at 1367 ("The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute."). The fact that no litigation with Overstock.com ensued only supports the proposition that such letters are desirable methods of petitioning by effectively and efficiently vindicating intellectual property rights. There can be no doubt that Select Comfort would be entitled to immunity had it simply filed a complaint against Overstock.com for infringement. Rather than suing Overstock.com, however, Select Comfort chose the "more civilized" route of sending a pre-suit demand letter.

Sleep Better argues that even if *Noerr-Pennington* immunity applies to pre-suit demand letters outside of the antitrust context, Select Comfort's conduct is still not immunized because it was merely a sham intended to disguise anticompetitive conduct. The Court disagrees. **HN12**[] The "sham exception" applies when a lawsuit (or threatened lawsuit) is so "objectively baseless in the sense that no reasonable litigant could **[**28]** realistically expect success on the merits." Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). But "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr.*" *Id.* Even when the litigation is objectively meritless, the inquiry does not end there—the court must then "examine the litigant's subjective motivation." Id. at 60. To defeat a claim of *Noerr* immunity, a party must "demonstrate[e] both the objective and the subjective components of a sham." Id. at 61.

Sleep Better asserts that Select Comfort's threat of litigation was baseless because Select Comfort had not registered the term "Number Air Mattress," and according to Sleep Better, the term is a purely descriptive phrase that it had been using for years. For the same reasons, Sleep Better also argues that Select Comfort misrepresented its right to the "Number Air Mattress." Because Sleep Better believes that Select Comfort "was incorrect to state that Overstock's use of the term infringed [Select Comfort]'s trademark rights," it contends that the letter was merely a sham to disguise Select Comfort's **[**29]** anticompetitive behavior.

Again, Sleep Better's argument hinges on its assertion that Select Comfort is just flat-out wrong in its allegation of trademark infringement. But whether the demand letter is a "sham" does not depend on Select Comfort's ultimate success or failure in pursuing its trademark infringement claims. *See, e.g.,* BE & K Constr. Co., 536 U.S. at 531-32 (considering "reasonably based but unsuccessful lawsuits" and stating that the doctrine "protect[s] petitioning whenever it is genuine, not simply when it triumphs."). Moreover, as noted above, the pleadings do not reveal Select Comfort's claim to be objectively baseless. Even if it were a losing claim, more than that is needed to prove that a threat of litigation is a "sham." As the Eighth Circuit noted,

> **HN13**[] [A] defendant's invocation of adjudicative process to press legitimate claims is protected even though its purpose in **[*900]** doing so is to eliminate competition. . . . It is only where a defendant's resort to the courts is accompanied or characterized by illegal and reprehensible practices such as perjury, fraud, conspiracy with or bribery of government decision makers, or misrepresentation, or is so clearly baseless as to amount **[**30]** to an abuse of process, that the *Noerr-Pennington* cloak of immunity provides no protection.

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[3] 35 U.S.C. § 287 provides that when the patented item is not marked as patented, "no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which even damages may be recovered only for infringement occurring after such notice."

Razorback Ready Mix Concrete Co., Inc. v. Weaver, 761 F.2d 484, 487 (8th Cir. 1985); *see also* id. at 488 (finding immaterial whether the defendants' motive was selfish or not). Here, there has been no indication of any such illegal or reprehensible practices or that the letter was merely a "sham" to conceal some sinister motive. Despite Sleep Better's argument that the cease-and-desist letter misrepresented Select Comfort's rights, the Court finds nothing in the pleadings to support this contention. Select Comfort did not assert that it had registered the specific phrase "Number Air Mattress"—rather, it stated only that Select Comfort believed that use of that phrase caused confusion with or dilution of its registered "Sleep Number" mark. On its face, the cease-and-desist letter articulates precisely the type of concerns that can legitimately form the basis of a lawsuit to protect federally registered trademarks.

Pre-suit demand letters are customarily used to protect intellectual property rights. These letters are "reasonably attendant" to litigation, especially where the trademark statute explicitly **[**31]** provides for such pre-suit notification to alleged infringers. Absent any indication that Select Comfort's cease-and-desist letter was a "sham," the Court finds that the *Noerr-Pennington* doctrine immunizes Select Comfort from Sleep Better's tortious interference with contract counterclaim. [4]

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Select Comfort's Renewed Motion to Dismiss Count II of Defendant's Answer to First Amended Answer and Counterclaim [Docket No. 54] is GRANTED.
2. Sleep Better's counterclaim of tortious interference with contract (Count II) is DISMISSED.

Dated: March 2, 2012

/s/ Joan N. Ericksen

JOAN N. ERICKSEN

United States District Judge

End of Document

[4] Because of the Court's rulings on justification and application of the *Noerr-Pennington* doctrine, the Court declines to address Select Comfort's anti-SLAPP arguments.

Asahi Kasei Pharma Corp. v. CoTherix, Inc.

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

March 5, 2012, Filed

A129146

Reporter

204 Cal. App. 4th 1 *; 138 Cal. Rptr. 3d 620 **; 2012 Cal. App. LEXIS 260 ***

ASAHI KASEI PHARMA CORPORATION, Plaintiff and Appellant, v. COTHERIX, INC., Defendant and Respondent.

Subsequent History: Application granted by *Asahi Kasei Pharma Corp. v. Cotherix Inc., 2012 Cal. App. LEXIS 446 (Cal. App. 1st Dist., Apr. 3, 2012)*

Review denied by, Request denied by, Application denied by *Asahi Kasei Pharma Corporation v. Cotherix, Inc., 2012 Cal. LEXIS 5652 (Cal., June 13, 2012)*

Subsequent appeal at, Decision reached on appeal by *Asahi Kasei Pharma Corp. v. Actelion Ltd., 2013 Cal. App. LEXIS 1017 (Cal. App. 1st Dist., Dec. 18, 2013)*

Prior History: [*1]** Superior Court of San Mateo County, No. CIV478533, Carol L. Mittlesteadt and Marie S. Weiner, Judges.

Core Terms

merger, Cartwright Act, Sherman Act, conspiracy, acquisition, entities, license agreement, antitrust, anticompetitive, premerger, conspired, restraint of trade, monopolize, subsidiary, summary adjudication, trial court, combined, anti trust law, consummation, competitor, concerted, firms, parties, wholly owned subsidiary, unfair competition, collusion, pursuing, italics, cases, unreasonable restraint

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN1[ ] **Entitlement as Matter of Law, Appropriateness**

A motion for summary judgment or summary adjudication is properly granted if all the papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Code Civ. Proc., § 437c, subd. (c)*.

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

HN2[ ] **Appellate Review, Standards of Review**

The court reviews an order granting or denying a motion for summary adjudication de novo. In its review, the court is required to liberally construe, and draw all reasonable inferences from, the evidence in favor of the party opposing the motion. The court strictly scrutinizes a defendant's showing.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN3[] **Conspiracy to Monopolize, State Regulation**

Both California and federal decisions urge caution in granting a defendant's motion for summary judgment in an antitrust case. Nevertheless, summary judgment is available, and always remains available, even in complex cases, including antitrust actions for an unlawful conspiracy under the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.* If a party moving for summary judgment in any action, including an antitrust action for unlawful conspiracy, would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN4[] **Conspiracy to Monopolize, State Regulation**

A violation of the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, requires a combination of capital, skill or acts by two or more persons that seeks to achieve an anticompetitive end. *Bus. & Prof. Code, § 16720*. Consequently, only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN5[] **Conspiracy to Monopolize, State Regulation**

Single firm monopolization is not cognizable under the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.* To maintain an action for a combination in restraint of trade under the Cartwright Act, the following elements must be established: (1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN6[] **Conspiracy to Monopolize, State Regulation**

The drafters intended that the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, apply, as its words had been construed, only to entities that "combine," in the sense of those who perdure (i.e., continue as separate, independent, competing entities during and after their collusive action)—and therefore the drafters did not intend the Cartwright Act to regulate the bona fide purchase and sale of one firm by another. The Cartwright Act cannot be used to challenge mergers and acquisitions. The drafters of the Cartwright Act intended to make their law applicable only to situations in which the parties improperly collude and continue as separate, independent entities, and not to situations in which, by virtue of purchase and sale, or merger, one or more of the entities ceases to exist. In a bona fide merger the entities lose forever their separate identities, and become a new, independent entity.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Governments > Courts > Judicial Precedent

HN7[] Conspiracy to Monopolize, State Regulation

Judicial interpretation of the Sherman Act, *15 U.S.C.S. §§ 1*, *2*, while often helpful, is not dispositive on issues under the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN8[] Conspiracy to Monopolize, State Regulation

An indispensable element of any action under the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, is proof of a combination of resources of two or more independent interests for the purpose of restraining commerce and preventing market competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Governments > Courts > Judicial Precedent

HN9[] Conspiracy to Monopolize, State Regulation

Judicial interpretation of the Sherman Act, *15 U.S.C.S. §§ 1*, *2*, while often helpful, is not directly probative of the intent of the drafters of the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.* Federal precedents must be used with caution because the acts, although similar, are not coextensive. The appropriate use of federal cases interpreting the Sherman Act is as an aid in interpreting our own Cartwright Act, not as controlling precedent.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN10[] Conspiracy to Monopolize, State Regulation

An antitrust plaintiff under the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, must plead and prove that separate entities maintaining separate and independent interests, combined for the purpose of restraining trade. A complaint for antitrust violations which fails to allege such concerted action by separate entities maintaining separate and independent interests is subject to demurrer.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN11[] Conspiracy to Monopolize, State Regulation

The Legislature did not intend the Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, to regulate the bona fide purchase and sale of one firm by another. It applies only to those who continue as separate, independent, competing entities during and after their collusive action.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN12[] **Conspiracy to Monopolize, State Regulation**

The Cartwright Act, *Bus. & Prof. Code, § 16700 et seq.*, like all antitrust laws, is about the protection of competition, not competitors. Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiff pharmaceutical company sued defendant, a biopharmaceutical company with which plaintiff had a licensing agreement for development of plaintiff's product, alleging under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) that there was a conspiracy between defendant and a company with which defendant was merging (acquiring company). The trial court granted summary judgment for defendant. (Superior Court of San Mateo County, No. CIV478533, Carol L. Mittlesteadt and Marie S. Weiner, Judges.)

The Court of Appeal affirmed the judgment. The court held that even if the two merging companies were capable of conspiring, for purposes of the Cartwright Act, in the period between execution of an acquisition agreement and the consummation of the merger, no viable Cartwright Act claim was presented because there was no evidence of any premerger meeting of the minds specifically to restrain the trade of plaintiff's product. The complaint alleged that the acquiring company unilaterally decided to acquire defendant in order to further its own goal to dominate the market. Because this alleged anticompetitive purpose was attributed only to the acquiring company and to individuals and not to defendant, there was no combination of capital, skill or acts by two or more persons for the purpose of preventing competition. The court also observed that the rationale of case law under the Cartwright Act—that the Cartwright Act was not intended to apply to situations in which, by virtue of purchase and sale, or merger, one or more of the entities ceases to exist—seems to apply equally where parties in the process of merging reach agreement to do that which the combined entity may freely do. (Opinion by Bruiniers, J., with Jones, P. J., and Simons, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

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

Monopolies and Restraints of Trade § 6—Cartwright Act—Requirements—Separate Entities.

A violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) requires a combination of capital, skill or acts by two or more persons that seeks to achieve an anticompetitive end (*Bus. & Prof. Code, § 16720*). Consequently, only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations. Single firm monopolization is not cognizable under the Cartwright Act. To maintain an action for a combination in restraint of trade under the Cartwright Act, the following elements must be established: (1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts.

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

Monopolies and Restraints of Trade § 6—Cartwright Act—Requirements—Separate Entities—Mergers.

The drafters intended that the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) apply, as its words had been construed, only to entities that "combine," in the sense of those who perdure (i.e., continue as separate, independent, competing entities during and after their collusive action)—and therefore the drafters did not intend the Cartwright Act to regulate the bona fide purchase and sale of one firm by another. The Cartwright Act cannot be used to challenge mergers and acquisitions. The drafters of the Cartwright Act intended to make their law applicable only to situations in which the parties improperly collude and continue as separate, independent entities, and not to situations in which, by virtue of purchase and sale, or merger, one or more of the entities ceases to exist. In a bona fide merger the entities lose forever their separate identities, and become a new, independent entity.

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

Monopolies and Restraints of Trade § 6—Cartwright Act—Interpretation—Sherman Act.

Judicial interpretation of the Sherman Act (*15 U.S.C. §§ 1*, *2*), while often helpful, is not directly probative of the intent of the drafters of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*). Federal precedents must be used with caution because the acts, although similar, are not coextensive. The appropriate use of federal cases interpreting the Sherman Act is as an aid in interpreting our own Cartwright Act, not as controlling precedent.

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

Monopolies and Restraints of Trade § 6—Cartwright Act—Premerger Conspiracy—Meeting of Minds.

No claim was presented under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) based on an alleged premerger conspiracy to restrain trade of plaintiff's pharmaceutical product, which was to be developed by defendant, the company acquired **[*3]** in the merger. Even if the merging companies were capable of conspiring in the period between execution of an acquisition agreement and the consummation of the merger, plaintiff failed to produce evidence of any premerger meeting of the minds specifically to restrain the trade of the product. The complaint alleged that the acquiring company unilaterally decided to acquire defendant in order to further its own goal to dominate the market. Because this alleged anticompetitive purpose was attributed only to the acquiring company and to individuals and not to defendant, there was no combination of capital, skill or acts by two or more persons for the purpose of preventing competition.

[Cal. Forms of Pleading and Practice (2011) ch. 565, Unfair Competition, § 565.75; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 595.]

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

Monopolies and Restraints of Trade § 6—Cartwright Act—Scope.

The Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), like all antitrust laws, is about the protection of competition, not competitors. Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws.

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Judges: Opinion by Bruiniers, J., with Jones, P. J., and Simons, J., concurring.

Opinion by: Bruiniers

Opinion

[622]** **BRUINIERS, J.**—A company lawfully acquires a competitor. Can the activities of the two companies in anticipation of the merger constitute a conspiracy in restraint of trade under the Cartwright Act, the California antitrust statute (*Bus. & Prof. Code, § 16700 et seq.*)?[1] **[**623]** Appellant Asahi Kasei Pharma Corporation (Asahi) sued respondent CoTherix, Inc. (CoTherix), alleging that Asahi suffered damage from such a conspiracy between CoTherix and its now **[*4]** parent company, Actelion Ltd. (Actelion). The trial court, relying on the opinion of our Supreme Court in *State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal.3d 1147 [252 Cal. Rptr. 221, 762 P.2d 385]* **[***2]** (*Texaco*), held that the Cartwright Act has no application in these circumstances and granted summary adjudication in favor of CoTherix.[2] Asahi claims this was error. We affirm.

I. Background

Asahi is a Japanese corporation which develops and markets pharmaceutical products and medical devices. One of its products is Fasudil, a Rho-kinase[3] inhibitor which Asahi sought to market for treatment of pulmonary arterial hypertension (PAH).[4] PAH is a chronic, progressive and often fatal disease, **[***3]** which is characterized by severe constriction and obstruction of the pulmonary arteries.

In order to market Fasudil in the United States (U.S.) for treatment of PAH, Asahi, on June 23, 2006, entered into a licensing agreement (the Licensing Agreement) with CoTherix, a California-based biopharmaceutical company focused on developing and commercializing products for the treatment of cardiovascular disease. CoTherix had previously obtained regulatory approval for its own inhaled PAH treatment drug, Ventavis. Under the terms of the Licensing Agreement, CoTherix agreed to obtain regulatory approvals for Fasudil, and to develop and commercialize it in North America **[***4]** and Europe. CoTherix was to develop oral and inhaled formulations of Fasudil for treatment of PAH, and an oral formulation of Fasudil for treatment of stable angina. It was required to use commercially reasonable efforts to develop Fasudil, and to obtain U.S. regulatory approvals for Fasudil as soon as reasonably practicable.

[*5] Actelion is a Swiss pharmaceutical company. Actelion Pharmaceuticals US, Inc., is a U.S.-based operational subsidiary of Actelion (through an intermediate subsidiary). Actelion has, since December 2001, marketed the drug Tracleer (bosentan), an endothelin receptor antagonist in the form of an orally ingested tablet which is also used in the treatment of PAH, and which has been approved by the Food and Drug Administration for use in the U.S. Tracleer is what is known in the pharmaceutical **[**624]** industry as a “blockbuster” drug, generating over $1 billion

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[1] All further statutory references are to the Business and Professions Code unless otherwise indicated.

[2] Asahi's third amended complaint alleged three causes of action against CoTherix for violation of California's Cartwright Act, false advertising law (*§ 17500 et seq.*), and unfair competition law (*§ 17200 et seq.*). On December 21, 2009, Judge Carol L. Mittlesteadt granted summary adjudication of the Cartwright Act claim as to CoTherix. On March 4, 2010, Asahi voluntarily dismissed its false advertising claim. On May 21, 2010, Judge Marie S. Weiner granted summary adjudication of the unfair competition law claim. A final judgment was accordingly entered by Judge Weiner in favor of CoTherix on July 8, 2010.

[3] Rho-kinase is a protein contributing to constriction in the smooth muscle in arterial blood vessels (vasoconstriction).

[4] Fasudil was originally formulated in 1984 for intravenous use in treatment of cerebral vasospasm after subarachnoid hemorrhage (a type of stroke), and received regulatory approval in Japan for this use. Asahi asserts that Fasudil also has additional potential uses beyond PAH treatment, including treatment of stable angina, arteriosclerosis, and other diseases or conditions in which Rho-kinase may be involved.

in revenue annually, and Actelion has held the dominant share of the relevant market. In 2006, 98 percent of Actelion's U.S. revenues were dependent upon Tracleer sales.

On January 9, 2007, Actelion, through an intermediate subsidiary, acquired all of the stock of CoTherix, pursuant to a tender offer under a November 19, **[***5]** 2006 “Agreement and Plan of Merger” (the Acquisition Agreement). Actelion concurrently notified Asahi that it was discontinuing development of Fasudil for “business and commercial reasons.”

On November 19, 2008, Asahi filed suit against CoTherix and Actelion.[5] Among other claims, Asahi alleged that CoTherix and Actelion violated the Cartwright Act by forming a “combination” by “conspir[ing] together, pre-acquisition, … to mislead Asahi about Actelion's … intentions [to discontinue the development of] Fasudil,” which Actelion allegedly viewed as a potential competitor to Tracleer.

Asahi contends that Actelion was concerned about immediate threats to its Tracleer market share from the launch of competing products and feared that Fasudil would compete directly with Tracleer, causing potential pricing issues which would cost Actelion hundreds of millions of dollars in lost net revenue. Therefore, Asahi asserts, one of Actelion's goals in acquisition **[***6]** of CoTherix was to terminate the development of Fasudil. In pursuit of this goal, Actelion purportedly directed CoTherix Chief Executive Officer Don Santel to falsely reassure Asahi, after the CoTherix acquisition was announced, that “CoTherix continues to operate in the ordinary course of business, which includes the development of Fasudil.” In reality, according to Asahi, Actelion never had any intention of permitting CoTherix to continue development of Fasudil, and CoTherix began halting and delaying work on Fasudil's development prior to close of the acquisition. Had it known the true facts, Asahi insists that it would have pursued contractual remedies against CoTherix and could have sued for injunctive relief under the Licensing Agreement, thereby delaying or **[*6]** aborting Actelion's planned acquisition. Thus, Asahi charges, Actelion conspired with CoTherix “for anticompetitive purposes to eliminate an upstart competitor in the relevant market for PAH treatments.”

On August 18, 2009, CoTherix and the other U.S. subsidiaries of Actelion (Actelion U.S. Holding Company, Actelion Pharmaceuticals US, Inc.) filed a motion for summary adjudication challenging, inter alia, Asahi's Cartwright **[***7]** Act claim. CoTherix argued that the Cartwright Act is inapplicable to corporate acquisition transactions; that there were no triable issues of material fact as to whether CoTherix and Actelion had conspired to interrupt the development of Fasudil; and that Asahi lacked antitrust standing.

On December 22, 2009, the trial court entered its order granting summary adjudication of Asahi's Cartwright Act claim as to CoTherix and the other U.S. subsidiaries of Actelion.[6] The court, citing *Texaco, supra, 46 Cal.3d at page 1168*, found that “Defendants have met their initial burden under [*Code of Civil Procedure section] 437c[, subdivision] (p)(2)* **[**625]** of showing that this cause of action has no merit because the Cartwright Act does not apply to a merger … and the complaint does not allege any pre-merger violation of the Cartwright Act.” The court found that the third amended complaint alleged only unilateral intent by Actelion to eliminate Fasudil as a competitor to Actelion's products, and that Asahi's allegations that CoTherix and Actelion conspired to prevent Asahi from pursuing its contractual remedies against CoTherix under the Licensing Agreement “do not state a Cartwright Act **[***8]** violation because they do not constitute allegations of a combination of capital, skill or acts by two or more persons for the purpose of restraining competition … .”

On March 19, 2010, defendants moved for summary adjudication of Asahi's seventh claim for violation of the unfair competition law. On May 21, 2010, the trial court granted the motion as to CoTherix.[7] That order disposed of all

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[5] Also named as defendants were Actelion Pharmaceuticals Ltd., Actelion Pharmaceuticals US, Inc., Actelion U.S. Holding Company, and Actelion officers Jean-Paul Clozel, Martine Clozel, and Simon Buckingham. They are not parties to this appeal.

[6] Asahi's Cartwright Act claims against the other individual and corporate defendants were subsequently, and separately, summarily adjudicated in their favor.

[7] Asahi acknowledges that its Cartwright Act claims constituted the predicate unlawful conduct on which its unfair practices claims were based.

causes of action against CoTherix[8] and, accordingly, judgment was entered in CoTherix's favor on July 8, 2010. A timely notice of appeal was filed on July 21, 2010.
[*7]

II. Discussion

A. *Standard of Review*

HN1[] A motion for summary judgment or summary adjudication is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Code Civ. Proc., § 437c, subd. (c)*.) **[***9]** *HN2*[] We review an order granting or denying a motion for summary adjudication de novo. (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 860 [107 Cal. Rptr. 2d 841, 24 P.3d 493]* (*Aguilar*).) In our review, we are required to liberally construe, and draw all reasonable inferences from, the evidence in favor of the party opposing the motion. (*Miller v. Department of Corrections (2005) 36 Cal.4th 446, 460, 470 [30 Cal. Rptr. 3d 797, 115 P.3d 77]*.) We strictly scrutinize a defendant's showing. (*Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 768 [107 Cal. Rptr. 2d 617, 23 P.3d 1143]*.) "In applying this exacting standard of review, we are also mindful that *HN3*[] both California and federal decisions urge caution in granting a defendant's motion for summary judgment in an antitrust case." (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court (2003) 114 Cal.App.4th 309, 321 [7 Cal. Rptr. 3d 628]*.) Nevertheless, "summary judgment is available, and always remains available, even in complex cases," including antitrust actions for an unlawful conspiracy under the Cartwright Act. (*Aguilar, at pp. 860–861*.) "If a party moving for summary judgment in any action, including an antitrust action for unlawful conspiracy, would prevail at trial without submission of any issue of material fact to a trier of fact for determination, **[***10]** then he should prevail on summary judgment." (*Id. at p. 855*.)

B. *The Cartwright Act*

In 1907, the California Legislature enacted the Cartwright Act[9] which " 'generally **[**626]** outlaws any combinations or agreements which restrain trade or competition or which fix or control prices.' [Citation.]" (*Pacific Gas & Electric Co. v. County of Stanislaus (1997) 16 Cal.4th 1143, 1147 [69 Cal. Rptr. 2d 329, 947 P.2d 291]*; see *Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal.App.3d 13, 23 [144 Cal. Rptr. 664]*.)

The focus of the Cartwright Act is "on the punishment of violators for the larger purpose of promoting free competition. (See Stats. 1907, ch. 530, p. 984 **[*8]** [the Cartwright Act is 'An act to define trust and to provide for criminal penalties and civil damages, and punishment of [entities **[***11]** connected with trusts], and to promote free competition in commerce and all classes of business in this state'].)" (*Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 783 [111 Cal. Rptr. 3d 666, 233 P.3d 1066]*.) A successful plaintiff can recover treble damages. (*§ 16750, subd. (a)*.)

CA(1)[] **(1)** *HN4*[] A Cartwright Act violation requires "a combination of capital, skill or acts by two or more persons" that seeks to achieve an anticompetitive end. (*§ 16720*; see Antitrust and Unfair Competition Law Section, State Bar, Cal. State Antitrust and Unfair Competition Law (2009) § 2.02[D], p. 40 (hereafter, Cal. Antitrust & Unfair Competition).) Consequently, "[o]nly separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations." (*Freeman v. San Diego Assn. of Realtors (1999) 77 Cal.App.4th 171, 189 [91 Cal. Rptr. 2d 534]* (*Freeman*), citing *Copperweld Corp. v. Independence Tube Corp.*

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[8] Asahi voluntarily dismissed its false advertising claim on March 4, 2010.

[9] *Section 16720* provides in relevant part: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: [¶] (a) To create or carry out restrictions in trade or commerce. [¶] … [¶] (c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity." *Section 16726* provides: "Except as provided in this chapter, every trust is unlawful, against public policy and void."

(1984) 467 U.S. 752, 769–771 [81 L. Ed. 2d 628, 104 S. Ct. 2731] (*Copperweld*) [discussing application of the federal Sherman Act].)

As we discuss further *post*, federal antitrust laws prohibit anticompetitive mergers. (See 15 U.S.C. §§ 1, 2 (Sherman Act); 15 U.S.C. § 18 (Clayton Act).) A merger is illegal under section 1 of the Sherman Act if it effects **[***12]** an unreasonable restraint of trade, while section 2 of the Sherman Act prohibits monopolies. (See Alaska Airlines v. United Airlines, Inc. (9th Cir. 1991) 948 F.2d 536, 540–541 [each Sherman Act section "focus[es] on different problems": "concerted conduct is subject to sanction [under § 1] if it merely restrains trade, unilateral conduct is subject to sanction [under § 2] only if it either actually monopolizes or threatens monopolization"].) A merger may be attacked under the Clayton Act if it has the potential to substantially lessen competition. (Texaco, supra, 46 Cal.3d at p. 1165, fn. 18.)

"[T]he Cartwright Act is not derived from the Sherman Act, but rather from the laws of other states, and the Cartwright Act and the Sherman Act differ in wording and scope." (Cal. Antitrust & Unfair Competition, *supra*, § 1.05, p. 24.) The Cartwright Act bans combinations, but ***HN5***[] single firm monopolization is not cognizable under the Cartwright Act. (Texaco, supra, 46 Cal.3d at p. 1163; Freeman, supra, 77 Cal.App.4th at p. 200, fn. 32; but cf. Lowell v. Mother's Cake & Cookie Co., supra, 79 Cal.App.3d at p. 23 [holding that "monopoly is a prohibited restraint of trade" under the Cartwright Act].) **[***13]** To maintain an action for a combination in restraint of trade under the Cartwright Act, "the following elements must be established: **[**627]** (1) the formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts. [Citation.]" (Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d 709, 718 [187 Cal. Rptr. 797].)
[*9]

C. *Texaco*

CA(2)[] **(2)** In *Texaco*, the Attorney General contended that a proposed acquisition by Texaco of the assets of Getty Oil Company through merger was anticompetitive and sued under the Cartwright Act seeking to enjoin the merger.[10] (Texaco, supra, 46 Cal.3d at pp. 1150–1151.) The trial court sustained Texaco's demurrer without leave to amend and dismissed the complaint. Affirming, our Supreme Court extensively examined the historical antecedents of the Cartwright Act, and concluded that our Legislature had implemented the Cartwright Act intending to adopt the meaning of "combination" as used, and as judicially interpreted, in the 1889 Texas and 1899 Michigan legislation upon which the Cartwright Act was modeled, i.e., anticompetitive collusion between otherwise independent and competing entities. (Texaco, at pp. 1162–1163.) The court particularly noted the **[***14]** Legislature's failure to adopt antimerger and antimonopoly provisions included in then recently amended antitrust legislation in other jurisdictions, and its failure to do so since, despite at least 26 other amendments subsequent to enactment in 1907. (Id. at pp. 1159–1163.)[11] "Given this history, we must conclude that ***HN6***[] the drafters intended that their Act apply, as its words had been construed, only to entities that 'combine,' in the sense of those who *perdure* (i.e., continue as separate, independent, competing entities during and after their collusive action)—and therefore that the drafters did not intend the Cartwright Act to regulate the bona fide purchase and sale of one firm by another."[12] (Texaco, at p. 1163.) The court held that the provisions of the Cartwright Act could

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[10] The Attorney General also alleged that the merger violated the Unfair Practices Act (§ 17000 et seq.). (Texaco, supra, 46 Cal.3d at pp. 1150–1151.)

[11] Since *Texaco* was decided, there have been three unsuccessful legislative attempts to provide a private damage cause of action for unilateral monopolization. (Cal. Antitrust & Unfair Competition, *supra*, § 6.01[B], pp. 187–188 [discussing Assem. Bill No. 671 (1989–1990 Reg. Sess.); Sen. Bill No. 1814 (2001–2002 Reg. Sess.); Sen. Bill No. 1274 (2005–2006 Reg. Sess.)].) Senate Bill No. 1274 was described as "an attempt to 'harmonize California ***antitrust law*** with § 2 of the federal Sherman Act' because California antitrust statutes 'lack an analogous provision specifically prohibiting monopolization or attempted monopolization.'" (Cal. Antitrust & Unfair Competition, *supra*, § 6.01[B], p. 188, fn. omitted.)

not be used to challenge mergers and acquisitions and found that "the drafters of the Cartwright Act intended to make their law applicable only to situations in which the parties improperly collude *and continue as separate, independent entities*, and not to situations in which, by virtue of purchase and sale, or merger, one or more of the entities ceases to exist." (*Texaco, at p. 1167*, some italics added.) In a bona fide **[***15]** merger "the entities lose forever their separate identities, and become a new, independent entity." (*Id. at pp. 1152–1153*.)
[*10]

[628]** D. **[***16]** *Copperweld*

Also relevant to our discussion is the determination by the Supreme Court that the coordinated acts of a parent and its wholly owned subsidiary do not constitute a combination or conspiracy under *section 1* of the Sherman Act. (*Copperweld, supra, 467 U.S. at p. 777*.) Rejecting prior cases suggesting the possibility of "intra-enterprise" liability in this context, the Supreme Court held that "[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no **[***17]** justification for *§ 1* scrutiny." (*Id. at pp. 772, 771*; see also *American Needle, Inc. v. National Football League (2010) 560 U.S. ___, ___ [176 L. Ed. 2d 947, 130 S.Ct. 2201, 2212]* (*American Needle*).)

The Supreme Court acknowledged that the focus of *section 1* of the Sherman Act on concerted behavior "leaves a 'gap' in the Act's proscription against unreasonable restraints of trade. … An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct … that may be indistinguishable in economic effect from the conduct of two firms subject to *§ 1* liability." (*Copperweld, supra, 467 U.S. at pp. 774–775*, citation omitted.)

Our own Supreme Court has not yet directly addressed the application and scope of *Copperweld* to the Cartwright Act. At least one appellate district has applied *Copperweld* in rejecting a Cartwright Act price-fixing claim brought against **[***18]** a corporate real estate multiple listing service and its local real estate association shareholders. (*Freeman, supra, 77 Cal.App.4th 171*; see also *Eddins v. Redstone (2005) 134 Cal.App.4th 290, 341–343 [35 Cal. Rptr. 3d 863]* [applying *Copperweld* in sustaining summary adjudication of a claim of collusion under the Unfair Practices Act between commonly controlled companies]; *Drum v. San Fernando Valley Bar Assn. (2010) 182 Cal.App.4th 247, 255–256 [106 Cal. Rptr. 3d 46]* [applying *Copperweld* principles to claim **[*11]** under the unfair competition law]; cf. *MacManus v A. E. Realty Partners (1987) 195 Cal.App.3d 1106, 1112 & fn. 4 [241 Cal.Rptr. 315]* [distinguishing *Copperweld* and declining to decide application under the Cartwright Act to a purely intra-enterprise conspiracy or combination].) In another instance, the federal district court for the Central District of California dismissed a Cartwright Act conspiracy claim against a manufacturer and its wholly owned subsidiaries, finding that *Copperweld* would "likely … be persuasive to the Supreme Court of California." **[**629]** (*Newport Components v. NEC Home Electronics (C.D.Cal. 1987) 671 F.Supp. 1525, 1544, 1550*.)[13]

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[12] The court held that the Unfair Practices Act was likewise inapplicable. (*Texaco, supra, 46 Cal.3d at p. 1170*.) This holding has been superseded by statute. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 570 [71 Cal. Rptr. 2d 731, 950 P.2d 1086]*.)

Absent contrary direction from our Supreme Court, we believe that the rationale of Copperweld is entirely consistent with the approach of Texaco, and the established teaching of our own cases that **HN8**[] an indispensable element of any action under the Cartwright Act is proof of a "'combination of resources of two or more *independent interests* for the purpose of restraining commerce and preventing market competition … .' [Citation.]" (G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 266 [195 Cal. Rptr. 211], italics added.)

E. *Application of* Texaco

The trial court, in granting summary adjudication, found *Texaco* controlling. Asahi, acknowledging the continuing vitality of *Texaco* in the context of corporate mergers, seeks to narrowly interpret its scope and contends that *Texaco* has no application to premerger activities during the period that the acquired and acquiring entities maintain separate identities. We find the distinctions that Asahi attempts to draw unpersuasive.

Asahi argues that, unlike the Attorney General in *Texaco*, it does not seek to challenge the Actelion/CoTherix merger, but instead targets an anticompetitive premerger combination **[***20]** or conspiracy resulting when "CoTherix and its executives … joined with Actelion to frustrate Asahi's rights under the [Licensing] Agreement so that the path would be clear for Actelion to prevent a vibrant competitive offering in the markets for PAH and [stable angina] treatments."

1. *The Licensing Agreement*

Asahi's theory of the case is premised on provisions of the Licensing Agreement anticipating potential change in control of CoTherix. Section 11.2(f) of the Licensing Agreement permitted Asahi to terminate the agreement in the event that CoTherix was acquired by a "Competitive Company," **[*12]** defined as "any Third Party … that conduct[s] Development or Commercialization of a Pulmonary Hypertension drug or Stable Angina drug … ." In that event, the Competitive Company was required to assume CoTherix's development obligations under the Licensing Agreement and provide written confirmation of its agreement to do so. Failure to do so would constitute a material breach of the Licensing Agreement, requiring relinquishment and return of all Asahi intellectual property and licenses, and allowing Asahi to terminate the agreement. Any party was entitled to "seek injunctive relief with **[***21]** respect to any actual or threatened breach of this Agreement, which breach would cause irreparable harm to the Party seeking such relief, from a court of competent jurisdiction."[14]

2. *Application of* Texaco *to Premerger Activities*

CA(3)[] **(3)** Finding no directly applicable California authority to support its position, **[**630]** Asahi relies primarily on federal cases under the Sherman Act, asserting that "the Cartwright Act is construed in accord with the interpretation courts give to the Sherman Act." There is a similarity in language and purpose between the federal and state statutes. The Cartwright Act, like the Sherman Act, "was enacted to promote free market competition and to prevent conspiracies or agreements in restraint or monopolization of trade." (Exxon Corp. v. Superior Court (1997) 51 Cal.App.4th 1672, 1680 [60 Cal. Rptr. 2d 195], **[***22]** fn. omitted.) In *Texaco*, however, our Supreme Court recognized that the Sherman and Cartwright Acts differ in legislative intent and history, as well as in statutory construction and language, and explained that **HN9**[] "judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters' intent … ." (Texaco, supra, 46 Cal.3d at p. 1164.) "[F]ederal precedents must be used with caution because the acts, although similar, are not coextensive. [Citation.]" (Freeman, supra, 77 Cal.App.4th at p. 183, fn. 9.) "[T]he appropriate use of federal cases interpreting the Sherman Act is as an aid in interpreting our own Cartwright Act, not as controlling precedent … ." (Cellular Plus, Inc. v. Superior Court (1993) 14 Cal.App.4th 1224, 1240 [18 Cal. Rptr. 2d 308]; see also Knevelbaard Dairies v. Kraft

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[13] As we discuss *post*, **HN7**[] judicial interpretation of the Sherman Act, while often helpful, is not dispositive **[***19]** on Cartwright Act issues. (Texaco, supra, 46 Cal.3d at p. 1164.)

[14] Section 13.10 of the Licensing Agreement otherwise provides for mandatory and binding commercial arbitration of contractual disputes between the parties. Some exhibits submitted in relation to the motion for summary adjudication appear to be excerpts from testimony submitted in International Chamber of Commerce arbitration proceedings arising from this dispute. The outcome of that proceeding is not directly relevant to the issues before us.

Foods, Inc. (9th Cir. 2000) 232 F.3d 979, 985 [role of federal antitrust precedents in a Cartwright Act analysis is "limited: they are 'often helpful' but not necessarily decisive"].)

Some federal circuits appear to have at least implicitly recognized a potential cause of action under section 1 of the Sherman Act for a premerger **[*13]** combination or conspiracy—at least with respect **[***23]** to per se antitrust violations such as price fixing.[15] (Vollrath Co. v. Sammi Corp. (9th Cir. 1993) 9 F.3d 1455 (*Vollrath*); Lantec, Inc. v. Novell, Inc. (10th Cir. 2002) 306 F.3d 1003 (*Lantec*).)

In *Vollrath*, the plaintiff alleged that the defendant, a subsidiary, and another later-acquired subsidiary violated the Sherman Act through a predatory pricing scheme for imported stainless steel mixing bowls. (*Vollrath, supra, 9 F.3d at p. 1457*.) The matter was submitted **[***24]** to a jury on theories including both an attempt and conspiracy to monopolize in violation of section 2 of the Sherman Act, as well as conspiracy to restrain trade in violation of section 1 of the Sherman Act. The jury returned a verdict for the plaintiff, but the trial court granted a motion for judgment notwithstanding the verdict. (*Vollrath, at pp. 1457–1459*.) The Ninth Circuit affirmed, and found, among other things, that the district court properly held that under *Copperweld* there could be no conspiracy following an acquisition of one of the defendants by another. (*Id. at p. 1463*.) Asahi asserts that *Vollrath* nevertheless recognized that the existence of a premerger conspiracy was an issue properly considered by a trier of fact. The conspiracy factually alleged in *Vollrath*, however, was **[**631]** an agreement to engage in below-cost pricing so as to monopolize the stainless steel mixing bowl market, a violation of section 2 of the Sherman Act (*Vollrath, at p. 1463*), for which there is no analog in the Cartwright Act. Further, under federal law, anticompetitive mergers are subject to scrutiny under both sections of the Sherman Act, as well as under the Clayton Act (15 U.S.C. § 18 [expressly prohibiting **[***25]** an acquisition or merger "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition … may be substantially to lessen competition, or to tend to create a monopoly"]). (United States v. First Nat. Bank (1964) 376 U.S. 665, 669–673 [12 L. Ed. 2d 1, 84 S. Ct. 1033].)

In *Lantec*, the plaintiff alleged that a merger between Novell and WordPerfect was unlawful as a vertical combination and conspiracy in restraint of trade under section 1 of the Sherman Act, and that Novell conspired with WordPerfect to monopolize the relevant software market in violation of section 2 of the Sherman Act. (*Lantec, supra, 306 F.3d at pp. 1022–1023*.) Following presentation of the claims to a jury, the trial court granted judgment for the **[*14]** defendants as a matter of law. (*Id. at p. 1011*.) The Tenth Circuit affirmed. Here again, a conspiracy to monopolize was alleged under section 2 of the Sherman Act, and the reviewing court only implicitly accepted the viability of a premerger conspiracy claim under section 1 of the Sherman Act in finding that Lantec had in any event failed to define a relevant market as a predicate to pursuing such claims. (306 F.3d at pp. 1024–1028.) *Lantec*'s discussion **[***26]** of premerger conduct of the defendants was limited entirely to the plaintiff's section 2 Sherman Act claims.

Asahi also directs our attention to Omnicare, Inc. v. UnitedHealth Group, Inc. (N.D.Ill. 2007) 524 F.Supp.2d 1031 (*Omnicare*), a federal trial court decision in the Seventh Circuit denying a motion to dismiss a section 1 Sherman Act claim based on alleged premerger price fixing by two prescription drug providers. This is the only case cited by Asahi that expressly discusses antitrust liability for concerted action between merging companies. The court found that the claim could not be dismissed at the pleading stage because "[i]t is at least plausible that two competitor corporations that are going through a process of merger continue to retain separate economic interests." (*Omnicare, at p. 1039*.) However, the plaintiff had alleged "that the decision to enter into a merger agreement on certain [anticompetitive] terms was itself an unlawful agreement" (*id. at pp. 1037–1038*), and the trial judge relied

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[15] "Under both California and federal law, agreements fixing or tampering with prices are illegal per se." (Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co. (1971) 4 Cal.3d 354, 363 [93 Cal. Rptr. 602, 482 P.2d 226]; see Knevelbaard Dairies v. Kraft Foods, Inc., supra, 232 F.3d at p. 986.) " 'California and federal ***antitrust law*** under the two acts generally distinguish between conduct that is per se unlawful and conduct that is evaluated under the rule of reason. The law conclusively presumes manifestly anticompetitive restraints of trade to be unreasonable and unlawful, and evaluates other restraints under the rule of reason. [Citations.]' [Citation.]" (Fisherman's Wharf Bay Cruise Corp. v. Superior Court, supra, 114 Cal.App.4th at pp. 334–335.)

not on any controlling case authority, but rather scholarly argument that combining firms should be continued to be treated as separate actors until a merger is fully consummated (*id. at p. 1039*, **[***27]** citing to an argument now found in 7 Areeda & Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application (3d ed. 2010) § 14E, ¶ 1464h, pp. 227–228 (hereafter, Areeda & Hovenkamp)).

Professors Areeda and Hovenkamp, in their multivolume treatise, address this specific point in a single sentence within a far more extensive analysis of "Intraenterprise Conspiracy" (Areeda & Hovenkamp, *supra*, § 14E, ¶¶ 1462–1478, pp. 199–377)—a doctrine that the U.S. Supreme Court has since characterized as "defunct." (*American Needle, supra, 560 U.S. at p. ___ [130 S.Ct. at p. 2210]*.) Their analysis and comment is, of course, also focused entirely on application of federal law, including *sections 1* and *2* of the Sherman Act, and does not purport to address the scope of our Cartwright Act. The argument relied upon by the federal trial court in *Omnicare* and by Asahi here, begins with an observation that, "Acquisitions are tested **[**632]** under the antitrust laws under a prophylactic standard that reaches most mergers that have any significant anticompetitive potential. Once we presume that a merger is lawful, the additional deterrence afforded by a continuing intraenterprise conspiracy doctrine is unnecessary **[***28]** and unwise. … Any increment in anticompetitive potential that resulted from the merger should be challenged in a lawsuit challenging the merger itself. Assuming its legality, the post-merger firm must thereafter be regarded as a single entity. [¶] *The flip side of* ***[*15]*** *the coin is that as a general rule firms contemplating mergers remain separate actors until their transaction is consummated*." (Areeda & Hovenkamp, *supra*, § 14E, ¶ 1464h, pp. 227–228, italics added & fns. omitted.) With regard to the italicized comment, the authors expressly noted their disagreement with a contrary holding in *International Travel Arrangers v. NWA, Inc. (8th Cir. 1993) 991 F.2d 1389* (*NWA*). (Areeda & Hovenkamp, *supra*, § 14E, ¶ 1464h, p. 228, fn. 41.)

In *NWA*, a tour operator sued Northwest Airlines, Inc., and affiliated companies, claiming violations of *sections 1* and *2* of the Sherman Act, and the Clayton Act, together with state law breach of contract and fraud claims. The jury found that Northwest Airlines did not conspire with a subsidiary prior to a merger, but found for the plaintiff on its claims that the defendants had monopolized and attempted to monopolize through predatory pricing. (*NWA, supra, 991 F.2d at p. 1392*.) **[***29]** On a cross-appeal, the plaintiff contended that the trial court had improperly instructed the jury, arguing that the rule announced by the Supreme Court in *Copperweld*—"that a parent and its wholly owned subsidiary 'are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act,'—[could not] properly be applied to insulate from Sherman Act liability joint actions by two previously independent competitors taken after they had agreed to merge but before the merger had been consummated."[16] (*NWA, at p. 1397*.) The Eighth Circuit disagreed, approving the jury instruction (thus allowing the jury to determine the economic substance of the relationship between the two entities) and stating "[w]e do not conclude, as [plaintiff] would have us do, that only the formal consummation of a merger precludes the application of *section 1* of the Sherman Act to an alleged conspiracy between the merging companies." (*Id. at p. 1398*.)

What the cited federal authorities suggest is that *section 1* of the Sherman Act may, at least under some circumstances, reach premerger anticompetitive conduct, dependent upon the economic reality of the acquired and acquiring entities as independent actors. This approach appears to be generally consistent with the requirement of our own cases that ***HN10***[] an antitrust plaintiff must plead and prove that separate entities maintaining separate and independent interests, combined for the purpose of restraining trade. (See *Freeman, supra,* ***[*16]*** *77 Cal.App.4th at p. 189*; *G.H.I.I. v. MTS, Inc., supra, 147 Cal.App.3d at p. 266* ["it is **[**633]** well settled that a

[16] One of the contested instructions advised the jury "*Section 1* of the Sherman Act prohibits only those unreasonable restraints of trade which are affected by a contract, combination or conspiracy between separate entities. The economic substance of the relationship **[***30]** between two entities determines whether they are 'separate' for purposes of a *section 1* conspiracy. Where the entities possess an inherent unity of economic interest and purpose, they are not separate entities capable of conspiring. Thus, if you find that NWA, Inc., Northwest, and [Mainline] lacked independent economic consciousness after they had decided to merge and before the merger was completed, they were not capable of conspiring together at that time." (*NWA, supra, 991 F.2d at p. 1397*.)

complaint for antitrust violations which fails to allege such **[***31]** concerted action by separate entities maintaining separate and independent interests is subject to demurrer"].)[17]

Asahi directs our attention to no California case, however, and we have found none, applying the Cartwright Act to penalize conduct during the merger process that would unquestionably be exempt from antitrust scrutiny upon consummation of the merger. *Copperweld* teaches that where the entities possess an inherent unity of economic interest and purpose, they are not separate entities capable of conspiring. Even legally distinct entities do not conspire if they "pursue[] the common interests of the whole rather than interests separate from those of the [group] itself . … Because [such] coordination … does not represent a sudden joining of two independent sources of economic power previously pursuing separate **[***32]** interests, it is not activity that warrants [Sherman Act *section 1*] scrutiny." (*Copperweld, supra, 467 U.S. at pp. 770–771*.)

"[S]ubstance, not form, should determine whether a[n] … entity is capable of conspiring under *§ 1*." (*Copperweld, supra, 467 U.S. at p. 773, fn. 21*.) "[T]he question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved 'seem' like one firm or multiple firms in any metaphysical sense. The key is whether the alleged 'contract, combination … , or conspiracy' is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a 'contract, combination … or conspiracy' amongst 'separate economic actors pursuing separate economic interests,' … such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' … and therefore of 'diversity of entrepreneurial interests,' … and thus of actual or potential competition … . [¶] … [¶] … [T]he inquiry is one of competitive reality … ." (*American Needle, supra, 560 U.S. at pp. ___ – ___ [130 S.Ct. at pp. 2211–2212]*, citations omitted.)

We have difficulty seeing how application **[***33]** of the Cartwright Act in the context presented here would further the policy of " 'unrestrained interaction of competitive forces' " that the antitrust laws seek to advance. (*Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 935 [130 Cal. Rptr. 1, 549 P.2d 833]*.) The " 'central evil' addressed by Sherman Act *§ 1*" is "the cartel eliminating competition that would otherwise exist." (Areeda & Hovenkamp, **[*17]** *supra*, § 14E, ¶ 1462b, p. 203.) The antitrust laws "supervise[] conspiracies because they increase market power *or make possible a restraint that could not otherwise be achieved*." (*Ibid.*, italics added & fn. omitted.) Assuming a merger that is otherwise lawful,[18] the combination inherent in the merger is what eliminates competition that would otherwise exist, and which makes possible restraints that could not otherwise be **[**634]** achieved. It is the merger itself that "deprives the marketplace of the independent centers of decisionmaking" and results in a single aggregation of economic power. (*Copperweld, supra, 467 U.S. at p. 769*; see *American Needle, supra, 560 U.S. at p. ___ [130 S.Ct. at p. 2212]*.)

And the combination resulting from a merger may well have anticompetitive effects, whether intended or incidental. As the Supreme Court observed in *Copperweld*, "[a]n unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms." (*Copperweld, supra, 467 U.S. at p. 775*.) But in *Texaco*, our high court expressly concluded that ***HN11***[] the Legislature "did not intend the Cartwright Act to regulate the bona fide purchase and sale of one firm by another," and that it applied only to those who "continue as

[17] Professor Areeda suggests that the question of economic integration should not be left to "a vaguely instructed jury" and "[j]udges, not juries, should define the purposes of the antitrust statutes and choose the conception that properly implements those purposes." (Areeda, Comment, *Intraenterprise Conspiracy in Decline* (1983) *97 Harv. L.Rev. 451, 469–470*, fns. omitted.)

[18] CoTherix notes that both Actelion U.S. Holding Company and CoTherix filed preacquisition notifications of the proposed merger with **[***34]** the U.S. Department of Justice and the Federal Trade Commission as required by the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 (*Pub.L. No. 94-435 (Sept. 30, 1976) 90 Stat. 1383*), and that neither agency challenged the acquisition as anticompetitive. Since Asahi specifically disclaims any challenge to the validity of the merger, the effect of such a filing is not directly relevant to the issue before us.

separate, independent, competing entities during *and after* their collusive action." (*Texaco, supra, 46 Cal.3d at p. 1163*, italics added.)

A merger is definitionally a combination of formerly **[***35]** separate interests. It is necessarily effectuated by "collusion" of the parties. The separate entities "possess an inherent unity of economic interest and purpose" in consummation of the merger, and the ultimate interests of the subsidiary and the parent are identical thereafter. (*NWA, supra, 991 F.2d at p. 1397*; see *Copperweld, supra, 467 U.S. at pp. 771–773* & fn. 18; *Texaco, supra, 46 Cal.3d at pp. 1152–1153* [in a bona fide merger "the entities lose forever their separate identities, and become a new, independent entity"].) Alignment of the business objectives of the acquired company with the new parent is the inevitable result. The "competitive reality" is that independent economic decisionmaking is compromised, even if not eliminated, once companies have formally agreed to merge. That compromise is exemplified by the Acquisition Agreement executed here by Actelion and CoTherix. CoTherix, for example, on signing the Acquisition Agreement, surrendered its freedom of action in the conduct of its business affairs as an independent entity by obligating itself to numerous contractual covenants and conditions, including limitations on its **[*18]** preclosing ability to incur indebtedness, make certain capital expenditures, **[***36]** and engage in certain dealings with its employees (Acquisition Agreement, art. VIII, § 8.1).

The coordinated or concerted action between Actelion and CoTherix alleged by Asahi, and the focus of its evidentiary showing, was that the principals of the two entities, in preparation for the proposed acquisition, agreed to give false assurances to Asahi that development of Fasudil would continue, while planning to do otherwise once Actelion controlled CoTherix. But the resulting loss of independent decisionmaking by CoTherix on the development of Fasudil, and the ultimate implementation of business objectives defined entirely by Actelion as the parent, were inherent in the combination between the two companies. It is difficult to see how our antitrust policies are furthered by saying that parties may not, in the process of merging, reach agreement to do that which the combined entity may freely do. The rationale of *Texaco*—that the Cartwright Act was intended to apply "only to situations in which the parties improperly collude *and continue as* separate, independent entities, and not to situations in which, by virtue of purchase and sale, or merger, one or more of the entities ceases to **[***37]** exist" (*Texaco, supra, 46 Cal.3d at p. 1167*, **[**635]** some italics added)—would seem equally applicable in these circumstances.

CA(4)[↑] **(4)** But even if we were to conclude (or find a triable factual issue) that Actelion and CoTherix remained capable of conspiring in the period between execution of the Acquisition Agreement and the consummation of the merger, we find that Asahi fails to present a viable claim here.

F. *Asahi Fails to Establish a Viable Cartwright Act Claim*

Asahi's theory of the case can best be summarized as follows: at least one of Actelion's purposes in acquisition of CoTherix was to eliminate Fasudil as a competitive threat to Tracleer; CoTherix was aware of Actelion's purpose; as part of an agreed "strategy" Actelion directed CoTherix and its principals to give false assurances to Asahi that development of Fasudil would continue under the Licensing Agreement; in reliance on those assurances, Asahi did not pursue available remedies which would have allowed it to impede or halt the Actelion/CoTherix merger.[19] Thus, Asahi concludes, CoTherix and Actelion "overcame a necessary hurdle" by dissuading Asahi from exercising its preacquisition rights and, by "[t]hwarting Asahi's exercise of its [Licensing] **[*19]** **[***38]** Agreement rights[,] thwarted Fasudil's development as a competitive product." In other words, the conduct of the parties in the course of effectuating their merger ultimately achieved Actelion's intended anticompetitive result. Asahi fails to demonstrate, however, how Cartwright Act penalties would properly apply in such circumstances.

Asahi failed to produce evidence of any premerger meeting of the minds specifically to restrain the trade of Fasudil. As the trial court observed in its order, Asahi's complaint alleges that "Actelion, unilaterally, decided to acquire CoTherix in order to further its own goal to dominate the market." Because this alleged anticompetitive purpose was

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[19] At oral argument, Asahi's counsel contended that there was a conspiracy, during the period between the Acquisition Agreement and closing of the merger, to *delay* the approval process for Fasudil, and that Asahi suffered consequential damages during that period. Asahi neither pled nor argued such a claim in the trial court and presented no such argument in its briefing here.

"attributed only to Actelion and the Individual Defendants and *not to CoTherix*, … there [was] no combination of capital, skill or acts **[***39]** 'by two or more persons' for the purpose of preventing competition." The agreement or collusive "strategy" on which Asahi bases its Cartwright Act claim was to " 'prevent Asahi from exercising its rights under the Fasudil Agreement in a way that could potentially disrupt Actelion's acquisition of CoTherix.' " In later granting summary adjudication in favor of Actelion, another trial judge separately found, "the only pre-merger agreement alleged … between Actelion and CoTherix is an agreement not to comply with the change of control provision of the [L]icense [A]greement … [, but this] … agreement is not a violation of the Cartwright Act because it is not an agreement to restrain competition, i.e., not an agreement to end the sale of Fasudil." Rather, "[t]he goal and purpose of the alleged 'conspiracy' [between CoTherix and Actelion] was to achieve a merger." In both instances the court found that the conduct alleged did not, as a matter of law, establish a violation of the Cartwright Act. We agree.

Asahi protests that it was not required to produce evidence of a shared common purpose or motive, but only the existence of a combination resulting in an anticompetitive effect. **[***40]** The anticompetitive *effect* **[**636]** that Asahi complains of, however, results not from any premerger agreement between the parties, but from ultimate consummation of the merger. Asahi's theory hinges on what it posits as its ability to impede or prevent the merger. Nothing in the Licensing Agreement provides for such a remedy. Citing section 13.10(b) of the Licensing Agreement, Asahi contends that, had it known the true facts, it "would have investigated all legal means to require the continued development of Fasudil" and that it "could have sued for injunctive relief, and thereby delayed or even caused a breakdown of Actelion's planned acquisition." While Asahi had the right to declare a material breach of the Licensing Agreement, and to terminate it, if it failed to receive reasonable assurances of continued development of Fasudil, nothing in the Licensing Agreement purports to give Asahi the right to prevent a "Change of Control," and Asahi fails to suggest how it could have successfully enjoined the *merger*. Certainly, as *Texaco* makes clear, it could not have done so under the Cartwright Act.

[*20] ***CA(5)***[] **(5)** The essence of Asahi's claim is that CoTherix breached the terms of the Licensing Agreement, that **[***41]** Actelion induced it to do so, and that development of Fasudil as a competitive product was "thwarted" as a result. What the undisputed evidence shows, however, is that development of Fasudil, at least by CoTherix, was thwarted by Actelion's acquisition of CoTherix. While Asahi presented voluminous evidence relating to the harm which it claims to have suffered as a result, ***HN12***[] the Cartwright Act, like all antitrust laws, is about " ' " 'the protection of *competition*, not *competitors*.' " ' [Citation.]" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 186 [83 Cal. Rptr. 2d 548, 973 P.2d 527]*; see also *Indiana Grocery, Inc. v. Super Valu Stores, Inc. (7th Cir. 1989) 864 F.2d 1409, 1413* [Sherman Act "does not reach conduct that is only unfair, impolite, or unethical"].) " 'Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws. [Citations.]' [Citation.]" (*People's Choice Wireless, Inc. v. Verizon Wireless (2005) 131 Cal.App.4th 656, 662–663 [31 Cal. Rptr. 3d 819]*.)

III. Disposition

The judgment is affirmed.

Jones, P. J., and Simons, J., concurred.

A petition for a rehearing was denied April 3, 2012, and appellant's petition for review by the Supreme Court was denied June 13, 2012, S201718.

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Diaz Aviation Corp. v. P.R. Ports Auth.

United States District Court for the District of Puerto Rico

March 5, 2012, Decided; March 5, 2012, Filed

CIVIL NO. 09-1583 (CVR)

Reporter

2012 U.S. Dist. LEXIS 29625 *; 2012 WL 706119

DIAZ AVIATION CORPORATION, Plaintiff, v. PUERTO RICO PORTS AUTHORITY, et al., Defendants.

Subsequent History: Affirmed by *Daz Aviation Corp. v. Airport Aviation Servs., 2013 U.S. App. LEXIS 12069 (1st Cir. P.R., June 14, 2013)*

Prior History: *Diaz Aviation Corp. v. Airport Aviation Servs., 2011 U.S. Dist. LEXIS 128983 (D.P.R., Nov. 7, 2011)*

Core Terms

Aviation, Airport, fuel, monopolization, Sherman Act, military, plane, conspiracy, anti-competitive, co-defendant, damages, restraint of trade, employees, commerce, concerted action, no evidence, aircraft, airplane, permits, present evidence, relevant market, rule of reason, evidence show, allegations, probability, witnesses, eviction, email

Counsel: **[*1]** For Diaz Aviation Corporation, doing business as Borinquen Air, Sixto Diaz-Saldana, Plaintiffs: Sixto Manuel Diaz-Saldana, LEAD ATTORNEY, San Juan, PR; Jose G. Perez-Ortiz, Castillo del Mar, Carolina, PR.

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For Departamento de Justicia de Puerto Rico, Interested Party: Yahil Quintero-Santos, Vega Baja, PR.

Judges: CAMILLE L. VELEZ-RIVE, UNITED STATES MAGISTRATE JUDGE.

Opinion by: CAMILLE L. VELEZ-RIVE

Opinion

OPINION AND ORDER

INTRODUCTION

Plaintiff Díaz Aviation Corporation (hereafter "Díaz Aviation") [1] filed a Verified Amended Complaint against defendants Airport Aviation Corp., José Algarín, and Rafael Matos (hereafter referred jointly as "Airport Aviation"), among other co-defendants who were dismissed. [2] (Docket No. 121).

Plaintiff Díaz Aviation claimed defendant Airport Aviation and its employees, individual defendants Algarín and Matos, interfered with the operation of Díaz Aviation's business which it considers is interference with interstate commerce and, thus, have restricted trade at the Luis Muñoz Marín International Airport in Carolina, Puerto Rico (hereafter "LMMIA"), an alleged violation of the Sherman Act. The acts of said defendants were based on plaintiff's submission on the pleadings that Airport Aviation represented itself as the only entity authorized to serve the Armed Forces of the United **[*4]** States upon having a contract with the Defense Department to provide aviation fuel to its military planes. Plaintiff also raised having suffered tort/damages upon the loss of sales from defendants' interference with its business by taking away its clients, which resulted in plaintiff firing employees, cutting costs and reducing its business. As way of interference plaintiff submitted the allegation defendants used the Ports Authority to remove plaintiff's trucks from the airport, interfere with its business, initiate eviction actions which were resolved in plaintiff's favor by state courts, among others. (Docket No. 121).

On February 27, 28 and 29, 2012, the non-jury trial in this case was held on the pending claims under the Sherman Act and for damages under Article 1802 of the Puerto Rico Civil Code. [3] Plaintiff presented twenty one (21) witnesses on its behalf and seven (7) exhibits, in addition to a Joint Exhibit. [4] At the conclusion of the non-jury trial and presentation of all evidence by plaintiff and having rested its case, defendants Airport Aviation, Algarín and Matos moved for non-suit. *Fed.R.Civ.P. 52*.

After considering the evidence presented at trial, including the testimonies and documents, and assessing credibility, the Court finds plaintiff has not met its burden in this case. [5] The undisputed evidence showed plaintiff

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[1] Plaintiff Díaz Aviation has been identified in the proceedings also as **[*3]** d/b/a Borinquen Air and as d/b/a Amber Air.

[2] Co-defendants Puerto Rico Ports Authority, (hereafter "Ports Authority"), Federico Sosa Román, Alvaro Pilar, Arnaldo Deleo, Edgar Sierra, Eric Gracia and Fernando Bonilla were also included in the Verified Amended Complaint but were dismissed as per Opinion and Order issued on July 27, 2010, Partial Judgment, and Order of September 3, 2010. (Docket Nos. 188, 191 and 201). Co-defendant Edwin Santana De La Rosa was also included in the Verified Amended Complaint but was dismissed on November 7, 2011 and Partial Judgment was entered. (Docket Nos. 274 and 276).

[3] Plaintiff waived a jury trial at the Pre-Trial Conference. (Docket No. **[*5]** 297).

[4] On the first day of trial, Sixto Díaz-Saldaña (president and owner of Díaz Aviation) informed the court he was going to continue legally representing plaintiff Díaz Aviation during the trial and he was also going to testify on behalf of plaintiff. Defendants renewed their objection to Mr. Díaz-Saldaña acting as counsel and as a witness. After hearing the arguments and having advised plaintiff it should have retained counsel, attorney Díaz-Saldaña was allowed to represent and testify on behalf of plaintiff.

[5] The testimonial evidence presented **[*6]** by plaintiff is undisputed and all witnesses were in essence consistent in their testimonies, thus reducing credibility determinations by the undersigned to a bare minimum.

Díaz Aviation and defendant Airport Aviation have competed for a share of the aviation fuel dispensing to military aircrafts at the LMMIA. Defendant Airport Aviation operates pursuant to a contract with the Armed Forces and has not interfered with the operations of Díaz Aviation. As such, no Sherman Act violation, tort or damages have been established. Thus, the Court issues its findings of facts and conclusions of law.

STANDARD UNDER FED.R.CIV.P. 52

Federal Rule of Civil Procedure 52 provides in pertinent part as follows:

> (a) Findings and Conclusions.
>
> (1) *In General*. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.
>
> .....
>
> (c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as **[*7]** required by *Rule 52(a)*.

A district court in making bench findings did not have to account for every detail, discuss all of the evidence that supported each of the findings made, or respond individually to each evidentiary or factual contention made by the losing side. *Fed.Rules Civ.Proc.Rule 52(a)*. *See* *Addamax Corp. v. Open Software Foundation, Inc., 152 F.3d 48 (1st Cir. 1998)*.

ANALYSIS

It is not clear from the Verified Amended Complaint under which Section of the Sherman Act plaintiff has made a claim. Thus, in an abundance of caution, we address *Sections 1* and *2* of the Sherman Act.

A. SHERMAN ACT, SECTION 1, CONSPIRACY TO RESTRAIN TRADE/COMMERCE.

Sherman Act, *15 U.S.C.A. §1*, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding **[*8]** 10 years, or by both said punishments, in the discretion of the court.

Plaintiff's submission as to a Sherman claim arises from the alleged existence of a conspiracy. An interpretation and application of *Section 1* of the Sherman Act, prohibits "(e)very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

The Sherman Act is a statute to be applied to mean what it says, which is not one to invalidating the entire body of commercial contract law or the regular competition in a free market. *National Society of Professional Engineers v. United States, 435 U.S. 679, 687-88, 98 S.Ct. 1355, 55 L. Ed. 2d 637 (1978)*. It is for this reason that the Act, in accordance with both its legislative history and common law antecedents, has been tempered by the Rule of

Reason. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60, 31 S.Ct. 502, 515, 55 L. Ed. 619 (1911). The Rule does not exempt restraints which may be argued to be reasonable or expedient, but rather focuses on the reasonableness of the effect of the challenged restraint on competition. National Society of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L. Ed. 2d 637 (1978).

"The **[*9]** probability of successfully monopolizing a market is usually assessed through market share. The greater share a defendant initially controls, the greater the probability of achieving monopoly status." Hewlett-Packard Company v. Boston Scientific Corp., 77 F.Supp.2d 189, 198 (D. Mass. 1999) (citing Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 885 F.2d 683, 693-94 (10th Cir. 1989)). Thus, in order to state a claim under this section, a plaintiff must allege and prove that the defendant had market power in the relevant market to potentially achieve monopoly status. *See* CVD, Inc. v. Raytheon Co., 769 F.2d 842, 851 (1st Cir. 1985). It is plaintiff's burden to define and prove a viable relevant market, both geographically and by product. The principal factor in establishing a claim for attempted monopolization is defendant's market share in the relevant market. United States v. Microsoft, 253 F.3d 34, 81, 346 U.S. App. D.C. 330 (D.C. Cir. 2001). Also, as in any monopolization claim, plaintiff must prove that "significant" barriers to entry in the relevant market will make monopolization possible. *Id. at 82-83*. Other relevant factors include the strength and capacity of existing or potential **[*10]** competition, the concentration of the market, the trend towards greater or lesser concentration, the nature of the defendant's anticompetitive conduct, and the elasticity of consumer demand. *See* Spectrum Sports, Inc. v. McQuillan., 506 U.S. 447, 459, 113 S.Ct. 884, 122 L. Ed. 2d 247 (1993).

An examination of the legality of any conduct alleged to be anticompetitive therefore necessitates a determination as to what the consequences of the conduct have been in the affected market.

Turning to this case, the evidence presented at trial shows the actions that plaintiff Díaz Aviation has assigned to defendants, as a possible violation of section 1, were mostly in regards to a third-party, the Ports Authority, which the evidence has not linked to any action by defendant Airport Aviation and the two co-defendants Algarín and Matos. The actions of defendant Airport Aviation's employees, co-defendants Algarín and Matos, to influence said non-party in their actions as to plaintiff, referring to instances of request for eviction from airport premises due to expiration of the lease contract and removal of permits from plaintiff's trucks were not presented. Rather, all that plaintiff submitted was that defendants Algarín **[*11]** and Matos at the time approached some military aircrafts that Díaz Aviation was servicing, at a location not identified, to provide the captain or main officer with a copy of the contract that was valid between defendant Airport Aviation and the Armed Forces.

The parties submitted jointly as Joint Exhibit I a copy of said contract that co-defendant AAS executed with the Defense Energy Support Center, acting on behalf of the U.S. Defense Air Logistics Agency (hereafter "DESC") (Contract No. SP0600-09-D-0076), to service into-plane fuel to military planes at LMMIA that covers a time period from April 1, 2009 to March 31, 2013. (Jointly Exhibit I). It is undisputed as well that, since 2002, plaintiff Díaz Aviation does not have a contract to provide plane services to military aircraft at the airport.

The evidence shows the captain of each aircraft was the ultimate decision maker as to whom serves fuel to its aircraft. Pursuant to the un-rebutted evidence presented at trial, this was done by the co-defendants in strict compliance with the obligations under the contract. Under the current contract, Airport Aviation services is to sell and serve fuel to a military airplane as long as Airport **[*12]** Aviation services is available, willing and capable of selling the fuel at the moment. (Joint Exhibit I). Otherwise, another company may sell the fuel to the military plane and still Airport Aviation will be paid the service fee by the government, as evidenced by Exhibit 12. As a matter of fact, the evidence showed that on two (2) instances in 2012, plaintiff Díaz Aviation sold fuel to two (2) military planes.

As to the specific situation with a C-130 airplane on February 20, 2010, the undisputed evidence showed through the testimony of Mr. Eric Gracia, Assistant Director of Operations at the LMMIA, that the airplane was parked in an area where it was not allowed to be parked. As such, in compliance with the regulations of the Federal Aviation Administration, the plane was ordered to be moved by the Ports Authority for safety reasons to an area where it did not interrupt the operations of the airport. The captain of the airplane decided to relocate the plane. No evidence was presented as to defendants participating in any way in this situation.

As **[*13]** to co-defendant Matos, Mr. Díaz-Saldaña admitted under oath having no evidence to substantiate plaintiff's claims against co-defendant Matos.

As to co-defendant Algarín, Mr. Díaz-Saldaña admitted the only link to him is an email by Mr. Algarín to Mr. Gil Rosario on October 23, 2009, informing of an incident between defendant Airport Aviation and plaintiff's employees as to fueling of a military plane that led to the filing of a complaint with the Puerto Rico Police. As testified by Mr. Algarín, this email expressed some concerns as to possible accidents while fueling airplanes at the airport and did not request the alleged "throwing out" of plaintiff's trucks as plaintiff alleged. Thus, for safety concerns, Algarín requested the Ports Authority's intervention. (Exhibit 6).

It is pellucidly clear that plaintiff Díaz Aviation has totally failed to show the concerted action requirement as to the conspiracy that it alleges is in violation of the Sherman Act. No credible evidence of exclusionary practice was presented at trial or that defendants asserted to be holding an exclusive contract for the sale of jet fuel to the Armed Forces.

The Highest Court stated in *Fisher v. City of Berkeley, Cal., 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)* **[*14]** that it has always limited the reach of the Sherman Act provision, *15 U.S.C.A. § 1*, to unreasonable restraints of trade effected by a contract, combination, or conspiracy between separate entities. Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability in the absence of agreement.

Additionally, plaintiff Díaz Aviation also failed to establish through competent evidence that even the acts attributed to the Ports Authority, once more, a non-party to this action, were contrary to law, although the eviction process concluded in favor of plaintiff upon payment of advanced lease payments. The evidence showed the removal of the permits to operate on the airport's ramps from plaintiff's trucks, which resulted in being denied access to airport premises, resulted from non-renewal of the permits after they expired and for security/safety reasons.

Even if we were to credit the acts alleged from the non-party Ports Authority as to eviction and removal of permits that may have hindered plaintiff's operation at the LMMIA's premises, such a restraint imposed unilaterally by a government entity does not **[*15]** become concerted action within the meaning of the Sherman Act simply because it has a coercive effect upon the parties who must obey the law and the mere fact that all competing concessioneries must comply with the ordinance is not enough to establish a conspiracy among them.

Plaintiff offered a chain of emails (Exhibit 6) in relation to a C-130 plane serviced in October 22, 2009, as evidence of its claims under the Sherman Act against defendants. However, a review of Exhibit 6 and the testimonies in reference thereto, do not support plaintiff's allegations of an alleged conspiracy. As testified by Mr. Arnaldo Deleo (manager of the LMMIA), Airport Aviation operates at the airport, with the corresponding permits and authorizations of the Ports Authority. In relation to the email of Mr. Arnaldo Deleo to Mr. Díaz-Saldaña (Exhibit 6), Mr. Deleo testified plaintiff served a C-130 military plane on October 22, 2009 without having the required "fuel permit." Mr. Deleo informed Atty. Díaz-Saldaña the C-130 should have been serviced by Airport Aviation which had a contract in effect at the time with the Defense Department (Joint Exhibit I) and the required "fuel permit." As such, Mr. Deleo requested **[*16]** plaintiff to cease and desist, due to safety/security reasons, from interfering with another concessionaire (Airport Aviation) which was and still is duly authorized and with valid fuel permits to operate at the LMMIA. Thus, the concern as to this incident was one of security and/or safety of the operations at the LMMIA and nothing related to a conspiracy to limit trade and drive plaintiff out of business as it claims.

As to the portion of Exhibit 6 which contains a related email from Luis Varona of Airport Aviation to co-defendant Algarín, and as testified by Mr. Varona, the same also raises security concerns for plaintiff did not have the required fuel permit to fuel military planes. It also makes reference to the contract between Airport Aviation and the Department of Defense. (Joint Exhibit I).

Similarly plaintiff's attempt to introduce some sort of conspiracy as to the sale of aviation fuel at different prices to different businesses engaged in dispensing aircraft fuel at the LMMIA, failed to establish the concerted action to impose a higher price to plaintiff as part of a scheme to conspire and eliminate plaintiff's competition in the sale of aviation fuel. All that the evidence **[*17]** showed was that plaintiff's fuel was more expensive, reason for which some clients decided to acquire fuel from competing companies, such as Airport Aviation. An example being Roblex Aviation, whose owner, Mr. Roberto Rodríguez testified he no longer buys fuel from plaintiff as a business decision because Airport Aviation sells him the fuel for less and on time. As such, Roblex Aviation has $1,000.00 in savings per week.

Thus, no concerted action in restraint of trade or commerce was established. The mere allegation of a conspiracy between a third party gas/fuel company (*i.e.*, Esso or Total) and defendants was undertaken with purpose of allowing defendants to become the dominant marketer of competitive sources of aviation fuel to military planes was merely a conclusory statement from plaintiff, without any showing or evidence from which it could be construed a scheme to monopolize or an exclusionary practice.

The factual allegations in support of plaintiff's claim that defendants established itself as a dominant marketer of aviation fuel in the LMMIA and that defendants were trying to monopolize the market at the LMMIA were contradicted by plaintiff's own evidence as to the existence **[*18]** of numerous other companies which compete in this same field both in the Verified Amended Complaint (Docket No. 121) and the testimonies of plaintiff's witnesses Atty. Díaz-Saldaña and his son Atty. Rodrigo Díaz-Muñoz, as to the existence of seven (7) other companies. *See* *Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980)* (conclusory evidence of a conspiracy being only the naked statement that one existed).

Moreover, as properly argued by defendants, the allegations of the Verified Amended Complaint nor the evidence presented at trial by plaintiff identified a market. No expert witness testimony was presented to place the Court in a position to define plaintiff's market and sales, the market defendants supposedly attempted to monopolize, the share of the participants of the market, the share of plaintiff and defendants or the other participants that could demonstrate to the Court there is a valid Sherman Act claim.

Furthermore, no evidence of threats, violence, intimidation, or force by defendant or its employees Matos and Algarín, in support of the alleged concerted action, was presented. The evidence (including the testimony of multiple witnesses) showed the employees **[*19]** of Airport Aviation just offered a copy of the contract to the pilots of the military planes in a polite manner in compliance with the obligations under the contract. (Joint Exhibit I). To the contrary, the evidence demonstrated through the testimony of Mr. Michael Santiago, supervisor of operations of Airport Aviation, that Mr. Díaz-Saldaña, on one instance, used obscene language against him and he (Mr. Santiago) felt threatened by Mr. Díaz-Saldaña while offering defendants' services to a military plane under the contract.

Plaintiff Díaz Aviation brought forth twenty one (21) witnesses, seven (7) exhibits and a Joint Exhibit to try to show the alleged conspiracy or the monopolization attempt to no avail. No evidence showed the alleged agreement by defendants with the Ports Authority or any other party to drive plaintiff out of business. Plaintiff's evidence just established that Airport Aviation secured a contract which is in effect until the year 2013 with a federal agency, Defense Logistics Agency, (Joint Exhibit I) which plaintiff previously had in 1998-2002. Plaintiff fails to recognize this valid contract at present and the evidence showed it sells fuel at a higher price than **[*20]** Airport Aviation under the contract which was obtained through procurement, competition and biding, to provide to the military fueling services at the most reasonable price available to the government. Plaintiff chose not to bid for said contract.

The witnesses and documents by plaintiff itself also demonstrate defendants were but attempting to inform to the captains of the military planes they had the contract with the Defense Department, were available to service their planes and honor the price in their contract, their obligation to be available and provide the fuel at said price. Ultimately, the decision from whom to buy the fuel was for the captain of the airplane.

A plaintiff alleging a conspiracy by defendants in violation of *section 1* of the Sherman Act, must be able to show said defendants' actions were in agreement so as to damage its position in market and plaintiff has the burden of proving by preponderance of evidence that two or more companies (not the defendants as employees of the same company with each other) formed a common plan, scheme, or design to suppress actual competition in a relevant market, that they took steps in furtherance of that plan, and that those steps **[*21]** were designed to harm competition unreasonably. Sherman Anti-Trust Act, § 1, as amended, 15 U.S.C.A. § 1. Computer Identics Corp. v. Southern Pacific Co., 756 F.2d 200 (1st Cir. 1985).

In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911), the Highest Court stated § 1 of the Sherman Act, 15 U.S.C.A. § 1, has been interpreted to proscribe only unreasonable restraints, and the accepted standard for testing whether a practice restrains trade in violation of § 1 is the rule of reason, pursuant to which the fact-finder weighs all of the circumstances of a case, including specific information about the relevant business and whether it has market power, as well as the restraint's history, nature, and anti-competitive or pro-competitive effect. The Court stated that only those restraints that would always or almost always tend to restrict competition and decrease output are deemed unlawful per se.

There was no evidence whatsoever as to the above requirements showing that defendants agreed and/or conspired to engage in certain unreasonably anti-competitive activities in restraint of trade or commerce, in violation of Sherman Act § 1.

In evaluating these claims, **[*22]** one must keep in mind the special antitrust meaning of the terms "reasonable" and "unreasonable," a meaning that draws its content from the basic objectives of ***antitrust law***'s "rule of reason." The Supreme Court adopted the "rule of reason" in order to provide an intellectually, administratively, and legally satisfactory way to limit the Sherman Act's broad language, which, if taken literally, might forbid all agreements, good and bad, that were in any sense at all "in restraint of trade." *See* United States v. Trans-Missouri Freight Association, 166 U.S. 290, 17 S.Ct. 540, 41 L. Ed. 1007 (1897); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60, 31 S.Ct. 502, 516, 55 L. Ed. 619 (1911).

Thus, the "rule of reason" limits the Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications, 7 Areeda & Turner ¶ 1500 at 362-63, though certain anticompetitive practices, such as price fixing, so typically lack justification as to be *per se* unreasonable. 7 Areeda & Turner ¶ 1509.

"Anticompetitive", too, has a special meaning. It refers not to actions that merely injure individual competitors, that is, only plaintiff Díaz Aviation's **[*23]** business, but rather to actions that harm the competitive process. Brown Shoe Co. v. United States, 370 U.S. 294, 319-20, 328-34, 82 S.Ct. 1502, 1521, 1525-29, 8 L. Ed. 2d 510 (1962); *see* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 97 S.Ct. 690, 697-98, 50 L. Ed. 2d 701 (1977). The law assesses both harms and benefits in light of the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods. *See* Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9, 11-12 (1st Cir.1987); 7 Areeda & Turner ¶ 1502.

The practices and agreements that plaintiff has characterized as anti-competitive and a violation of anti-trust, were not *per se* unreasonable, for plaintiff should have shown that the likely anti-competitive effects of these practices outweighs the business and safety/security justifications, or at least that the defendants might achieve any legitimate business objectives in a significantly less restrictive way. 7 Areeda & Turner ¶ 1505b. *See* Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478 (1st Cir. 1988).

In sum, no evidence was presented to show defendants requested **[*24]** or entered into any agreement with Ports Authority or any of its officers to evict plaintiff Díaz Aviation from its leased premises at the airport or to restrain trade of aviation fueling operations at the LMMIA.

As such, plaintiff has failed to prove a valid claim under Section 1 of the Sherman Act.

B. SHERMAN ACT, SECTION 2, ATTEMPT TO MONOPOLIZE.

Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. *15 U.S.C. §2*.

The Supreme Court has defined monopolistic power as the power to control prices or exclude competition. *United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 100 L. Ed. 1264 (1956)*.

To sustain a claim under *section 2* of the Sherman **[*25]** Act, if such was the claim since the Amended Complaint nor the evidence presented particularized the grounds for plaintiff's claim under Sherman, that is, that defendants have attempted to monopolize the market for such item, plaintiff must succeed in linking defendants with both an intent to monopolize and a pattern of activity creating a dangerous probability of monopolization. *See U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393, 76 S.Ct. 994, 100 L. Ed. 1264 (1956)*; *American Tobacco Co. v. United States, 328 U.S. 781, 785, 66 S.Ct. 1125, 90 L. Ed. 1575 (1946)*; *Swift & Co. v. United States, 196 U.S. 375, 396, 25 S.Ct. 276, 49 L. Ed. 518 (1905)*.

To show monopolization in violation of Sherman Act, plaintiff must prove that defendant engaged in an act that helped create or maintain its alleged monopoly. Sherman Act; *Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002)*

An intent to monopolize may be shown by direct evidence. *United States v. Corn Products Ref. Co., 234 F. 964, 978 (S.D.N.Y.1916)*, appeal dismissed, *249 U.S. 621, 39 S. Ct. 291, 63 L. Ed. 805 (1919)*. The direct evidence of intent at most must show that defendant intended to eliminate plaintiff from the market. Intent may also be inferred from conduct, that is, indirect **[*26]** evidence. *See, e.g.*, *Union Leader Corp. v. Newspapers of New England, Inc., 180 F.Supp. 125, 140 (D.Mass.1959)*, *aff'd in part*, *284 F.2d 582* (1st Cir. 1960), *cert. denied*, *365 U.S. 833, 81 S. Ct. 747, 5 L. Ed. 2d 744 (1961)*.

The alleged conduct cannot be said either to have a potential dangerous probability of successful monopolization. *See* *Syracuse Broadcasting Co. v. Newhouse, 236 F.2d 522, 526 (2d Cir. 1956)*; *Keco Industries, Inc. v. Borg-Warner Corp., 334 F.Supp. 1240, 1245 (M.D.Pa.1971)*; *United States v. Charles Pfizer & Co., Inc., 245 F.Supp. 737, 739 (E.D.N.Y.1965)*.

Plaintiff's presentation of evidence at trial completely lacked evidence to establish the following elements of a *§2* monopolization or attempted monopolization claim: (1) the relevant product market, (2) the share of the market held by defendants; (3) strength of the competitors that compose the market; (4) potential barriers to entry into the market; (5) market trends: or (6) any other fact indicative that monopolization might be a success.

As above explained, no credible evidence was presented by plaintiff that defendants have attempted to monopolize the market for jet fuel. Plaintiff did not succeed in linking defendants (Airport Aviation, **[*27]** Matos or Algarín) with both an intent to monopolize and a pattern of activity creating a dangerous probability of monopolization. To the contrary, plaintiff's evidence at the trial showed, as explained above, there are several other companies in the business of aviation fuel dealing at the LMMIA, for which plaintiff has not proven a *section 2* attempt-to-monopolize violation. *See* *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974)*.

Thus, no violation of *Section 2* of the Sherman Act was established.

B. PENDENT STATE TORT CLAIM UNDER ARTICLE 1802.

Plaintiff Díaz Aviation seemly presented a supplemental claim under state tort even though no specific allegations of negligent acts or omissions were included in the Verified Amended Complaint but just a mention of Article 1803 in the paragraph of "Jurisdiction". (Docket No. 121, p. 1).

Article 1802 of Puerto Rico's Civil Code, *31 P.R. Laws Ann. § 5141*, provides for a right of action stemming from a person's negligence. Section 1802 provides that "[a] person who by an act or omission causes damage to another party through fault or negligence shall be obliged to repair the damage so done." *31 P.R. Laws Ann. § 5141*.

Tort **[*28]** actions arise when there has been a violation of a right or an omission of a duty required by law. Under art. 1802 of the Civil Code of Puerto Rico, *31 L.P.R.A. § 5141*, the person who, through fault or negligence, causes damage to another shall be obliged to repair the damage so done. Thereunder, an injured party has the right to recover for the damages actually suffered and for lost profit. *Zeno v. Vázquez Rosario, 6 P.R. Offic. Trans. 462, 106 D.P.R. 324, 326-29 (1977)* (torts); *Pérez v. Sampedro, 86 P.R.R. 498, 86 D.P.R. 526, 530 (1962)* (contracts). The goal in damages actions is to put the injured party as nearly as possible where he would have been had the breach not occurred. Cappalli, *Tort Damages in Puerto Rico*, 46 Rev.Jur.U.P.R. 241, 242 (1977); I-II J. Puig Brutau, *Fundamentos de Derecho Civil* 512 (1976).

First, first there must be an action or breach of duty from which recovery follows. However, evidence of any torts action (as a result of negligence, acts or omission by defendants) claimed under P.R. Civil Code Section 1802 as to the corporation Díaz Aviation or defendants AAS, Algarín or Matos was not presented or established at trial as to any act or breach that defendants undertook and from which the damages, **[*29]** had they been established or proven, may be recovered. Moreover, no credible evidence of causation or reliable evidence of damages was presented.

The attempt to establish damages to plaintiff's business with the testimonies in a vacuum of Atty. Díaz-Saldaña and his son, Atty. Rodrigo Díaz-Muñoz, without any expert witness and/or documentary evidence in support thereof (*i.e.*, financial statements, income tax returns, invoices, evidence of sales and loss of profit, among others) was unsuccessful and unreliable. The assertions of Atty. Díaz-Saldaña and Díaz-Muñoz were conclusory with minimal factual basis in support thereof and considered self-serving.

As such, plaintiff has failed to prove a claim for damages under Article 1802.

CONCLUSION

In view of the above, the oral motion for non-suit under *Fed.R.Civ.P. 52* by defendants Airport Aviation, Algarín and Matos is GRANTED. All remaining claims under the Sherman Act and Article 1802 of the Puerto Rico Civil Code are DISMISSED WITH PREJUDICE. [6]

Judgment **[*30]** to be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 5th day of March 2012.

/s/ CAMILLE L. VELEZ-RIVE

CAMILLE L. VELEZ-RIVE

UNITED STATES MAGISTRATE JUDGE

End of Document

[6] An abbreviated version of this Opinion and Order was read in open court on February 29, 2012 after a recess was taken upon conclusion of the arguments on the Rule 52 motion.

Leonard v. Abbott Labs., Inc.

United States District Court for the Eastern District of New York

March 5, 2012, Decided; March 5, 2012, Filed

10-CV-4676(ADS)(WDW)

Reporter
2012 U.S. Dist. LEXIS 30608 *; 2012 WL 764199

SHELLY A. LEONARD, ESTHER ALEXANDER, BRIDGETT HERRERA, VELICIA MATA, LeRON DAVIS, and ASHLEY SULLIVAN, individually and as parents and natural guardians of their minor children and on behalf of all others similarly situated, Plaintiffs, -against- ABBOTT LABORATORIES, INC., Defendant.

Subsequent History: Motion to strike denied by, Motion granted by, Class certification denied by *Pagan v. Abbott Labs., Inc., 2012 U.S. Dist. LEXIS 159273 (E.D.N.Y., Oct. 20, 2012)*

Prior History: *Leonard v. Abbott Labs., Inc., 2012 U.S. Dist. LEXIS 6857 (E.D.N.Y., Jan. 20, 2012)*

Core Terms

consumer, Plaintiffs', damages, class action, consumer protection, pleadings, notice, infants, parties, misleading, omissions, motion to amend, second amended complaint, advertising, allegations, requirement of notice, formula, misrepresentations, contaminated, courts, punitive damages, cause of action, practices, products, puffery, amend, amended complaint, complaints, motion to dismiss, deadline

Counsel: **[*1]** For plaintiffs: Jason T. Brown, Esq., Steven Bennett Blau, Esq., Of Counsel, Blau, Brown & Leonard, LLC, New York, NY.

For defendant: John D. Winter, Esq., Of Counsel, Patterson, Belknap, Webb & Tyler LLP, New York, NY.

Judges: ARTHUR D. SPATT, United States District Judge.

Opinion by: ARTHUR D. SPATT

Opinion

MEMORANDUM OF DECISION AND ORDER

SPATT, District Judge.

This case arises from the recall by Abbott Laboratories, Inc. ("Abbott" or "the Defendant") of five million containers of its Similac brand infant powder formula that were potentially contaminated with beetle parts and larvae, which could cause gastrointestinal discomfort and refusal to eat. The plaintiffs allege that Abbott engaged in unfair and deceptive practices by misrepresenting the safety of Similac and failing to timely warn consumers of the dangers associated with the contaminated product in violation of the consumer protection statutes in New York, Texas, Ohio, and New Hampshire.

Presently before the Court is a motion by Abbott for judgment on the pleadings and a motion by the plaintiffs to amend the complaint. For the reasons set forth below, the Court grants in part and denies in part both motions.

I. BACKGROUND

Abbott Laboratories, Inc. formulates, **[*2]** designs, manufactures, markets, advertises, distributes, and sells infant powder formulas under the brand name Similac. In September 2010, during an internal quality review at its Sturgis, Michigan facility ("the Sturgis Facility"), Abbott detected the presence of a common warehouse beetle and its larvae in its powdered formula. Subsequently, on September 20, 2010, Abbott notified the United States Food and Drug Administration ("FDA"), which determined that "while the formula containing these beetles poses no long-term health problems, there is a possibility that infants who consume formula containing the beetles or their larvae could experience gastrointestinal discomfort and refusal to eat as a result of small insect parts irritating the GI tract". (FDA Press Release, September 27, 2010, Knobler Decl. in Support of Abbott's Motion for Judgment on the Pleadings, Ex. B.) As a result, on September 22, 2010, Abbott recalled five million containers of Similac infant formula products ("the Recall" or "the Recall program"). The details of the Recall program were set forth in the Declaration of Laurie Boogard filed in a related case, *Vavak v. Abbott Laboratories, Inc., No. SACV-10-1995-JVS, 2011 U.S. Dist. LEXIS 111408 (CD. Cal.)* **[*3]** , and submitted to this Court as an attachment to Abbott's June 28, 2011 Notice of Supplemental Authority (Docket Entry # 19).

The plaintiffs in this case are: Shelley A. Leonard, a resident and citizen of the State of New York ("the New York Plaintiff); residents and citizens of the State of Texas Esther Alexander, Bridgett Herrera, and Velicia Mata ("the Texas Plaintiffs"); LeRon Davis, a resident and citizen of the State of Ohio ("the Ohio Plaintiff); and Ashley Sullivan, a resident and citizen of New Hampshire ("the New Hampshire Plaintiff and collectively "the Plaintiffs"). According to the Plaintiffs, they each purchased the recalled formula during an undefined "relevant time period", rather than purchasing a less expensive alternative, based on various statements by Abbott that indicated that Similac was safe for consumption by infants. The Plaintiffs also allege that their infant children became ill after consuming the contaminated Similac formula.

On October 10, 2010, the Plaintiffs commenced this action against Abbott in their individual capacity, as parents and natural guardians of their minor children, and as representatives of putative classes of similarly situated **[*4]** individuals from their respective states. In the complaint, and the amended class action complaint filed on December 2, 2010, the Plaintiffs seek declaratory, injunctive, and monetary relief based on Abbott's alleged unfair and deceptive acts and practices in misrepresenting that Similac was "safe for the consumption by infants" and failing to warn consumers or recall the contaminated formula sooner, in violation of: (1) *New York General Business Law § 349* ("NYCPA"); (2) the Texas Deceptive Trade Practices-Consumer Protection Act ("TDTPA"), *Tex. Code. Bus. & Com. § 17.41, et. seq*.; (3) the Ohio Uniform Deceptive Trade Practices Act ("ODTPA"), *Ohio Rev. Code Ann. § 4165, et. seq*., and Uniform Consumer Sales Practices Act ("OCSPA" and together with the ODTPA the "Ohio statutes"), *Ohio Rev. Code Ann. § 1345, et. seq*.; and (4) the New Hampshire Consumer Protection Act ("NHCPA"), *N.H. Rev. Stat. Ann. § 358-A, et. seq*. (collectively the "consumer protection statutes").

On March 15, 2011, Abbott filed a motion for judgment on the pleadings seeking the dismissal of the Plaintiffs' claims under the consumer protection statutes and the cause of action seeking injunctive relief for failure to **[*5]** state a claim. In addition, Abbott also sought dismissal of: (1) any claim predicated on Abbot's representation that it is "dedicated to . . . complying with all applicable laws and regulations in the countries where [it] do[es] business" (Am. Compl., ¶ 24), or its failure to comply with certain federal laws, as preempted by federal law; (2) any class claim under the Ohio Uniform Consumer Sales Practices Act because the statute does not permit a class action under the circumstances alleged; (3) any claim under the Ohio Uniform Deceptive Trade Practices Act because the statute does not confer standing on a consumer; and (4) any claim under the Texas Deceptive Trade Practices-Consumer Protection Act because the Plaintiffs failed to provide the requisite notice under the statute.

On September 21, 2011, the Plaintiffs moved to amend their complaint to: (1) include Kristie Pagan in the caption of this matter as a party plaintiff and potential representative of the putative New York class; (2) remove plaintiff Shelly

A. Leonard from the caption in this matter and dismiss her claims without prejudice with leave to renew her individual claims or any claims on behalf of her infant/child in the **[*6]** event the Court certifies a class under Federal of Civil Procedure 23; (3) include additional factual contentions "clarifying and amplifying the false, misleading, fraudulent and deceptive business practices employed by [the Defendant]" (Pl.'s Br. at 1); and (4) to remove the allegation expressly waiving the New York Plaintiffs' right to seek punitive damages under *New York General Business Law § 349*. Attached to the Plaintiffs' motion to amend was a proposed second amended complaint containing these changes.

Subsequently, on January 20, 2012, the Court directed the parties to submit supplemental briefing on whether the Recall program instituted by Abbott mooted the Plaintiffs' claims under the consumer protection statutes, which was an issue raised by Abbott in opposition to the motion to amend.

The Court addresses the two motions below. However, because an analysis of the Defendant's motion for judgment on the pleadings is intertwined with an analysis of the Plaintiffs' motion to amend to add factual allegations, the Court will frame its analysis around the Plaintiffs' motion to amend. Thus, the Court addresses the legal arguments asserted in the Defendant's motion for judgment on **[*7]** the pleadings in conjunction with the motion to amend futility analysis.

II. LEGAL STANDARDS

A. Motion to Amend

On February 18, 2011, United States Magistrate Judge William D. Wall issued a scheduling order, setting a September 2, 2011 deadline for joining new parties and amending the pleadings. Although the parties subsequently agreed to changes to the discovery cut-off deadlines, the deadline for joining new parties and amending the pleadings remained as September 2, 2011. Contrary to the Plaintiffs contention, an extension to the discovery deadlines does not automatically extend the deadline to join new parties or amend the pleadings. The Plaintiffs' instant motion to amend was filed on September 15, 2011, almost two weeks after the deadline set in the scheduling order. As such, the Court must consider *Fed. R. Civ. P. 16(b)* ("*Rule 16*"), which "may limit the ability of a party to amend a pleading if the deadline specified in the scheduling order for amendment of the pleadings has passed." *Kassner v. 2nd Avenue Delicatessen, Inc., 496 F.3d 229, 243 (2d Cir. 2007)*; see *Fed. R. Civ. P. 16(b)(4)* ("A schedule may be modified only for good cause and with the judge's consent.").

"Where a scheduling **[*8]** order has been entered, the lenient standard under *Rule 15(a)*, which provides leave to amend 'shall be freely given,' must be balanced against the requirement under *Rule 16(b)* that the Court's scheduling order 'shall not be modified except upon a showing of good cause.'" *Grochowski v. Phoenix Construction, 318 F.3d 80, 86 (2d Cir. 2003)* (quoting older versions of *Rule 15(a)* and *Rule 16(b)*). "[A] finding of 'good cause' depends on the diligence of the moving party." *Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000)*. To satisfy the good cause standard "the party must show that, despite its having exercised diligence, the applicable deadline could not have been reasonably met." *Sokol Holdings, Inc. v. BMB Munai, Inc. No. 05-CV-3749, 2009 U.S. Dist. LEXIS 72659, 2009 WL 2524611, at *7 (S.D.N.Y. Aug. 14, 2009)* (citing *Rent-A-Center Inc. v. 47 Mamaroneck Ave. Corp., 215 F.R.D. 100, 104 (S.D.N.Y. 2003))*. However, the good cause standard is not satisfied when the proposed amendment rests on information "that the party knew, or should have known, in advance of the deadline." Id. (collecting cases).

If a court finds that good cause for extending the deadline exists, a party still has the burden to show **[*9]** that the proposed amendment is permissible under *Federal Rules of Civil Procedure 15* ("*Rule 15*"). *Rule 15(a)(2)* provides that "a party may amend its pleading only with the opposing party's written consent or the court' leave" and that "[t]he court should freely give leave when justice so requires." A court should deny leave to amend only upon "undue delay, bad faith or dilatory motive on the part of the [moving party], repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the [non-moving party,] . . . [or] futility." *Foman v. Davis, 371*

U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed. 2d 222 (1962); see also Aetna Cas. & Sur. Co v. Aniero Concrete Co., Inc., 404 F.3d 566, 603-04 (2d Cir. 2005). Amendments are generally favored because "they tend to facilitate a proper decision on the merits." Blaskiewicz v. Cnty of Suffolk. 29 F. Supp. 2d 134, 137 (E.D.N.Y. 1998). However, it is ultimately "within the sound discretion of the court whether to grant leave to amend." John Hancock Mut. Life Ins. Co. v. Amerford Int'l Corp., 22 F.3d 458, 462 (2d Cir. 1994) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962)). Finally, the party opposing an amendment **[*10]** has the burden of proving that leave to amend would be prejudicial. See Blaskiewicz, 29 F. Supp. 2d at 137-38.

B. Motion for Judgment on the Pleadings and Futility

The Defendant has moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) ("Rule 12(c)"). In general, "the standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim." Cleveland v. Caplaw Enters., 448 F.3d 518, 521 (2d Cir. 2006). In addition, the Defendant contends that the Court should deny the Plaintiffs leave to amend the complaint because the proposed amendments would be futile. As with a Rule 12(c) motion, a proposed amendment is futile if the proposed claim could not withstand a Rule 12(b)(6) motion to dismiss. Lucente v. IBM Corp., 310 F.3d 243, 258 (2d Cir. 2002). The Court therefore applies the Rule 12(b)(6) standard in deciding the Defendant's motion for judgment on the pleadings and in assessing the futility of the proposed second amended complaint.

Under the now well-established Twombly standard, a complaint should be dismissed only if it does not contain enough allegations of fact **[*11]** to state a claim for relief that is "plausible on its face." Bell Atl. Corp. v. Twombly. 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929. 570. 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). The Second Circuit has explained that, after Twombly, the Court's inquiry under Rule 12(b)(6) is guided by two principles. Harris v. Mills, 572 F.3d 66 (2d Cir. 2009) (citing Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868. 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)).

"First, although 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' 'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" Id. at 72 (quoting Iqbal, 129 S. Ct. at 1949). "'Second, only a complaint that states a plausible claim for relief survives a motion to dismiss' and '[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" Id. (quoting Iqbal, 129 S. Ct. at 1950). Thus, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and . . . determine whether they **[*12]** plausibly give rise to an entitlement of relief." Iqbal, 129 S. Ct. at 1950.

In considering a motion to dismiss, this Court accepts as true the factual allegations set forth in the complaint and draws all reasonable inferences in the Plaintiffs' favor. Zinermon v. Burch, 494 U.S. 113, 118, 110 S. Ct. 975, 979, 108 L. Ed. 2d 100 (1990); In re NYSE Specialists Sees. Litig., 503 F.3d 89, 91 (2d Cir. 2007). Only if this Court is satisfied that "the complaint cannot state any set of facts that would entitle the plaintiff to relief" will it grant dismissal pursuant to Rule 12(b)(6). Hertz Corp. v. City of New York. 1 F.3d 121, 125 (2d Cir. 1993). The issue on a motion to dismiss is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) (quoting Scheuer v. Rhodes. 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)).

In addition, in deciding Abbott's motion, the Court considers a number of documents submitted by the parties that are incorporated by reference in the complaint. Furthermore, the Court considers the documents attached to the parties supplemental briefing **[*13]** on the issue of mootness only with respect to that issue, and not with regard to the sufficiency of the allegations in the Plaintiffs' amended complaint or proposed second amended complaint.

III. APPLICATION

The Plaintiffs seek to amend their complaint to: (1) remove plaintiff Shelly A. Leonard from the caption in this matter and dismiss her claims without prejudice with leave to renew her individual claims or any claims on behalf of her infant/child in the event the Court certifies a class under *Federal of Civil Procedure 23* ("*Rule 23*"); (2) include Kristie Pagan in the caption of this matter as a party plaintiff and potential representative of the putative New York class; (3) remove the allegation expressly waiving the New York Plaintiffs' right to seek punitive damages under the NYCPA; and (4) include additional factual contentions "clarifying and amplifying the false, misleading, fraudulent and deceptive business practices employed by [the Defendant]" (Pl.'s MTA Br. at 1). The Court addresses each of these proposed amendments separately below. Furthermore, as previously stated, the Court addresses the Defendant's motion for judgment on the pleadings in conjunction with the Plaintiffs' **[*14]** motion to amend to add factual allegations.

A. As to the Plaintiffs' Motion for an Order Permitting Leonard to Voluntarily Dismiss Her Claims Without Prejudice

In the motion to amend, the Plaintiffs seek an order permitting Shelly A. Leonard, named plaintiff of the New York putative class, to voluntarily dismiss her claims without prejudice and with leave to renew her claims in the event the Court certifies the putative class. The basis for this request is that Leonard is an attorney at Blau, Brown & Leonard LLC, the law firm representing the Plaintiffs, and therefore "she cannot serve as a class representative, due to inherent conflicts of interest". (Pls.' MTA Br. at 7-8.) Because the Defendant has filed an answer in this action, the Plaintiffs' motion is properly classified as a motion for dismissal by court order pursuant to *Federal Rule of Civil Procedure 41(a)(2)* ("*Rule 41(a)(2)*").

"*Rule 41(a)(2)* provides that except where all parties agree to a stipulation of dismissal, 'an action shall not be dismissed at the plaintiffs instance save upon order of the court and upon such terms and conditions as the court deems proper.'" *Catanzano v. Wing, 277 F.3d 99, 109 (2d Cir. 2001)* (quoting **[*15]** *Rule 41 (a)(2)*). In deciding whether to grant a motion for voluntary dismissal without prejudice, courts consider: "(I) the plaintiff's diligence in bringing the motion; (2) any 'undue vexatiousness' on plaintiff's part; (3) the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; (4) the duplicative expense of relitigation; and (5) the adequacy of plaintiff's explanation for the need to dismiss." *Id. at 109-10* (quoting *Zagano v. Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1990)*).

Here, the Defendant does not contend that the Plaintiffs have acted with "undue vexatiousness" or that there is a risk of incurring the duplicative expense associated with a dismissed plaintiff commencing a second action. Accordingly, those factors support the Plaintiffs' motion. Rather, the Defendant contends that the Court should deny the motion because: (1) the Plaintiffs should have been aware from the time they commenced this action that Leonard was conflicted from serving as a class representative; (2) although Leonard has not been deposed, Abbott has incurred costs in preparing for her deposition, which was cancelled the day before it was supposed **[*16]** to take place; and (3) the Plaintiffs' explanation for the delay is inadequate because they disingenuously state that Leonard commenced this action in her individual capacity. The Court agrees with the Defendant that the Plaintiffs have offered a wholly insufficient excuse for their delay in moving to dismiss Leonard's claims in her capacity as a named plaintiff.

The Plaintiffs state that "Ms. Leonard rightfully determined to become a plaintiff in this action, in her individual capacity and as parent and natural guardian of her infant-child". (Pls.' MTA Br. at 7.) However, both the initial and amended complaints were characterized as "class action complaints" and include class allegations and a cause of action on behalf the "New York Class". The Court's jurisdiction in this action is premised on the Class Action Fairness Act. Indeed, given that she is asserting a state law claim and her individual damages are below the $75,000 threshold, Leonard could not have commenced this action in federal court without a good faith belief that it could be certified as a class action. Although it is a fact specific inquiry as to whether an employment relationship between a class representative and **[*17]** class counsel will constitute an insurmountable conflict, see *In re Metlife Demutualization Litig., 229 F.R.D. 369, 376 (E.D.N.Y. 2005)* ("Courts in this circuit have refused to certify cases involving a potential conflict of interest where attorneys sought to serve as both a class representative and counsel,

. . . Nevertheless, no bright line rule exists covering these kinds of employee/plaintiff to employer/class counsel relationships.") (citing *Brick v. CPC Int'l, Inc., 547 F.2d 185, 186 (2d Cir. 1976)*, the Plaintiffs concede that there is an "inherent conflict[] of interest", and do not argue that their delay resulted from a mistaken belief that Leonard was qualified to represent the class. In contrast to a situation where a named plaintiff seeks to withdraw because facts revealed during discovery indicate that he or she has a conflict with the class, this conflict was known at the time the complaint was filed. Finally, Leonard, as an attorney, is not an innocent bystander to the errors of her counsel.

Nevertheless, the Court is mindful of the Second Circuit's guidance that "[g]enerally, . . . a voluntary dismissal without prejudice under *Rule 41 (a)(2)* will be allowed if the defendant **[*18]** will not be prejudiced thereby". *Catanzano, 277 F.3d at 109* (internal quotation marks omitted). While the Defendant expended resources in preparation for Leonard's deposition, this does not rise to the level of prejudice sufficient to preclude a plaintiff from withdrawing a claim without prejudice. Accordingly, the Court grants the Plaintiffs' motion to voluntarily withdraw Leonard's individual claims without prejudice solely to her right to participate in the class in the event it is certified.

B. As to the Plaintiffs' Motion to Permit Pagan to Intervene as a Named Plaintiff and Putative New York Class Representative

Generally, the dismissal of the named plaintiff's claims before a motion for class certification has been filed would result in the dismissal of the complaint, or, in this case, the putative New York class' NYCPA cause of action. See *Bowens v. Atl. Maint. Corp., 546 F. Supp. 2d 55, 76 (E.D.N.Y. 2008)* ("The unnamed class members are not technically part of the action until the court has certified the class; therefore, once the named plaintiffs' claims are dismissed, there is no one who has a justiciable claim that may be asserted."); see also *Phillips v. Ford Motor Co., 435 F.3d 785, 787 (7th Cir. 2006)* **[*19]** ("Strictly speaking, if no motion to certify has been filed (perhaps if it has been filed but not acted on), the case is not yet a class action and so a dismissal of the named plaintiffs' claims should end the case."). In order to avoid this result, the Plaintiffs seek to add Kristie Pagan as a named plaintiff and potential representative of the putative New York class. The Plaintiffs contend that they did not engage in undue delay in seeking to add Pagan because she only retained the Plaintiffs' counsel on September 6, 2011, and they filed the instant motion nine days later.

Under *Rule 20(a) of the Federal Rules of Civil Procedure* ("*Rule 20(a)*"), "[a]ll persons may join in one action as plaintiff if they assert any right to relief. . . arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." *Rule 20(a)* should be liberally interpreted to "enable the court to promote judicial economy by permitting all reasonably related claims for relief by or against different parties to be tried in a single proceeding." *A.I.A. Holdings, S.A. v. Lehman Brothers, Inc., No. 97-CV-4978, 1998 U.S. Dist. LEXIS 4175, 1998 WL 159059, at *5 (S.D.N.Y. April 1, 1998)* **[*20]** (internal quotation marks and citation omitted).

In addition, *Federal Rule of Civil Procedure 21* ("*Rule 21*") provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." *Fed. R. Civ. P. 21*; see *Garcia v. Pancho Villa's Huntington Vill., Inc., 268 F.R.D. 160, 165 (E.D.N.Y. 2010)* (citing *Duling v. Gristede's Operating Corp., 265 F.R.D. 91 (S.D.N.Y. 2010))*; see also *City of Syracuse v. Onondaga County, 464 F.3d 297, 308 (2d Cir. 2006)*. *Rule 21* grants the court broad discretion to permit the addition of a party at any stage in the litigation. *Sullivan v. West New York Residential, Inc., No. 01-CV-7847. 2003 U.S. Dist. LEXIS 6498, 2003 WL 21056888, at *1 (E.D.N.Y. Mar. 5, 2003)*.

Here, it is not the intervention of Pagan herself that the Defendant's oppose, but the intervention of any plaintiff that could continue to litigate this case on behalf of the New York putative class. The Plaintiffs lack of diligence in seeking to substitute a named plaintiff for the putative New York class prior to the deadline set in the scheduling order supports the Defendant's position.

However, at this stage in the litigation, before the Plaintiffs have moved for class certification and where **[*21]** the parties have only engaged in limited discovery, the Defendant would not be prejudiced by the intervention. By contrast, Pagan, as well as the putative New York class would be severely prejudiced by the dismissal of their NYCPA claims. As a result, the Court finds that the interests of justice as well as judicial economy weigh in favor of permitting Pagan to intervene, and therefore grants the Plaintiffs' motion to amend the complaint to add Pagan (hereinafter "the New York Plaintiff") as a named plaintiff and the representative of the putative New York class.

C. As to the Plaintiffs' Motion to Amend the Complaint to Remove the Express Waiver of the New York Plaintiffs' Right to Seek Punitive Damages under the NYCPA

Under the NYCPA, the treble damages available for willful and knowing misconduct are commonly referred to as a type of "limited punitive damages". *Karlin v. IVF America, Inc., 93 N.Y.2d 282, 291, 690 N.Y.S.2d 495, 499, 712 N.E.2d 662, 666 (N.Y. 1999)*. This is because punitive damages above and beyond the trebling of actual damages are not an available remedy under the statute. See *Mayline Enters., Inc. v. Milea Truck Sales Corp.. 641 F. Supp. 2d 304, 310 (S.D.N.Y. 2009)*.

In **[*22]** the amended complaint, the New York Plaintiff explicitly waived her entitlement to punitive damages under the NYCPA. (See Am. Compl., ¶ 72 ("ABBOTT is liable to plaintiff and members of the class for compensatory damages. Plaintiff expressly waives punitive damages available under *New York General Business Law § 349, et. seq*.").) In the proposed second amended complaint, the underlined sentence is surreptitiously removed. (See PSAC, ¶ 95 ("ABBOTT is liable to plaintiff and members of the class for all damages and relief available under *New York General Law, § 349, et. seq*.").). The Court says "surreptitiously" because, in identifying the proposed changes for the Court, the Plaintiffs fail to mention that the proposed second amended complaint asserts a claim for relief previously waived in the amended complaint. In fact, the Plaintiffs explicitly state that "[t]he averments in the proposed Second Amended Complaint *do not change any legal theories of liability* . . . ." (Pls.' MTA Br. at 5 (emphasis added).)

As a result of this proposed amendment, the Defendant's potential liability to a New York class would increase threefold. While increased exposure is not equivalent to the type of **[*23]** prejudice required to preclude an amendment, the enormity of this change highlights why the Court finds it problematic that the Plaintiffs failed to bring it to the attention of the Court.

Furthermore, the Plaintiffs failed to avail themselves of the opportunity in either their moving brief, or their reply brief, to explain to the Court why they delayed in amending the complaint to remove the punitive damages waiver. Nor could the Court conceive of any valid reason for the delay. In the amended complaint, based on the same set of factual allegations, the Texas Plaintiffs seek treble damages under the Texas statute on the ground that Abbott's "omissions and commissions" were "intentional, willful and with knowledge". (Am. Compl., ¶ 106.) This is the same standard the Plaintiffs must meet to obtain treble damages under the New York statute. See *N.Y. Gen. Bus. Law § 349(h)*. Thus, it would be disingenuous for the Plaintiffs to assert that they learned of the facts supporting a claim for punitive damages under the NYCPA during the course of discovery.

Although the Court has the discretion to permit an untimely amendment where, as here, the Defendant will not be prejudiced, the Court finds **[*24]** that exercising its discretion in this instance is unwarranted. Not only have the Plaintiffs failed to provide *any* explanation for their lack of diligence and delay, but their conduct in not highlighting this substantial change to the Court or addressing it in their reply brief is of concern to the Court. Thus, the Court denies the Plaintiffs' motion to amend the complaint to the extent they seek to assert a claim for punitive damages under the NYCPA.

D. As to the Defendant's Motion for Judgment on the Pleadings and the Plaintiffs' Motion to Amend the Complaint to Add Factual Allegations

The Plaintiffs seek to amend the complaint to add additional factual allegations "clarifying and amplifying the false, misleading, fraudulent and deceptive business practices employed by [the Defendant]". (Pl.'s MTA Br. at 1.) The majority of these allegations relate to Abbott's knowledge of an insect infestation problem at its' Sturgis Facility from 2007 to 2010; its' negligence in maintaining its facility to prevent the insects from contaminating the products; and its' knowledge of 238 complaints between January 2010 and August 2010 about the presence of insect parts in the Similac produced at the **[*25]** Sturgis Facility.

As an initial matter, as with the Plaintiffs' motion to remove the punitive damages waiver, the Plaintiffs have failed to meet their burden of showing good cause for their undue delay, and the Defendant has failed to meet its burden of showing it would be prejudiced by the proposed amendments. However, unlike the removal of the punitive damages waiver, there is no evidence of untoward conduct on the part of the Plaintiffs, and therefore the Court finds that the balance of these factors weighs in favor of permitting the amendments. See *Kassner v. 2nd Avenue Delicatessen Inc., 496 F.3d 229, 244 (2d Cir. 2007)* ("The district court, in the exercise of its discretion under *Rule 16(b)*, also may consider other relevant factors including, in particular, whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants."). Thus, the Court's analysis focuses on the futility of permitting the Plaintiffs to amend the complaint.

In opposing the Plaintiffs' motion to amend, the Defendant argues that the proposed amendments are futile because the proposed second amended complaint does not cure any of the defects that warrant the dismissal of **[*26]** the amended complaint. In particular, the Defendant contends that the Court should dismiss the amended complaint and deny the Plaintiffs leave to file the proposed second amended complaint because: (1) the Ohio Plaintiff, as a consumer and representative of a putative class, cannot state a claim under the Ohio statutes; (2) the Texas Plaintiffs have failed to comply with the TDTPA notice requirement; (3) the Plaintiffs have failed to plead violations of the consumer protection statutes with particularity in either their amended complaint or their proposed second amended complaint; and (4) the Recall program mooted the Plaintiffs claims under the state consumer statutes. The Court addresses each of these arguments in turn below.

1. Whether the Ohio Statutes Bar the Plaintiffs Consumer Class Action Complaint

The Ohio Plaintiff brings an action under the Ohio Consumer Sales Practices Act and the Ohio Deceptive Trade Practices Act, on behalf of herself and a putative Ohio subclass. The Defendant seeks dismissal of the OCSPA cause of action for failure to state a claim because the Ohio Plaintiff failed to plead that she satisfied the notice requirement that serves as a prerequisite to bringing **[*27]** a class action under the statute. With respect to the claims under the ODTPA, the Defendant contends that, because the Ohio Plaintiff is a consumer and not a competitor, she lacks standing and therefore the claim should be dismissed. The Court addresses the viability of the Ohio Plaintiff's claims under each statute separately.

a. OCSPA

The OCSPA provides that claims for violations of the OCSPA may not be brought "in a class action", unless the purported violation was either: (1) "an act or practice declared to be deceptive or unconscionable by a rule adopted [by the Attorney General] before the consumer transaction on which the action is based" or (2) "an act or practice determined by [an Ohio state court] to violate [the OCSPA] and committed after the decision containing the determination has been made available for public inspection . . . " *Ohio Rev. Code Ann. § 1345.09(B)* ("*section 1345.09(B)*"); *Volbers-Klarich v. Middletown Mgmt., Inc., 125 Ohio St. 3d 494, 501-02, 2010 Ohio 2057, 929 N.E.2d 434, 4411 (Ohio 2010)*.

The Ohio Plaintiff does not argue that, if given the opportunity, she could meet the requisite pleading requirement of *section 1345.09(B)* by alleging that Abbott's conduct was previously **[*28]** declared deceptive or unconscionable in an administrative rule or judicial decision by the Ohio state court. Rather, the Plaintiff argues that the Supreme Court's decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., ___ U.S. ___, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)* abrogates the OCSPA's prohibition against class actions unless the notice requirements in *section 1345.09(B)* are met. The Court disagrees.

In Shady Grove, the Supreme Court addressed whether *Rule 23* governing class actions conflicted with *New York Civil Practice Law § 901(b)* ("*section 901(b)*"), which precludes class actions seeking penalties or statutory minimum damages. The plaintiff in Shady Grove had filed a putative class action in federal court premised on diversity jurisdiction, seeking to recover unpaid statutory interest under *New York Insurance Law § 5106(a)*. *130 S. Ct. at 1436*. Under New York law, statutory interest is a penalty, and therefore pursuant to *section 901 (b)*, the plaintiff's claim would have been barred if he had brought it in New York state court. The district court dismissed the complaint for lack of subject-matter jurisdiction on the ground that *section 901 (b)* prohibited the **[*29]** proposed class action. Id. at 1437. In affirming the district court, the Second Circuit held that: (I) *Rule 23* and *section 901(b)* did not conflict and (2) that *section 901 (b)* was "substantive" and must be applied by federal courts sitting in diversity. Id. In a 5-4 decision, the Supreme Court reversed.

Justice Scalia delivered the opinion of the Court with respect to Parts I and II-A. The Court set out the "familiar" framework for determining when to apply a federal rule that appears to conflict with a state law. First, the court must determine "whether *Rule 23* answers the question in dispute." Id. If it does, then *Rule 23* applies "unless it exceeds statutory authorization or Congress's rulemaking power." Id.

Applying this framework, a majority of the Court agreed that *Rule 23* "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action" and the New York procedural statute "flatly contradict [ed]" *Rule 23*. Id. at 1438, 1441. The Court concluded that a conflicting state class action provision could apply in a diversity suit only if "*Rule 23* is ultra vires," or outside the scope of the Rules Enabling Act, *28 U.S.C. § 2071, et. seq.* **[*30]** Id. at 1437.

In Part II-B, Justice Scalia, writing on behalf of himself and three other justices ("the plurality opinion"), noted that a Federal Rule of Civil Procedure is within the Rules Enabling Act if the Rule is procedural in nature, meaning that it "governs only the manner and the means by which the litigants' rights are enforced". Id. at 1442 (internal quotation marks omitted). Justice Scalia concluded that *Rule 23* "really regulate[s] procedure" and therefore falls within the Rules Enabling Act because it "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits" and "it leaves the parties' legal rights and duties intact and the rules of decision unchanged." Id. at 1442-43 (internal quotation marks omitted). In addition, Justice Scalia stated that, for Rules Enabling Act purposes, "the substantive nature of New York's law, or its substantive purpose, *makes no difference*". Id. at 1444 (emphasis in original).

Justice Stevens concurred in the narrow holding that *Rule 23* and *section 901(b)* conflict, but wrote a separate opinion addressing whether *Rule 23* violates the Rules Enabling Act as applied to New York law. See id. at 1448 **[*31]** (Stevens, J. concurring in part and concurring in judgment) (the "concurring opinion"). In contrast to the plurality opinion that categorically held that *Rule 23* complied with the Rules Enabling Act, Justice Stevens agreed with the four justice dissent that "that there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State's definition of substantive rights and remedies". Id. Specifically, Justice Stevens held that "[a] federal rule . . . cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the terra but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." Id. at 1452. To avoid such a result, Justice Stevens concluded that, "[w]hen a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result." Id.

The Plaintiffs argue that the restrictions on class actions under *section 1345.09(B)* of the OCSPA are not applicable in federal court after Shady Grove because the restriction **[*32]** conflicts with *Rule 23*. Specifically, the Plaintiffs contend that the plurality opinion is the controlling opinion, and therefore Shady Grove stands for the proposition that any state law restricting class actions in federal court is invalid.

"'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003)* (quoting *Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977))* (internal quotation marks omitted). "This rule is not a carte blanche; it only applies 'in instances where one opinion can meaningfully be regarded as "narrower" than another . . . that is to say, only when that narrow opinion is the common denominator representing the position approved by at least five justices.'" In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 2011 WL 2848195, at *18 (S.D.N.Y. 2011) (quoting Alcan Aluminum Corp., 315 F.3d at 189).

The Second Circuit has yet to directly address whether Justice Steven's **[*33]** concurrence is the controlling opinion. See Retained Realty, Inc. v. McCabe, 376 F. App'x 52, 55 (2d Cir. 2010) (noting that the decision in Shady Grove "does not set forth a single test for whether a Federal Rule is procedural and thus consonant with the Rules Enabling Act", but that it was unnecessary to determine whether the plurality opinion or concurring opinion controlled because "[u]nder either of these tests, [they] find that Rule 54(b), like every other Federal Rule of Civil Procedure ever examined by the Supreme Court, is procedural"). However, the Court agrees with the majority of district and circuit courts that have found Justice Stevens concurring opinion was on the "narrowest grounds", and therefore is the controlling opinion. This is because "although he found Rule 23 to conflict with § 901(b) along with the plurality, Justice Stevens' Rules Enabling Act analysis called for an analysis of the state's substantive rights and remedies that was consistent with approach of the four members of the dissent." In re Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 675 (E.D. Pa. 201 0); see James River Ins. Co. v. Rapid Funding, LLC, 658 F.3d 1207, 1217 (10th Cir. 2011) ("Justice **[*34]** Stevens concurred, and the Tenth Circuit has understood his concurrence to be the controlling opinion in Shady Grove." (citing Garman v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 983 n. 6 (10th Cir. 2010)); Godin v. Schencks, 629 F.3d 79, 84 (1st Cir. 2010) (relying on Justice Steven's concurrence in holding that "[b]ecause *Section 556* is 'so intertwined with a state right or remedy that it functions to define the scope of the state-created right,' it cannot be displaced by Rule 12(b)(6) or Rule 56". (quoting Shady Grove. 130 S. Ct. at 1452 (Stevens, J., concurring)); In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 2011 WL 2848195, at * 18; In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 660 (E.D. Mich. 2011) ("Courts interpreting the Shady Grove decision ... have concluded that Justice Stevens' concurrence is the controlling opinion by which interpreting courts are bound."); Bearden v. Honeywell Int'l. Inc., No. 09-CV-1035, 2010 U.S. Dist. LEXIS 83996, 2010 WL 3239285, at * 10 (M.D. Tenn. Aug. 16, 2010) ("Justice Stevens's concurrence is the controlling opinion")); Kline v. Mortgage Electronic Sec. Sys., No. 08-CV-408, 2010 U.S. Dist. LEXIS 143391, 2010 WL 6298271, at *3 (S.D. Ohio 2010) (noting that the district courts in Ohio faced **[*35]** with this precise issue "have concluded unanimously 'that Justice Stevens' concurrence . . . is the controlling opinion by which [they are] bound.'") (quoting McKinney v. Bayer Corp., 744 F. Supp. 2d 733 (N.D. Ohio 2010)); In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 08-WP-65000, 2010 U.S. Dist. LEXIS 69254, 2010 WL 2756947 at *2 (N.D. Ohio July 12, 2010).

Furthermore, while the Plaintiffs do not address whether the class action restriction in the OCSPA is "intertwined" with the state substantive right, every court in Ohio to address this issue has held that section 1345.09(B) is substantive in nature and therefore not preempted by Rule 23 because it "is not a pan-substantive rule that applies to federal claims or to claims based on other states' laws. Rather, it applies only to 'a violation of Chapter 1345 of the [Ohio] Revised Code'—indicating its substantive nature." Whirlpool. 2010 U.S. Dist. LEXIS 69254, 2010 WL 2756947, at *2 (quoting Ohio Rev. Code § 1345.09)); see Kline, 2010 U.S. Dist. LEXIS 143391, 2010 WL 6298271, at *3-*4 (adopting the reasoning in Whirlpool that section 1345.09(B) is substantive in nature and not preempted by Rule 23); McKinney, 744 F. Supp. 2d at 746-47 (same); cf. In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 2011 WL 2848195, at *18 **[*36]** (holding that the plaintiffs could not assert a class action claim for violations of an Illinois ***antitrust law*** that includes in the text of the statute a provision "preclude[ing] private parties from asserting class actions on behalf of indirect purchasers" because "[u]nlike the New York law at issue in Shady Grove, its limitation is not contained in a generally applicable procedural rule but, rather, in the same paragraph of the same statute that creates the underlying substantive right.").

This Court finds the reasoning employed by those courts to be convincing and concludes that the Shady Grove decision does not mandate that Rule 23 invalidates the OCSPA's class action restrictions. As previously stated, the Ohio Plaintiff does not contend that she can meet the notice requirements for maintaining a class action under section 1345.09(B). Accordingly, the Court grants the Defendant's motion and dismisses the Ohio Plaintiff's OCSPA claim,

b. ODTPA

Pursuant to the ODTPA, "[a] person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person . . . "[r]epresents that goods or services have sponsorship, approval, characteristics, **[*37]** ingredients, uses, benefits, or quantities that they do not have", *Ohio Rev. Code § 4165.02(A)(7)*, and/or "[r]epresents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another", *Ohio Rev. Code § 4165.02(A)(9)*. The ODTPA "is substantially similar to the federal Lanham Act, and it generally regulates trademarks, unfair competition, and false advertising." *Dawson v. Blockbuster, Inc., 2006 Ohio 1240, 2006 WL 1061769, at *3 (Ohio Ct. App. 2006)*. The Defendant argues that the Court should dismiss the Ohio Plaintiff's ODTPA claim because, like the Lanham Act, the ODTPA only confers standing on competitors and not on individual consumers.

There is a split between courts in the Northern District of Ohio and the Southern District of Ohio on the question of whether a consumer can state a claim under the ODTPA. See *McKinney v. Bayer Corp., 744 F. Supp. 2d 733, 749 (N.D. Ohio 2010)* (collecting cases). On the one hand, at least one court in the Southern District of Ohio has held that "because the plaintiffs are individuals, 'and the statute by its plain language places no limitation on the type of individuals **[*38]** who are considered to be a 'person' and may pursue a claim,' the plaintiffs could maintain a cause of action based on alleged violation of the ODTPA". *Id. at 749-50* (quoting *Bower v. Int'l Business Machines, Inc., 495 F. Supp. 2d 837, 842 (S.D. Ohio 2007))*.

By contrast, courts in the Northern District of Ohio have held that consumers lack standing under the ODTPA "[b]ecause the Lanham Act denies standing to consumers, and Ohio courts apply the same analysis applicable to the Lanham Act to ODTPA claims", *Id. at 750* (citing *Dawson, 2006 Ohio 1240, 2006 WL 1061769*). Moreover, because the OCSPA and ODTPA regulate the same conduct, *compare* *Ohio Rev. Code § 4165.02(A)* *with* *Ohio Rev. Code § 1345.02(B)*, "to confer standing on consumers under the DTPA would render the CSPA superfluous". *Robins v. Global Fitness Holdings, LLC, No. 11-CV-1373, 838 F. Supp. 2d 631, 2012 U.S. Dist. LEXIS 5606, 2012 WL 163031, at * 15 (N.D. Ohio 2012)*; cf. *Blankenship v. CFMOTO Powersports. Inc., 161 Ohio Misc.2d 5, 2011 Ohio 948, 944 N.E.2d 769 (Ohio Com. Pl. 2011)*. After analyzing the con diet in great detail, the court in McKinney certified the question to the Ohio Supreme Court. However, before the Ohio Supreme Court could reach the issue, the plaintiff in McKinney dismissed the claim. Nevertheless, **[*39]** the Court finds that the analysis regarding the similarities between the ODTPA and the Lanham Act identified in McKinney, Robins, and Blankenship to be compelling. Furthermore, the Court agrees with those courts that have found that reading the ODTPA to permit consumer claims would render the OCSPA superfluous. Thus, the Court finds that the ODTPA does not confer a private right of action on consumers, and therefore grants the Defendant's motion dismissing the Ohio Plaintiff's ODTPA claim.

Because the Court finds that the Ohio Plaintiff cannot state a claim under either statute, the Court dismisses the claims with prejudice. As a result, the Court will not address whether the pleadings otherwise satisfy the elements of an OCSPA or ODTPA claim.

2. Whether the Texas Plaintiffs Have Satisfied the TDTPA Notice Requirement

The Defendant contends that the Court should hold the Texas Plaintiffs' TDTPA claims in abeyance because they failed to comply with the notice requirements set forth in *Tex. Bus. & Com. Code § 17.505* ("*section 17.505*"). *Section 17.505* states in relevant part:

> (a) As a prerequisite to filing a suit seeking damages under Subdivision (I) of Subsection (b) of *Section 17.50* of **[*40]** this subchapter against any person, a consumer shall give written notice to the person at least 60 days before filing the suit advising the person in reasonable detail of the consumer's specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant. During the 60-day period a written request to inspect, in a reasonable manner and at a reasonable time and place, the goods that are the subject of the consumer's action or claim may be presented to the consumer.

Tex. Bus. & Com. Code § 17.505(a). The purpose of the notice requirement is "to afford the opportunity for presuit negotiations and settlement in avoidance of lengthy and costly litigation". *Hines v. Hash, 843 S.W.2d 464, 465-66 (Tex. 1992)* (internal quotation marks and citation omitted). The notice requirement of the TDTPA is mandatory. *Id. at 467*. In addition, the plaintiff has the burden to plead and prove compliance with this provision. *Keith v. Stoelting, Inc., 915 F.2d 996, 998 (5th Cir. 1990)*. Nevertheless, the penalty for failure to comply with the notice requirement is abatement **[*41]** of the action for 60-days, not dismissal, because "abatement of the action for the statutory notice period is more consistent with the purpose of notice than dismissal". *Hines. 843 S.W.2d at 468-69*.

When a plaintiff fails to comply with the notice requirement, a defendant has up to 30 days after the date it files the answer to file a plea in abatement, which, if granted, holds the case in abeyance for 60-days to allow the parties to engage in the settlement discussions anticipated by the statute. *Tex. Bus. & Com. Code § 17.505(c)*; *Hines, 842 S.W.2d at 469* ("To be timely, the request for an abatement must be made while the purpose of notice—settlement and avoidance of litigation expense—remains viable. Thus, defendant must request an abatement with the filing of an answer or very soon thereafter").

The Texas Plaintiffs do not dispute that they failed to provide the requisite notice either prior to commencing this action, or anytime thereafter. Rather, the Texas Plaintiffs submit that Abbott has waived its right to object to the lack of notice because it did not make a timely request for an abatement. The Court disagrees. The Defendant filed its answer on February 14, 2011, in which it specifically **[*42]** raised as an affirmative defense that the TDTPA claim was "barred by failure to plead and provide proper and timely notice, as required by [the statute]". (Answer § 126.) Twenty-nine days later, the Defendant filed the instant motion seeking the dismissal of the complaint, and again raising the objection that the Texas Plaintiffs have yet to comply with the notice requirement. Courts consider raising the notice requirement in a motion to dismiss "to be a timely objection to [a plaintiff's] failure to comply with the notice requirement". *Ramirez v. Am. Home Prods., No. C.A. B-03-155, 2005 U.S. Dist. LEXIS 40577, 2005 WL 2277518, at * 10 (S.D. Tex. Sept. 16, 2005)*. Thus, the Court finds that the Defendant's request for an abatement was timely.

The Court therefore orders the Texas Plaintiffs' TDTPA claim abated for sixty days after the Texas Plaintiffs serve written notice on Abbott. The Texas Plaintiffs must provide notice within twenty days of the date this Order issues, and notify the Court when they have done so. If the Texas Plaintiffs fail to provide timely notice, the Court will dismiss their claim.

3. Whether the Plaintiffs State a Claim Under the New York, New Hampshire and Texas Consumer Protection Statutes

The **[*43]** Plaintiffs allege that the Defendant made affirmative misrepresentations and omissions with regard to the safety of Similac in violation of the consumer protection statutes. As previously stated, because the Court dismisses the claims under the Ohio statutes with prejudice on separate grounds, it will not address whether the Ohio Plaintiff plausibly stated a claim for a deceptive act or practice under the statutes. By contrast, because the Court is not dismissing the Texas Plaintiffs' claim for failure to comply with the notice requirement, but rather holding it in abeyance, the Court deems it prudent to address whether the Texas Plaintiffs' plausibly state a claim under the statute. Thus, this section addresses the sufficiency of the Plaintiffs claims under the New Hampshire, New York, and Texas statutes for the purposes of the Defendant's motion for judgment on the pleadings, and the futility analysis of the Plaintiffs' motion to amend, solely with respect to the factual allegations regarding the alleged deceptive acts and practices.

The New Hampshire Consumer Protection Act prohibits the use of "any unfair or deceptive act or practice in the conduct of any trade or commerce." *N.H. Rev. Stat. Ann. § 358—A:2*. **[*44]** The act provides a non-exhaustive list of prohibited practices, including prohibitions against: (1) "Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have . . . ", *N.H. Rev. Stat. Ann. § 358-A:2.V*.; and (2) "Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another", *N.H. Rev. Stat. Ann. § 358-A:2.VII*.

In addition, although not include in the enumerated list of prohibited practices, courts have found that "the failure to warn of a defective or dangerous condition can, under appropriate circumstances, constitute an unfair or deceptive trade practice under New Hampshire's Consumer Protection Act." *Herne v. Cooper Indus., Inc.,2005 DNH 144, 2005 WL 2671 540, at *4 (D.N.H. 2005)*. Moreover, regardless of whether it is among the enumerated list of prohibited practices, "in order for conduct to run afoul of the statute, it 'must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.'" *Hobin v. Coldwell Banker Residential Affiliates, Inc. 144 N.H. 626, 635, 744 A.2d 1134, 1141 (N.H. 2000)* **[*45]** (quoting *Barrows v. Boles, 141 N.H. 382, 390, 687 A.2d 979, 986 (N.H. 1996))*.

With respect to damages, the NHCPA provides that "[i]f the court finds for the plaintiff, recovery shall be in the amount of actual damages or $1,000, whichever is greater," and the plaintiff" shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court." *N.H. Rev. Stat. Ann. § 358-A:10*. Furthermore, the NHCPA provides that a court may award "as much as 3 times, but not less than 2 times" the amount of damages if it finds the violation was "willful or knowing". Id.

The New York Consumer Protection Act codified at *Section 349 of the New York General Business Law* declares that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" in New York are unlawful. *N.Y. Gen. Bus. § 349(a)*. "To make out a prima facie case under *Section 349*, a plaintiff must demonstrate that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result." *Maurizio v. Goldsmith, 230 F.3d 518, 521 (2d Cir. 2000)* (per curiam) (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank. 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741, 744 (N.Y. 1995))*; **[*46]** *Stutman v. Chemical Bank, 95 N.Y.2d 24, 709 N.Y.S.2d 892, 731 N.E.2d 608 (2000)*.

Furthermore, a consumer can maintain a cause of action under the NYCPA based on omissions "where the business alone possesses material information that is relevant to the consumer and fails to provide this information." *Oswego, 85 N.Y.2d at 26, 623 N.Y.S.2d at 533, 647 N.E.2d at 745*. With respect to damages, "[c]itizens can enjoin an unlawful business practice, recover actual damages (or $50, whichever is greater) and obtain attorney's fees. In addition, if a defendant knowingly or willfully engages in a deceptive practice, the court may, in its discretion, award treble damages up to a maximum of $1,000". *Stutman, 95 N.Y.2d at 29, 709 N.Y.S.2d at 895-96, 731 N.E.2d at 611-12* (citing General Business Law *§ 349(h)*).

Finally, to establish a violation of the Texas Deceptive Trade Practices Act, plaintiffs must show that: (1) they fit the statutory definition of "consumer;" (2) the defendant engaged in one of the false, misleading, or deceptive acts enumerated in the statute; and (3) these acts constituted a "producing cause" of the plaintiffs' damages. *Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 478 (Tex. 1995)*. **[*47]** Among the affirmative statements prohibited by the statute are representations that products have "characteristics, ingredients, uses, benefits, or quantities which they do not have", *Tex. Bus. & Com. Code § 17.46(b)(5)*, and that products "are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another", *Tex. Bus & Com. Code Ann. §17.46(b)(7)*. With respect to omissions, the TDTPA explicitly prohibits "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed". *Tex. Bus. & Com. Code. § 17.46(b)(24)*.

Violations of the TDTPA permit a plaintiff to recover "actual damages" under either the "out of pocket" rule or the "benefit of the bargain" rule, whichever gives the consumer the greater recovery. *Leyendecker & Assocs., Inc. v. Wechter, 683 S.W.2d 369, 373 (Tex. 1984)*; *W.O. Bankston Nissan. Inc. v. Walters. 754 S.W.2d 127, 128 (Tex. 1988)* (defining out-of-pocket and benefit-of-the-bargain damages). In addition, **[*48]** the statute permits additional damages for "mental anguish" up to the three times the amount of actual damages for TDTPA violations that were committed "knowingly" or "intentionally". *Tex. Bus. & Com. Code § 17.50(b)(1)*.

In its motion, the Defendant does not separately address the sufficiency of the Plaintiffs' claims under each state statute. Rather, the Defendant mainly argues that all of the consumer protection statute claims should be dismissed because: (1) the statements and omissions underlying the claims are not plead with the particularity required by Federal Rule of Civil Procedure 9(b) ("Rule 9(b)"); and (2) even under Federal Rule of Civil Procedure 8(a) ("Rule 8(a)"), the Plaintiffs fail to state a claim under the state statutes because the alleged misrepresentations are either too vague to state a claim or constitute non-actionable puffery or opinion.

a. As to the Applicable Pleading Standard

The parties dispute whether the Court should analyze the sufficiency of the Plaintiffs' consumer protection statute claims under the liberal pleading standard of Rule 8(a) or the heightened pleading requirements of Rule 9(b).

In the Second Circuit, the controlling case on the pleading **[*49]** standard governing consumer protection statutes is Pelman v. McDonald's Corp., 396 F.3d 508 (2d Cir. 2005). In Pelman, the plaintiffs alleged that McDonalds engaged in deceptive practices by, among other acts, misrepresenting the nutritional quality of its food through a combination of advertisements and failing to disclose that certain of its foods were substantially less healthy than advertised. The district court dismissed the plaintiffs' NYCPA claim on the grounds that the plaintiffs failed to plead facts supporting a causal connection between their consumption of McDonald's food and their alleged injuries, and because the plaintiffs' "allegations of a generalized campaign to create a false impression were vague and conclusory". 396 F.3d at 511, 512 n.5.

The Second Circuit vacated the district court decision, holding that "because § 349 extends well beyond common-law fraud to cover a broad range of deceptive practices, and because a private action under § 349 does not require proof of the same essential elements (such as reliance) as common-law fraud, an action under § 349 is not subject to the pleading-with-particularity requirements of Rule 9(b), but need only meet the bare-bones **[*50]** notice-pleading requirements of Rule 8(a)". Id. at 511 (internal citations omitted). With respect to the "vague and conclusory allegations" regarding the generalized campaign, the court held that "the cure for such deficiencies, in a claim not required to be plead with particularity, is a motion for a more definite statement under Rule 12(e), rather than dismissal". Id. at 512 n.5 (citing Swierkiewcz v. Sorema N.A., 534 U.S. 506, 514-15, 122 S. Ct. 992, 152 L.Ed. 2d 1 (2002)).

The Defendant contends that the Court should limit Pelman to its facts because it related to an "advertising scheme" as opposed to "literally false statements of material fact with scienter intending to induce reliance", and asserts that the Second Circuit's decision in Rombach v. Chang. 355 F.3d 164 (2d Cir. 2004) should control. (Def.'s MTD Br. at 8-9.) In Rombach. the Second Circuit held that whether a plaintiff's claims "sound[s] in negligence or in fraud" for the purposes of applying Rule 9(b), depends not on whether the allegations are "styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action" but rather whether the "wording and imputations of the complaint **[*51]** are classically associated with fraud". 355 F.3d at 171-72. The Defendant argues that the decision in Rombach cannot be squared with the decision in Pelman. which distinguished NYCPA and fraud claims in part because NYCPA claims do not require a showing of reliance and scienter. Based on Rombach and a narrow reading of Pelman. the Defendant contends that because the Plaintiffs allege the type of intentional conduct that "sounds in fraud", and because they allege reliance on particular advertisements rather than a general "advertising scheme", their claims should be held to the heightened pleading standard of Rule 9(b).

However, the Defendant's attempt to limit Pelman to its facts cannot be credited in light of the Second Circuit's decision in City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425 (2d Cir. 2008), which cited Pelman for the proposition that Rule 8(a) was applicable to two sets of NYCPA claims. The first NYCPA claim alleged that "defendants intentionally failed to inform their customers that they must pay taxes and omitted the amount of taxes owed to the City and the State from the advertised prices". 541 F.3d at 455. Despite the fact that this allegation was pled **[*52]** in terms of "intentional" conduct, the Second Circuit did not apply Rule 9(b). The second NYCPA claim alleged "that defendants represented to customers that the cigarettes are "tax free," that their customers do not have to pay taxes, and/or that defendants did not have to file Jenkins Act reports", Id. at 456. Unlike Pelman, this allegation was premised not on an "advertising scheme", but allegedly false statements about the defendant's "tax-free" status. However, the Second Circuit still applied Rule 8(a).

Read together, Pelman and Smoke-Spirits.com establish a categorical rule that NYCPA claims, regardless of whether they "sound in fraud", or are premised on specific misrepresentations rather than an "advertising scheme", are not subject to the heightened pleading requirement of *Rule 9(b)*. See *Welch v. TD Ameritrade Holding Corp., No. 07-CV-6904, 2009 U.S. Dist. LEXIS 65584, 2009 WL 2356131, at *24 n. 13 (S.D.N.Y. July 27, 2009)* (following Rombach in ruling that a plaintiff's unjust enrichment claim for a fraudulent securities scheme was subject to *Rule 9(b)*, but that the *section 349* claim premised on the same allegations was subject to *Rule 8(a)* because "the Second Circuit has held that, as a categorical matter, **[*53]** claims under *§ 349* are only required to meet the requirements of *Rule 8(a)*") (citing *Smokes-Spirits.Com, 541 F.3d at 455*); *Ng v. HSBC Mortg. Corp., No. 07-CV-5434, 2010 U.S. Dist. LEXIS 40109, 2010 WL 889256, at *14 (E.D.N.Y. March 10, 2010)* ("Deceptive conduct that does not rise to the level of actionable fraud, may nevertheless form the basis of a claim under New York's Deceptive Practices Act, which was created to protect consumers from conduct that might not be fraudulent as a matter of law, and also relaxes the heightened standards required for a fraud claim.").

As to the non-New York statutes, whereas the Plaintiffs fail to address the applicable pleading standard to the NHCPA and TDTPA claims, the Defendant presumes that, because federal district courts in New Hampshire and Texas apply a heightened pleading standard to the claims under their state statutes, this Court should as well. Contrary to the Defendant's assumption, this Court is not bound by the pleading standard applied by district courts in other states to that state's law.

Although the substantive requirements of the NHCPA and TDTPA are governed by the law of their respective states of origin, any pleading requirements are governed by federal law, **[*54]** which controls procedural matters in diversity cases. "Whether plaintiffs' claims must comply with the pleading burdens imposed by *Fed. R. Civ. P. 9(b)* by virtue of the complaint 'sounding in fraud' or being 'grounded in fraud' is an issue of federal law, not state law." *Ackerman v. Coca-Cola Co., No. 09-CV-395, 2010 U.S. Dist. LEXIS 73156, 2010 WL 2925955, at * 18 n. 31 (E.D.N.Y. July 21, 2010)*. Here, the Court is bound by the law of Second Circuit. See *Northwestern Mut. Life Ins. Co. v. Banc of America Securities LLC. 254 F. Supp. 2d 390, 396 (S.D.N.Y. 2003)* ("[B]ecause *Rule 9(b)* is a rule promulgated pursuant to a federal statute, this Court is required to follow the precedent of the Court of Appeals for the Second Circuit with respect to the interpretation and application of *Rule 9(b)*."); see also *Desiano v. Warner-Lambert & Co., 467 F.3d 85, 91 (2d Cir. 2006)*. Thus, the relevant issue is whether the Second Circuit would apply *Rule 8(a)* to the non-New York statutes because, like the NYCPA, they are either distinguishable in form or purpose from fraud claims. See *Keegan v. Am. Honda Motor Co,. Inc., 838 F. Supp. 2d 929, 2012 U.S. Dist. LEXIS 3007, 2012 WL 75443, at *21-*22 (C.D. Cal. 2012)* (acknowledging that although the Second Circuit **[*55]** under Pelman would apply *Rule 8(a)* to the plaintiffs' NYCPA claim, it was bound by Ninth Circuit precedent to apply *Rule 9(b)* to the NYCPA claims); *Petri v. Gatlin. 997 F. Supp. 956, 973 (N.D. Ill. 1997)* ("Because the DTPA is substantially similar to the ICFA, we assume *arguendo* that *Rule 9(b)* applies to statutory fraud claims under Texas law as well.").

Similar to the NYCPA, the New Hampshire statute also does not include the elements of reliance or scienter. Although the Texas statute requires a plaintiff to prove reliance in order to prevail on a TDTPA claim, *Henry Schein. Inc. v. Stromboe, 102 S.W.3d 675, 686 (Tex. 2002)* (identifying reliance as an element of plaintiffs' TDTPA claims), a plaintiff is not required to show that the defendant acted "knowingly or intentionally". *Miller v. Keyser, 90 S.W.3d 712, 716 (Tex. 2002)*. In addition, just as the New York Court of Appeals has held that "[i]n contrast to common-law fraud, [the NYCPA] is a creature of statute based on broad consumer-protection concerns", *Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 343, 704 N.Y.S.2d 177, 182, 725 N.E.2d 598, 603 (N.Y. 1999)*, the Texas Supreme Court has explicitly noted that "[a] primary **[*56]** purpose of the enactment of the DTPA was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit." *Smith v. Baldwin. 611 S.W.2d 611 (Tex. 1980)*; see also *Miller. 90 S.W.3d at 716*; *Eagle Properties, Ltd. v. Scharbauer, 807 S.W.2d 714 (Tex. 1990)*. Thus, in light of the similarities between the NYCPA and the analogous New Hampshire and Texas statutes, the Court finds that the applicable pleading standard to claims under all three statutes is the notice pleading requirements of *Rule 8(a)*.

b. Misrepresentations and Omissions

The Plaintiffs allege that Abbott violated the NHDPA, NYCPA, and TDTPA by misleading consumers as to the safety of Similac through the following affirmative statements: (1) Similac was "safe for the consumption by infants"; (2) Abbott was "dedicated to the highest standards of manufacturing and marketing — and to complying with all applicable laws and regulations in the countries where [they] do business"; (3) Similac "provid[es] babies with excellent nutrition for growth and development and has been clinically proven to aid brain, bone and immune **[*57]** system development"; and (4) Abbott is "committed to conducting research to ensure that formula-fed infants receive the highest quality products to meet their nutritional needs". Abbott contends that these statements are either objectively non-misleading, or amount to mere puffery or opinion and therefore are not actionable under the consumer protection statutes.

"A material claim is one that 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'" *Bildstein v, MasterCard Int'l Inc., 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004)* (quoting *Novartis Corp. v. F.T.C., 223 F.3d 783, 787, 343 U.S. App. D.C. 111 (D.C. Cir. 2000))*. The relevant inquiry is not whether the statement is literally false. *Am. Home Prods. Corp. v. Johnson & Johnson. 577 F.2d 160, 165 (2d Cir. 1978)*. Rather, "[w]hat is important in determining whether a statement is misleading is the over-all impression it tends to create on the public." *Country Tweeds, Inc. v. F.T.C., 326 F.2d 144, 148 (2d Cir. 1964)*; *Beer v. Bennett. 160 N.H. 166, 170, 993 A.2d 765, 768 (N.H. 2010)* ("Moreover, even if the individual representations could be read as literally true, the advertisement **[*58]** could still violate the CPA if it created an overall misleading impression.").

However, statements that are vague or "either mere puffery or hyperbole" such that "a reasonable consumer would not view [them] as significantly changing the general gist of available information . . . are not material, even if they were misleading." *In re Ford Motor Co. Securities Litig., Class Action, 381 F.3d 563, 570 (6th Cir. 2004)*. "Simply stated, puffing is sales talk that the buyer should discount when making a transaction because no reasonable person under the circumstances would rely on the statement when contemplating a purchase." *Tylka v. Gerber Prods. Co., No. 96-CV-1647, 1999 U.S. Dist. LEXIS 10718, 1999 WL 495126, at *5 (N.D. Ill. July 1, 1999)*.

If an alleged misrepresentation would not deceive a reasonable person because it is vague or amounts to mere puffery or opinion, then a claim under the consumer protection statutes *may* be dismissed, as a matter of law, on a motion to dismiss. *Lacoff v. Buena Vista Publishing, Inc., 183 Misc.2d 600, 705 N.Y.S.2d 183, 191 (N.Y. Sup. Ct. 2000)* (dismissing claims under *sections 349* and *350* because certain language "is not actionable, as it is simply puffery or opinion"); *Helena Chemical Co. v. Wilkins, 47 S.W.3d 486, 502 (Tex. 2001)* **[*59]** ("The DTPA does not mention "puffing" as a defense. However, this Court has recognized that "mere puffing" statements are not actionable under *sections 17.46(b)(5)* or *17.46(b)(7)*.") (citing *Pennington v. Singleton, 606 S. W.2d 682, 687 (Tex. 1980))*; *Private Jet Servs. Group, Inc. v. Sky King, Inc., 2006 DNH 116, 2006 WL 2864057, at *5 (D.N.H. 2006)* ("Mere puffery that does not represent that the company adheres to particular standards or requirements is not actionable under [the NHCPA]. Further, in general only factual misstatements, not statements of opinion, constitute actionable misrepresentations.") (internal citations omitted).

The Court finds that the majority of the statements cited by the Plaintiffs in support of their claims either have nothing to do with the safety of Similac, or are too vague to mislead a reasonable consumer and therefore are immaterial. Specifically, the statements that Similac "provid[es] babies with excellent nutrition for growth and development and has been clinically proven to aid brain, bone and immune system development" and that Abbott is "'committed to conducting research to ensure that formula-fed infants receive the highest quality products to **[*60]** meet their nutritional needs'" are not material, and therefore not actionable, because they have no bearing on the safety of the product for the ingestion by infants and "[a]n infant formula containing beetles could nonetheless improve immunity, bone strength, and brains and eyes, and provide important nutrition". *Vavak v. Abbott Labs., Inc., SACV 10-1995 JVS, 2011 U.S. Dist. LEXIS 155962, *11 (C.D.Cal. March 7, 2011)*: accord *Bland v. Abbott Labs.. Inc., No. 11-CV-430, 2012 U.S. Dist. LEXIS 1732, 2012 WL 32577, at *2 (W.D. Ky Jan. 6, 2012)*; *Gray v. Abbott Labs., Inc., No. 10-CV-6377, 2011 U.S. Dist. LEXIS 80189, 2011 WL 3022274 (N.D. Ill. July 22, 2011)*; *Jasper v. Abbott Labs., Inc., 834 F. Supp. 2d 766, 2011 WL 2672519 (N.D. Ill. 2011)*.

Furthermore, the statement that Abbott is "dedicated to the highest standards of manufacturing and marketing — and to complying with all applicable laws and regulations in the countries where [they] do business" is not actionable under the consumer protection statutes. This aspirational statement is simply too vague for a reasonable consumer to rely on it in any material way in making a decision to purchase the Defendant's products. General statements about compliance with safety and quality standards are non-actionable **[*61]** "puffery" where, as here, they fail to identify specific requirements or standards. See *Private Jet Servs. Group. Inc. 2006 DNH 116, 2006 WL 2864057, at *5* (holding that statements about the high quality of the defendant's services were "mere puffery" and therefore not actionable under the NHCPA because "they do not provide any implied or express warranties as to quality or any representations about compliance with specific requirements or standards"); *Cleveland Mack Sales, Inc. v. Foshee, No. I4-CV-59, 2001 Tex. App. LEXIS 6164, 2001 WL 1013393, at *4 (Tex. Ct. App. 2001)* ("Imprecise or vague statements are generally considered puffing, and are not actionable under the DTPA, while statements of material fact are actionable;') (citing *Douglas v. Delp, 987 S.W.2d 879, 886 (Tex. 1999))*; *Tylka, 1999 U.S. Dist. LEXIS 10718, 1999 WL 495126, at *8* ("'The people and resources of the Gerber Products Company are dedicated to assuring that the company is the world leader in, and advocate for, infant nutrition, care and development,' simply presents no basis for consumer deception.").

Contrary to the Plaintiffs' contention, a statement that Abbot is "dedicated . . . to complying with all applicable laws and regulations" is distinguishable from false or even literally **[*62]** true statements that mislead a consumer to believe that a product is FDA-approved. Those allegations involve the "peculiar form that marketing has taken as having a specialized, implicit meaning in the eyes of the consumer [ ] that the drug is FDA-approved." *Mutual Pharm. Co. v. Ivax Pharms., Inc., 459 F. Supp. 2d 925, 941 (CD. Cal. 2006)* (holding that plaintiffs presented viable claims that defendant had falsely implied that its drugs were FDA approved by placing them on comparative clinical databases). For example, in *In re Bayer Corp, Combination Aspirin Products Marketing and Sales Practices Litigation, 701 F. Supp. 2d 356 (E.D.N.Y. 2010)*, the case relied upon by the Plaintiffs for this proposition, the court found that the plaintiffs stated a claim under a number of state consumer protection statutes based on the plaintiffs' allegation that Bayer falsely implied that its drug was FDA-approved "by employing valid FDA-approved statements about the virtues of the component parts of the combination products". *Id. at 374*.

By contrast, in the statement cited by the Plaintiffs, the Defendant vaguely references a dedication to complying with unspecified standards and all of the laws and **[*63]** regulations in the countries where it operates. As the Plaintiffs themselves allege in the amended and proposed second amended complaints, Abbott "markets its products in more than 130 countries". (Am. Compl., ¶ 20; PSAC, ¶ 20.) A broadly stated goal to comply with the laws of 130 countries is puffery and therefore cannot materially mislead a reasonable consumer. See *Bernstein v. Extendicare Health Servs., Inc., 607 F. Supp. 2d 1027, 1032 (D. Minn. 2009)* (holding that "[s]tatements that a nursing home will comply with or exceed 'applicable laws,' or that it has established 'rigorous standards,' are similar to statements that services provided will be 'high quality.'" and therefore constitute non-actionable puffery under the Minnesota Deceptive Trade Practices Act).

Because the Court finds that the statement that Abbott is "dedicated to the highest standards of manufacturing and marketing — and to complying with all applicable laws and regulations in the countries where [they] do business" is not actionable, it is unnecessary to address the Defendant's contention that the Plaintiffs reliance on this statement is preempted by the Food Drug and Cosmetics Act ("FDCA"). Neither must the **[*64]** Court resolve at this stage what evidence regarding Abbott's compliance with FDA regulations may or may not ultimately be admissible to support the Plaintiffs' claims.

However, the Court finds that the allegation that the "product packaging describes Similac as being a formula approved and used most by hospitals, because it is safe for the consumption by infants" (Am. Compl., ¶ 25) plausibly supports a claim based on affirmative misrepresentations under the consumer protection statutes. Moreover, by identifying the alleged misrepresentation as being located on the "product packaging" and alleging that they "relied" on this statement in purchasing and paying a premium price for the contaminated formula, the Plaintiffs have satisfied the requisite causal connection between the deceptive act and their injuries to sustain a claim under all three statutes, as well as the reliance element of the TDTPA.

Although the Plaintiffs have not quoted a specific advertisement, this is not required under *Rule 8(a)*. This case is distinguishable from the Court's decision in *Woods v. Maytag ("Maytag I"), No. 10-CV-599, 2010 U.S. Dist. LEXIS 116595, 2010 WL 4314313 (E.D.N.Y. Nov. 2, 2010)*, where the Court dismissed a claim under the **[*65]** NYCPA based on alleged misrepresentations, which, unlike the allegations in the instant case, were plead on "information and belief. Contrary to the Defendant's characterization, the Court dismissed the plaintiff's NYCPA claim premised on *omissions*, not affirmative misrepresentations, because the plaintiff "vaguely allege[d] that Defendants 'knew' of the alleged defect". *2010 U.S. Dist. LEXIS 116595, 2010 WL 4314313, at * 16*. As discussed below, because a failure to disclose for the purposes of stating a claim under the NYCPA only arises when a defendant "exclusively possess information that a reasonable consumer would want to know and could not discover without difficulty", a plaintiff cannot plead that an omission constituted a deceptive practice based on conclusory allegations of knowledge. Id. Indeed, in a later opinion, the Court denied Maytag's motion to dismiss the plaintiff's NYCPA claim based on omissions in his amended complaint because the plaintiff alleged facts plausibly alleging that Maytag had knowledge of product defect and engaged in a "deceptive act or practice" by failing to warn consumers. See *Woods v. Maytag ("Maytag II"), 807 F. Supp. 2d 112, 129 (E.D.N.Y. 2011)*.

Furthermore, while certain **[*66]** statements that a product is "safe" *may* constitute puffery, it is an actionable deceptive practice to mislead consumers into believing a product is safe for a particular use when it is not. See *In re Bayer Corp., 701 F. Supp. 2d at 375* (holding that the plaintiffs allegations that "Bayer misrepresented the safety and effectiveness of the combination products" was a "traditional claim of consumer misrepresentation"). However, because the Plaintiffs have not identified a specific advertisement for the Court to assess whether the language used would mislead a reasonable customer, the Court cannot find as a matter of law that advertising that a product is "approved and used most by hospitals, because it is safe for the consumption by infants" is non-actionable puffery. See, e.g., *Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1125-26 (N.D. Cal. 2010)* ("The insistence that a product with (allegedly) dangerous additives is nonetheless 'wholesome,' . . ., arguably *could* mislead a reasonable consumer. Accordingly, at this juncture, the term 'wholesome' cannot be deemed to constitute non-actionable puffery."); cf. *Cecere v. Loon Mt. Rec. Corp., 155 N.H. 289, 297-98, 923 A.2d 198 (2007)* (granting summary **[*67]** judgment on CPA claim to defendants where plaintiff "alleged that the defendants violated the CPA by falsely advertising that the terrain park and specifically its jumps were 'state of the art' and 'safe for the use by patrons for the specific purpose of snow boarding'" but produced "no advertising by the defendants representing that the terrain park was 'state of the art' or 'safe for ... snowboarding'"); *Sergeant Oil & Gas Co., Inc. v. Nat'l Maintenance & Repair, Inc., 861 F. Supp. 1351, 1362 (S.D. Tex. 1994)* ("Whether a statement constitutes merely an expression of opinion or "puffing," or an actionable misrepresentation depends on several factors, including the specificity of the statement and the comparative levels of the buyer's and seller's knowledge concerning the subject matter of the transaction.") (citations omitted).

Finally, the Court also finds that the Plaintiffs have stated claims under the consumer protection statutes based on omissions. The Plaintiffs allege that Abbott engaged in a deceptive practice by omission, because Abbott was aware that the Similac was contaminated with insect parts and therefore not "safe for ingestion by infants", and failed to disclose that **[*68]** information to consumers.

All three statutes require either actual or constructive knowledge to state a claim based on omissions. See *Maytag I. 2010 U.S. Dist. LEXIS 116595, 2010 WL 4314313, at * 15* ("As with fraud claims, when a defendant exclusively possesses information that a reasonable consumer would want to know and could not discover without difficulty, failure to disclose can constitute a deceptive or misleading practice") (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 27, 623 N.Y.S.2d 529, 647 N.E.2d 741 (N.Y. 1995))*; *Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 479 (Tex. 1995)* ("To be actionable under the DTPA, a failure to disclose material information necessarily requires that the defendant have *known* the information and have failed to bring it to the plaintiff's attention.") (emphasis in original); *Beer v. Bennett, 160 N.H. 166, 170, 993 A.2d 765, 768-69 (N.H. 2010)* (holding that although the NHCPA does not require that a misrepresentation or omission be knowing or intentional in order to recover the minimum statutory damages, "the statute's plain language 'indicates that some element of knowledge on the part of the defendant is required'".) (quoting **[*69]** *Kelton v. Hollis Ranch, 155 N.H. 666, 668, 927 A.2d 1243 (N.H. 2007))*.

In the amended complaint, the Plaintiffs stated in conclusory terms that Abbott "had actual and/or constructive notice that Similac contained contaminants, including insect/bettle particles and larvae, when placing these products into the stream of commerce". (Am. Compl., ¶ 45.) Absent from the amended complaint were facts that, if true, would render this contention plausible. However, in the proposed second amended complaint, the Plaintiffs allege additional facts that, when viewed in the light most favorable to the Plaintiffs, plausibly allege that the Defendant had "actual or constructive" knowledge of the contamination "when placing [Similac] into the stream of commerce". In particular, the Plaintiff alleges that: (1) Abbott was aware of a beetle infestation in the Sturgis Facility that became progressively worse from January 2007 until 2010 based on reports provided by its exterminator, (PSAC, ¶¶ 53-58, 60); (2) Abbott was aware that the equipment in the facility responsible for preventing insects from contaminating the product was defective and poorly maintained, (PSAC, ¶¶ 41-48, 61); and (3) Between January **[*70]** 2010 and August 2010, Abbott "received 238 infestation complaints for product manufactured at the Sturgis, Michigan facility" (PSAC, ¶ 52).

Whether Abbott's failure to disclose the existence of the customer complaints about insect parts in its product constitutes a material omission "depends upon the volume and accuracy of those complaints". *St. Patrick's Home for Aged and Infirm v. Laticrete Int'l, Inc., 264 A.D.2d 652, 655-56, 696 N.Y.S.2d 117, 122 (1st Dep't 1999)* ("Non-disclosure of a single, unsubstantiated allegation of product failure is not sufficient. On the other hand, concealment of scores of complaints about the defective nature of a product would clearly approach fraud."). Notably, the mere existence of product complaints does not in and of itself prove that the product was unsafe. Whether these complaints provided actual knowledge of the product contamination, and whether these complaints provided actual knowledge that contamination with beetle parts was "unsafe", are factual issues that the Court does not need to decide on a motion to dismiss. Indeed, at this stage in the litigation, what the Plaintiffs can "prove" is irrelevant. The parties submitted declarations and **[*71]** documentary evidence regarding these complaints in conjunction with their supplemental briefing on mootness. However, because these documents are not incorporated by reference in the complaint, the Court cannot consider them on a motion to dismiss without converting the motion into one for summary judgment, which the Court declines to do.

Here, the Plaintiffs have alleged that: (1) Abbott knew about the presence of insect parts in the formula manufactured at the Sturgis Facility from 238 consumer complaints; (2) Abbott intentionally withheld this information to induce customers to purchase the formula; and (3) the Plaintiffs would not have purchased Similac and/or paid the premium price for Similac had they known of the contamination. Thus, the Plaintiffs have plausibly stated a claim under all three statutes based on the Defendant's omissions. See *Szymczak v. Nissan North America, Inc., No. 10-CV-7493, 2011 U.S. Dist. LEXIS 153011, 2011 WL 7095432, at *16 (S.D.N.Y. 2011)*. ("Here, plaintiffs' allegations include sufficient detail and a plausible narrative for how defendants knew of the radiator defect. At this stage, the Court can only assume the narrative is true. Therefore, the Court will not dismiss the *Section 349* **[*72]** claims as to plaintiffs Szymczak, Lopez, Greathouse, and Jackson . . . but will leave those plaintiffs to their proof."); *In re Sony VAIO Computer Notebook Trackpad Litig., No. 09-Cv-2109, 2010 U.S. Dist. LEXIS 115142, 2010 WL 4262191, at *5 (S.D. Cal. 2010)* (holding that the plaintiffs plausibly alleged claims under the California, New Jersey, and Florida consumer protection statutes based on omissions because the plaintiffs "alleged that Sony knew about a material fact, the defective trackpad, from numerous consumer complaints, but concealed that information from Plaintiffs [and] Plaintiffs further allege that if they had known about the defect. Plaintiffs never would have purchased the notebooks at the prices they paid."); *Doll v. Ford Motor Co., 814 F.Supp.2d 526, 2011 U.S. Dist. LEXIS 95427, 2011 WL 3820324, at *16 (D. Md. 2011)* ("Plaintiffs have adequately pled a claim under the New York Deceptive Trade Practices Act. In the Amended Complaint, Plaintiffs contend that Ford misled consumers by withholding material information regarding the defective torque converter, and, as a result, consumers were harmed by high repair and replacement costs. This Court finds that Ford's alleged omissions are consumer orientated, materially misleading, **[*73]** and are the source of the Plaintiff's injuries.").

Accepting the allegations set forth in the amend complaint and proposed second amended complaint as true, and viewing them in the light most favorable to Plaintiffs, they have stated viable claims under the NHCPA, NYCPA, and TDTPA based on affirmative misrepresentations and omissions. Accordingly, the Defendant's motion for judgment on the pleadings on this ground is denied, and the Plaintiffs' motion to amend the complaint to add the additional factual allegations is granted. The amendment is not futile.

4. Whether the Recall Program Moots the Plaintiffs Consumer Protection Act Claims

On January 20, 2012, the Court directed the parties to submit supplemental briefing on whether the voluntary recall mooted the Plaintiffs' claims, an argument raised by the Defendant in opposition to the motion to amend. As the Court noted in its supplemental briefing order, a number of courts also handling cases against Abbott based on the contaminated Similac subject to the Recall had held that, because Abbott had offered to reimburse consumers through the Recall, any claims by plaintiffs seeking damages for economic loss or restitution were moot.

Most **[*74]** comparable to the instant case was *Jovine v. Abbott Laboratories, Inc., 795 F. Supp. 2d 1331 (S.D. Fla. 2011)*, when the plaintiff sought to recover unspecified damages for Abbott's violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Although the court found that the plaintiff adequately alleged an unfair or deceptive practice under the statute, the court dismissed the claim on the ground that the plaintiff "[could not] plausibly allege that he suffered damages insofar as the amount he paid for the product, for he alleges that Defendants issued a voluntary recall". *Id. at 1334*. The court further noted that, "[t]o the extent Plaintiff predicates his FDUTPA damages on injury he suffered beyond the purchase price of the product", those damages were barred by the statutory limitation on "actual damages". Id.

Here, the Plaintiffs are similarly vague with regard to the damages they seek. Although the Plaintiffs allege that their children suffered personal injuries, the Plaintiffs do not expressly seek damages on this ground. Furthermore, while in their supplemental briefing the Plaintiffs assert that the New York Plaintiff incurred medical costs associated with her **[*75]** child's condition allegedly caused by the contaminated formula, this allegation is not included in the amended or proposed second amended complaints. Nevertheless, the Court finds that, even assuming the Plaintiffs are only seeking their out-of-pocket costs for the purchase, the option of recouping that cost through the Recall program does not moot their claims.

As the Defendant concedes in its supplemental brief, the reimbursement offer through the Recall program does not moot the Plaintiffs' claims in the constitutional sense, because it would not offer the Plaintiffs the complete remedy they seek. Rather, the Defendant argues that the existence of the Recall program renders the Plaintiffs unable to state a claim for damages under the state deceptive practice statutes. The Court disagrees.

While the Court recognizes that other courts in the Similac cases have reached a different conclusion, there is no bar preventing plaintiffs from forgoing compensation through a voluntary refund program in order to pursue their claims in a consumer class action. In contrast to the cases cited by the Defendant, the conditions of the Recall program were not part of the "benefit-of-the-bargain" when **[*76]** they purchased the product, see *Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 251, 872 A.2d 783 (N.J. 2005)* ("Indeed, the warranty provided as part of the contract of sale or lease is part of the benefit of the bargain between the parties. The defects that arise and are addressed by warranty, at no cost to the consumer, do not provide the predicate "loss" that the [New Jersey Consumer Fraud Act ("CFA")] expressly requires for a private claim under the CFA . . . ."), nor do the Plaintiffs claim that the Recall program constituted a deceptive act or practice, see *Jorge v. Toyota Motor Insurance Services, Inc., 2006 N.J. Super. Unpub. LEXIS 2079, 2006 WL 2129026, at *4-5 (N.J. Super. A.D. 2006)* (finding no ascertainable loss under the New Jersey Consumer Fraud Act where the plaintiff failed to avail herself of repair or replacement services that were subject of a vehicle services agreement between the parties that the plaintiff alleged was unfair and deceptive, rendering the claimed loss hypothetical and therefore not cognizable).

The wisdom of the Plaintiffs' decision to forgo the Recall program is questionable, particularly in light of the number of cases that have denied class certification in consumer class actions **[*77]** because a voluntary recall and/or refund program provided a superior method of compensating the putative class members. As the court explained in *In re Aqua Dots Products Liability Litigation, 270 F.R.D. 377 (N.D. Ill. 2010)*:

> Where available refunds afford class members a comparable or even better remedy than they could hope to achieve in court, a class action would merely divert a substantial percentage of the refunds' aggregate value to the class lawyers. For this reason, among others, rational class members would not choose to litigate a multiyear class action just to procure refunds that are readily available here and now. Not so for the class lawyers; . . . At bottom, this is a suit to recover the purchase price of tainted Aqua Dots. Since the defendants

will provide a refund-without needless judicial intervention, lawyer's fees, or delay-to any purchaser who asks for one, there is no realistic sense in which putative class members would be better off coming to court. From their perspective, a class action is not the superior alternative. The court therefore declines to certify any of the proposed classes.

Id. at 383-85; see also *In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 621-23 (W.D. Wash. 2003)* **[*78]** (holding that the voluntary refund program was superior to a class action to recover for economic injuries resulting from the purchase of recalled products, regardless of the facts that the program had proof of purchase requirements; that the majority of the refunds were provided to retailers; and that each individual had to actually seek out a refund, and holding that the need to use the class action vehicle to deter future misconduct was diminished by the multitude of personal injury actions commenced against the defendant based on the same product defect); *Chin v. Chrysler Corp., 182 F.R.D. 448, 463 (D.N.J. 1998)* ("The lack of superiority of a nationwide class action in this case is also shown by the fact that, as a result of Chrysler's voluntary recall, it is unclear if there is any useful remedy this Court could fashion under the laws of certain states even for those Plaintiffs who have suffered problems with their ABS systems.").

Furthermore, the New York and New Hampshire statutes provide for a minimum amount of statutory damages. Thus, even assuming the Plaintiffs were able to prove injury, but their damages were less than the statutory minimum, they would still be entitled **[*79]** to the minimum amount of statutory damages. *Kim v. BMW of Manhattan, Inc., 11 Misc.3d 1078[A], 819 N.Y.S.2d 848, 2005 NY Slip Op 52293[U] (Table) (N.Y. Sup. 2005)* ("Plaintiffs here have not alleged pecuniary damages. Accordingly, they are entitled to the statuary damages of $50."); *Becksted v. Nadeau. 155 N.H. 615, 926 A.2d 819 (N.H. 2007)* ("[NHDPA] does not require a showing of actual damages for the claimant to be awarded the statutory minimum and attorney's fees."); *Carter v. Lachance, 146 N.H. 11, 14, 766 A.2d 717 (2001)* ("[T]he statute mandates that the trial court award the prevailing plaintiff the minimum of $1,000 in damages plus costs and reasonable attorney's fees."); cf *Mayline Enters., Inc. v. Milea Truck Sales Corp., 641 F. Supp. 2d 304, 309 (S.D.N.Y. 2009)* ("Defendant claims that the [Federal Odometer Act claim] should be dismissed because plaintiff suffered no actual damages. But this is a silly argument; one can never have no damages for violation of a statute that provides for statutory damages."). In fact, the New Hampshire Supreme Court has specifically noted that the damages provisions of the statute "relieve the plaintiff from the usual requirement of pleading and proving damages and of **[*80]** pleading costs and attorney's fees." *Preferred Nat'l Ins. Co. v. Docusearch, Inc., 149 N.H. 759, 829 A.2d 1068 (N.H. 2003)*.

Accordingly, the Court finds that the existence of the Recall program does not render the parties claims under the NYCPA and the NHDPA moot. The Texas statute presents a more complicated question.

Under the TDTPA, it is a "defense to a cause of action", if, within 30 days of receiving notice of the claim, the defendant "tendered to the consumer: (1) the amount of actual damages claimed; and (2) the expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant." *Tex. Bus. & Com. Code § 17.506(d)*. The reasonableness of a defendant's tender is a fact-specific inquiry.

As previously stated, the Texas Plaintiffs have yet to provide the Defendant with a notice setting forth "in reasonable detail . . . the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant." See *Tex. Bus. & Com. Code § 17.505(a)*. By contrast, in the case relied upon by the Defendant, *Stanley v. Wal-Mart Stores, Inc., 839 F. Supp. 430, 434 (N.D. Tex. 1993)*, **[*81]** the plaintiff had timely provided the defendants, Wal-Mart and Toys-R-Us ("Toys"), with notice prior to initiating the lawsuit. Thus, the Court was able to assess the reasonableness of the defendants tender in dismissing the plaintiffs' TDTPA claim on summary judgment.

The Defendant seeks to have this Court find, as a matter of law, that the Recall program reasonably satisfies any potential amount of damages. However, as indicated in the complaint, the Texas Plaintiffs seek damages under the Texas statute not only for out-of-pocket losses, but also for mental anguish. The Court cannot say at this stage in the litigation that the Texas Plaintiffs will be unable to recover for mental anguish. Furthermore, the Court is unlikely to find a request for all the attorneys' fees associated with commencing and prosecuting the instant case to be reasonable. Indeed, it would undermine the statute to reward attorneys who disregard the plain language of its provisions by failing to provide "presuit" or even "timely" notice. However, there may be some reasonable level of attorneys' fees associated with preparing the notice and litigating any disputes over the reasonableness of the tender. Ultimately, **[*82]** without more specific information about the amount requested, the Court cannot, as a matter of law, rule that the Recall program would reasonably compensate the Texas Plaintiffs. Thus, whether the Defendant's Recall program constitutes a reasonable offer under the statute is not ripe for review.

5. Whether the Plaintiffs have Stated a Claim for Injunctive Relief

In both the amended and proposed second amended complaints, the Plaintiffs assert a claim for injunctive relief, seeking "an order prohibiting, restraining and preliminarily/permanently enjoining ABBOTT from engaging in the false, misleading, or deceptive acts or practices alleged herein". (Am. Compl., ¶ 112; PSAC, ¶ 135.) However, under all three consumer protection statutes, an injunction is a remedy, and not a separate cause of action. See *N.H. Rev. Stat. Ann. § 358-A:10*; *N.Y. Gen. Bus. Law § 349(h)*; *Tex. Bus. & Com. Code § 17.50(b)(2)*; see also *Chiste v. Hotels.com L.P., 756 F. Supp. 2d 382, 406-07 (S.D.N.Y. 2010)* (dismissing a plaintiff's causes of action for declaratory and injunctive relief based on NYCPA violations because "[d]eclaratory judgments and injunctions are remedies, not causes of action", but deeming these **[*83]** remedies "added to [the plaintiff's] ad damnum clause"). Thus, the Plaintiffs may seek injunctive relief in their Prayer for Relief, but the Defendant's motion to dismiss the request for injunctive relief as a separate claim is granted.

IV. CONCLUSION

For the foregoing reasons, it is hereby:

ORDERED, that plaintiff Shelly A. Leonard's claims are dismissed pursuant to *Rule 41(a)(2)* without prejudice with leave to renew her individual claims or any claims on behalf of her infant/child in the event the Court certifies a class under *Federal of Civil Procedure 23*, and it is further

ORDERED, that the Plaintiffs' motion to add Kristie Pagan as a plaintiff and putative New York class representative is granted, and it is further

ORDERED, that the Plaintiffs' motion to amend the complaint to remove the New York Plaintiffs express waiver of punitive damages under the NYCPA is denied, and it is further

ORDERED, that the Defendant's motion for judgment on the pleadings pursuant to *Rule 12(c)* dismissing the Ohio Plaintiff's claims under the OCSPA and ODTPA is granted, and it is further

ORDERED, that the Texas Plaintiffs' TDTPA claim is abated for sixty days after the Texas Plaintiffs serve written notice **[*84]** on Abbott. The Texas Plaintiffs must provide notice within twenty days of the date this Order issues, and notify the Court when they have done so, and it is further

ORDERED, that the Defendant's motion for judgment on the pleadings pursuant to *Rule 12(c)* as to the Plaintiffs' claims under the NYCPA, NHCPA, and TDTPA is denied, and it is further

ORDERED, that the Defendant's motion for judgment on the pleadings pursuant to *Rule 12(c)* as to the Plaintiffs' claim for injunctive relief is granted, and it is further

ORDERED, that the Plaintiffs are directed to file a second amended complaint consistent with the rulings contained herein within 20 days of the date of this order. If the Texas Plaintiffs do not comply with the notice requirement within twenty days of the date of this order, the Court will consider a motion by the Defendant to dismiss any claims asserted on behalf of the Texas Plaintiffs in the second amended complaint.

SO ORDERED.

Dated: Central Islip, New York

March 5, 2012

/s/ Arthur D. Spatt

ARTHUR D. SPATT

United States District Judge

End of Document

[Trueposition, Inc. v. LM Ericsson Tel. Co. (Telefonaktiebolaget LM Ericsson)](#)

United States District Court for the Eastern District of Pennsylvania

March 6, 2012, Decided; March 6, 2012, Filed

CIVIL ACTION No. 11-4574

Reporter

2012 U.S. Dist. LEXIS 29294 *; 2012-1 Trade Cas. (CCH) P77,822; 2012 WL 707006

TRUEPOSITION, INC., Plaintiff, v. LM ERICSSON TELEPHONE COMPANY (TELEFONAKTIEBOLAGET LM ERICSSON), QUALCOMM, INC., ALCATEL-LUCENT USA, INC., EUROPEAN TELECOMMUNICATIONS STANDARDS INSTITUTE, and THIRD GENERATION PARTNERSHIP PROJECT a/k/a 3GPP, Defendants.

Prior History: *TruePosition, Inc. v. LM Ericsson Tel. Co., 844 F. Supp. 2d 571, 2012 U.S. Dist. LEXIS 1646 (E.D. Pa., Jan. 6, 2012)*

Core Terms

discovery, Blocking, protective order, telecommunications, courts, Sherman Act, documents, national interest, factors, comity, discovery request, compliance, argues, resort

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Judges: ROBERT F. KELLY, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT F. KELLY

Opinion

MEMORANDUM

ROBERT F. KELLY, Sr. J.

Presently before the Court is the Motion for Protective Order filed by European Telecommunications Standards Institute ("ETSI"), the response in opposition by Plaintiff, Trueposition, Inc. ("Trueposition"), and ESTI's reply. For the reasons provided below, ESTI's Motion for a Protective Order will be denied.

I. FACTUAL AND PROCEDURAL HISTORY[1]

TruePosition **[*3]** describes itself as a "leading innovator in developing and marketing high accuracy location products that operate over cellular telecommunications networks." (Am. Compl. ¶ 3.) It devotes substantial resources annually to research and development for positioning technology. (Id. ¶ 10.) TruePosition alleges that ETSI is a "not-for-profit" standard-setting organization ("SSO") [2] located in France comprised of more than 700 member companies from 62 countries, including countries outside of Europe. (Id. ¶ 15.) According to TruePosition, "[t]he business of ETSI is, fairly and impartially, to create globally applicable standards for information and telecommunications technologies, including for mobile telecommunications." (Id.)

This action stems from the alleged anticompetitive conduct of major players in the international telecommunications market within the context of a SSO. (Id. ¶¶ 1-9.) TruePosition alleges that LM Ericsson Telephone **[*4]** Company (Telefonaktiebolaget LM Ericsson) ("Ericsson"), Qualcomm, Inc., and Alcatel-Lucent USA, Inc. ("ALU") (collectively, the "Corporate Defendants") conspired to exclude its positioning technology, Uplink Time Difference of Arrival ("UTDOA"), [3] from standards promulgated by a SSO, 3GPP. (Id.) According to TruePosition, the Corporate Defendants were able to exclude UTDOA by collaboratively manipulating 3GPP's processes and procedures. (Id. ¶ 6.) TruePosition further alleges that ETSI and 3GPP ("SSO Defendants") participated in the conspiracy to exclude UTDOA from 3GPP standards by failing in their obligations to ensure that the Corporate Defendants complied with 3GPP Rules. (Id. ¶¶ 114-122.)

TruePosition filed a Complaint on July 20, 2011. Therein, TruePosition alleged that the conduct described above violated United States ***antitrust law*** giving rise to two causes of action: (1) violations of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; and (2) violations of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. TruePosition's *Section 1* claim was asserted against all Defendants, while TruePosition's *Section 2* claim **[*5]** was only asserted against Ericsson and ALU.

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[1] A more in-depth factual and procedural background is provided in the Court's prior Memorandum Opinion dated January 6, 2012. See *Trueposition, Inc. v. LM Ericsson Tel. Co., No. 11-4574, 2012 U.S. Dist. LEXIS 1646, 2012 WL 33075 (E.D. Pa. Jan. 6, 2012)*.

[2] Third Generation Partnership Project ("3GPP") is a not-for-profit SSO located in France that is in business to "fairly and impartially . . . create global standards for mobile telecommunications technologies based on objective technical merit." (Am. Compl. ¶ 14.)

[3] "Positioning technology" refers to technology used to locate mobile handsets.

A majority of Defendants moved to dismiss the Complaint. Instead of dismissing the action, we allowed Trueposition to file an amended complaint curing any defects set forth in our January 6, 2012 Memorandum Opinion. Notably, ETSI moved for dismissal on the premise that we lack personal jurisdiction over it. In our Memorandum Opinion, we concluded that TruePosition's claim of jurisdiction was not frivolous, but limited jurisdictional discovery was needed in order to determine whether personal jurisdiction exists over ETSI. Trueposition filed an Amended Complaint on February 3, 2012. (See Am. Compl.) The Amended Complaint contains only one count asserted against all Defendants entitled "Combination Conspiracy in Violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*)." (Id. ¶¶ 139-153.)

II. DISCUSSION

A. The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters, *28 U.S.C.S. § 1781*, Mar. 18, 1970

The matter before the Court is a discovery dispute between TruePosition and ETSI. ETSI has moved for a protective order on the premise that the jurisdictional discovery between the parties must be secured through the Hague Convention **[*6]** on Taking Evidence Abroad in Civil or Commercial Matters, *28 U.S.C.S. § 1781*, Mar. 18, 1970 ("Hague Evidence Convention"). TruePosition argues that the discovery should proceed in accordance with the Federal Rules of Civil Procedure. For the reasons that follow, the jurisdictional discovery shall be conducted pursuant to the Federal Rules.

The Hague Evidence Convention "prescribes certain procedures by which a judicial authority in one contracting nation may request evidence located in another contracting state." [4] *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 524, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)*; see also *In re Automotive Refinishing Paint Antitrust Litig., 358 F.3d 288, 299 (3d Cir. 2004)*. Notably, the Hague Evidence Convention is not mandatory and "was intended to establish optional procedures that would facilitate the taking of evidence abroad." *Id. at 538*. It "does not provide exclusive procedures for obtaining documents and information located in a foreign signatory nation's territory." *In re Automotive Refinishing Paint, 358 F.3d at 300* (citing *Aerospatiale, 482 U.S. at 533-36*). "Accordingly, the Convention does not deprive **[*7]** the District Court of its jurisdiction to order, under the Federal Rules of Civil Procedure, a foreign national party to the proceeding to produce evidence physically located within its territory." Id. (citing *Aerospatiale, 482 U.S. at 539-40*).

Significantly, the United States Supreme Court in Aerospatiale rejected a rule of first resort to the Hague Evidence Convention holding that the determination of whether to resort to the Hague Evidence Convention or the Federal Rules of Civil **[*8]** Procedure requires "prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that such resort will prove effective." *Aerospatiale, 482 U.S. at 546*. "Aerospatiale rejects . . . a rule of first resort favoring the Convention on grounds of international comity and respect for 'judicial sovereignty' of the signatory nation in which evidence is sought is located." *In re Automotive Refinishing Paint, 358 F.3d at 300* (citing *Aerospatiale, 482 U.S. at 542-43*). In Aerospatiale, the Supreme Court identified the following five factors to be considered in a comity analysis: (1) the importance of the documents or information requested to the litigation; (2) the degree of specificity of the requests; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the requests would undermine important interests of the United States, or compliance of the requests would undermine

[4] There is no disagreement amongst the parties that both the United States and France are contracting states under the Hague Evidence Convention. ETSI alleges, under the Hague Evidence Convention, that Letters of Request are the best method of taking discovery. "Upon receipt of a Letter of Request, which must provide specific information regarding the lawsuit and information sought to be discovered, the signatory state 'shall [then] apply the appropriate measure of compulsion as is customary for the execution of orders issued by the authorities of its own country.'" *Pronova BioPharma Norge AS v. Teva Pharms. USA, Inc., 708 F. Supp. 2d 450, 452 (D. Del. 2010)* (quoting Hague Evidence Convention, Art. 3, 10).

important interests of the state where the information is located. [5] *482 U.S. at 543-44 & n.28*. Courts construing the holding in Aerospatiale have articulated two additional factors **[*9]** to be considered: (1) good faith of the party resisting discovery; and (2) the hardship of compliance on the party or witness from whom discovery is sought. See *Strauss v. Credit Lyonnais, 249 F.R.D. 429, 454-56 (E.D.N.Y. 2008)*; *In re Global Power Equipment Group Inc., 418 B.R. 833, 847 (Bank. D. Del. 2009)* (citing *Strauss, 249 F.R.D. at 454-56*). It is important to note that no one factor is dispositive. *In re Global Power, 418 B.R. at 847*.

ETSI, as the proponent for the Hague Evidence Convention's application in this case, bears the burden of persuasion as to the optional use of its procedures. See *In re Automotive Refinishing Paint, 358 F.3d at 305*; see also *In re Vitamins Antitrust Litig., 120 F. Supp. 2d 45, 52 n.7 (D.D.C. 2000)* (listing cases). "The burden is not great, however, since the 'Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention.'" Id. (quoting *Aerospatiale, 482 U.S. at 541*). When deciding whether to require **[*10]** parties to resort to the Hague Evidence Convention, courts must be mindful of "unnecessary, or unduly burdensome, discovery." Id.

Importantly, we also point out that there is no exception to the *Aerospatiale* holding for jurisdictional discovery. See *In re Automotive Refinishing Paint, 358 F.3d at 302* ("[W]e see no legal barrier to exercising the discretion given to trial courts by Aerospatiale in cases of jurisdictional discovery.") "It is well established that the trial court has inherent power and jurisdiction to decide whether it has jurisdiction." *Id. at 303*. "[T]he distinction drawn . . . between 'merits' discovery and 'jurisdictional' discovery [is] predicated on a false dichotomy of having and not having jurisdiction, [and] amounts to no real difference because the court has jurisdiction for either type of discovery." Id.

B. Analysis

ETSI argues that it "faces potential criminal liability under French law if it responds to discovery requests that do not comply with the Hague Convention." (ETSI Mem. Law Support Mot. Protective Order at 1.) ETSI points to a French Blocking Statute, French Penal Code Law No. 80-538, which is a French criminal statute that prescribes sanctions for **[*11]** French nationals who disclose information during foreign discovery without using the procedures established under the Hague Evidence Convention. See French Penal Code Law No. 80-538. Specifically, the French Blocking Statute provides:

> Article 1A of French Penal Code Law No. 80-538
> Subject to applicable treaties or international agreements, it is prohibited for a natural person having the French citizenship or residing in France as well for a director, representative, agent or an employee of a legal entity having its registered office or a branch in France, to communicate by writing, orally or in any other form, in whatever place or location, to Foreign Public Authorities any documentation or information in economic, commercial, industrial, financial or technical fields, whenever such communication may be detrimental to the sovereignty, security or essential economic interests of France or to Public Order as specified if need be by the administrative authority.
> Article 1, bis
>
> Subject to applicable treaties or international agreements and laws and regulations, it is prohibited for anyone to request, look for, or transmit in writing, orally or in any other form, any document or information **[*12]** in economic, commercial, industrial, financial or technical fields for the purpose of gathering evidence in view of foreign civil or administrative proceedings or in the framework of said proceedings.
> Article 3
> Subject to heavier penalties provided under the law, any infringement to provisions of Article 1 and 1 bis of this Statute shall be punishable by a term of imprisonment of six months and/or a fine of 18,000 Q.

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[5] The five factors listed above, elucidated by the Supreme Court in Aerospatiale, are set forth in the *Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c)*.

French Penal Code Law No. 80-538. Additionally, ETSI asserts that a proper balancing of French and United States interests pursuant to the comity analysis in Aerospatiale shows that due respect should be given to France's sovereign interest in ensuring that discovery in France is conducted in compliance with the Hague Evidence Convention. (ETSI's Reply at 2.)

Trueposition argues that the procedures pursuant to the Hague Evidence Convention do not apply, even in light of the French Blocking Statute. Relying upon the Supreme Court decision in Aerospatiale, and the United States Court of Appeals for the Third Circuit's holding in In re Automotive Refinishing Paint, Trueposition argues that its jurisdictional discovery was properly propounded under the Federal Rules of Civil Procedure. **[*13]** (Trueposition's Mem. Law Opp'n ETSI's Mot. for Protective Order at 2.) Trueposition argues that the French Blocking Statute does not mandate that jurisdictional discovery in this case be governed by the Hague Evidence Convention, and that the comity factors specified in Aerospatiale overwhelmingly support discovery pursuant to the Federal Rules of Civil Procedure. (Id. at 13.)

The French Blocking Statute is not dispositive of whether the Hague Evidence Convention should be utilized in this case. As noted by the Supreme Court in Aerospatiale, blocking statutes "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." *Aerospatiale, 482 U.S. at 544 n.9*; see also *In re Automotive Refinishing Paint, 358 F.3d at 300* (stating that Aerospatiale reiterates the well-settled view that blocking statutes do not deprive U.S. courts of their jurisdiction to order a foreign national party to produce evidence located within its country through the Federal Rules); *Schindler Elevator Corp. v. Otis Elevator Co., 657 F. Supp. 2d 525, 533-34 (D.N.J. 2009)* (party's reliance on Swiss Penal Law **[*14]** unavailing pointing out that foreign statutes prohibiting discovery do not bind American courts); *In re Aspartame Antitrust Litig., No. 06-1732, 2008 U.S. Dist. LEXIS 109670, 2008 WL 2275531, at *4 (E.D. Pa. May 13, 2008)* (finding that a Swiss blocking statute does not mandate that the Hague Convention should be utilized over the Federal Rules of Civil Procedure); *Strauss, 249 F.R.D. at 454* ("The Supreme Court examined . . . the French Blocking Statute, and ordered discovery notwithstanding the penalties that could be imposed.") Specifically addressing the French Blocking Statute, the Aerospatiale Court stated that "[i]t is clear that American courts are not required to adhere blindly to the directives of such a statute." *Aerospatiale, 482 U.S. at 544*.

Our analysis of the comity factors as they pertain to the specific facts of this case shows that several factors favor Trueposition, while others favor ETSI. The documents in question deal with jurisdictional discovery regarding ETSI's contacts with the United States and are relevant discovery. In fact, such limited jurisdictional discovery, which is not nearly as intrusive as merits discovery, has been ordered by this Court so that we can determine whether personal **[*15]** jurisdiction over ETSI is proper. See *In re Automotive Refinishing Paint, 358 F.3d at 302* ("[W]e see no legal barrier to exercising the discretion given to trial courts by Aerospatiale in cases of jurisdictional discovery."). The discovery requests are specific and adequately tailored to the jurisdictional issue at hand. The majority of the documents at issue, or possibly all of the documents, originated in France because ETSI's only offices and its employees are located in France.

As for the availability of alternative means of securing the information, "the Federal Rules are the normal methods for litigation involving foreign national parties," *In re Automotive Refinishing Paint, 358 F.3d 288*; however, the Hague Evidence Convention was intended to establish optional procedures for facilitating the taking of evidence abroad. See *Aerospatiale, 482 U.S. at 538*. Even though both the Federal Rules and the Hague Evidence Convention are means of securing information, it must be noted that the procedures required pursuant to the Hague Evidence Convention are much more likely to be time-consuming than the procedures under the Federal Rules. See *In re Automotive Refinishing Paint, 358 F.3d at 300* **[*16]** ("Aerospatiale notes that in many situations, the Convention procedures would be unduly time-consuming and expensive, and less likely to produce needed evidence than direct use of the Federal Rules."); see also *In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-1775, 278 F.R.D. 51, 2010 U.S. Dist. LEXIS 30598, 2010 WL 1189341, at *2 (E.D.N.Y. Mar. 29, 2010)* ("[T]he outcome of a request pursuant to the Convention is by no means certain, and making the request will undeniably result in delays of unknown, and perhaps considerable, duration.") Both parties in this case have a strong interest in an efficient and speedy means of obtaining this jurisdictional discovery so that the threshold issue of personal jurisdiction over ETSI can be resolved, and this case, in which time is of the essence, can progress forward.

Regarding the hardship of compliance potentially undermining important interests of the United States and France, we find that several strong national interests of the United States are implicated. This action involves allegations of alleged anticompetitive conduct of major players in the international telecommunications market within the context of a conspiracy claim under *Section 1* of the Sherman Act, *15 U.S.C. § 1*. **[*17]** There is a strong national interest in enforcing the policies of free market competition that underlie the Sherman Act, especially in an antitrust case involving the international telecommunications market. Trueposition has an interest in bringing these claims in a timely fashion before an American court and, similarly, the United States has an interest in fully and fairly adjudicating such suits before the federal judiciary. The French interest is a sovereign interest in managing access to information within its borders, as well as attempting to protect its citizens from discovery in foreign litigation. As previously stated, the discovery in this case is limited to jurisdictional discovery and does not seem to be the vexatious discovery that the French are attempting to protect their citizens from with the French Blocking Statute. Upon consideration of the interests of both countries, it is clear that France's relatively weak national interest in prohibiting disclosure of information regarding jurisdictional contacts of a SSO with worldwide membership is outweighed by the significant national interests of the United States outlined above.

The final factors regarding the good faith **[*18]** of the party resisting discovery and the potential hardship that compliance with the discovery request imposes upon ETSI weigh slightly in favor of ETSI. ETSI is a French entity and, thereby, it falls under the purview of the French Blocking Statute which specifically prohibits production of documents relating to foreign judicial or administrative proceedings. "The prospect that the foreign litigant would face criminal penalties rather than civil penalties weighs in favor of the objecting party." *In re Global Power, 418 B.R. at 849* (quoting *Strauss, 249 F.R.D. at 454*). "If, however, the objecting litigant is a party to the action, courts accord that party's hardship less weight." Id. (quoting *Strauss, 249 F.R.D. at 454*). Notably, as Trueposition points out, ETSI has presented no evidence that the French Blocking Statute has ever been enforced in the context of a federal suit, not even an antitrust case, filed in the United States regarding jurisdictional discovery. [6] In addition, ETSI does not present any evidence showing that it faces a significant risk of prosecution by complying with Trueposition's discovery requests under the Federal Rules of Civil Procedure. In fact, there are **[*19]** "other courts [that] have held 'the French Blocking Statute does not subject defendant to a realistic risk of prosecution, and cannot be construed as a law intended to universally govern the conduct of litigation within the jurisdiction of a United States court.'" *In re Global Power, 418 B.R. at 850* (quoting *Bodner v,. Paribas, 202 F.R.D. 370, 375 (E.D.N.Y. 2000))*.

In this case, the interests of comity as set forth by the Supreme Court in *Aerospatiale* weigh in favor of using the Federal Rules of Civil Procedure. The strong national interest of the United States in enforcing the policies of free market competition that underlie the Sherman Act, especially in an antitrust case involving the international telecommunications market, is significant in comparison to the weak national interest of France in prohibiting disclosure of information regarding jurisdictional contacts of a French entity with worldwide membership and protecting its citizens from burdensome discovery in foreign litigation. Likewise, the United States has a strong interest in fully and fairly adjudicating Sherman Act suits before the federal judiciary in an efficient and timely fashion. The French sovereign interest of managing access to information within its borders, as well as attempting to protect its citizens from discovery in foreign litigation, pales in comparison to the interests at stake for the United States. In light of the above, and **[*21]** being sensitive to the fact that ETSI is a foreign litigant attempting to follow the laws of its own nation, we conclude that ETSI has failed to meet its burden of persuasion that the Hague

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[6] In support of its argument that the French Blocking Statute is enforced, ETSI refers to In re Advocat "Christopher X," Cour de Cassation, Chambre Criminelle [Criminal Chamber of Supreme Court], Paris, Dec. 12, 2007, No. 07-83228, a 2007 case in which the French Supreme Court upheld the conviction and €10,000 fine against an attorney found to have violated the French Blocking Statute. (ETSI Mem. Law Support Mot. Protective Order at 7 n.13.) The facts in this case significantly differ from the facts in Christopher X. This case involves a Court Order for jurisdictional discovery, and does not involve allegations of false statements as found in Christopher X. Also, numerous courts have discounted the fear of criminal prosecution in light of the ruling in Christopher X as a basis for permitting French litigants to invoke the **[*20]** Hague Evidence Convention. See *In re Air Cargo, 2010 U.S. Dist. LEXIS 30598, 2010 WL 1189341, at *3*; *In re Global Power, 418 B.R. at 849*; *Strauss, 249 F.R.D. at 450*.

Evidence Convention should be followed in this case. Accordingly, ETSI is ordered to comply with Trueposition's discovery requests as set forth in the Federal Rules of Civil Procedure.

III. CONCLUSION

ETSI's Motion for a Protective Order requiring Trueposition to withdraw its jurisdictional discovery under the Federal Rules of Civil Procedure, and pursue such discovery in accordance with the Hague Evidence Convention, is denied. A party seeking a protective order under *Federal Rule of Civil Procedure 26(c)* has the burden of establishing good cause. *Fed. R. Civ. P. 26(c)*; see also *Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994)* ("In the context of discovery, it is well-established that a party wishing to obtain an order of protection over discovery material must demonstrate that 'good cause' exists for the order of protection."). Additionally, as previously explained, the party seeking the application of the Hague Evidence Convention rather than the Federal Rules bears the burden of **[*22]** persuasion. See *In re Automotive Refinishing Paint, 358 F.3d at 305*. ETSI has failed to meet either burden. Consequently, its Motion for Protective Order is denied, and the jurisdictional discovery at issue shall proceed according to the Federal Rules of Civil Procedure. ETSI's request for oral argument is denied.

An appropriate Order follows.

ORDER

AND NOW this 6th day of March, 2012, upon consideration of the Motion for Protective Order filed by European Telecommunications Standards Institute ("ETSI"), the response in opposition by Plaintiff, Trueposition, Inc. ("Trueposition"), and ESTI's reply, it is hereby **ORDERED** that:

1. the Motion (Doc. No. 89) is **DENIED**;
2. ETSI's request for an oral argument is DENIED; and
3. the jurisdictional discovery between Trueposition and ETSI shall be conducted pursuant to the Federal Rules of Civil Procedure.

BY THE COURT

/s/ Robert F. Kelly

ROBERT F. KELLY

SENIOR JUDGE

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In re Del Monte Fresh Pineapple Cases

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

March 7, 2012, Filed

A126638

Reporter
2012 Cal. App. Unpub. LEXIS 1777 *; 2012 WL 734115

DEL MONTE FRESH PINEAPPLE CASES.

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

Prior History: **[*1]** Alameda County Super. Ct. JCCP No. 4446.

Harris v. Fox, 2008 U.S. Dist. LEXIS 1838 (N.D. Ohio, Jan. 10, 2008)

Core Terms

purchasers, trial court, class action, plaintiffs', pineapples, consumers, indirect, class member, damages, certification, overcharges, Fresh, class certification, retailers, notice, putative class member, fluid recovery, anti-competitive, predominate, distribute, antitrust, monetary, prices, Cases, supracompetitive, class-wide, certify, lawsuit, member of the class, class period

Judges: McGuiness, P.J.; Pollak, J., Jenkins, J. concurred.

Opinion by: McGuiness

Opinion

Plaintiffs Kathleen Conroy, James Linden, Nancy Linden, Michael Greenspan, Joyce Greenspan, and Jonathan Weiss appeal from an order denying their motion for class certification of their "third amended class action complaint" against defendants Fresh Del Monte Produce, Inc., Del Monte Fresh Produce Company and Del Monte Fresh Produce, N.A., Inc. (hereinafter also referred to as Del Monte). They argue that the trial court applied incorrect legal criteria and made erroneous legal assumptions in denying their request for class certification. We disagree and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In 2004, federal class action litigation was commenced against Del Monte, "on behalf of all those who purchased 'Fresh Del Monte Gold[™]' pineapples . . . in the United States . . . [from] March 1, 1996" forward. (In re Fresh Del

Monte Pineapples Antitrust Litigation (S.D.N.Y. Feb, 20, 2008, No. 1:04-md-1628 (RMB), 2008 U.S. Dist. LEXIS 1838*, pp. *3-4 [nonpub. opn.].)[1] The federal plaintiffs included "both Direct Purchasers, *i.e.,* all those who purchased Fresh Del Monte Gold™ pineapples **[*2]** directly from Del Monte (such as [retail grocery stores]), and Indirect Purchasers, *i.e.,* 'all end-payors,' including 'consumers, the last persons . . . in the chain of distribution' who purchased such pineapples. (Id. at p. *5.) It was alleged that "Del Monte 'improperly obtained and maintained a monopoly over the propagation, marketing, and sale of fresh, whole, extra-sweet pineapple . . . by: (i) securing a patent, through the prosecution of a fraudulent patent application with the United States Patent and Trademark Office ("PTO") for a pineapple variety it knew, and has now admitted, was unpatentable . . .; (ii) issuing intentionally false and misleading letters to competitors and others stating that the "Fresh Del Monte Gold ™" pineapple was patented by [Del Monte] and threatening litigation if they engage in the propagation, marketing, or sale of that pineapple . . .; [and] (iii) commencing and pursuing sham patent litigation in order to foreclose competition in the fresh, whole, extra-sweet pineapple market . . . .'" It was further alleged that "'Del Monte used its unlawfully obtained monopoly power to charge supracompetitive[2]] prices for the [Fresh Del Monte Gold ™] pineapples, **[*3]** thereby causing both direct and indirect purchasers of [such] pineapples to sustain injury to their business and property.' [Citation.]" (Id. at p. *4.)

After the filing of the federal lawsuit, plaintiffs in this state court litigation (hereinafter referred to as "plaintiffs") filed separate lawsuits, which were consolidated in the state trial court. After the trial court sustained two demurrers, plaintiffs filed a third amended class action complaint, alleging a single cause of action for violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.[3]) "on behalf of a putative class of California indirect purchasers [consumers] of Fresh Del Monte Gold™ pineapples." The factual allegations in support of the UCL claim are essentially identical to those in the parallel federal complaint. According to plaintiffs, Del Monte's alleged conduct violates the UCL because "it **[*4]** threatens an incipient violation of an ***antitrust law*** (namely the Sherman Act § 2),[4] as well as violates the policy and spirit of both federal and California state antitrust laws because its effects are comparable to or the same as a violation of law, or otherwise significantly threatens or harms competition in the whole, fresh extra-sweet pineapple market. Further, [Del Monte's] conduct constitutes a practice that offends established public policies of not engaging in anti-competitive activity and thwarts fair competition in the marketplace." Plaintiffs also allege that Del Monte's conduct violates the UCL provision that prohibits unfair conduct in violation of the public policy concerns articulated in the Federal Trade Commission Act (15 U.S.C. § 45(a)[5]). Plaintiffs seek declaratory relief, restitution, interest, punitive damages, attorney fees, and costs.

In 2008, the United States District Court for the Southern District of New York certified a nationwide class of direct pineapple purchasers with respect to their "claims of monopolization" under Section 2 of the Sherman Act (15 U.S.C. § 2) for which they sought injunctive relief and treble damages. (In re Fresh Del Monte Pineapples Antitrust Litigation, supra, 2008 U.S. Dist. LEXIS 18388, pp. *5, 14)~ However, the federal district court denied class

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1 The named defendants in the federal action were Del Monte Fresh Produce Company and Del Monte Fresh Produce, N.A. (In re Fresh Del Monte Pineapples Antitrust Litigation, supra, 2008 U.S. Dist. LEXIS 18388, p. *3.)

2 "Supracompetitive" means artificially high. (Sanders v. Brown (9th Cir. 2007) 504 F.3d 903, 909.)

3 "We shall refer to Business and Professions Code section 17200 et seq. as the unfair competition law (UCL) even though this is not a legislatively adopted name for these codes sections. However, our Supreme Court refers to these sections in the same way. [Citation.]" (Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 705, fn. 3, 113 Cal. Rptr. 2d 399; **[*5]** see Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal.4th 257, 263, 41 Cal. Rptr. 2d 220, 895 P.2d 56.)

4 Section 2 of the Sherman Act (15 U.S.C. § 2), reads: "Every person who shall monopolize, or attempt to monopolize, . . ., shall be deemed guilty of a felony . . . ." "Use of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of § 2 of the Sherman Act. [Citations.]" (Otter Tail Power Co. v. United States (1973) 410 U.S. 366, 377, 93 S. Ct. 1022, 35 L. Ed. 2d 359.)

5 15 United States Code section 45, subdivision (a), reads, in pertinent part: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

certification to indirect purchasers (which included **[*6]** California indirect purchasers) on the grounds that class litigation would not be "manageable" for two principal reasons: "(1) [indirect purchaser] Plaintiffs failed to satisfy their burden of 'present[ing] a damages model that can be used on a class-wide basis' . . . and (2) [indirect purchaser] Plaintiffs failed to present a reliable method of distributing any damages to putative Class Members." (*Id. at pp. *17, 33, 26*.) Certification of an "Indirect Purchaser Class seeking only injunctive relief" was also denied because injunctive relief was being pursued by the certified class of direct purchasers, who were "more directly injured by the [alleged] antitrust activit[y] and in a better position to prosecute a claim based upon that activity," and therefore, "[a] '"significant antitrust violation [would not go] undetected or unremedied.'" [Citations.]" (*Id. at pp. *42-43*.)[6]

Thereafter, in May of 2009, plaintiffs **[*7]** in this state lawsuit moved to certify their third amended complaint as a class action.[7] The motion was opposed by Del Monte. After oral argument and the submission of supplemental motion papers, the trial court denied the motion for the following stated reasons: "Despite the common questions that exist, very substantial individual questions must be resolved to establish injury to class members who purchased pineapples from different direct purchasers in different competitive markets throughout the State. Even if liability can be established, Plaintiffs have not sustained their burden of showing how members of the class who may have been injured by defendants' anticompetitive behavior many years ago can be notified and participate in any kind of cost effective claims process. Further, because the anticompetitive conduct ended five years ago and is being pursued in the direct purchaser class action in federal court, defendants and others similarly situated continue to have ample incentives to comply with the federal ***antitrust law*** and California's [UCL]." In so ruling, the trial court adopted pertinent portions of the federal district court's decision refusing to certify a federal indirect **[*8]** purchaser class. (*In re Fresh Del Monte Pineapples Antitrust Litigation, supra, 2008 U.S. Dist. LEXIS 18388, at pp. *17-21, 26-30, 33-42*.)[8]

Plaintiffs filed a timely notice of appeal. (See *Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27* ["denial of certification to an entire class is an appealable order"] (*Linder*).)

DISCUSSION

"'"A trial court may certify a UCL claim as a class action when the statutory requirements of *section 382 of the Code of Civil Procedure* are met."' [Citation.]" (*In re Tobacco II Cases (2009) 46 Cal.4th 298, 313, 93 Cal. Rptr. 3d 559, 207 P.3d 20*; see *Arias v. Superior Court (2009) 46 Cal.4th 969, 980, 95 Cal. Rptr. 3d 588, 209 P.3d 923* (*Arias*) [a representative action under the UCL "must meet the requirements for a class action. [Citation.]"].)[9] *Section 382 of*

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[6] According to Del Monte, the federal indirect purchasers sought interlocutory review of the denial of their motion for class certification, pursuant to *Federal Rule of Civil Procedure, rule 23(f)*, and the United States Court of Appeals for the Second Circuit denied their petition.

[7] In their complaint, plaintiffs propose a class defined as: "All persons and entities who currently reside in California and who, at any time prior to May 6, 2003, purchased a pineapple with the 'Gold' designation indirectly from Defendants (the 'Class')." Excluded from the proposed class were "Defendants, their parents, subsidiaries and affiliates." In their motion for class certification, the class period was modified to run "from April 1, 2000, through and including the date of trial, or until the anticompetitive effects of the conduct alleged herein have subsided, whichever is earlier (the 'Class Period')." In its order denying class certification, the trial court stated that plaintiffs propose a class defined as: "'All persons and entities who resided in California during the period April 1, 2000, through April 1, 2009 (the 'Class Period') and who during the Class Period purchased a pineapple with a 'Gold' designation indirectly from Defendants for their own use and not for resale.'"

[8] Since this appeal was perfected, the United States Court **[*9]** of Appeals for the Second Circuit dismissed the federal direct purchasers' class action in a summary order on the merits. (*American Banana Co. v. J. Bonafede Co. (2d Cir., 2010) 407 Fed. Appx. 520, 2010 U.S. App. LEXIS 23022*.) The federal circuit court held that direct purchasers' claims failed because, assuming Del Monte possessed monopoly power in a market limited to the Fresh Del Monte Gold™ pineapple, there was no showing that Del Monte's conduct had the requisite anticompetitive effect of delaying its competitors' entry into the market. (*Id. at pp. *2, 4-5*.)

the Code of Civil Procedure authorizes certification **[*10]** of a class when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." To obtain certification, "the class proponent must demonstrate that there is an ascertainable, manageable class of plaintiffs and a well-defined *community of interest* among class members, such that litigating the controversy as a class action would be a superior method of resolving the dispute and of substantial benefit to the litigants and the court. [Citations.]" (Walsh v. IKON Office Solutions, Inc. (2007) 148 Cal.App.4th 1440, 1450, 56 Cal. Rptr. 3d 534 (*Walsh*).) "The community of interest requirement involves three factors: '(1) predominate common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' [Citation.] Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. [Citation.]" (Linder, supra, 23 Cal.4th at p. 435.) **[*11]** However, "group action also has the potential to create injustice," and therefore, "trial courts are required to '"carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts."' [Citation.]" (*Ibid.*)

"Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." (Linder, supra, 23 Cal.4th at p. 435.) Thus, "[o]ur task on appeal is . . . to determine . . . whether the trial court has abused its discretion in denying certification." (Osborne v. Subaru of America, Inc. (1988) 198 Cal.App.3d 646, 654, 243 Cal. Rptr. 815.) "Absent other error, we will 'not disturb a trial court ruling on class certification which is supported by substantial evidence unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation].' [Citation.] '"So long **[*13]** as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld." [Citations.]' [Citation.]" (Caro v. Procter & Gamble Co. (1993) 18 Cal.App.4th 644, 655, 22 Cal. Rptr. 2d 419 (*Caro*).) We conclude that in this case the trial court applied appropriate criteria and did not make erroneous legal assumptions in denying plaintiffs' motion for class certification.

In concluding that a class of indirect purchasers would be neither manageable nor superior to alternative methods of resolving the parties' controversy, the trial court explained: "There is a point where the individual monetary claims are so small in comparison to the costs of administration that even the benefits of a class action do not justify pursuit of the claims. In that circumstance, the interests of the absent class members might no longer be served by collective active. [Citations.] [¶] In this case it appears that class certification will not confer any appreciable monetary benefit on the absent class members. The Court can identify several ways to distribute any monetary recovery, but none would effectively return money to the injured parties. [Fn. omitted.] [¶] Ideally, the Plaintiffs could **[*14]** locate the actual persons who bought Del Monte extra-sweet pineapples in the class period and distribute the appropriate amounts of any monetary relief to those persons. It will, however, be difficult, if not impossible, to identify the specific persons who purchased Del Monte extra sweet pineapples during the class period, particularly during the early years when Plaintiffs' proof of illegal overcharges to direct purchasers will be strongest. Plaintiffs suggest using retailer data from their loyalty card programs to determine which persons purchase pineapples and then to provide notice directly to them. This approach is seriously flawed because not all retailers collect such data, any collected data likely has not been retained for more than the most recent portion of the class period, and the

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[9] "Before 2004, any person could assert representative claims under the unfair competition law to obtain restitution or injunctive relief against unfair or unlawful business practices. Such claims did not have to be brought as a class action, and plaintiff had standing to sue even without having personally suffered any injury. [Citations.]" (Arias, supra, 46 Cal.4th at p. 977.) However, in 2004, "the electorate passed Proposition 64, an initiative measure," which amended Business and Professions Code 17203 "to provide that a private plaintiff may bring a representative action under this law only if the plaintiff has 'suffered injury in fact and has lost money or property as a result of such unfair competition' and 'complies with Section 382 of the Code of Civil Procedure . . . .' [Fn. omitted.]" (Arias, supra, 46 Cal.4th at pp. 977.) "Notably absent from the ballot materials [for Proposition **[*12]** 64] is any indication that the purpose of the initiative was to alter the way in which class actions operate in the context of the UCL. Indeed other than the requirement that the representative plaintiff comply with Code of Civil Procedure section 382, the ballot materials contain no reference whatsoever to class actions, nor is there any indication that Proposition 64 was intended in any way to alter the rules surrounding class action certification." (In re Tobacco II Cases, supra, 46 Cal.4th at p. 318.)

retailers have no obligation to turn over their data. [Citation.][10] A second approach would be a broad notice program through appropriate publications followed by class member self-identification. This is a potential option, but one that historically has not been particularly effective. People tend not to remember, much less keep records of, what specific groceries they bought last month, much **[*15]** less several years ago. [Citations.][11] Further, given the small amounts involved for any individual class members they would have little incentive to self-identify, particularly if doing so required them to respond to a notice by filling out a claim form and mailing it back. [¶] Even assuming that Plaintiffs could identify the members of the class or a notice program would lead the members of the class to self-identify, it is highly probable that the administrative costs of identifying the class members and returning a few dollars to each would significantly outweigh the value of the distribution itself. Assuming that Plaintiffs prove that Del Monte overcharged by an average of $0.20 per pound of pineapples over the class period, that an average of $0.10 per pound overcharge was passed through to consumers, and that a hypothetical consumer filing a claim bought 15 pounds of pineapples each year for 5 years, then the consumer's recovery would be $7.50. [Citations.][12] The time and expense of providing notice, making the claim, processing the claim, and paying the claim could easily outweigh the value of the claim itself." Citing to the declarations of plaintiffs' experts Melissa Kanter **[*16]** and Katherine Kinsella, the trial court concluded that "Plaintiffs' proposals to identify frequent pineapple purchasers or current pineapple purchasers and distribute any monetary relief to them d[id] not appear reasonable on the facts of this case. [Citations.] Plaintiffs have not shown that they can develop evidence showing that those who purchased pineapples during the early years of the class period when Plaintiffs are most likely to be able to establish that monopoly overcharges occurred and those who are currently buying pineapples are the same people. [Citation.]" Finally, the trial court noted that although it "could approve a plan of cy pres distribution under [*Code of Civil Procedure section] 384* that would benefit the class indirectly," it did not appear that the statutory provision authorized certification of a class action "when the [c]ourt finds little or no prospect of being able to distribute any significant portion of a damages award to members of the class in a cost effective manner."

We see no merit to plaintiffs' arguments challenging "[t]he trial court's superiority and manageability determinations." As explained by our Supreme Court in *Blue Chip Stamps v. Superior Court (1976) 18 Cal.3d 381, 386, 134 Cal. Rptr. 393, 556 P.2d 755* (*Blue Chip Stamps*): "[W]hen potential recovery to the individual is small and when substantial time and expense would be consumed in distribution, the purported class member is unlikely to receive any appreciable benefit. The damage action being unmanageable and without substantial benefit to class members, it must then be dismissed. (*In re Hotel Telephone Charges (9th Cir. 1974) 500 F.2d 86, 91-92* (potential recovery of $6 per class member); *Devidian v. Automotive Service Dealers Assn. (1973) 35 Cal.App.3d 978, 986, 111 Cal. Rptr. 228* **[*18]** (most claims $10 or less); *Stilson v. Reader's Digest Assn., Inc. (1972) 28 Cal.App.3d 270, 273-274, 104 Cal. Rptr. 581* (millions of class members entitled to nominal damages).)"

By moving for certification of a "smaller, more manageable California-only indirect purchaser class," plaintiffs asserted that they could overcome the manageability concerns raised by the federal district court as to the federal indirect purchaser plaintiffs' failure to offer a meaningful proposal for distributing relief to absent class members.[13]

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[10] At this point in the order, the trial court cited to portions of the deposition testimony of plaintiffs' expert Melissa Kantor.

[11] At this point in the order, the trial court cited to **[*17]** portions of the federal district court decision in *In re Fresh Del Monte Pineapples Antitrust Litigation, supra, 2008 U.S. Dist. LEXIS 18388, at pp. *26-30, 36-42*.

[12] At this point in the order, the trial court cited to the declaration of plaintiffs' expert Gary L. French, PhD., and supporting tables attached to the declaration, that showed that consumers bought pineapples infrequently, and the alleged overcharges paid by direct purchasers ranged from $0.00 to $0.40 per pound.

[13] In concluding that the federal plaintiffs' "proposed 'formal claims procedure' [was] also not a reliable method of distributing damages" to a class of indirect purchasers (consumers) of Fresh Del Monte Gold™ pineapples, the federal district court found: "(i) Plaintiffs have not established what percentage of the Indirect Purchaser Class is likely to receive notice of the claims process [citations]; (ii) given the relatively small claims involved in terms of monetary value (and the proposed payment of claims in coupons), only a small percentage of Class Members would likely file claims [citations]; (iii) many filed claims are not likely to be accurate or verifiable [citations]; and (iv) the cost of notice and claims administration (which Plaintiffs failed to estimate) might

Thus, plaintiffs proffered the affidavits of two experts to demonstrate "a manageability plan for this action that was lacking in" the federal litigation. However, the experts were not asked and did not proffer any estimates of the costs of their proposed methods of identifying and notifying putative class members and the administration of any claims procedure. Rather, plaintiffs merely argued, in a conclusory fashion, that "the costs of administration and notice likely will be negligible in comparison to the total aggregate benefit to the class." Consequently, we conclude that the trial court acted well within its discretion by finding in substance that plaintiffs' evidence did not **[*19]** overcome the manageability issues identified by the federal district court. Contrary to plaintiffs' suggestion, the trial court did not have an obligation "to create . . . cost-effective and meaningful notice and fund distribution programs." Instead, "plaintiffs' failure to propose . . . how the litigation of individualized damages could be handled in a manageable fashion as part of its proposed class action bars plaintiffs' claim that the trial court failed '"to consider the use of . . . innovative procedural tools *proposed by a party* to certify a manageable class."'" (*Evans v. Lasco Bathware, Inc. (2009) 178 Cal.App.4th 1417, 1429, fn. 6, 101 Cal. Rptr. 3d 354* (*Evans*), quoting *Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 339, 17 Cal. Rptr. 3d 906, 96 P.3d 194* (*Sav-On Drug Stores*), italics added in *Evans.*) Nor do we see any merit to plaintiffs' assertion that the trial court "simply assumed, without relying on any record evidence, that administrative costs would outweigh the value of the distribution itself [citation]." The trial court's example of a hypothetical consumer's recovery was based on evidence proffered by plaintiffs' expert. Given that plaintiffs do not challenge the court's example that a putative class **[*20]** member's monetary recovery could be as low as $7.50, we see no error in the trial court's finding that "[t]he time and expense of providing notice, making the claim, processing the claim, and paying the claim could easily outweigh the value of the claim itself."

Plaintiffs **[*21]** also argue that the trial court misinterpreted the concept of a "cy pres" or "fluid recovery" as described in *Code of Civil Procedure section 384*.[14] "The term 'fluid recovery' refers to the application of the equitable doctrine of *cy près* in the context of a modern class action." (*Granberry v. Islay Investments (1995) 9 Cal.4th 738, 750, fn. 7, 38 Cal. Rptr. 2d 650, 889 P.2d 970*.) It "developed as a means by which to distribute the residue of a favorable class action judgment remaining after payment to those class members who have sufficient interest in obtaining recovery and can produce the documentation necessary to file individual claims." (*Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 127-128, 96 Cal. Rptr. 2d 485, 999 P.2d 718* (*Kraus*).) Contrary to plaintiffs' contentions, "[w]e do not read the trial court's comments as necessarily denying the existence of the remedy of [fluid recovery] in a properly certified class action, but as a determination that plaintiffs here failed to carry their burden of establishing the prerequisites for a certifiable class. [Citation.] The court was saying that by itself," plaintiffs' desire to distribute any restitutionary relief by a fluid recovery mechanism was not sufficient to demonstrate that **[*22]** certification of a class was appropriate in this case. (*Frieman v. San Rafael Rock Quarry, Inc. (2004) 116 Cal.App.4th 29, 35, 10 Cal. Rptr. 3d 82* (*Frieman*).) We see no abuse of discretion in the trial court's finding.

Plaintiffs' reliance on *Corbett v. Superior Court (2002) 101 Cal.App.4th 649, 125 Cal. Rptr. 2d 46* (*Corbett*), and *In re Vitamin Cases (2003) 107 Cal.App.4th 820, 132 Cal. Rptr. 2d 425*, both cases decided by Division Two of this court, and *Bruno v. Superior Court (1981) 127 Cal.App.3d 120, 179 Cal. Rptr. 342* (*Bruno*), decided by Division Two of the Fourth District Court of Appeal, is misplaced. "The court in *Corbett* specified: '*Where a class has properly been certified,* a plaintiff in a UCL action may seek disgorgement of unlawful profits into a fluid recovery fund.' (*Corbett, supra, 101 Cal.App.4th at p. 655*, italics added.) Even according to *Corbett,* a desire for a particular remedy is not itself **[*23]** a reason for certification." (*Frieman, supra, 116 Cal.App.4th at pp. 35-36*.) Similarly, the court in *Bruno* held only that a fluid class recovery was not prohibited in Cartwright Act[15] class actions. (*Bruno,*

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overwhelm any relatively minimal benefit to the Class [citations]." (*In re Fresh Del Monte Pineapples Antitrust Litigation, supra, 2008 U.S. Dist. LEXIS 18388, at pp. *40-41*.)

[14] *Code of Civil Procedure section 384* reads, in pertinent part: "(a) It is the intent of the Legislature in enacting this section to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians."

[15] The Cartwright Act (*Bus. & Prof. Code, § 16700 et. seq.*) is our state **[*24]** law that governs certain forms of antitrust conduct. As the trial court noted in its order: "Because no Cartwright Act claim is presented, but only a [*Business and Professions Code section] 17200* claim based upon [a] violation of the Sherman Act, an important question not addressed on this motion is

supra, 127 Cal.App.3d at p. 135.) The *Bruno* court specifically commented that "damages distribution" was to be addressed in the first instance by the trial court "when it considered whether the lawsuit might be maintained as a class action," and was "but one of several factors that must be weighed and balanced to determine the correctness of maintaining a class action." (*Id. at p. 135, fn. 10*; see *Kraus, supra, 23 Cal.4th at p. 135* ["fluid recovery might be appropriate in a consumer *class* action"].) In *In re Vitamin Cases,* the appellate court's discussion of the appropriateness of a fluid recovery distribution was made in the context of approving a class action settlement. (107 Cal.App.4th a pp. 826-832.) Contrary to plaintiff's argument, the *In re Vitamin Cases* court did not focus or otherwise discuss in general the potential use of fluid recovery in deciding the appropriateness of certifying a class. (*Ibid.*)

Plaintiffs also challenge the trial court's reliance on the then pending federal direct purchasers class action. As explained by the trial court, a state class action was not necessary to deter defendant's allegedly anti-competitive action "[b]ecause the federal court has certified a class action on behalf of direct purchasers such as grocery stores." "[I]f plaintiffs prevail in that case defendants will be liable for treble damages based on the total overcharge" paid by direct purchasers, and Del Monte "will not be able to mitigate [its] damages by asserting that the federal plaintiffs passed the overcharge down through the chain of distribution. **[*25]** [Citations.]" Thus, "[a] plaintiffs' victory in the federal action [would] subject Del Monte to damages that [would] provide an effective deterrent to unlawful behavior. Although brought by private parties, the federal action is equivalent in its deterrent effect to an enforcement action by public prosecutors. [Citation.]"

Contrary to plaintiff's contention, a trial court may take into consideration """the advantages of alternative procedures for handling the total controversy""" in determining whether litigation may be maintained as a class action. (*Caro, supra, 18 Cal.App.4th at p. 661*.) The fact that plaintiffs' state lawsuit asserts a UCL cause of action, while the federal direct purchasers class action asserted causes of action based on federal ***antitrust law***, did not preclude the trial court from looking at the federal proceeding as both actions involved the same alleged misconduct by Del Monte. (*Ibid.;* see also *In re Fresh Del Monte Pineapples Antitrust Litigation, supra, 2008 U.S. Dist. LEXIS 18388, at p. *31* ["[t]he existence of relevant pending litigation may not favor certification [of an indirect purchaser class action], because 'to the extent plaintiffs pursue a class vehicle **[*26]** as a means of punishing defendants, preventing their retention of "ill gotten gains," or deterring future behavior, the existing [Direct Purchaser Class Action] may well serve those purposes'"].)

In their reply brief, plaintiffs argue that the trial court's reliance on the federal class action no longer supports its denial of class certification because the federal direct purchasers class action has now been dismissed.[16] However, "it would be eminently unfair to assess a trial court's exercise of discretion based on matters not before it at the time of decision." (*Reese v. Wal-Mart Stores, Inc. (1999) 73 Cal.App.4th 1225, 1237, 87 Cal. Rptr. 2d 346*.) Additionally, dismissal of the federal litigation does not, by itself, warrant reversal. In assessing the appropriateness of class certification, the trial court properly considered and concluded the then-pending federal litigation would provide a better method of both adjudicating the parties' controversy and deterring any future antitrust violations by Del Monte. Concededly, dismissal of the federal class action now eliminates any potential monetary benefits that might have accrued to the benefit of California citizens. Nevertheless, the fact that the federal **[*27]** litigation has resulted in a favorable outcome to Del Monte does not support plaintiffs' argument that the trial court's denial of class certification now results in an *unjust* advantage to Del Monte.

Plaintiffs also raise several arguments challenging the trial court's finding that certification was not appropriate because individual questions would predominate over common questions regarding the impact of Del Monte's allegedly anti-competitive conduct on putative class members. After examining whether substantial evidence supports "the trial court's finding on predominance and draw[ing] inferences from the evidence in favor of the order" (*Soderstedt v. CBIZ Southern California, LLC (2011) 197 Cal.App.4th 133, 144, 127 Cal. Rptr. 3d 394)*, we conclude that plaintiffs' arguments are unavailing.

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whether the federal doctrine precluding actions by indirect purchasers for violation of the Sherman Act is part of [p]laintiffs' claim in this case. [Citation.] That issue would be a common one and the Court has not addressed it in ruling on this motion."

[16] See footnote 8, *ante.*

When, as here, the putative class members are indirect purchasers, a two-step analysis is necessary to determine the adverse impact caused by Del Monte's alleged anti-competitive conduct. (Somers v. Apple, Inc. (N.D. Cal. 2009) 258 F.R.D. 354, 358.) Plaintiffs must first show that direct purchasers (retailers) paid a supracompetitive cost for Fresh Del Monte Gold™ pineapples, and then plaintiffs **[*28]** must show that the direct purchasers, in turn, passed through some or all of the supracompetitive cost in the nature of supracompetitive prices to indirect purchasers (consumers). (*Ibid.*) Consequently, the fact that the trial court found plaintiffs had shown that common issues of law and fact would predominate in determining the aggregate amount Del Monte allegedly overcharged direct purchasers does not affect the trial court's ruling regarding the predominance factor as applied to the pass through of overcharges from direct purchasers to indirect purchasers, as plaintiffs suggest.

We also see no significance to plaintiffs' argument that "whether tracing is required and, if so, how it may be accomplished, are themselves questions common to the Class." In addressing plaintiff's motion for certification, the trial court properly considered "'how a trial on the merits would be conducted if a class were certified.' [Citations.] This, in turn, 'entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class,' a process that ultimately 'prevents the class from degenerating into **[*29]** a series of individual trials.' [Citation.]" (Bell Atlantic Corp. v. AT&T Corp. (5th Cir. 2003) 339 F.3d 294, 302.) Plaintiffs assert that Del Monte sold millions of Fresh Del Monte Gold™ pineapples to thousands of customers. If the litigation proceeded as a class action, the trial court found that it would be faced with the complex task of evaluating "the pricing decisions of each California" direct purchaser "in each of the separate California markets" in which the direct purchasers sold pineapples in order to ascertain the impact of Del Monte's conduct on indirect purchasers, namely, whether any overcharges were passed through from retailers to putative class members. (See also Keating v. Philip Morris, Inc. (Minn. App. 1987) 417 N.W.2d 132, 137-138 ["lawsuit would remain unmanageable" even if liability and damages issues were bifurcated because it "would still leave the problem of determining the fact . . . of damage for each" indirect purchaser].)

Plaintiffs argue, however, that the impact of Del Monte's alleged anti-competitive conduct can be demonstrated without a showing of individual injury to putative class members, citing to B.W.I Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal.App.3d 1341, 235 Cal. Rptr. 228 **[*30]** (B.W.I Custom Kitchen) and Rosack v. Volvo of America Corp. (1982) 131 Cal.App.3d 741, 182 Cal. Rptr. 800 (*Rosack*). However, in those cases concerning price fixing—a per se violation of both federal and state antitrust laws—the courts have held that when a conspiracy to fix prices has been established and plaintiffs have established that they purchased the affected goods or services, the fact of injury or impact on a consumer can be treated as a common question for class certification because "a jury can *infer* the fact of injury," thereby "eliminat[ing] the need for each class member to prove individually the consequences of the defendants' actions to him or her." (Rosack, supra, 131 Cal.App.3d at p. 753; see B.W.I Custom Kitchen, supra, 191 Cal.App.3d at p. 1348.) In this case, we are not concerned with price fixing, but only allegations that Del Monte's purported market monopolization constituted unfair competition. The injury to consumers caused by Del Monte's allegedly wrongful conduct must be shown, and not inferred, as the UCL does not authorize "'an award of . . . restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice.'" (Knapp v. AT&T Wireless Services, Inc. (2011) 195 Cal.App.4th 932, 945, 124 Cal. Rptr. 3d 565.)

We **[*31]** are also not persuaded by plaintiffs' argument that "[g]iven that the putative Class may be restored in the amount of Del Monte's ill-gotten gain realized as a result of its wrongful conduct (see, e.g., Juarez v. Arcadia Financial, Ltd. (2007) 152 Cal.App.4th 889, 913, 61 Cal. Rptr. 3d 382 [(*Juarez*)]), . . . 'tracing' monies paid by pineapple purchasers through the chain of distribution back to Del Monte is not an element of proof of their UCL claim." The UCL does not authorize disgorgement of "'all profits to a plaintiff who does not have an ownership interest in those profits.'" (Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1147, 131 Cal. Rptr. 2d 29, 63 P.3d 937). Thus, even if plaintiffs could show the existence of a vested interest in any profits Del Monte may have received as a result of collecting moneys pursuant to their alleged wrongful business practices, plaintiffs would still have to establish that Del Monte's profits "can be traced directly to the ill-gotten funds" acquired from putative class members. (Juarez, supra 152 Cal.App.4th at p. 917 & fn. 16.) Indeed, plaintiffs concede as much in their third amended class action complaint in which they allege that they "can trace the overcharge they and all other **[*32]** members of the class paid in connection with their pineapple purchases through the retailers to Del

Monte." Consequently, we conclude the trial court correctly considered that "[t]o prove causation/fact of injury on a classwide basis," plaintiffs would have to demonstrate a class-wide method of tracing the alleged supracompetitive prices through the chain of distribution from Del Monte to putative class members.

We also reject plaintiffs' contention that the trial court impermissibly treated their class certification motion as one for summary judgment by assessing the credibility of the parties' conflicting expert testimony as to whether and how to determine "the pass-through of overcharges (from retailers to consumers) resulting from Defendants' [alleged] anticompetitive conduct," and then adopting the opinion of defendants' expert on the merits. Plaintiffs' expert opined that proof defendant's conduct caused harm to consumers could be demonstrated on a class-wide basis because a trier of fact could presume that one hundred percent of Del Monte's alleged unlawful supracompetitive prices was passed through from retailers to consumers. The plaintiffs' expert's opinion was based on the **[*33]** following factors: Del Monte charged the same prices to grocery stores without regard to store size or geography, grocery stores had thin profit margins, and consumers were not price sensitive when shopping for pineapples. In rejecting the opinion of plaintiffs' expert, the trial court found in substance that the declaration of defendants' expert persuasively demonstrated that a presumption of a one hundred percent pass-through of overcharges from retailers to consumers was not supported by either economic theory or an empirical analysis of the available data between wholesale price changes and retail price changes across time and location.[17]

Despite plaintiffs' arguments to the contrary, we conclude that "the trial court was within its discretion to credit [Del Monte's] evidence . . . over [plaintiffs'], and we have no authority to substitute our judgment **[*34]** for the trial court's respecting this or any other conflict in the evidence. [Citation.]" (*Sav-On Drug Stores, supra, 34 Cal.4th at p. 331*; *Walsh, supra, 148 Cal.App.4th at p. 1462*.) "The trial court was not deciding—nor are we—the merits of plaintiffs' case. . . . We need not conclude that [defendant's] evidence is compelling, or even that the trial court would have abused its discretion if it had credited [plaintiffs'] evidence instead. '[I]t is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' [Citations.]" (*Sav-On Drug Stores, supra, 34 Cal.4th at p. 331*; see *Caro, supra, 18 Cal.App.4th at p. 656*.) Instead, we conclude only that a reasonable court could find, as did the trial court in this case, that the "causation/ fact of injury" element of liability was not capable of proof on a class-wide basis, and "would essentially result in 'thousands of minitrials, rendering [the] case unmanageable and unsuitable for class action treatment.' [Citation.]" (*In re Graphics Processing Units Antitrust Litig. (N.D. Cal. 2008) 253 F.R.D. 478, 505*; see also, *In re Fresh Del Monte Pineapples Antitrust Litigation, supra, 2008 U.S. Dist. LEXIS 18388, at pp. *19, 21* **[*35]** [court rejected opinion of plaintiffs' expert that "[b]y assuming a 100% pass-through rate [of monopoly overcharges from direct purchasers to indirect purchasers] throughout the entire Class Period, . . . total damages [could] be calculated based upon aggregate data, thus avoiding the 'difficulties' in 'find[ing] data for the actual transaction prices paid by consumers and the quantities of pineapples purchased by consumers over the relevant time period'"].)

Plaintiffs' reliance on *In re Cipro Cases I & II (2004) 121 Cal.App.4th 402, 17 Cal. Rptr. 3d 1* (*Cipro Cases*) is misplaced. The *Cipro Cases* court "did *not* hold a trial court abuses its discretion when it declines to certify a class on the grounds that individual showings of damages predominate over common issues merely because the class proponent offered a formula to calculate classwide damages, which formula the trial court rejected. To the contrary, the *Cipro Cases* court *upheld* the trial court's discretionary determination because it recognized '[t]he trial court is in the best position to weigh the advantages of class treatment against its disadvantages' (*Cipro Cases, supra, 121 Cal.App.4th at p. 416*), and specifically stated it was not an abuse **[*36]** of discretion to adopt a formula to calculate damages in that case because it was 'within the trial court's discretion to weigh the inherent imperfections of such approximations against the vindication of important statutory policies and the burden to the courts of proving damages on a strictly individual basis.' (*Id. at p. 418*.)" (*Evans, supra, 178 Cal.App.4th at p. 1432*.) Indeed, in this case, the only reason that proving the monetary harm suffered by consumers "with exactitude presents difficulty . . . is that it would prove unwieldy in a class action setting to prove each member's right to recovery and the amount.

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[17] Plaintiffs' expert conceded that he did not devise a retail level model or propose an empirical methodology for measuring pass-through rates for indirect purchasers of Fresh Del Monte Gold™ pineapples because such methodologies could not be implemented without reasonably good and representative data, which was not made available to him.

However, that latter factor *supports,* rather than undermines, the determination that individual issues predominated over common issues." (*Id. at p. 1432, fn. 9*.)

Finally, we reject plaintiffs' argument that an affirmance of the trial court's order "would recast California's long-standing practice of protecting its citizens from the wrongful conduct of those, like [d]efendants, who illegally obtain small amounts from large numbers of consumers, in favor of a policy that: (a) presumes that small individual claims militate **against** class certification, and (b) permits a trial **[*37]** court to look to other jurisdictions or parties to protect the interests of California citizens in advance of any benefit being obtained for the proposed class." By affirming the trial court order, we conclude only that on this record the trial court did not abuse its discretion in ruling that certification of a class of indirect purchasers was not shown to be appropriate. "Perhaps another trial judge considering the matter in the first instance would have allowed class treatment, but that does not merit reversal. 'A record presenting facts on which reasonable minds may differ is not a record establishing an abuse of discretion.' [Citation.] The ruling here does not exceed the bounds of reason or result in a miscarriage of justice." (*Ali v. U.S.A. Cab Ltd. (2009) 176 Cal.App.4th 1333, 1351-1352, 98 Cal. Rptr. 3d 568*.)

DISPOSITION

The order is affirmed. Defendants are awarded costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Jenkins, J.

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Hightower v. Aramark Corp.

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

March 9, 2012, Decided; March 9, 2012, Filed

CIVIL ACTION NO. 1:10CV166-SA-DAS

Reporter

2012 U.S. Dist. LEXIS 31597 *; 2012 WL 827113

GEORGE HIGHTOWER, and HIGHTOWER FOODS, L.L.C., PLAINTIFFS v. ARAMARK CORPORATION, DEFENDANT

Subsequent History: Reconsideration denied by *Hightower v. Aramark Educ. Servs., 2012 U.S. Dist. LEXIS 207649 (N.D. Miss., Nov. 13, 2012)*

Affirmed by *Hightower v. Aramark Educ. Servs., 537 Fed. Appx. 489, 2013 U.S. App. LEXIS 15546 (5th Cir. Miss., July 30, 2013)*

Prior History: *Hightower v. Aramark Educ. Servs., LLC, 2010 U.S. Dist. LEXIS 164743, 2010 WL 11553284 (N.D. Miss., Nov. 19, 2010)*

Core Terms

lease agreement, negotiate, terminate, invitation, campus, Plaintiffs', tortious interference, antitrust, lease, Sherman Act, debit, renovations, responded, food, customers, appears, broker, rates, summary judgment, proposals, management services, restraint of trade, cause damage, tied product, no evidence, monopolization, contractual, calculated, contracts, effective

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

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

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

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is warranted under *Fed. R. Civ. P. 56(a)* when evidence reveals no genuine dispute regarding any material fact and that the moving party is entitled to judgment as a matter of law. The rule mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. The nonmoving party must then go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. In reviewing the evidence, factual controversies are to be resolved in favor of the nonmovant, but only when both parties have submitted evidence of contradictory facts. When such contradictory facts exist, the court may not make credibility determinations or weigh the evidence. However, conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments have never constituted an adequate substitute for specific facts showing a genuine issue for trial.

Torts > ... > Contracts > Intentional Interference > Elements

HN2[] **Intentional Interference, Elements**

Under Mississippi law, recovery for intentional interference with contract is only allowed against those who intentionally and improperly interfere with the performance of a contract, while mere negligent interference is no cause of action at all. The elements of tortious/intentional interference with contract are: (1) that the acts were intentional and willful; (2) that they were calculated to cause damage to the plaintiffs in their lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant; and (4) that actual damage and loss resulted. The element of willfulness and calculation does not require a showing on the part of the plaintiff that defendant had a specific intent to deprive plaintiff of contractual rights. Rather, the requisite intent is inferred when defendant knows of the existence of a contract and does a wrongful act without legal or social justification that he is certain or substantially certain will result in interference with the contract. Once the plaintiff has established a prima facie case of interference, the defendant may rebut with proof that his actions were either without knowledge of the existence of the contract, or were justified. Further, the plaintiffs must prove that the contract would have been performed but for the alleged interference.

Torts > ... > Contracts > Intentional Interference > Elements

HN3[] **Intentional Interference, Elements**

The nature of the actor's conduct is a chief factor in determining whether the conduct is improper or not, despite its harm to the other person. Several Mississippi cases have considered whether the defendant displayed bad acts exceeding the realm of legitimate competition' and whether the defendant's acts were committed without legal or social justification. Courts have recognized the right to engage in legitimate competition. It is proper to engage in competition for prospective gain, as long as tortious acts are not employed to further that gain. The Mississippi Supreme Court further made clear that it is not a tort to fairly compete with a business rival for a prospective customer. A competitor should feel free to acquire business for himself by fair and reasonable means.

Torts > ... > Commercial Interference > Contracts > General Overview

HN4[] **Commercial Interference, Contracts**

The aggressive marketing of a company's products or services, of necessity, is intended to impact the business of competitors by the increase in its market share and the decrease in the earnings potential of those others operating in the same sphere. Such actions in and of themselves are lawful, and without more, do not give rise to a cause of action. Thus, the court concluded that aggressiveness in the pursuit of business, even when described as playing hardball, is not illegal.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

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

HN5[] Sherman Act, Claims

Section 1 (15 U.S.C.S. § 1) of the Sherman Act states: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Taken literally, the applicability of § 1 to every contract, combination or conspiracy could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm's chief executive telling her subordinate how to price their company's product. But even though, if read literally, § 1 would address the entire body of private contract, that is not what the statute means. Not every instance of cooperation between two people is a potential contract, combination, or conspiracy, in restraint of trade. 15 U.S.C.S. § 1. The meaning of the term contract, combination or conspiracy is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes § 1 of the Sherman Act from § 2. Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers concerted and independent action, but only if that action monopolizes, 15 U.S.C.S. § 2, or threatens actual monopolization, a category that is narrower than restraint of trade. Monopoly power may be equally harmful whether it is the product of joint action or individual action.

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

HN6[] Tying Arrangements, Sherman Act Violations

The United States Supreme Court defined a tying arrangement as: an agreement by a party to sell one product but only on the condition that the buyer also purchases a different, or tied, product. Tying agreements deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. An illegal tying arrangement has four basic characteristics: (1) two separate products; (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market. An illegal tying arrangement has four basic characteristics: (1) two separate products; (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN7[] Price Fixing & Restraints of Trade, Tying Arrangements

The United States Supreme Court has condemned tying arrangements when the seller has some special ability, usually called market power, to force a purchaser to do something that he would not do in a competitive market. The market must be defined so as to include all reasonable substitutes for the product. One way a seller can achieve market power or appreciable economic power is by producing a unique product, which has little or no competition from functionally similar products or services. Consumer preference for a brand name alone does not establish product uniqueness necessary for appreciable economic power.

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

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

HN8[] Conspiracy to Monopolize, Elements

To state a claim for monopolization under § 2 of the Sherman Act, a plaintiff must allege: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Monopoly power is defined as the power to control prices or exclude competition. and is also referred to as a high degree of market power. To succeed on their claims, plaintiffs must show that defendants have engaged in improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus creating or maintaining market power. As a prerequisite to any antitrust claim, the plaintiff must allege a relevant market in which the anticompetitive effects of the challenged activity can be assessed. Without a definition of the relevant market, there is no way to measure a company's ability to act as a monopolist. A relevant market is comprised of a market for the specific product at issue, the market for reasonably interchangeable products, and a geographic market, the area in which sellers of the relevant product effectively compete.

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

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

HN9[] Conspiracy to Monopolize, Elements

The United States Court of Appeals for the Second Circuit explained that economic power derived from contractual arrangements affecting a distinct class of consumers cannot serve as a basis for a monopolization claim. Moreover, the Second Circuit observed, if a parietal rule requiring some students to reside in college or university housing runs afoul of the antitrust laws, it has largely escaped the notice of the many colleges and universities across the country that have had and continue to have those rules and the notice of the millions of students who have attended those institutions in the more than a century since the Sherman Act was enacted.

Counsel: **[*1]** For George W. Hightower, Hightower Foods, L.L.C., Plaintiffs: Jim D. Waide, III, Rachel M. Pierce, WAIDE & ASSOCIATES, PA, Tupelo, MS.

For Aramark Educational Services, LLC, Defendant: Ceejaye Sneddon Peters, LEAD ATTORNEY, BAKER, DONELSON, BEARMAN & CALDWELL - Jackson, Jackson, MS.

Judges: Sharion Aycock, UNITED STATES DISTRICT JUDGE.

Opinion by: Sharion Aycock

Opinion

MEMORANDUM OPINION

Presently before the Court is a Motion for Summary Judgment [41] filed by Defendant Aramark Corporation. After reviewing the motion, responses, rules, and authorities, the Court finds as follows:

BACKGROUND

This dispute arises from a leasing agreement for a Subway franchise between Plaintiffs George Hightower and Hightower Foods ("Plaintiffs" or "Hightower") and Mississippi State University ("MSU"). Plaintiffs contend that

Aramark Corporation ("Defendant" or "Aramark"), the company selected by MSU to manage campus dining services, tortiously interfered with the leasing agreement at issue.

In 1993, MSU leased space in Colvard Union to Subway Real Estate Corporation for the purpose of operating a Subway restaurant. This property was subleased to Lee Jabob, a Subway franchisee. In 2003, Jacob assigned his sublease to Plaintiff George Hightower, **[*2]** who took over the operation of the Subway restaurant in Colvard Union. Also in 2003, MSU apparently started planning to renovate Colvard Union and, because of this, MSU and Subway Real Estate Corporation signed an amendment to the leasing agreement on October 3, 2003. The amendment recognized MSU's intent to renovate, providing that MSU could close Colvard Union for renovations after providing six months written notice to Subway. This amendment also offered Subway Real Estate Corporation four additional one-year options to lease the space, with the first option to commence on May 17, 2005 and expire on May 16, 2006, and the final option to expire on May 16, 2009.

In October 2005, MSU informed Hightower via written letter that it wished to terminate the leasing agreement effective April 1, 2006, due to impending renovations to Colvard Union. MSU offered Hightower the availability of a temporary location to operate during the renovations. MSU additionally requested Hightower's contact information in order to send him a Request for Proposal ("RFP") if MSU decided to re-bid for food court vendors. In November 2005, Hightower requested a temporary location as had been offered and, subsequently, **[*3]** MSU proceeded with renovations to Colvard Union and Hightower began operating Subway out of a mobile unit in August 2006. [1]

On November 9, 2006, MSU announced that it planned to utilize a management services company to operate its campus dining sources. According to Plaintiffs, Bill Broyles, MSU's Assistant Vice President of Student Affairs-apparently acting without knowledge of the amendment to Hightower's leasing agreement-informed Hightower that he would no longer be permitted to return to Colvard Union. Subsequent to this, MSU issued a public invitation to negotiate, seeking proposals from companies that could provide campus dining management services. This invitation to negotiate mentioned MSU's current food service locations and identified several food locations excluded from the contract; however, the Subway restaurant operated by Hightower was not mentioned in the invitation to negotiate.

Defendant Aramark submitted proposals to MSU in response to MSU's public invitation to negotiate. [2] In **[*4]** January 2007, MSU selected Defendant to operate its dining services. Shortly thereafter, and also in January 2007, Bill Broyles informed Hightower that he had only recently learned of the October 2003 amendment that gave Subway the option to renegotiate the rental rate and return to Colvard Union upon completion of the renovations. After learning of this amendment, MSU appears to have engaged in discussions with both Hightower and the Defendant.

First, in February 2007, MSU informed Defendant Aramark of the amendment to the Subway leasing agreement. According to Defendant, MSU asked if Aramark's proposal would change if Subway returned to Colvard Union. Defendant alleges it asserted that, while its financial proposal might change, Subway's return would not be a "deal breaker." Next, MSU entered into discussions with the Plaintiffs concerning the discovery of the amendment. Defendant asserts that Bill Broyles and Don Buffman, MSU's Director of Procurement, invited Hightower and Paul Bisbee, Subway's Development Agent, to negotiate a new rental rate—pursuant to Section 4 of the amendment—if Subway elected to return **[*5]** to Colvard Union until May 16, 2009 (i.e., until the expiration of the lease). [3] Hightower, however, did not agree to the rental rate or the terms proposed during the meeting. [4] Apparently, MSU

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[1] According to Plaintiffs, in anticipation of "a return and continued lease with MSU, Hightower spent over $70,000.00 in renovating a modular unit for a temporary location at MSU's request."

[2] It is undisputed that other companies also submitted proposals to MSU.

[3] The parties appear to have met in either February or March of 2007 to discuss Subway's potential return to Colvard Union. This meeting appears to have taken place **before** the execution of the management services contract between MSU and Defendant.

was subsequently notified by Paul Bisbee that Subway was electing not to return to Colvard Union. Thus, on March 29, 2007, Subway Real Estate Corporation's attorney, Michael Donahue, sent MSU a "proposed lease termination" for the termination of the lease agreement. However, it appears that Hightower refused to sign the termination agreement and, instead, Plaintiffs opted to file a lawsuit against MSU for breach of the October 2003 amendment to the leasing agreement. Given this, Hightower continued to operate his Subway in the mobile unit on MSU's campus.

On May 23, 2007, after receiving Hightower's notice of claim, MSU contacted Subway Real Estate Corporation via written letter and again attempted to negotiate Subway's return to Colvard Union in accordance with the October 2003 amendment. MSU requested acceptance of the terms discussed in the letter by June 4, 2007. The June 4, 2007 deadline appears to have passed without acceptance of the rental amount by either Subway Real Estate Corporation or Hightower and, on September 6, 2007, MSU informed Hightower that he must remove his mobile unit from the MSU campus by October 31, 2007. Thereafter, Plaintiffs filed suit against MSU and, on December 19, 2007, Plaintiffs filed a motion for temporary restraining order and preliminary injunction in chancery court, which appears to have been later transferred to the circuit court.

In January 2008, MSU began proceedings in justice court to evict Hightower from the mobile unit. After a hearing, the justice court issued an eviction order against Hightower in February 2008. Hightower appealed the order, and the circuit court subsequently entered an order granting MSU's request for a writ of removal on May 2, 2008. As such, **[*7]** Hightower removed the mobile unit several days after the circuit court's order. During the pendency of Plaintiffs' lawsuit against MSU—which is still ongoing in the in the Circuit Court of Okitibbeha County—Plaintiffs filed this action against Defendant Aramark for tortious interference of contract. Defendant has filed motion for summary judgment, arguing it is entitled to judgment as a matter of law on Plaintiffs' claim.

LEGAL STANDARD

HN1[] Summary judgment is warranted under *Rule 56(a) of the Federal Rules of Civil Procedure* when evidence reveals no genuine dispute regarding any material fact and that the moving party is entitled to judgment as a matter of law. The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those **[*8]** portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id. at 323, 106 S. Ct. 2548*. The nonmoving party must then "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.'" *Id. at 324, 106 S. Ct. 2548* (citation omitted). In reviewing the evidence, factual controversies are to be resolved in favor of the nonmovant, "but only when . . . both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)* (en banc). When such contradictory facts exist, the Court may "not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*. However, conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments have never constituted an adequate substitute for specific facts showing a genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash., 276 F.3d 754, 759 (5th Cir. 2002)*; *SEC v. Recile, 10 F.3d 1093, 1097 (5th Cir. 1997)*; *Little, 37 F.3d at 1075*.

ANALYSIS AND DISCUSSION

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[4] According to Plaintiffs, one of the reasons for this disagreement surrounded the fact that Hightower would allegedly not be able to use the new debit system, known as "Flex Dollars." The Court discusses **[*6]** this in more detail *infra.*

HN2[] Under Mississippi law, recovery for intentional **[*9]** interference with contract is only allowed against those who "intentionally and improperly interfere with the performance of a contract," while mere negligent interference is no cause of action at all. *Morrison v. Miss. Enterprise for Tech. Inc., 798 So. 2d 567, 574 (Miss. 2001)*. The elements of tortious/intentional interference with contract are:

(1) that the acts were intentional and willful;

(2) that they were calculated to cause damage to the plaintiffs in their lawful business;

(3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and

(4) that actual damage and loss resulted.

Par Indus., Inc. v. Target Container Co., 708 So. 2d 44, 48 (Miss. 1998). With respect to the elements of willfulness and calculation, the court in Liston v. Home Ins. Co., explained that

> The element of willfulness and calculation does not require a showing on the part of the plaintiff that defendant had a specific intent to deprive plaintiff of contractual rights. Rather, the requisite intent is inferred when defendant knows of the existence of a contract and does a wrongful act without legal or **[*10]** social justification that he is certain or substantially certain will result in interference with the contract. *Cranford v. Shelton, 378 So. 2d 652, 655 (Miss. 1980)* (quoting *Ramondo v. Pure Oil Co., 159 Pa. Super. 217, 48 A. 2d 156 (1946)*; *Restatement (Second) of Torts § 766 (comment j)*. Once plaintiff has established a prima facie case of interference, the defendant may rebut with proof that his actions were either without knowledge of the existence of the contract, or were justified. *Mid-Continent Telephone Corp. v. Home Telephone Co., 319 F. Supp. 1176, 1200 (N.D. Miss. 1970)*.

659 F. Supp. 276, 281 (S. D. Miss. 1986). [5] Further, in order to succeed on this claim, Plaintiffs "must prove that the contract would have been performed but for the alleged interference." *Grice v. FedEX Ground Package Sys., Inc., 925 So. 2d 907, 910 (Miss. Ct. App. 2006)*.

In their complaint, Plaintiffs allege that Defendant "intentionally entered into a contract with MSU, whereby it would take over the property being leased by Plaintiff, with full knowledge **[*11]** of lease." Further, Plaintiffs assert that it was Defendant's "intent to interfere with that contract," and that Defendant's alleged interference with Plaintiffs' contract is the "sole and exclusive reason why Plaintiff was being prevented from returning to the [MSU] Student Union." After a thorough review of the record, the Court concludes that Plaintiffs cannot demonstrate that Defendant tortiously interfered with the leasing agreement between Hightower and MSU.

Defendant, along with several other companies, responded to a request from MSU for proposals to provide management services for campus dining. As aptly set forth by Defendant, the timeline in this matter is important:

- In October 2005, MSU informed Hightower via written letter that it wished to terminated its leasing agreement effective April 1, 2006.
  Through this letter, MSU also informed Hightower that, in the event that MSU decided to re-bid for food court vendors, it "may" send Hightower an RFP.
- On November 6, 2006, MSU announced via a press release that it intended to utilize a management services company for its campus dining services.
- On November 13, 2006, MSU issued a **public** invitation to negotiate and requested that **[*12]** interested companies submit bids for the contract to provide management services.
  The invitation to negotiate does not mention Subway, either that it was currently in operation or that it would remain on campus.

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[5] In 1998, the Mississippi Supreme Court held that the Liston case was "instructive as it pertains to the element of intent." *Par Indus., 708 So. 2d at 48*.

• Aramark, **along with several other companies**, submitted proposals in response to the invitation to negotiate from MSU.
• In January 2007, MSU completed the process for evaluating proposals and selected Aramark's proposal.

• In February 2007, at Aramark and MSU's initial meeting to negotiate the terms of the management services contract, Aramark, **after** its proposal was selected by MSU, was first informed of Hightower's leasing agreement. [6]
• At this meeting, MSU asked Aramark how it would affect Aramark's proposal if Subway remained on campus.

• Aramark, in acknowledging that it would not profit from Subway's sales, noted that while it would affect the financial terms of its proposal, it would **not** be a "deal breaker" for Subway to remain its operation on campus.

The evidence demonstrates that MSU was already considering the termination of Plaintiff's leasing agreement even prior to the public solicitation of proposals, thus also prior to Aramark responding to such proposals. Hightower **[*13]** admits as much in his deposition testimony:

Q: So November of 2006, you're realizing that MSU is not planning to let you return to [Colvard] Union?
A: Paul [Bisbee] told me they weren't going to.

Therefore, Hightower knew that MSU was considering the termination of his lease prior to Aramark's involvement in this action. In fact, Aramark did not learn of Hightower's lease until after it had responded to the invitation to negotiate and after its proposal was selected by MSU. Even beyond this, however, there is otherwise no evidence that Aramark induced MSU to breach Hightower's leasing agreement after learning of the lease.

HN3[] "The nature of the actor's conduct is a chief factor in determining whether the conduct is improper or not, despite its harm to the other person." *Rest. 2D of Torts § 767 cmt. c*. An illustrative example can be found in the Restatement (Second) of Torts: B is under contract to sell goods to C. B offers to sell them A, who knows of the contract. A accepts the offer and receives the goods. A has *not* induced the breach and is not subject **[*14]** to liability. *Rest. 2D of Torts § 766 cmt. n*. Here, Plaintiffs have put forth no evidence of any active and improper solicitation by Aramark of MSU's business. Rather, the record evidence only demonstrates that Aramark responded to a public inquiry from MSU. Id. (noting that "A's active solicitation of B's business is more likely to make his interference improper than his mere response to an inquiry from B"). Aramark informed MSU that it had no objection to Subway returning to Colvard Union. Certainly, responding to a public invitation to negotiate without knowledge of the prior leasing agreement and, upon learning of such an agreement, having no objection to it being performed does not amount to an "intermeddling" tort, see *Morrison v. Miss. Enter. For Tech., Inc., 798 So. 2d 567, 575 (Miss. Ct. App. 2001)*, such as the one brought in this action.

Several Mississippi cases are instructive on this point. See *McBride Consulting Service, LLC v. Waste Mgmt of Miss., 949 So. 2d 52, 56 (Miss. Ct. App. 2006)* ("[S]everal Mississippi cases . . . have considered whether the defendant displayed 'bad acts exceeding the realm of legitimate competition' and whether the defendant's acts were committed **[*15]** without legal or social justification.") (citing to *MBF Corp. v. Century Bus. Communications, Inc., 663 So. 2d 595 (Miss. 1995)* and *Par Industries, 708 So. 2d at 48*). In MBF Corporation, the Mississippi Supreme Court was faced with an action for tortious interference with business relationships. [7] The court began by noting that "[c]ourts have recognized the right to engage in legitimate competition . . . It is proper to engage in competition for prospective gain, as long as tortious acts are not employed to further that gain." *663 So. 2d at 598* (citing Prosser

[6] Bill Broyles learned of Subway's amendment to the leasing agreement in January 2007, shortly before MSU's February 2007 meeting with Aramark.

[7] This tort is "closely intertwined" with an action for tortious interference with contract. See *McBride, 949 So. 2d at 56*; *MBF Corp., 663 So. 2d at 599* ("The tort of interference with business relations is closely aligned with that of interference with **[*17]** a contract."). While, by definition, the two torts may be distinguishable from one other depending on the tortious acts employed, in order to prove tortious interference with business relations, the plaintiff has to show the same type of elements as those needed to prove a tortious interference with contract claim. See *MBF Corp., 663 So. 2d at 599*. Thus, this Court finds the MBF Corporation case instructive in terms of demonstrating the type of acts that would be considered unlawful and beyond the realm of legitimate competition.

AND KEATON, THE LAW ON TORTS, § 130, 1012 (5th ed. 1984)). The Mississippi Supreme Court further made clear that it is "not a tort to fairly compete with a business rival for a prospective customer. A competitor should feel free to acquire business for himself by fair and reasonable means." Id. (internal citations omitted). After noting this, and examining the defendant's actions in that case, the court concluded that the record revealed several instances in which defendant went far beyond the realm of legitimate competition. Id. The facts established that defendant's acts were intentional, willful, and calculated to cause damage **[*16]** to plaintiff's customer base and, in turn, to the entire business. *Id. at 599*. The defendant had intentionally and willfully taken files from the premises of MBF, as well as hired its two key salesmen and instructed these salesmen to copy customer files containing vital information while the salesmen were still employed at MBF. Id. In addition, defendant supplied the salesmen with defendant's purchase order invoices which were used to obtain orders on behalf of defendant from MBF customers. Id. Along the same lines, information was spread to MBF customers that MBF was closing its Jackson branch office. Id. The defendant's acts were not the result of justifiable purpose, but instead were clearly motivated by the unlawful purpose of causing damage or loss. Id. The record in the *MBF Corporation* case provides an example of the kind of acts that constitute a tortious interference claim—acts that are most certainly not present in this action.

The case of McBride Consulting Service is also instructive. There, the Court of Appeals of Mississippi held that the defendant did not act unlawfully by offering lower rates to consumers who negotiated directly instead of through a broker. *McBride, 949 So. 2d at 52*. As background, McBride Consulting is a waste broker that would enter into at will contracts with small businesses to serve as their exclusive agent for the negotiation of waste disposal contracts. McBride would then negotiate with a third party waste disposal company a collective price for the waste disposal of its clients, and McBride would serve as paying agent for its clients. McBride made its **[*18]** money from the cost savings obtained for its clients by this collective negotiation. Waste Management was a third party waste disposer with whom McBride negotiated waste disposal for its clients. McBride apparently worked aggressively to grow its business, and this included making contracts with businesses for whom Waste Management was already the contracted waste disposer. Apparently recognizing that waste brokers were a growing group, Waste Management adopted a national policy which required that (1) the rates to be charged to waste brokers be established by the regional office, (2) these rates be in upper tiers of the rate scales, and (3) the waste brokers sign a standard contract. The policy mandated that if a broker declined to execute the standard contract, then Waste Management would not do business with him. McBride refused to execute the standard contract.

At some point in the process, Waste Management became concerned that its relationship with McBride was less than satisfactory. Among the concerns expressed by Waste Management were (1) the refusal of McBride to sign the standard contract and (2) its perception that McBride was tardy in the payment of the invoices sent to **[*19]** it. To address these concerns, Waste Management undertook a series of aggressive actions, including offering to individual businesses lower prices than those prices which it was willing to give to McBride. Waste Management made clear that these lower rates were only available to customers who dealt directly with it. As a result of the lower rates offered directly by Waste Management, a number of McBride's clients chose to contract directly with Waste Management rather than have their needs brokered by McBride. McBride filed suit against Waste Management for (1) intentional interference with a contractual relations and (2) intentional interference with business relationships. At the conclusion of McBride's case-in-chief, the trial court, finding insufficient evidence to submit the matter to the jury, entered judgment for the defendants.

The court of appeals affirmed the trial court. The McBride court's opinion began in a similar fashion as the MBF Corporation court's, noting that,

> ***HN4***[] The aggressive marketing of a company's products or services, of necessity, is intended to impact the business of competitors by the increase in its market share and the decrease in the earnings potential of **[*20]** those others operating in the same sphere. Such actions in and of themselves *are lawful, and without more, do not give rise to a cause of action.*

949 So. 2d at 56 (emphasis added). The court of appeals went on to find as follows:

> There was evidence presented from which it might be concluded that some contracts between McBride and its clients were terminated because Waste Management offered lower rates to these businesses. These were

> rates which Waste Management refused to extend to McBride. Waste Management says that its efforts were justified and legal because they were intended to keep its customers and increase its revenues. The effort to increase profitability, without more is not improper. However, the effort may be conducted under circumstances which render it improper, and therefore actionable. *Cenac v. Murry, 609 So. 2d 1257, 1269 (Miss. 1992)* (citing *Wesley v. Native Lumber Co., 97 Miss. 814, 820, 53 So. 346, 347 (1910))*. Likewise, the refusal of Waste Management to extend to a waste broker the same or lesser rates than those given to direct customers is not per se improper. *Wertz v. Ingalls Shipbuilding, Inc., 790 So. 2d 841, 848(¶ 27) (Miss. Ct. App. 2000)* (citing *RESTATEMENT (SECOND) OF TORTS § 766* **[*21]** (1977)). Nor has McBride produced evidence of actions by Waste Management which were unlawful. Without proof of some improper action by Waste management, McBride's claim must fail.

Id. Thus, the court concluded that "aggressive[ness] in the pursuit of business," even when "described as playing hardball," is "not illegal." Id. Here, the record is void of any type of evidence even similar to that engaged in by the parties in *McBride*, a case in which the court found the tortious interference claim to fail.

In their response in opposition to summary judgment, Plaintiffs do not appear to contest many of the underlying facts in this action, or the timeline of events. Rather, unlike what appears to be alleged in their complaint, Plaintiffs raise two separate, yet interrelated, arguments: the first relating to MSU's debit systems and the second involving alleged antitrust violations. The Court begins by first providing background of MSU's debit systems.

The student debit systems at issue are "Money Mate" and "Flex Dollars." The Money Mate program appears to be comparable to a prepaid debit card system that students may use to purchase a myriad of items, including food on and off campus, books, **[*22]** and medical services at the Student Health Center. The MSU Flex Dollars program is similar to Money Mate, as it is a prepaid debit card system; however, unlike Money Mate, Flex Dollars appears to only be used to purchase food at on-campus facilities. In an attempt to meet the element of "malice" necessary to support a tortious interference claim, Plaintiffs assert that Defendant wrongfully interfered with its continued access to the aforementioned MSU debit systems. Hightower asserts that Money Mate was approximately forty percent of his total sales. According to Hightower, he was informed at the February 2007 meeting that the debit system was going to be altered, and that the new debit system, Flex Dollars, would only be used by Defendant Aramark. According to Plaintiffs, tortious interference exists because only Aramark could use the new Flex Dollars system. The Court concludes that Plaintiffs' argument fails for several reasons.

To begin with, there is no evidence in the record, either from deposition testimony or the leasing agreement itself, which demonstrates that Hightower ever had a contractual right to participate in either the Money Mate or Flex Dollars systems. See *Hennessey v. Nat'l Collegiate Athletic Ass'n, 564 F.2d 1136, 1143 (5th Cir. 1977)* **[*23]** ("Ordinarily, such a claim must be premised upon a valid contract. . . ."). In fact, by Plaintiffs' own admission, Flex Dollars is a *new* debit system at MSU—one apparently not even in existence when Hightower's contract was entered into. If Hightower had no contract with MSU to utilize either debit system, it logically follows that Aramark could not tortiously (or otherwise) interfere with such a nonexistent agreement. Even beyond this, however, there is no evidence that Aramark used the Flex Dollars system as method of inducing MSU to terminate its leasing agreement with Hightower. As noted *supra*, MSU informed Hightower—prior to Aramark submitting its proposal—that it wished to terminate Hightower's leasing agreement. Further, Plaintiffs have presented no evidence that Aramark played *any* role in the decision made by MSU to exclude Subway from the Flex Dollars program. In fact, the record demonstrates just the opposite. Bill Broyles, MSU's Vice President of Student Affairs, testified as follows:

> Q: Did y'all discuss with Aramark the possibility of allowing Mr. Hightower to accept the Flex Dollars?
>
> A: No. We discussed with Aramark the possibility of Mr. Hightower coming back on campus.
>
> Q: **[*24]** Okay. Did you ever bring up to Mr. Nelson [of Aramark] the possibility of Subway being allowed to accept the Flex Dollars and how that could work?
>
> A: No, I didn't.
>
> Q: Okay. Why didn't you?
>
> A: Didn't think about it.

Thus, MSU concedes that it did not even consult Aramark about Subway being, or not being, allowed to use Flex Dollars.

While Plaintiffs contend that "Hightower could not compete with Aramark's restaurants *when MSU was forcing* the entire freshman population to make their purchases of meals from Aramark by paying in advance for their meals [i.e., using Flex Dollars], which could only be used at an Aramark restaurant," this argument, like the majority of allegations in Plaintiffs' brief in opposition, couches the alleged "wrongdoing" in terms of actions by MSU. [8] Along the same lines, while Hightower avers that he could not utilize the Flex Dollars program (again, a program Hightower had no contractual right to utilize), the Court has methodically mined the record and found no evidence that Hightower would have been excluded from continuing to utilize MSU's Money Mate program. The Money Mate program appears to exist in conjunction with Flex Dollars, and Money Mate comprised, according **[*25]** to Hightower, forty percent of Hightower's total sales.

Plaintiffs additionally advance an argument grounded in ***antitrust law*** as an attempt to demonstrate that Defendant acted with malice when entering its agreement with MSU. At the outset, and before addressing Plaintiffs' antitrust allegations, the Court notes that many of Plaintiffs' arguments appear to put the proverbial cart before the horse. That is, several of Plaintiffs' arguments focus only on the actual contract between Aramark and MSU and, whether under the law, the contract itself is proper without *first* establishing that Aramark— the Defendant in this action— actually wrongfully "interfered" (i.e., the claim asserted is indeed one for tortious *interference*, not one for antitrust **[*26]** violations) with Hightower's leasing agreement, or otherwise caused or induced MSU to terminate that agreement. [9] By way of example:

> Assume that A has a contract with B, and A writes to B saying it wishes to terminate its contract with B. Then, a year later, C responds to a public solicitation from A without knowledge of A's preexisting agreement with B. Even if the contract that A and C subsequently enter into is void or voidable due to some federal or state regulation, it would not automatically mean that C "tortiously interfered" with A and B's preexisting contract solely because of the potential unlawfulness of A and C's current contract. B would still have to demonstrate the elements of tortious interference, which include a showing that C's actions were "calculated" to cause damage to B.

If Aramark did not "interfere" with MSU and Hightower's leasing agreement (i.e., if Plaintiffs cannot prove that the contract would have been performed but for the alleged interference from Aramark), then even if Aramark's contract with MSU violates some provision of the Sherman Act, it would appear that such a violation would be irrelevant *to the tortious interference claim.*

As noted above, it is undisputed that MSU sought to terminate Hightower's leasing agreement in 2005. Specifically, on October 31, 2005, the Director of Procurement and Contracts for MSU sent Hightower and Subway Real Estate Corporation a written letter stating,

> Due to impending renovation of the Colvard Union, Mississippi State University *wishes to terminate its contract with your company* effective April 1, 2006. If you are interested in a temporary location while renovations are in process, please contact me within **[*28]** thirty days. Also, please provide contact information so that we may send you an RFP in the event that we decide to re-bid for food court vendors.

Over a year after MSU informed Hightower that it wished to terminate his leasing agreement, MSU issued its public invitation to negotiate. Without knowledge of Hightower's leasing agreement, Aramark merely responded to this

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[8] In fact, if portions of Plaintiffs' brief were read in isolation, it would initially appear that the lawsuit is actually against MSU - not Aramark. For example, Plaintiffs assert that "*MSU* was willing to grant an exclusive contract to Aramark, *despite MSU's preexisting lease* with Hightower because *it* [i.e., *MSU*] expected to make about $12,000,000.00 over ten years from Aramark." (Emphasis added). This statement confers no malicious intent on Aramark.

[9] Stated more simply, **[*27]** it does not automatically flow from MSU's alleged breach of its agreement with Hightower that the company to now obtain a contract with MSU caused, or otherwise induced, that alleged breach. Proof of tortious interference or some type of unlawful inducement still must be shown. See *Morrison v. Miss. Enter. For Tech., Inc., 798 So. 2d 567, 575 (Miss. Ct. App. 2001)* ("Tortious interference is based on intermeddling - a tort occurs if without sufficient reason, one person intentionally interferes with another's contract even if the interference is by giving information that is completely accurate, when the *purpose was to cause interference* and injury results.") (emphasis added).

pubic invitation. Aramark was only one of several companies to respond to this public request. Thus, even if Aramark's proposal would not have been selected by MSU, another company's would have been, and that other company would presumably then be the target defendant in this action. Given this, it is hard to qualify *Aramark's* response to MSU's public invitation as *the* "but for" cause of Hightower's leasing agreement being terminated. That is, if merely responding to a public invitation to negotiate is the initial action by Aramark that, under Plaintiffs' theory, subjects it to liability for tortious interference, then it would follow that every other company who responded, yet was not selected, would also be liable. However, such is not the case.

Yet, because the *Restatement (Second) of Torts § 767* briefly mentions antitrust **[*29]** violations in terms of a way to show that the alleged interference was improper, the Court will squarely address Plaintiffs' Sherman Act arguments. Specifically, the Restatement states as follows,

> Unlawful conduct. Conduct *specifically* in violation of statutory provisions or contrary to *established* public policy may for that reason make an interference improper. This may be true, for example, of conduct that is in violation of antitrust provisions or is in restraint of trade or of conduct that is in violation of statutes, regulations, or judicial or administrative holdings regarding labor relations.

Rest. 2D Of Torts § 767 cmt. c. (emphasis added). According to Plaintiffs, "[a]n agreement that one may not be a freshman student at MSU unless he or she pays for food from a single vendor (Aramark) is a plainly anti-competitive tying agreement which has been held to violate public policy in other contexts." [10] Plaintiffs maintain that the contract is unlawful under both the Sherman Act as well as Mississippi antitrust statutes.

HN5[] *Section 1* of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. Taken literally, the applicability of *§ 1* to "every contract, combination . . . or conspiracy" could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm's chief executive telling her subordinate how to price their company's product. But even though, if "read literally," *§ 1* would address "the entire body of private contract," that is not what the statute means. See *Nat'l*

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[10] Plaintiffs' brief also states, "According to the evidentiary materials, Aramark specified that Hightower, if he were to continue his lease on campus, could not utilize **[*30]** this new debit system." Plaintiffs further state, "the evidentiary materials have established that Aramark would allow an exception to its exclusive food contract with MSU only if Hightower were excluded from using the debit system (Flex Dollars). . . ."

The Court is unsure as to what evidentiary materials Plaintiffs refer to. In fact, Plaintiffs fail to even cite to a portion of the record to support such assertions. See *Williams v. Valenti, 432 F. App'x 298, 303 (5th Cir. 2011)* (noting that the district court is "not required to search the record in support of evidence supporting a party's opposition to summary judgment"). As Defendant notes, Plaintiffs appear to be misconstruing the record evidence in an attempt to create the (mis)impression that Aramark mandated Subway's exclusion from the debit program. Plaintiffs do this by wrongfully imputing statements by MSU officials, specifically Bill Broyles, to Defendant Aramark. Specifically, it was Bill Broyles of MSU, not Aramark, that stated, "We told him [Hightower] . . . that he could not accept the Flex Dollars for meal purchases." Dep. of Broyles at 23. Further, as noted above, Broyles also testified as follows:

> Q: Did y'all discuss **[*31]** with Aramark the possibility of allowing Mr. Hightower to accept the Flex Dollars?
>
> A: No. We discussed with Aramark the possibility of Mr. Hightower coming back on campus.
>
> Q: Okay. Did you ever bring up to Mr. Nelson [of Aramark] the possibility of Subway being allowed to accept the Flex Dollars and how that could work?
>
> A: No, I didn't.
>
> Q: Okay. Why didn't you?
>
> A: Didn't think about it.

Dep. of Broyles. at 39 - 42.

Soc. of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978); **[*32]** *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* ("This Court has not taken a literal approach to this language"); cf. *Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)* (reasoning that the term "restraint of trade" in *§ 1* cannot possibly refer to any restraint on competition because "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence"). Not every instance of cooperation between two people is a potential "contract, combination . . ., or conspiracy, in restraint of trade." *15 U.S.C. § 1*.

The meaning of the term "contract, combination . . . or conspiracy" is informed by the "'basic distinction'" in the Sherman Act "'between concerted and independent action'" that distinguishes *§ 1 of the Sherman Act* from *§ 2*. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (quoting *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. *Section 1* applies only to concerted action that restrains trade. *Section 2*, by contrast, covers both concerted and independent **[*33]** action, but only if that action "monopolize[s]," see *15 U.S.C. § 2*, or "threatens actual monopolization," see *Copperweld, 467 U.S. at 767, 104 S. Ct. 2731*, a category that is narrower than restraint of trade. Monopoly power may be equally harmful whether it is the product of joint action or individual action.

In *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1953)*, ***HN6***[] the Supreme Court defined a tying arrangement as: "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . ." *356 U.S. at 5, 78 S. Ct. 514*. Tying agreements "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." *Id. at 6, 78 S. Ct. 514*. An illegal tying arrangement has four basic characteristics: (1) two separate products (the tying and the tied product); (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive **[*34]** effects in the tied market. *Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321 (5th Cir. 1974)*; see also *Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980)* (noting that to state a claim for an illegal tie, a plaintiff must allege "five specific elements: first, a tying and a tied product; second, evidence of actual coercion by the seller that in fact forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; and fifth, involvement of a 'not insubstantial' amount of interstate commerce in the tied market.").

HN7[] The Supreme Court "ha[s] condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13-14, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. The market must be defined so as "to include all reasonable substitutes for the product." *Id. at 37-38, n.7, 104 S. Ct. 1551* (O'Connor, J. concurring). One way a seller can achieve market power or "appreciable economic **[*35]** power" is by producing a unique product, which has little or no competition from functionally similar products or services. See *Lee v. Life Ins. Co. of N. Am., 23 F.3d 14, 16 (1st Cir. 1994)*, *cert. denied*, *513 U.S. 964, 115 S. Ct. 427, 130 L. Ed. 2d 340 (1994)*. Consumer preference for a "brand name alone does not establish product 'uniqueness' necessary for [appreciable economic power]." *Id. at 17*.

Courts have routinely rejected Sherman Act challenges such as the one Plaintiffs attempt to bring in this action. For example, in Lee, the First Circuit held that the University of Rhode Island's ("URI") policy to condition semester registration upon the payment of a fee for use of the on-campus health clinic was not an illegal tying arrangement. *Id. at 15*. The university required full-time undergraduate students to pay the health clinic fee. Id. In order to use the clinic, students were also required to carry supplemental insurance. The university offered supplemental insurance through "a private health care underwriter, which URI sponsor[ed] as its 'default' insurer." Id. The plaintiffs alleged that "conditioning continued matriculation at URI on payment of the . . . clinic fee and/or the **[*36]** . . . supplemental insurance premium" was an illegal tying arrangement. Id.

The court explained that "URI obviously is a 'unique' institution in a colloquial sense, [however, the] appellants cannot claim that other institutions of higher education do not or cannot provide 'functionally similar' educational offerings to potential URI applicants." Id. at 17. Therefore, the court held that the plaintiffs had failed to state a claim that URI possessed appreciable economic power "in the tying market for a university education." Id.

Similarly, the court in Hack v. President and Fellows of Yale College, 16 F. Supp. 2d 183 (D. Conn. 1998), *aff'd*, 237 F.3d 81 (2d Cir. 1999) addressed an action for damages and injunctive relief brought by freshman and sophomore students at Yale College claiming that the defendants had denied them permission to reside off campus. The antitrust claim was based on the school's mandated housing program, and defendants argued that the complaint failed to sufficiently alleged that Yale obtained the requisite economic market power to make the tying agreement illegal under 15 U.S.C. § 1. The plaintiffs argued that, because their complaint alleged that a Yale education **[*37]** was unique, they had sufficiently stated their tying claim. In response to this argument, the court noted that, with respect to the uniqueness of a product, the Supreme Court has explained that "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product. Without any such advantage differentiating his product from that of his competitors, the seller's product does not have the kind of uniqueness considered relevant in prior tying-clause cases." United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620-21, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977) (Fortner II). Applying the Supreme Court's logic to the case before it, the court reasoned that plaintiffs' complaint "fail[ed] to sufficiently allege that Yale has the requisite economic market power in the tying product market—in either the broader university education market or the narrower Ivy League education market—to coerce the plaintiffs to accept the tied-product[:] residence hall accommodations." Hack, 16 F. Supp. 2d at 195.

Along the same lines as discussed in Lee and Hack, courts have also uniformly rejected claims under Section Two of the Sherman Act. **HN8**[] To state **[*38]** a claim for monopolization under § 2 of the Sherman Act, a plaintiff must allege "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). Monopoly power is defined as "the power to control prices or exclude competition . . . and is also referred to as a high degree of market power[.]" Id. (internal quotation marks and citation omitted). To succeed on their claims, plaintiffs must show that defendants have "engaged in improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus creating or maintaining market power." Id. at 226-27 (citing PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 108 (2d Cir. 2002)). As a prerequisite to any antitrust claim, the plaintiff must allege a relevant market in which the anticompetitive effects of the challenged **[*39]** activity can be assessed. See Geddie v. Seaton, 2006 U.S. Dist. LEXIS 55106, 2006 WL 2263335, at *5 (N.D. Tex. Aug. 8, 2006). "Without a definition of the relevant market, there is no way to measure a company's ability to act as a monopolist." United States v. Eastman Kodak Co., 63 F.3d 95, 104 (2d Cir. 1995). A relevant market is comprised of a market for the specific product at issue, the market for reasonably interchangeable products, and a geographic market, the area in which sellers of the relevant product effectively compete. See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956).

For example, in Delta Kappa Epsilon (DKE) Alumni Corp. v. Colgate University, 492 F. Supp. 2d 106 (N.D.N.Y. 2007), the court addressed and rejected a monopolization claim under Section Two of the Sherman Act based on the university required housing program. The Delta Kappa Epsilon court noted,

> Here, Colgate and its students enter into a unique contractual arrangement which governs both parties' conduct during the tenure of their relationship. It is undisputed that "a number of colleges with which [Colgate] competes to enroll high school graduates provide functionally similar educational **[*40]** offerings and have the potential to take significant numbers of students away from [Colgate]." Hamilton, 106 F. Supp. 2d at 412. In fact, just as colleges are competing with their peers to enroll the best applicants, high school students also face tough competition in seeking admittance into a highly select college like Colgate. Once potential Colgate students receive their offers of admission, they compare and contrast their options, weighing a cluster of factors, such as academic reputation, location, sporting facilities, and student diversity. Indeed, students may consider housing among other factors in ultimately choosing a college.

> Once a student decides to enroll in a particular college, a unique and distinctive relationship commences between school and student that governs that student's four-year tenure. Over the next four years, an undergraduate student lives and studies in a "quasi-parented" environment, where the school, in loco parentis, creates and enforces policies for the protection and welfare of its students. Here, Colgate has exercised these rights, namely, its "parietal" rights, see Hack, 237 F.3d at 85, in creating a residential policy that is part of a Colgate education. **[*41]** As such, the court holds, as a matter of law, that Colgate's residential policy is an effect of the exercise of its lawful and appropriate parietal rights.

Id. at 117 (brackets in original). Similarly, ***HN9***[] the Second Circuit on appeal in *Hack v. President & Fellows of Yale College, 237 F.3d 81, 85 (2d Cir. 2000)* explained that "[e]conomic power derived from contractual arrangements affecting a distinct class of consumers cannot serve as a basis for a monopolization claim." Moreover, the Circuit observed,

> if a parietal rule requiring some students to reside in college or university housing runs afoul of the antitrust laws, it has largely escaped the notice of the many colleges and universities across the country that have had and continue to have those rules and the notice of the millions of students who have attended those institutions in the more than a century since the Sherman Act was enacted.

Id.; see also *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, 106 F. Supp. 2d 406, 413 (N.D.N.Y. 2000)* (rejecting monopolization challenge to college's required housing and meal programs and finding that "[s]tudents do not - indeed cannot - shop separately for individual college services **[*42]** or characteristics, but rather must select one college which offers a group of services and qualities"); *E. Food. Servs. v. Ponticial Catholic Univ. Ass'n, Inc., 357 F.3d 1, 8-9 (1st Cir. 2004)* (rejecting exclusive-dealing challenge to university's selection of suppliers for campus vending machines).

While Plaintiffs in the case *sub judice* attempt to satisfy the "malice" element of their tortious interference claim by alleging violations of antitrust provisions, Plaintiffs fail to cite to a single case, or any other authority, that has found analogous university programs to run afoul of such antitrust laws. In fact, Plaintiffs do nothing more than make a blanket statement that the contract is unlawful; Plaintiffs' brief is entirely void of the analysis needed to mount an argument that Defendant has acted contrary to the Sherman Act or comparable Mississippi statutes. Accordingly, Plaintiffs have failed to establish the element of malice necessary to support a claim for tortious interference. Plaintiffs have further failed to establish that any of Defendant Aramark's actions were willfully and intentionally calculated to cause damage to Plaintiffs or that Hightower's leasing agreement **[*43]** would have been performed but for Aramark's alleged interference.

CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment is GRANTED.

So ordered on this, the 9th day of March, 2012.

/s/ Sharion Aycock

UNITED STATES DISTRICT JUDGE

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C-E Minerals, Inc. v. Carbo Ceramics, Inc.

United States District Court for the Northern District of Georgia, Atlanta Division

March 13, 2012, Decided; March 14, 2012, Filed

CIVIL ACTION NO. 1:11-cv-02574-JOF

Reporter
2012 U.S. Dist. LEXIS 198653 *

C-E Minerals, Inc., Plaintiff, v. CARBO Ceramics, Inc., et al., Defendants.

Core Terms

proppants, parties, manufacture, non-compete, horizontal, ceramic, confidentiality, preliminary injunction, covenants, violates, argues, per se violation, public policy, territorial, injunction, anti trust law, competitor, ancillary, restrictive covenant, restraint of trade, rule of reason, vertical, irreparable harm, state law, Sherman Act, concentrates, bargaining, contracts, courts

Counsel: **[*1]** For C-E Minerals, Inc., Plaintiff, Counter Defendant: Frank M. Lowrey, IV, Bondurant Mixson & Elmore, LLP, Atlanta, GA; Mary Louise Webb, U.S. Attorneys Office-ATL, Assistant United States Attorney, Atlanta, GA.

For CARBO Ceramics, Inc., Defendant, Counter Claimant: James R. Eiszner, LEAD ATTORNEY, PRO HAC VICE, Shook Hardy & Bacon, LLP - MO, Kansas City, MO; Samuel S. Woodhouse, III, The Woodhouse Law Firm, LLC, Atlanta, GA.

Judges: J. OWEN FORRESTER, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: J. OWEN FORRESTER

Opinion

ORDER

This matter is before the court on Plaintiff's motion for preliminary injunction [10].

I. Background

A. Procedural History and Facts

Plaintiff, C-E Minerals, Inc. filed the instant declaratory judgment action against Defendant, CARBO Ceramics, Inc., on August 4, 2011. Plaintiff asks the court to declare a particular provision in the parties' requirements supply contract to be a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiff also asks the court to find this provision is an illegal, unreasonable, and unenforceable restraint of trade under Georgia and Alabama state law. C-E asks the court to grant preliminary injunctive relief enjoining CARBO from enforcing or threatening to enforce the **[*2]** provision of the contract. The court heard argument on Plaintiff's motion for preliminary injunction on February 15, 2012.

The facts in this case are undisputed. C-E owns and operates a facility for the mining, processing, and sale of kaolin clay in Andersonville, Georgia. CARBO owns and operates a manufacturing facility in Eufaula, Alabama, for the manufacture and sale of ceramic proppants which are used in the extraction of oil and natural gas. C-E supplies to CARBO clay that is used in the manufacture of the proppants.

In 1995, the parties signed a clay Supply Agreement which lasted for a term of eight years until December 31, 2003. The parties then signed a second Raw Material Requirements Agreement ("the Supply Agreement") which is at issue in this litigation. The term of the second Supply Agreement ran from January 1, 2004 through December 31, 2010. Unlike the first agreement, this Supply Agreement contained a non-compete clause which reads:

> Without intending to limit the legal rights of either party, CARBO and C-E agree as follows: that CARBO will not enter into direct competition with C-E in the manufacture of calcined clay for general sale to refractory or other related industry, **[*3]** and that C-E will not enter into competition with CARBO in the manufacture or sale of ceramic proppants. This agreement will endure for 3 years after the expiration of this contract.

See Supply Agreement, ¶ 5.[1] The Supply Agreement expired on December 31, 2010, and Paragraph 5's non-compete clause is set to expire on December 31, 2013. Despite the existence of this clause, counsel for C-E admitted at oral argument that C-E is currently manufacturing and selling ceramic proppants.

In 2006, C-E corresponded with CARBO and stated C-E's position that Paragraph 5 was invalid and unenforceable. C-E stated that it did not intend to follow Paragraph 5, but that it would abide by the other provisions in the Agreement. CARBO responded that it believed Paragraph 5 to be enforceable and reserved its right to seek to enforce that portion of the Supply Agreement. The parties continued under the terms of the Supply Agreement despite their differing views on the enforceability of Paragraph 5.

There are shortages of supply in the lightweight ceramic proppant market. Despite the fact that CARBO has increased its prices, it routinely sells out its inventory for ceramic proppants.

B. Contentions

Plaintiff argues **[*4]** that Paragraph 5 is a *per se* violation of *Section 1* of the Sherman Act because it is a horizontal market allocation where actual or potential customers have agreed to refrain from competing in a particular market. Because Paragraph 5 violates ***antitrust law***, Plaintiff contends, it cannot be enforced. Plaintiff also avers that Paragraph 5 violates Georgia law governing non-compete agreements because it contains no geographical restriction and violates Alabama state law because it limits the quantity of a commodity to be mined in Alabama, as well as violating federal ***antitrust law***.

Defendant first argues that Plaintiff cannot seek equitable relief from the court because it comes with "unclean hands" by delaying taking any action with respect to Paragraph 5 despite the fact that it believed it was unenforceable in 2006. Defendant further responds that Paragraph 5 is not a horizontal market allocation agreement, rather Paragraph 5 is an ancillary confidentiality provision which the parties negotiated because Defendant agreed to accept clay from deposits in Georgia instead of Alabama and certain confidential information would need to be exchanged in order to determine whether the composition of the **[*5]** Georgia clay would work in Defendant's manufacturing process. Because Paragraph 5 is an ancillary agreement and not a naked restraint of trade, Defendant avers, the court must consider it under the Rule of Reason and Plaintiff has not — and cannot — make an argument that Paragraph 5 violates the Rule of Reason. Defendant avers that Paragraph 5 does not

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[1] The 1995 Agreement contained a clause which permitted C-E to terminate the Agreement if CARBO entered the calcined clay market.

violate Georgia state law as it currently stands because Georgia's legislature has made the policy decision to more broadly accept non-compete agreements.

II. Discussion

A party seeking a preliminary injunction must show "(1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest." *N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1217 (11th Cir. 2008)* (internal quotation marks omitted).

A. Federal Antitrust

It is axiomatic that *Section 1* prohibits only those agreements which unreasonably restrain competition. *See Standard Oil Co. v. United States, 221 U.S. 1, 58-64, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. There are a variety of agreements which can unreasonably restrain competition. "A restraint may be adjudged **[*6]** unreasonable either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 457-58, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. The Supreme Court established the *per se* rule in *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)* when it stated: "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id. at 5*. *See also Broadcast Music, Inc. v. Columbia Broadcasting Co., 441 U.S. 1, 8, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*.

Once an agreement is determined to be a *per se* violation, the unreasonableness of the restraint is presumed. *See, e.g., Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538, 1546 (11th Cir. 1996)* (citing *Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344-45, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)* and *United States v. Trenton Potteries Co., 273 U.S. 392, 397-98, 47 S. Ct. 377, 71 L. Ed. 700 (1927))*. The *per se* rule is the "trump card" of ***antitrust law***. "When an antitrust plaintiff successfully plays it, he need only tally his score." *United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980)*. Rule of Reason cases, on the other hand, require the court to "engage in a comprehensive analysis of the agreement's purpose and effect to determine whether it unreasonably restrains competition." *See Levine, 72 F.3d at 1546* (citing *Broadcast Music, 441 U.S. at 24-25*).

There is no "bright line" rule as to what separates a *per se* case from a Rule of Reason case. *See, e.g., National Bancard Corp. (NaBanco) v. VISA U.S.A., Inc., 779 F.2d 592, 598 (11th Cir. 1987)* (quotation and citation omitted). The **[*7]** "presumption" is that the rule-of-reason standard apples to *section 1* cases. *See, e.g. Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1567 (11th Cir. 1991)*. The *per se* rule is applied "only when history and analysis have shown that in sufficiently similar circumstances the rule of reason unequivocally results in a finding of liability." *Levine, 72 F.3d at 1546* (citing *Consultants & Designers, Inc. v. Butler Serv. Group, Inc., 720 F.2d 1553, 1562 (11th Cir. 1983))*.

"Certain types of practices, however, have emerged as traditionally per se violations." *NaBanco, 779 F.2d at 598* (citing *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505, (1960)* (vertical price fixing agreements); *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)* (horizontal market divisions); *International Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947)* (tying agreements); *Fashion Originators' Guild v. FTC, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)* (group boycotts)).

Plaintiff contends that Paragraph 5 falls into the *per se* category because it is a horizontal market division. "An agreement between competitors to allocate markets is . . . clearly anticompetitive. Such an agreement has the obvious tendency to diminish output and raise prices." *Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 344 F.3d 1294, 1304 (11th Cir. 2003)*. The Supreme Court has explained that an agreement between competitors to allocate market

> is usually termed a "horizontal" restraint, in contradistinction to combinations of persons at different levels of the market structure, e.g., manufacturers and distributors, which are termed "vertical" restraints. This Court has reiterated time and time again that "horizontal territorial limitations . . . are naked restraints of trade with no purpose **[*8]** except stifling of competition." Such limitations are per se violations of the Sherman Act.

See United States v. Topco Assocs., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972).

The first step the court must take, obviously, is determining whether Paragraph 5 is a horizontal market allocation. Defendant strongly urges that the requirements Supply Agreement is a vertical agreement and Paragraph 5 is merely ancillary to this vertical agreement because it serves the legitimate business purpose of (1) preventing C-E from competing unfairly using confidential information, (2) fostering loyalty, and (3) preventing abusive tactics from a supplier turned competitor. In other words, Defendant argues that Paragraph 5 is not a "naked" restraint.

The court finds that the case of *Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*, is instructive on this point. There, HBJ began offering a Georgia bar review course on a limited basis in 1976. HBJ was in direct competition with BRG from 1977 to 1979. In early 1980, the two companies entered into an agreement that gave BRG an exclusive license to market HBJ's materials in Georgia and to use HBJ's trade name Bar/Bri. The parties also agreed that HBJ would not complete with BRG in Georgia and that BRG would not compete with HBJ outside of Georgia. *Id. at 47*. The Court found this agreement **[*9]** unlawful on its face. *Id. at 49*. "Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Id. at 49-50*. An important aspect of *Palmer* for this case is the fact that the Supreme Court specifically rejected the argument that a market allocation agreement could not violate ***antitrust law*** unless the two entities had previously competed against one another. *Id. at 49*.

The court agrees with Defendant that the Supply Agreement on its own is a vertical agreement, but that does not end the analysis. The effect of Paragraph 5 was to delay or prevent C-E from entering the market for ceramic proppants. Thus, C-E is a "potential" competitor of CARBO in the ceramic proppant market. (Likewise, the effect of Paragraph 5 was to bar CARBO from entering the market for the supply of clay and thus, CARBO was a potential competitor of C-E in the clay market.) Paragraph 5, therefore, is a horizontal allocation of at least the proppant market because it bars C-E, a potential competitor, from entering the market. *See, e.g.*, *General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 591 (7th Cir. 1984)* (Posner, J.) ("when firms in the same line of business agree not to enter each **[*10]** other's territories they violate *section 1* of the Sherman Act even if they might be able to show that dividing markets and yielded economic benefits greater than any plausible estimate of the costs in diminished competition; that, in short, horizontal market divisions are illegal per se."). The fact that such a horizontal allocation agreement is contained within a vertical agreement does not save it.

Defendant next contends that even if the court were to find that Paragraph 5 represents some kind of "horizontal" agreement, it is not a *per se* violation because it is not a "naked restraint" of trade, but rather an "ancillary restraint" that results in "efficiency-enhancing integration" among the parties to the agreement. *See NaBanco, 779 F.2d at 603*. That is, Paragraph 5 was "necessary" to the Supply Agreement.[2] Defendant's primary argument that Paragraph 5 is ancillary is the contention that Paragraph 5 is actually a confidentiality agreement. Defendant argues that with the information C-E could glean about CARBO's manufacturing processes during the testing of the

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[2] Because the court finds Paragraph 5 neither "essential" nor "necessary" to the Supply Agreement, the court need not decide which is the precise formulation of the standard under ***antitrust law***. *Compare American Needle, Inc. v. NFL, 560 U.S. 183, 130 S. Ct. 2201, 2216-17, 176 L. Ed. 2d 947 (2010)* (using "essential") *with Broadcast Music, Inc. v. CBS, 441 U.S. 1, 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* (using "necessary") and *National Bancard Corp. v. VISA, U.S.A., Inc., 779 F.2d 592, 601 (11th Cir. 1986)* (same).

Georgia clay, C-E would be able to shorten its path to market by three years. Thus, the parties agreed to a three year restriction to protect C-E from "free **[*11]** riding" off of CARBO's know-how.

The main problem with CARBO's argument is that Paragraph 5 looks nothing like a confidentiality agreement. As an initial matter, it never mentions "confidentiality." Furthermore, nothing in Paragraph 5 or the Supply Agreement prohibits C-E from breaching the alleged confidentiality of any information it gleans from CARBO. C-E could sell the information to a competitor of CARBO with impunity. On the other hand, C-E is prevented from selling ceramic proppants even if it purchased the proppants from someone else and did not manufacture the proppants itself through information it may have gleaned during CARBO's testing of the Georgia clay.

Moreover, CARBO did not protect any of its information. As Plaintiff noted, in patent filings, CARBO has long revealed the composition of clay appropriate for the manufacture of proppants. Those patent filings included a chemical analysis of clay from Andersonville, Georgia, the same location from which C-E intended to supply CARBO. The only evidence CARBO points to concerning its own efforts to protect confidentiality is a form non-disclosure agreement that any visitor to CARBO's proppant plant must sign, **[*12]** including visitors from C-E. But this general form does not relate to any of the matters CARBO now argues should have been kept confidential, including clay composition.

There are some exceptional circumstances which might move a horizontal agreement out of the *per se* category, such as entities working together to bring a new product to the market — a product that would not reach market unless the entities worked as described in their agreement. *See, e.g.,* *American Needle, Inc. v. National Football League, 560 U.S. 183, 130 S. Ct. 2201, 2216-17, 176 L. Ed. 2d 947 (2010)*.

The parties' Supply Agreement, however, does not fit this category. The Supply Agreement is a straightforward raw materials supply agreement. There is no doubt that in the absence of Paragraph 5, either these parties or other companies would sell kaoline to proppant manufacturers. That is, the Supply Agreement and Paragraph 5, in particular, are not required to guarantee the existence of ceramic proppants. The fact that the parties had a previous Supply Agreement that did not contain a Paragraph 5-like mutual allocation is ample evidence for the fact that Paragraph 5 is not ancillary to the Supply Agreement. There is no hint of partnership or joint venture between CARBO and C-E. To the contrary, theirs is an arms-length relationship. **[*13]**

Defendant also raises some general defenses to Plaintiff's motion. Defendant argues that Plaintiff delayed in challenging the validity of Paragraph 5, waiting for the end of the term of Supply Agreement and in the meantime accruing benefits under the Supply Agreement. Defendant contends that Plaintiff's failure to take action with respect to Paragraph 5 in 2006 prevented CARBO from protecting its legitimate business interest in confidentiality in ways other than the enforcement of Paragraph 5. This laches/*in pari delicto* argument, however does not apply to antitrust actions. *See, e.g.,* *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1153 (11th Cir. 2006)* (*in pari delicto* does not apply in enforcement of antitrust laws).

Defendant's unclean hands argument is essentially a reformulation of its laches argument. Furthermore, Defendant's unclean hands argument cuts both ways. Plaintiff clearly repudiated Paragraph 5 of the Supply Agreement in 2006 and Defendant took no steps to mandate its enforcement at that time just as Plaintiff took no steps to bar its enforcement. *Rinks v. Courier Dispatch Group, Inc., 2001 U.S. Dist. LEXIS 4728, 2001 WL 34090167 (N.D. Ga. Apr. 11, 2001)* (Forrester, J.), cited by Plaintiff, is distinguishable because the court's ruling relied to a great extent on the fact that the plaintiff had just accepted a monetary settlement in exchange **[*14]** for signing an agreement releasing any claims she had against her employer when she turned around and sued her employer. The court's ruling hinged on the release agreement and not the underlying non-compete agreements.

In sum, the court finds Plaintiff has a substantial likelihood of demonstrating that Paragraph 5 is a horizontal market allocation that is a *per se* violation of *Section 1* of the Sherman Act. In the alternative, the court also considers whether Paragraph 5 violates state law.

B. State Law

Although the Supply Agreement provided that Alabama law would apply, Georgia courts would first consider whether the agreement violated Georgia's public policy. *See, e.g.,* *Siech v. Hobbs Group, LLC, 198 Fed. Appx. 840, 841 n.1 (11th Cir. 2006)*; *Convergys Corp. v. Keener, 276 Ga. 808, 582 S.E.2d 84 (2003)* (law of jurisdiction chosen by parties governs contractual rights unless application of other jurisdiction's law would violate Georgia public policy). If the agreement would not be enforceable under Georgia law, it is violative of Georgia's public policy. *Id.*

When "determining whether the application of [foreign] law creates a conflict, the Court should apply Georgia's public policy as it existed at the time [the employee] entered into the Non-Compete." *Boone v. Corestaff Support Servs., Inc., 805 F. Supp. 2d 1362 (N.D. Ga. 2011)* (Story, J.). Due to recent statutory and constitutional amendments, questions **[*15]** have been raised as to what constitutes Georgia law on the subject. *Id.* The Georgia legislature passed a new restrictive covenant law in 2009 which gives more favorable treatment to restrictive covenants than they would have received in the past. *Id. at 1377*. Furthermore, a constitutional amendment adopting that law became effective on January 1, 2011. *Id.*

Several courts have held, however, that the statutory and constitutional amendments do not apply to agreements entered into before the effective date of the legislation. *See, e.g., Boone, 805 F. Supp. 2d at 1369* (discussing 2011 law); *Bunker Hill Intern., Ltd. v. Nationsbuilder Ins. Servs., Inc., 309 Ga. App. 503, 505 n. 1, 710 S.E.2d 662 (2011)* (discussing 2009 law); *Gordon Document Prods., Inc. v. Service Techs., Inc., 308 Ga. App. 445, 448 n. 5, 708 S.E.2d 48 (2011)* (discussing 2009 law); *Cox v. Altus Healthcare and Hospice, Inc., 308 Ga. App. 28, 30, 706 S.E.2d 660 (2011)* (discussing 2009 law).

Having determined that the new statutory and constitutional amendments should not be applied retroactively, the court must consider whether Paragraph 5 violates Georgia law as it existed at the time the parties entered into Supply Agreement in 2003. Under Georgia law, contracts that restrain trade are void against public policy. *See, e.g.,* *W.R. Grace & Co. v. Mouyal, 262 Ga. 464, 465, 422 S.E.2d 529 (1992)*. Courts generally consider duration, territorial coverage, and scope of activity in determining whether a particular restraint is reasonable. *Id.* (citing *Watson v. Waffle House, 253 Ga. 671, 673, 324 S.E.2d 175 (1985)*). *See also* *Koger Properties v. Adams-Cates Co., 247 Ga. 68, 274 S.E.2d 329 (1981)* ("Georgia law prohibits contracts or agreements, tending to defeat or **[*16]** lessen competition or in general restraint of trade. However, covenants against competition in employment contracts are considered in partial restraint of trade, and they are enforceable if strictly limited in time and territorial effect, and if they are otherwise reasonable considering the business interests of the employer sought to be protected and the effect on the employee.").

Georgia applies different levels of scrutiny to restrictive covenants depending on the context of the business arrangement. The lowest level of scrutiny is given to agreements signed in connection with the sale of a business; the highest level of scrutiny goes to agreements signed in the employment context. Defendant also argues that Georgia law requires that the court consider the bargaining capacities of the parties and any independent consideration given for the covenant. However, the case Defendant cites for this proposition — *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc., 404 F.3d 1297 (11th Cir. 2005)* — does not support it. *Palmer & Cay* discussed an intermediate level of scrutiny that Georgia applies to professional partnership agreements because the partners have relatively equal bargaining power and share equally in consideration. *Id. at 1303 n.12*.

Supply agreements, such as the instant agreement, **[*17]** are not considered to be analogous to a contract for the sale of a business. *See, e.g.,* *Amstell, Inc. v. Bunge Corp., 213 Ga. App. 115, 443 S.E.2d 706 (1994)*. There, Amstell developed a fiber base concentrate to be used in the production of fiber-fortified milk. It contracted with Carlin Foods Corporation to manufacture and distribute the concentrate. *Id. at 115*. Carlin executed a nondisclosure agreement. *Id.* Bunge Corporation became a party to these agreements after it acquired Carlin Foods. *Id.* The agreements also contained a non-compete clause which stated that for three years after the term of the agreement, Bunge agreed not to produce, or assist or consult in the production of, any concentrates or finished products which are fiber-fortified milk concentrates. *Id.* Bunge also agreed not to develop, produce, license or market fiber-based concentrates for the production of fiber-containing milks or dairy base for the production of shakes and ice cream. *Id. at 115-16*. Amstell eventually sued Bunge for breaching the covenants not to compete and Bunge defended by arguing the covenants were not valid.

The court first determined that the non-compete at issue was not analogous to a contract for the sale of a business but rather the non-compete was ancillary to an independent contractor **[*18]** manufacturing and distributorship agreement. As such, it should be treated as an employment rather than a sales contract. *Id. at 116*. "Such a covenant is enforceable only where it is strictly limited in time and territorial effect and is otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee." *Id.* (quotation and citation omitted). Because the non-competes in *Amstell* contained "absolutely no territorial limits, they are invalid." *Id.*

The court finds the supplier-manufacturer relationship between Plaintiff and Defendant analogous to the facts of *Amstell*. Defendant argues that *Amstell* does not apply to the instant situation because there, the distributor had less bargaining power and the non-compete was one-sided. These factors, however, were not particularly relevant to the court's analysis. The *Amstell* court, rather, found that the parties' relationship most closely matched an employment relationship and therefore the non-compete agreements had to be given careful scrutiny.

In determining the nature of the parties' relationship here, Georgia law, as reflected by *Amstell*, has already accounted for bargaining power and consideration, **[*19]** and has determined that it should receive the strict scrutiny associated with employment covenants, and not sale-of-business or partnership covenants. Furthermore, consideration of the facts in this case show that the Supply Agreement is an arms-length negotiation between two sophisticated business partners. The fact that both parties had reasons for wanting to structure the deal as they did does not mean that any particular party had excessive bargaining leverage. The only context in which Georgia courts apply the "much less scrutiny" standard suggested by Defendant is the sale of business, which this clearly is not.

Moreover, setting aside the issue of which level of scrutiny applies, the court has located no Georgia case — and the parties have not identified one — in which the court has approved a worldwide territorial restriction. CARBO exports proppants to 50 countries and C-E and its affiliated companies obtain kaolin from 18 countries. This scope of business is not sufficient to support the much broader worldwide territorial restriction contained in Paragraph 5. Regardless of whether CARBO had a legitimate business interest of protecting confidential information — an allegation **[*20]** the court above found not too convincing — that interest still does not support a worldwide restriction.

For these reasons, the court finds that Plaintiff has a substantial likelihood of demonstrating that Paragraph 5 is also invalid under Georgia restrictive covenant law.

C. Remaining Preliminary Injunction Factors[3]

The court must now consider whether Plaintiff will suffer irreparable harm absent an injunction and balance the harms. *See, e.g., MacGinnitie v. Hobbs Group, LLC, 420 F.3d 1234, 1242-43 (11th Cir. 2005)*. As to federal ***antitrust law***, the court's ruling that Paragraph 5 is a *per se* violation essentially ends the inquiry. Moreover, because the court determined that it is substantially likely that Paragraph 5 violates federal ***antitrust law***, the enforcement of the court's injunction is not limited to Georgia.

With respect to Georgia non-compete law, Defendant argues that the alleged harm Plaintiff suffers can be addressed through monetary remedies. However, in *MacGinnitie*, where the Eleventh Circuit reviewed a district court order denying a motion for preliminary injunction with respect to a non-compete provision, the Court of Appeals held that the unenforceable restrictions on the plaintiff's access to customers, employees, and information

[3] The court is puzzled by Defendant's argument that Plaintiff's requested injunction would violate Defendant's *First Amendment* right to petition any court. Plaintiff filed an action for declaratory judgment and a motion for a preliminary injunction. Defendant has fully participated in litigating before the court and raised counterclaims of breach of contract, disgorgement, and unjust enrichment. The fact that the court has determined that Plaintiff has a substantial likelihood of demonstrating that Paragraph 5 is invalid does not mean that Defendant did not have an opportunity to petition the court as to its views of Paragraph 5.

was an "irreparable **[*21]** harm" that could not be "undone through monetary remedies." *Id. at 1242*. "These injuries are in the form of lost opportunities, which are difficult, if not impossible, to quantify. Georgia public policy is clear that restrictive covenants in employment contracts are disfavored as potential restraints of trade which tend to lessen competition. Because of this public policy, the Georgia courts and this court have not hesitated to find irreparable harm in cases involving covenants not to compete." *Id.* (citations omitted). Likewise, here, C-E's irreparable harm is not being able to pursue opportunities in the ceramic proppants market.

On balancing of the harms, the *MacGinnitie* court held that Georgia public policy disfavored restrictive covenants because of their "negative effect on competition" and therefore, the harms weighed in favor of striking the covenant. *Id. at 1243*. "Loss of business due to free and fair competition is not a harm; violation of legal rules designed to promote such competition is a harm." *Id.* As such, the court finds that the remaining three factors to consider in whether to issue a preliminary injunction weigh in Plaintiff's favor.

D. Bond

Defendant requests that if the court grants Plaintiff's **[*22]** motion for preliminary injunction, the court should set an appeal bond at $20-$30 million, a figure that reflects CARBO's estimate of the profits C-E would make in the ceramic proppants markets during the intended three year term of Paragraph 5. Plaintiff responds that Defendant's cause of action regarding Paragraph 5 would be breach of contract for which the appropriate remedy is CARBO's damages and not C-E's disgorgement of profits. Plaintiff, therefore, asks the court to require a minimal bond or none at all.

Federal Rule of Civil Procedure 65(c) provides "the court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." *Id.* The determination of the amount of an injunction bond is within the discretion of the court and the court may decide to require no security at all. *See, e.g., BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC, 425 F.3d 964, 970-71 (11th Cir. 2005)*.

The court agrees that Defendant would not be entitled to disgorgement of C-E's profits as measure of damage for its breach of contract claim. Furthermore, the court finds that Plaintiff has a high probability of succeeding on the merits of its claim. In the absence of any **[*23]** evidence or further suggestion on bond, bond is hereby fixed in the sum of $100,000.

III. Conclusion

The court GRANTS Plaintiff's motion for preliminary injunction [10].

Defendant is ENJOINED from seeking to enforce the provisions of Paragraph 5.

IT IS SO ORDERED this 13th day of March, 2012.

/s/ J. Owen Forrester

J. OWEN FORRESTER

SENIOR UNITED STATES DISTRICT JUDGE

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QSGI, Inc. v. IBM Global Fin.

United States District Court for the Southern District of Florida

March 13, 2012, Decided; March 14, 2012, Entered on Docket

Case No. 11-80880-CIV-RYSKAMP/VITUNAC

Reporter
2012 U.S. Dist. LEXIS 49601 *

QSGI, INC., Plaintiff, v. IBM GLOBAL FINANCING, a division of International Business Machines Corporation, INTERNATIONAL BUSINESS MACHINES CORPORATION, parent to and/or d/b/a IBM GLOBAL FINANCING, Defendant.

Subsequent History: Sanctions allowed by *Qsgi, Inc. v. IBM Global Fin., 2012 U.S. Dist. LEXIS 202783 (S.D. Fla., June 18, 2012)*

Motion denied by *Qsgi, Inc. v. IBM Global Fin., 2012 U.S. Dist. LEXIS 202784 (S.D. Fla., June 18, 2012)*

Costs and fees proceeding at, Request granted, in part, Request denied by, in part *QSGI, Inc. v. IBM Global Fin., 2012 U.S. Dist. LEXIS 197306 (S.D. Fla., July 25, 2012)*

Dismissed by *Qsgi, Inc. v. IBM Global Fin., 2012 U.S. Dist. LEXIS 202583 (S.D. Fla., July 31, 2012)*

Core Terms

antitrust, allegations, mainframe, antitrust claim, competitor, purported, damages, market share, customers, six-month, factual allegations, actual damage, unfair

Counsel: **[*1]** For QSGI, Inc., a Delaware Corporation, Plaintiff: Juan Pablo Bauta, II,Case A. Dam, Ferraro Law Firm, Miami, FL.

For IBM Global Financing, a division of International Business Machines Corporation, IBM Global Financing, a division of International Business Machines Corporation, International Business Machines Corporation, Parent to IBM Global Financing, doing business as IBM Global Financing, Defendants: Laura Besvinick, LEAD ATTORNEY, Hogan Lovells US LLP, Miami, FL; Benjamin H. Diessel, PRO HAC VICE, Evan R. Chesler, Richard J. Stark, PRO HAC VICE, Teena-Ann V. Sankoorikal, PRO HAC VICE, Cravath, Swaine & Moore, LLP, New York, NY; Eric J. Stock, PRO HAC VICE, Hogan Lovells US LLP, New York, NY; Ty Cobb, PRO HAC VICE, Hogan Lovells, US, LLP, Washington, DC.

Judges: KENNETH L. RYSKAMP, UNITED STATES DISTRICT JUDGE.

Opinion by: KENNETH L. RYSKAMP

Opinion

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE comes before the Court pursuant to Defendants International Business Machines Corporation ("IBM") and IBM Global Financing ("IGF")'s (collectively, "Defendants") motion to dismiss the second amended complaint, filed September 26, 2011 **[DE 19].** Plaintiff QSGI, Inc. ("QSGI," or "Plaintiff") responded on October 28, 2011 **[DE [*2] 24].** Defendants replied on November 7, 2011 **[DE 28].** This motion is ripe for adjudication.

I. BACKGROUND

QSGI alleges that it built a business based on its particular practice of "purchas[ing] used IBM mainframe computers on the open market," changing their processing capacity, or reconfiguring them, and reselling them to end-user customers. (Compl. ¶¶ 11, 13.) Specifically, QSGI claims that its ability to downgrade the processing capacity of used IBM mainframes was critical to its success and that it needed IBM microcode and parts to do so. (*Id.* ¶ 13.) The Complaint does not identify any other third party that engaged in this particular business practice.

According to the Complaint, in or around 2007 IBM adopted a policy that it would only sell the parts and microcode needed to reconfigure a used IBM mainframe computer if it had been installed and in use by the customer for at least six months (the "six-month rule"). (*Id.* ¶¶ 13, 16.) Moreover, QSGI alleges that, while IBM enforced the six-month rule against QSGI, it did not enforce the rule against IGF, permitting IGF to change the capacity of used IBM mainframes prior to shipping. (*Id.* ¶¶ 16, 18.) [1] Because QSGI's business model allegedly **[*3]** centered on selling changed-capacity mainframes, QSGI asserts that IBM's policy disadvantaged it relative to IGF, forcing QSGI out of business. (*Id.* ¶¶ 13, 16-18.)

QSGI frames its Complaint as one of monopolization, alleging that IBM used its "monopoly power to quash QSGI's ability to compete and exist in the marketplace for used IBM mainframe computers." (*Id.* ¶ 18.) For its causes of action, QSGI first asserts a violation of the Florida Antitrust Act and, second, repackages the same claim as a violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). (*See id.* ¶ 1.) Defendants move for the dismissal of both claims.

II. LEGAL STANDARD

On a motion to dismiss, while the Court takes the plaintiff's allegations as true, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003)* (citing *South Florida Water Mgm't Dist. v. Montalvo, 84 F.3d 402, 406 (11th Cir. 1996))*. Plaintiff's **[*4]** obligation to provide the grounds for his entitlement to relief requires more than "labels and conclusions," and a "formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal,556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007))*. "The point is to 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Davis v. Coca-Cola Bottling Co., 516 F.3d 955, 974 (11th Cir. 2008)* (quoting *Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)* and finding allegations insufficient to meet *Twombly* standard). A complaint's factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly, 127 S.Ct. at 1965*. "Only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft, 129 S.Ct. at 1950*. A determination of whether a complaint states a plausible claim for relief requires the reviewing court "to draw on its judicial experience and common sense." *Id.* When a plaintiff fails to plead factual content permitting the court to infer more than the mere possibility of misconduct, it has not "shown" entitlement to relief. **[*5]** *Id.* (quoting *Fed.R.Civ.P. 8(a)(2)*).

III. DISCUSSION

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[1] IGF is not a legal entity, but rather an IBM business unit that in the United States is a business segment of IBM Credit LLC, a wholly owned subsidiary of IBM.

A. Failure to Plead Antitrust Injury

Antitrust standing requires a specific showing of antitrust injury, that is, that there is a public harm from the alleged conduct that coincides with a plaintiff's private harm. *See* *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449-50 (11th Cir. 1991)*. As the Eleventh Circuit has stated, "antitrust injury [i]s the touchstone for antitrust standing." *Austin v. Blue Cross & Blue Shield of Ala., 903 F.2d 1385, 1389 (11th Cir. 1990)*; *see also* NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007) (antitrust injury is a "'necessary , but not always sufficient' condition of antitrust standing" (quoting *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986))*. As such, where a plaintiff's antitrust claim merely alleges harm to an individual competitor, dismissal is warranted. *See* *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Comms., Inc., 376 F.3d 1065, 1069 (11th Cir. 2004)* ("Critically, under both sections [*One* and *Two of the Sherman Act*], an antitrust plaintiff must show harm to competition in general, rather than merely damage to an individual competitor."); *Pierson v. Orlando Reg'l Healthcare Sys., Inc., 619 F.Supp.2d 1260, 1276 (S.D. Fla. 2009)* **[*6]** (finding no standing to bring Sherman Act or Florida Antitrust Act claims where "[t]he Amended Complaint alleges many detriments to Plaintiff, but it does not allege 'antitrust injury'"). Federal antitrust standing law applies to Florida Antitrust Act claims. *See* *All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 745 n.11 (11th Cir. 1998)* ("Federal and Florida antitrust laws are analyzed under the same rules and case law.").

Absent factual allegations of antitrust injury, an antitrust claim will fail under *Twombly* and *Iqbal.* *Iqbal, 129 S.Ct. at 1949*; *Twombly, 550 U.S. at 555*. Without such allegations, there can be no plausible claim to relief on an antitrust claim that could withstand dismissal. *See, e.g.,* *NicSand, 507 F.3d at 451* ("a 'naked assertion' of antitrust injury, the Supreme Court has made clear, is not enough; an antitrust claimant must put forth factual 'allegations plausibly suggesting (not merely consistent with)' antitrust injury" (quoting *Twombly, 550 U.S. at 557*)).

Properly pleading antitrust injury requires allegations, rooted in fact, of the anticompetitive effects of the conduct alleged to violate the antitrust laws. *Todorov, 921 F.2d at 1450* **[*7]** ("[Plaintiffs] must plead and prove that the injury they have suffered derives from some anticompetitive conduct and is the type the antitrust laws were intended to prevent."). QSGI makes no allegations as to the structure of the alleged market for used IBM mainframe computers. While QSGI alleges that IBM has a 35% market share of a purported "new mainframe computer market" (Compl. ¶ 7), it fails to allege IBM's market share in the purported used IBM mainframe computer market. QSGI also fails to allege what its own market share was before and after IBM's purported adoption of the six-month rule in 2007; how many competitors are in the purported used IBM mainframe market; the strength of any other competitor in the purported market; how other competitors were impacted, if at all; or why QSGI's exit from that market would result in uncompetitive prices to customers. QSGI has not identified a single competitor (other than itself) that supposedly has been harmed by IBM's six-month rule; nor has QSGI identified a single customer adversely affected by the rule. QSGI has not explained how competition in the alleged market has been reduced by IBM's rule, or how customers could have been adversely **[*8]** affected. On the contrary, QSGI alleges that its business model involved purchasing used IBM mainframe computers on the "open"—*i.e.*, freely competitive—market. (Compl. ¶ 11.) QSGI gives no reason to think that this "open market" does not still exist.

In *Spanish Broadcasting*, Spanish Broadcasting System ("SBS") brought antitrust claims under the Sherman Act against Clear Channel Broadcasting ("CC") and Hispanic Broadcasting Channel ("HBC") alleging that CC and HBC had conspired to harm SBS, induced its employees to breach their employment contracts, hindered its ability to raise capital, and discouraged advertisers from purchasing ad time on SBS. *376 F.3d at 1069-70*. SBS's allegations of harm included "weakened stock prices, restricted access to capital markets, loss of employees, damaged reputation, and loss of advertising revenue." *Id. at 1072*. The district court dismissed SBS's complaint, and the Eleventh Circuit affirmed, holding that SBS's complaint failed to allege harm to competition. *Id. at 1072-74, 1076-77*. The Court of Appeals noted that the complaint contained "no allegations at all about a factual connection between the conduct alleged and overall impact on the advertising **[*9]** market." *Id. at 1072*. The court rejected SBS's argument that as the primary competitor in its alleged market, any damage to SBS inherently damaged competition, explaining that SBS had failed to meet its burden of supporting this inference with "specific factual allegations" such as "specific damage done to consumers in the relevant market." *Id. at 1072-73*.

Here, all the allegations concern the unique impact of IBM's six-month rule on QSGI's chosen business strategy. QSGI offers a few wholly conclusory allegations to the effect that IBM used its purported market power to "injure[] competition", "restrict competition" and "render[] it impossible for competition to exist." (Compl. ¶¶ 22, 23.) Such naked assertions of harm to competition cannot withstand dismissal under the *Twombly* and *Iqbal* pleading standard. *See* CBC Cos. v. Equifax, Inc., 561 F.3d 569, 571-72 (6th Cir. 2009) (allegations of "restricting competition", "decreasing options" and "increasing . . . costs" insufficient to establish antitrust standing). Accordingly, QSGI's antitrust claim is dismissed. *See* George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 140 (2d Cir. 1998) (affirming dismissal for lack of antitrust **[*10]** standing where "Plaintiff has failed to plead its own market share" or the "market share purportedly absorbed by" the defendant's alleged co-conspirator); Glades Pharms., LLC v. Murphy, No. 1:06-CV-0940, 2006 U.S. Dist. LEXIS 90154, 2006 WL 3694625, at *3 (N.D. Ga. Dec. 12, 2006) (dismissing complaint, noting that "[t]he complaint makes no mention of how many competitors are in the [relevant] market or why [defendant's] entrance into the market would 'reduce prices'").

QSGI's reliance on Global Candle Gallery Licensing Co. v. Nabozny, No. 8:08-CV-2532, 2009 U.S. Dist. LEXIS 111580, 2009 WL 3852794 (M.D. Fla. Nov. 18, 2009), is unavailing. The *Global Candle* antitrust plaintiff, unlike QSGI, identified a relevant market and made specific allegations of antitrust injury. *See* 2009 U.S. Dist. LEXIS 111580, [WL] at *3.

The Court disregards QSGI's conclusory allegations about purportedly uncompetitive prices because they are contradicted by other specific factual allegations in the complaint. *See* United States ex rel. Nicholas v. JFK Med. Ctr., No. 01-8158-CIV, 2002 U.S. Dist. LEXIS 28169, 2002 WL 31941007, at *2 (S.D. Fla. Nov. 15, 2002) (court not required to credit "internally inconsistent" allegations). For example, QSGI claims to have purchased used IBM mainframe computers on the "open market." (Compl. **[*11]** ¶ 11.) If used IBM mainframe computers are available for purchase on the "open market," then QSGI is not the only entity that can purchase them. There is nothing in the complaint to suggest that customers cannot buy them, too, or that the elimination of QSGI's middleman services actually reduced the supply of used IBM mainframe computers. QSGI's allegation that IBM has a 35% market share necessarily leaves 65% of the market to competitors. This allegation is also inconsistent with QSGI's antitrust claim. QSGI's Florida Antitrust Act claim is dismissed.

B. Failure to State a FDUPTA Claim

A claim under FDUPTA has three elements: "(1) a deceptive or unfair practice; (2) causation; and (3) actual damages." Siever v. BWGaskets, Inc., 669 F.Supp.2d 1286, 1292 (M.D. Fla. 2009). A FDUTPA claim may be alleged as a "*per se* violation premised on the violation of another law proscribing unfair or deceptive practice." Hap v. Toll Jupiter, Ltd. P'ship, No. 07-81027-CIV-RYSKAMP, 2009 U.S. Dist. LEXIS 5866, 2009 WL 187938, at *9 (S.D. Fla. Jan. 28, 2009).

QSGI makes no allegations that IBM's purported adoption in 2007 of the six-month rule is in any way deceptive. QSGI also fails to allege any facts suggesting that IBM's conduct **[*12]** was at all unfair other than a conclusory assertion that use of "monopoly power" is an "unfair business practice." (Compl. ¶ 25.) QSGI's FDUTPA allegations are, thus, merely a repackaging of the allegations offered for its antitrust claims. When, as here, a plaintiff's FDUTPA claim is based on the same allegations as its antitrust claim, failure to establish a violation of ***antitrust law*** is sufficient to conclude that the plaintiff has also failed to state a FDUTPA claim. *See* JES Props., Inc. v. USA Equestrian, Inc., No. 802CV1585T24MAP, 2005 U.S. Dist. LEXIS 43122, 2005 WL 1126665, at *19 & n.23 (M.D. Fla. May 9, 2005) ("Plaintiffs concede that their FDUPTA claims 'survive' or 'fall' with their antitrust claims."); *see also* Hunter v. Bev Smith Ford, LLC, No. 07-80665-CIV-RYSKAMP, 2008 U.S. Dist. LEXIS 34982, 2008 WL 1925265, at *9 (S.D. Fla. Apr. 29, 2008) (plaintiffs based all FDUTPA allegations on violations of state and federal statutes that the court had already considered and rejected, thus there could be no FDUTPA violation). Because QSGI's antitrust claim have been dismissed, QSGI's FDUTPA claim cannot survive.

The FDUPTA claims is also subject to dismissal because QSGI failed to plead "actual damages" as required by Florida law. "[A]ctual **[*13]** damages" under section 501.211(2) is "a term of art." Eclipse Med., Inc. v. Am. Hydro-

Surg. Instruments, Inc., 262 F.Supp.2d 1334, 1357 (S.D. Fla. 1999). "The measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered according to the contract of the parties," except that where a product is "rendered valueless" as a result of a defect, "purchase price is the appropriate measure of damages." *Jovine v. Abbott Labs., Inc., 795 F.Supp.2d 1331, 1344 (S.D. Fla. 2011)* (quoting *Rollins, Inc. v. Heller, 454 So.2d 580, 585 (Fla. 4th DCA 1984)*; *see also* *Eclipse Med., 262 F.Supp.2d at 1357*.

QSGI has failed to plead any facts from which one could plausibly infer the degree to which, or even whether, the market value of any product has changed as a result of IBM's purported conduct. Nor has QSGI pled that any product has been rendered valueless as a result of a defect such that a purchase price (also not alleged) could stand in as the market value for purposes of actual damages.

All that remains is QSGI's repeated claim to consequential damages in the form of "lost profits" and "lost business." (Compl. ¶¶ 17, 18, 26, 31.) But **[*14]** consequential damages are not recoverable under FDUTPA. *Eclipse Med., 262 F.Supp.2d at 1357* ("Florida courts specifically reject the recovery of consequential damages under FDUTPA."). Because QSGI failed to plead facts sufficient to show actual damages under FDUTPA, the FDUPTA claim is dismissed..

IV. CONCLUSION

THE COURT, having considered the pertinent portions of the record and being otherwise fully advised, hereby

ORDERS AND ADJUDGES that the motion to dismiss, filed September 26, 2011 **[DE 19]**, is GRANTED. The second amended complaint is DISMISSED WITHOUT PREJUDICE. QSGI may have fifteen days from the date of this order to file an amended complaint.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 13th day of March, 2012.

/s/ Kenneth L. Ryskamp

KENNETH L. RYSKAMP

UNITED STATES DISTRICT JUDGE

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Regas Christou v. Beatport, LLC

United States District Court for the District of Colorado

March 14, 2012, Decided; March 14, 2012, Filed

Civil Action No. 10-cv-02912-RBJ-KMT

Reporter
849 F. Supp. 2d 1055 *; 2012 U.S. Dist. LEXIS 34307 **; 2012-1 Trade Cas. (CCH) P77,829

REGAS CHRISTOU, R.M.C. HOLDINGS, L.L.C. D/B/A THE CHURCH, BOUBOULINA, INC D/B/A VINYL, MOLON LAVE, INC. D/B/A 2 A.M., CITY HALL, LLC, 1037 BROADWAY, INC. D/B/A BAR STANDARD F/K/A THE SHELTER, 776 LINCOLN ST., INC. D/B/A FUNKY BUDDHA LOUNGE, and 1055 BROADWAY, INC. D/B/A THE LIVING ROOM, Plaintiffs, v. BEATPORT, LLC, BRADLEY ROULIER, BMJ&J, LLC D/B/A BETA NIGHTCLUB AND BEATPORT LOUNGE, and AM ONLY, INC., Defendants.

Subsequent History: Motion denied by, Sanctions allowed by, Summary judgment denied by, Motion granted by *Christou v. Beatport, LLC, 2013 U.S. Dist. LEXIS 9034 (D. Colo., Jan. 23, 2013)*

Prior History: *Regas Christou, R.M.C. Holdings, L.L.C. v. Beatport, LLC, 2011 U.S. Dist. LEXIS 149079 (D. Colo., Dec. 28, 2011)*

Core Terms

plaintiffs', trade secret, motion to dismiss, Music, defendants', relevant market, monopoly, Electronic, antitrust, sufficient facts, conspiracy, monopolize, live performance, misappropriation, allegations, friends, customer, pled, sanctions, conspire, lists, downloads, profiles, antitrust claim, specific intent, employees, interchangeability, competitor, enterprise, nightclub

Counsel: **[**1]** For Regas Christou, R.M.C. Holdings, LLC, (actually named as R.M.C. Holdings, L.L.C.), doing business as Church, The, Bouboulina, Inc., doing business as Vinyl, Molon Lave, Inc., doing business as 2 A.M., City Hall, LLC, 1037 Broadway, Inc., doing business as Bar Standard formerly known as Shelter, The, 776 Lincoln St., Inc., doing business as Funky Buddha Lounge, 1055 Broadway. Inc., doing business as Living Room, The, Plaintiffs: Jeffrey S. Vail, Jeff Vail LLC, The Law Office of, Englewood, CO.

For Beatport, LLC, Defendant: George Vernon Berg, Jr., Judy Bradshaw Snyder, Katherine M. L. Pratt, Patrick Michael Haines, Berg Hill Greenleaf & Ruscitti, LLP, Boulder, CO.

For Bradley Roulier, BMJ&J, LLC, doing business as Beta Nightclub, doing business as Beatport Lounge, Defendants: Joe L. Silver, Martin Dean Beier, Nicholas Ethan Mitchell, Silver & DeBoskey, P.C., Denver, CO.

Judges: Honorable R. Brooke Jackson, United States District Judge.

Opinion by: R. Brooke Jackson

Opinion

[*1062] ORDER

This matter comes before the Court on defendant Beatport L.L.C.'s Motion to Dismiss [CM/ECF document #15]; defendant AM Only, Inc.'s Motion to Dismiss [#25]; defendants Bradley Roulier and BMJ&J L.L.C.'s Motion to Dismiss [#32], and Defendant **[**2]** Beatport L.L.C.'s Motion for Sanctions [#30]. All of these motions have been fully briefed.

Facts

Beginning during the 1990's, plaintiff Regas Christou founded several nightclubs in Denver, including R.M.C. Holdings, L.L.C. ("The Church"), Molon Lave, Inc. ("2 A.M."), 1037 Broadway, Inc. ("Bar Standard f/k/a "The Shelter"), City Hall L.L.C. ("City Hall"), 775 Lincoln St., Inc. ("Funky Buddha Lounge"), and 1055 Broadway, Inc. ("The Living Room"). Mr. Christou is also affiliated with Bouboulina, Inc. ("Vinyl"). These clubs are alleged to comprise the South of Colfax Nightlife district ("SOCO"). Complaint [#1] at 3.

The SOCO clubs, especially The Church and Vinyl, emphasize "Electronic Dance Music" and live performance by DJs. *Id*. at ¶4. Mr. Christou has been instrumental in developing the Electronic Dance Music market in Denver. *Id*. at ¶16. Both The Church and Vinyl are nationally recognized clubs in the Electronic Dance Music scene. *Id*. ¶17.

Defendant Bradley Roulier is a co-founder and member of Beatport, LLC ("Beatport") and founder and member of BMJ&J, L.L.C. d/b/a Beta Nightclub ("Beta"). *Id*. at ¶6. Starting in 1998, Mr. Roulier was employed by Mr. Christou as a talent buyer and assisted **[**3]** in booking top DJs to perform at SOCO venues. *Id*. at ¶18. While he was still employed by Mr. Christou, Mr. Roulier, along with several partners, conceived of the idea that would become Beatport. *Id*. at ¶19. In 2003, Beatport was founded as an online marketplace for downloading music that catered to consumers and producers of Electronic Dance Music. *Id*. at ¶19-20. Mr. Christou co-signed a $50,000 loan to start Beatport in exchange for Mr. Roulier's promise that Mr. Christou would later be given partial ownership of the company. *Id*. at ¶20. Mr. Christou also initially assisted in Beatport's promotion by advertising Beatport in SOCO's print and online advertisements, **[*1063]** distributing promotional flyers, and financing a promotional video. *Id*. at ¶23. Mr. Roulier never transferred any ownership interest to Mr. Christou. *Id*. at 33.

By 2005 Beatport was a commercial success, with over one million purchases and song downloads from the website. *Id*. at ¶24. The website claims that "Beatport is the most relevant online source of electronic music in the world." *Id*. at ¶ 31. Beatport gained popularity and success by differentiating itself from other music marketplaces such as Apple's iTunes. *Id*. at **[**4]** ¶26. Unlike other music download websites, Beatport offered music at higher bit rates and without Digital Rights Management (DRM) controls, which enabled DJ's to re-mix and use music downloaded from Beatport during their live performances. *Id*. Beatport's dominance in the Electronic Dance Music community meant that Beatport became financially important for DJs. *Id*. at ¶25. Plaintiffs allege that favorable promotion, or the lack thereof, on Beatport can "make or break album sales." *Ibid*.

Beatport entered into a partnership with German hardware manufacturer, Native Instruments GmbH, to provide the seamless integration of music downloads from Beatport and hardware used by DJs. *Id*. at ¶27. Plaintiffs believe that Native Instruments GmbH has subsequently acquired a majority interest in Beatport due to Beatport's importance to the Electronic Dance Music community. *Id*. at ¶29.

Mr. Roulier initially expressed interest in purchasing The Church from Mr. Christou, but instead he opened a competing nightclub in Denver. While still employed by Mr. Christou, and while still in negotiations regarding the purchase of The Church, Mr. Roulier opened the nightclub Beta in March 2008. Plaintiffs allege that **[**5]** Mr. Roulier and the other defendants leveraged their ownership of Beatport to coerce DJs to boycott SOCO's venues and only perform at Beta's Beatport lounge. *Id*. at ¶34. Plaintiffs allege that Beatport has the ability to remove all artists on a DJ's label from its online marketplace if the DJ performs at a SOCO venue. *Id*. at ¶46.

Beatport allegedly began using its position to coerce DJ's into performing only at Beta in 2008. *Ibid*. Because access and promotion on Beatport are critical to both a DJ's and a label's success, many DJs and agents were allegedly compelled to agree with Beatport and Beta's demands. For example, plaintiffs allege that DJ Charissa Saverio ("DJ Rap"), just prior to formalizing an agreement with The Church, was contacted by Mr. Roulier and told that if she wanted continued access and label support on Beatport she must play at Beta and not at The Church. *Id*. at ¶ 52. Mr. Roulier told DJ Rap's booking agency, Bullit Booking, that "he would pull both of DJ Rap's record labels entirely off Beatport if DJ Rap played at SOCO's clubs." *Id*. DJ Rap canceled her performance at The Church and instead performed at Beta.

Plaintiffs quote an "owner of a major Electronic Dance **[**6]** Music record label" as saying that Beta and Mr. Roulier are "using their Beatport connections to make sure things happen." *Id*. at ¶ 54. In an interview with the Denver Post, Mr. Roulier was quoted as saying "[w]ith [Beta's] relationship with Beatport we think most of the DJs will want to play for us." *Id*. at ¶55.

As a result plaintiffs allege that the SOCO clubs were squeezed out of the market. Plaintiffs brought the present action alleging nine claims for relief: (1) Unlawful tying in violation of *15 U.S.C. §1* against Beatport, Beta and Mr. Roulier; (2) Monopolization in violation of *15 U.S.C. §2* against Beta and Mr. Roulier; (3) Attempted monopolization in violation of *15 U.S.C. §2* against Beta and Mr. **[*1064]** Roulier; (4) Conspiracy to Monopolize in violation of *15 U.S.C. §2* against all defendants;[1] (5) Conspiracy to eliminate competition by unfair means in violation of *15 U.S.C. §1* against all defendants; (6) Theft of trade secrets in violation of *C.R.S. § 7-74-101* against Beatport, Beta, and Mr. Roulier; (7) Violation of the Racketeer Influenced and Corrupt Organization Act (RICO), *28 U.S.C. §1962* against all defendants; (8) Intentional interference with prospective business expectances **[**7]** against Mr. Roulier[2]; and (9) Civil conspiracy against all defendants.

Beatport filed a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* on January 12, 2011 [#15]. Plaintiffs responded [#38] and Beatport replied [#57]. Defendants Bradley Roulier and BMJ&J (Beta) also filed a motion to dismiss pursuant to *Fed. R. Civ. P. 8(a)*, *9(b)*, *12(b)(1)*, and *12 (b)(6)* on February 7, 2011 [#32]. Plaintiffs responded [#42] and Beta replied [#59].

Standard

Motion to Dismiss: 12(b)(6)

When reviewing a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* the Court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007)* (citing *David v. City & County of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996)*. However, a complaint must set forth a plausible, not merely a possible, claim. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Atwell v. Gabow, 311 Fed. Appx. 122, 125 (10th Cir. 2009)*. **[**8]** "To survive a motion to dismiss, a complaint must contain factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*).

Motion to Dismiss: 9(b)

Allegations of fraud are subject to a heightened pleading standard. The requirements of *Rule 9(b)* dictate that "[i]n alleging a fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*. The complaint must "set forth the time, place and contents of the false representation, the identity of the party making the statement and the consequences thereof." *Koch v. Koch Industries, Inc., 203 F.3d 1202, 1236 (10th Cir. 2000)* (citing *Lawrence Nat'l Bank v. Edmonds, 924 F.2d 176, 180 (10th Cir. 1991))*.

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[1] This claim originally included defendant AM Only, Inc. AM Only was dismissed on September 27, 2011. [# 102].

[2] This claim was originally asserted against Mr. Roulier and AM Only.

Conclusions

Defendants seek the dismissal of all claims asserted against them. Prior to the evaluation of plaintiffs' antitrust claims the Court must first evaluate plaintiffs' definition of the relevant markets:

Relevant Markets

In order to state a cause of action under either *Section 1* **[**9]** or *Section 2* of the Sherman Act, the plaintiff must adequately define the relevant market. Defining the relevant market for purposes of antitrust analysis requires the plaintiffs to define both a product market and a geographic market. Plaintiffs allege two separate relevant markets in their Complaint. The first such market is "the market for digital downloads of DRM-free, high fidelity Electronic Dance Music suitable for playing on high performance sound systems. **[*1065]** Complaint ¶35. In plaintiffs' estimation, this is a distinct submarket of the broader market for the sale of Electronic Dance Music. *Id*. at ¶37. Due to the costs associated with re-mixing and finding sufficient audio fidelity, plaintiffs allege that there are no reasonably substitutable products. The substitution of other musical genres or formats would be insufficient and unreasonably costly. *Id*. at ¶36. Because digital downloads are available anywhere an internet connection exists, plaintiffs define their relevant geographic market as global.

The second market pertinent to plaintiffs' claims is "the market for live performance by A-list DJs playing Electronic Dance Music. Complaint ¶38. "A-list" DJs are allegedly a distinct **[**10]** sub-market in the broader market for live performances by DJs. *Id*. at ¶37. Plaintiffs argue that this sub-market is recognized by both consumers and industry insiders and is "characterized by unique pricing and sensitivity to price changes." *Id*. This product, according to plaintiffs, also has no reasonable substitute. Plaintiffs define the geographic market as the "Denver metro area" because of the "low cross-elasticity of demand by consumers inside the Denver metro area with providers outside of it." *Id*. at ¶38.

Defendants argue that all of plaintiffs' antitrust claims must fail because they have failed properly to define the relevant market. In particular, Beta and Mr. Roulier argue that plaintiffs do not address reasonable interchangeability or cross-elasticity of demand in the proposed relevant markets. Defendants also argue that plaintiffs' definitions of the submarkets are insufficient.

The plaintiff must define the relevant market by making specific reference to "the reasonable interchangeability of use or the cross-elasticity of demand between the product and substitutes for it." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. A plaintiff's failure sufficiently to **[**11]** define the relevant market is cause for dismissal of the claim. *Campfield v. State Farm Mutual Automobile Ins., 532 F.3d 1111, 1118 (10th Cir. 2008)*. "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand...even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Ibid*. (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436-37 (3d Cir. 1997))*.

Plaintiffs argue that they have adequately defined the market in their complaint. The Court agrees. In plaintiff's market for "digital downloads of DRM-free, high fidelity Electronic Dance Music" plaintiffs have alleged that there are "no reasonable substitutes." Complaint ¶36. Plaintiffs argue that there is no substitute because of unique characteristics in the industry, such as the need to re-mix the music, and the demand for high quality sound. *Ibid*. Although plaintiffs do not also use the phrase "cross-elasticity of demand," that is not fatal to their market definition. The basic test for product market definition is "reasonable **[**12]** interchangeability." *Telecor Communications, Inc. v. Southwestern Bell, 305 F.3d 1124, 1131 (10th Cir. 2002)*. "Interchangeability may be measured by, and is substantially synonymous with, cross elasticity." *Ibid*. (citing *Brown Shoe Co, 370 U.S. at 325*). Plaintiffs have alleged a product market definition that addresses the reasonable interchangeability of other products.

The second product market alleged by plaintiffs is the market for "live performances by A-list DJs playing Electronic **[*1066]** Dance Music." Complaint ¶38. Here, plaintiffs address interchangeability by stating that there are "no reasonably substitutable services...because substitution of non-live performances or live performances of other genres of music would impose on consumers a substantial and unreasonable cost." *Id*. at ¶39. According to plaintiffs, A-list DJs are a distinct sub-market because A-list DJs are able to draw larger crowds to venues, and consumer are willing to pay more for the tickets based on the DJ's talent and name recognition. *Ibid*. The plaintiffs do not, as Beatport would like, list or describe other reasonable substitutes. However, that is excusable given plaintiffs' theory that there are no reasonable **[**13]** substitutes for these services. Plaintiffs have addressed reasonable interchangeability with regard to their product market. Plaintiffs also address potential cross-elasticity of demand in the geographic market: "there is extremely low cross-elasticity of demand by consumers inside the Denver metro area with providers outside of it." *Id*. at ¶38. In other words, consumers in the Denver Metro area are unlikely to travel outside of that market to attend a show.

The Court finds that plaintiffs' pleadings amount to "more than a cursory mention of a relevant product and geographic market." *Total Renal Care, Inc. v. Western Nephrology and Metabolic Bone Disease, P.C., 2009 U.S. Dist. LEXIS 80821, 2009 WL 2596493 at *7 (D. Colo. Aug. 21, 2009)*. This Court agrees with the sentiment of the Second Circuit, as well as other circuits, that "[b]ecause market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)*.

Therefore, the Court will not dismiss plaintiffs' antitrust claims for failure to sufficiently define the relevant market. Each claim, and defendants' arguments in favor of dismissal, **[**14]** will be addressed below.

(1) UNLAWFUL TYING: CLAIM 1

Plaintiffs' first claim for relief alleges that defendants Beatport, Beta, and Mr. Roulier violated *Section 1* of the Sherman Act through an unlawful tying arrangement. Beatport, Beta, and Mr. Roulier assert three arguments that support their contention that plaintiffs fail to state a claim for unlawful tying. First, defendants argue that plaintiffs fail to plead that Beatport had sufficient economic power in the tying product market. Second, plaintiffs fail to plead that the alleged tying arrangement had a substantially adverse effect on competition in the tied market. Third, plaintiffs lack standing.[3]

Failure to Plead Sufficient Market Power & Failure to Plead Adverse Effect on Competition

The Court will address defendant's first two arguments together. To support a claim for illegal tying, the plaintiff must set forth sufficient facts to allege (1) two separate products; (2) a sale or agreement to sell one product or service conditioned on the purchase of another; (3) seller has sufficient power in the tying product's market to enable it **[**15]** to restrain trade in the market for the tied product; and (4) a substantial volume of commerce affected in the tied product market. *Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 498-99, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)*. In their motion to dismiss, defendants initially argued that plaintiffs insufficiently alleged facts to prove any element. However, in their reply defendants **[*1067]** have narrowed their objections to those facts alleged in the third element: sufficient power in the tying product's market [#57 at 2].

Plaintiffs define the two separate products as "Electronic Music downloads and live performance by DJs." Complaint ¶70. Plaintiffs have alleged sufficient facts such that the Court finds that it is plausible that these are in fact distinct products. Plaintiffs have also alleged facts, and described a few specific instances, in which the defendants conditioned sales, promotion, and availability on Beatport with an agreement to perform only at Beta. *See* Complaint, ¶¶52-53, 43. Plaintiffs have also alleged facts that could plausibly demonstrate that a substantial amount of interstate commerce in DJ performance is affected. *See id*. ¶¶ 17, 52-53, 62-63, 67, 76. Plaintiffs has adequately alleged the first, **[**16]** second and fourth elements.

[3] Beta and Mr. Roulier adopt Beatport's standing argument in their Motion to Dismiss [#32 at 7].

Defendants maintain that even if these other elements are met, plaintiffs have not sufficiently pled the third element. Defendants argue that plaintiffs have not indicated what share of the alleged product market they possess. Plaintiffs are correct that the test for a tying claim does not require that plaintiffs demonstrate that defendants have "monopoly" power in the tying market. Courts use two tests to analyze tying claims: the *per se* rule and the "rule of reason." *See* *Jefferson Parish Hospital Dist. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. In a per se analysis the Court focuses on the seller's share of the tying market. *Nobody in Particular Presents, Inc. v. Clear Channel Communications, 311 F.Supp.2d 1048 (D. Colo. 2004)* (citing *Jefferson Parish, 466 U.S. at 17*). "When a seller's share of the tying market is high, or when the seller offers a unique product that competitors are not able to offer, the Supreme Court has held that the likelihood that market power is being used to restrain competition in a separate market is sufficient to make a *per se* condemnation appropriate." *Id*. Under a rule of reason analysis the Court must first make a determination "of whether **[**17]** the challenged restraint has a substantially adverse effect on competition....The inquiry then shifts to an evaluation of whether the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts." *Law v. National Collegiate Athletic Association, 134 F.3d 1010, 1016 (10th Cir. 1998)* (internal citations omitted).

To survive defendants' motion to dismiss, plaintiff must plead sufficient facts to demonstrate that the defendants had sufficient power to force or coerce the tying of the products. Here, plaintiffs allege that defendants have sufficient market power in the market for Electronic Dance Music downloads. The Court finds that plaintiffs have pled sufficient facts to demonstrate that their claim is plausible. *See* Complaint ¶¶30-31, 42, 71-72. Plaintiffs have also pled sufficient facts to demonstrate that the restraint has had a substantially adverse effect on competition for live performances of A-List DJs. *See id*. ¶¶ 52-53, 55, 63, 76, 99.

Defendants Beta and Mr. Roulier advance a related argument that SOCO's Section 1 claims must fail because they have failed to plead substantial foreclosure of the market.[4] However, under the rule of reason **[**18]** standard a plaintiff need only plead facts of anticompetitive conduct if the parties compete in the same market. *See* *Nobody in Particular Presents Inc. v. **[*1068]** Clear Channel Communications, 311 F.Supp.2d 1048, 1097-98 (D. Colo. 2004)*. Here, plaintiffs have pled facts that demonstrate the required alleged anticompetitive effect within the same market. Although more facts and evidence will be necessary to prove their tying claims, plaintiffs currently have pleaded sufficient facts in their complaint to survive a motion to dismiss.

Standing

Defendants next argue that plaintiffs lack standing to bring a tying clam under *§1* of the Sherman Act because they did not purchase on-line music downloads or live performances by A-list DJs playing Electronic Dance Music. Defendants allege that while Vinyl and The Church may have standing, plaintiffs have failed to allege sufficient facts to demonstrate an injury against the other SOCO clubs. Further, Defendants maintain that Mr. Christou, as an individual, does not have standing to bring an antitrust claim on behalf of a corporation.

Antitrust **[**19]** standing requires plaintiff to show "(1) an antitrust injury; and (2) a direct causal connection between the injury and a defendant's violation or the ***antitrust law***." *Tal v. Hogan, 453 F.3d 1244, 1253 (10th Cir. 2006)* (citing *Ashley Creek Phosphate Co. v. Chevron USA, Inc., 315 F.3d 1245, 1254 (10th Cir. 2003))*. Under Tenth Circuit law, two categories of parties have standing to challenge an illegal tying arrangement: "the purchasers who are forced to buy the tied product to obtain the tying product...and the competitor who is restrained from entering the market for the tied product." *Sports Racing Services, Inc. v. Sports Car Club of America, 131 F.3d 874, 887 (10th Cir. 1997)*.

(a) SOCO Nightclubs[5]

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[4] Beta and Mr. Roulier's argument advocates for the dismissal of all plaintiffs' section 1 claims, both claims 1 and 5.

Plaintiffs assert that they possess standing to bring an antitrust claim by virtue of their status as competitors who are foreclosed from the market. First, plaintiffs must establish a cognizable antitrust injury that flows from **[**20]** defendants' conduct. Here, plaintiffs have alleged that the market for live performance of A-list DJs, in which the SOCO clubs participate, is restrained by defendants' activities. Plaintiffs Vinyl and The Church allege antitrust injuries of lost past and future profits, decreased ability to compete, and decreased value of real property [#1] ¶122). All of the SOCO clubs allege, in general, that the defendants' unlawful practices have "prevented SOCO from competing in the market for live Electronic Dance Music...and foreclosed to SOCO an amount of business and profit substantial enough as to not be merely *de minimis." Id*. at ¶77. The SOCO nightclubs further allege that they have been further injured in its loss of actual and potential customers and profits, reputation, and ability to form business partnerships and book live performances.

Under the second prong, plaintiffs must allege a direct causal connection between these injuries and the defendants' conduct. SOCO alleges that defendants' tying practices foreclosed significant portions of the market, causing the aforementioned injuries. *Id*. at ¶76. SOCO further alleges that revenue from patrons' visiting all of SOCO's clubs has decreased **[**21]** since SOCO's ability to book A-list DJs has been impaired by defendants conduct. *Id*. at ¶78. SOCO also alleges that defendants' conduct was and is specifically aimed at excluding **[*1069]** the SOCO clubs from the market. *Id*. at ¶48.

To bring a claim for unlawful tying the plaintiffs must be a member of one of the two categories described in Tenth Circuit law. Plaintiffs allege that they fit in the second category of allowed plaintiffs: a "competitor who is restrained from entering the market for the tied product." *Sports Racing, 131 F.3d at 887*. As has been discussed above, SOCO has repeatedly alleged that they have been foreclosed from the market for live performance of A-list DJs.

As to defendants' argument that plaintiffs have not demonstrated that Beatport has sufficient economic interest, the Court finds that plaintiffs have alleged that Beatport, through common ownership and through the "Beatport Lounge," has an economic interest in allegedly forcing DJs to perform only at Beta. Therefore, given all of the facts described above, the Court finds that all of the SOCO clubs have standing to bring an antitrust claim for unlawful tying. To survive further, SOCO will need to present additional **[**22]** evidence and facts to prove harm to SOCO nightclubs other than Vinyl and The Church. However, at this point the Court finds there are sufficient facts to support antitrust standing.

(b) Mr. Christou

In their reply, defendants argue that Mr. Christou does not have standing to pursue antitrust claims in his individual capacity. *Section 4* of the Clayton Act authorizes private individuals to bring antitrust suits. An individual who is "injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States..." *15 U.S.C. §15(a)*. By virtue of the "by reason of" language, courts have imposed a standing requirement requiring legal causation. *See Western Systems, Inc. v. Dynatech Corp., 610 F. Supp. 585, 588 (D. Colo. 1985)*. The Court must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Assoc. General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*.

"Standing cannot be established without an antitrust injury, but the existence of an antitrust injury does not automatically confer standing." *City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 652 n. 14 (10th Cir. 1992)*. **[**23]** An 'antitrust injury' is an injury of the type "antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id*. Although defendants are correct that it is "settled law that shareholders and employees do not have standing to sue for antitrust violations that injure a corporation," the Court interprets plaintiffs' argument to be that Mr. Christou himself has suffered injury to his "business or property,"

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[5] Defendants argue that the complaint lacks specific allegations with regard to Molon Lave, Inc ("2am"), City Hall, L.L.C. ("City Hall"), 1037 Broadway, Inc. ("Bar Standard"), 776 Lincoln St., Inc. ("Funky Buddha Lounge"), and 1055 Broadway, Inc. ("The Living Room").

separate from the injury sustained by the named corporations. The question now is whether Mr. Christou has stated sufficient facts to demonstrate that he was directly injured by anti-competitive behavior and thus can maintain standing.

In their complaint, plaintiffs argue that "the reputation of SOCO's clubs and Mr. Christou have been diminished, resulting in inability to form business partnerships and greatly increased costs of booking live performances, including but not limited to A-List DJs." Complaint ¶78. However, Mr. Christou cannot demonstrate sufficient causation to satisfy the Clayton Act by damage to his reputation: "injury to his reputation, dignity and emotional damages are not the type of injuries redressable by the antitrust **[**24]** laws..." *Tal v. Hogan, 453 F.3d 1244, 1254 (10th Cir. 2006)*.

[*1070] It is further alleged that the defendant's actions have negatively affected the real property value of the SOCO component properties (#1, ¶78). Mr. Christou can assert personal injury based on the loss of property value of his SOCO properties. To evaluate whether this injury is sufficient, the Court looks to factors enumerated by the Supreme Court: "(1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the defendant's intent or motivation; (3) the nature of the plaintiff's injury — i.e. whether it is one intended to be redressed by the antitrust laws; (4) the directness or indirectness of the connection between the plaintiff's injury and the market restraint resulting from the alleged antitrust violation; (5) the speculative nature of the damages sought; and (6) the risk of duplicative recoveries or complex damages apportionment." *Sharp v. United Airlines, Inc., 967 F.2d 404, 406-07 (10th Cir. 1992)* (citing *Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1987))*. The Tenth Circuit has formulated this inquiry into a two-part test: (1) whether there was an antitrust injury, and (2) whether the **[**25]** antitrust injury resulted directly from the antitrust violation. *See* *id at 407, n.2*.

Applying the above factors, the Court finds that Mr. Christou has not alleged sufficient facts to demonstrate that he has suffered an antitrust injury that is the direct result of an antitrust violation. Plaintiffs offer no facts that show that Mr. Christou is the owner of the properties affected, how the valuations of the properties were affected, or how the defendants' actions caused or at least contributed to the devaluation of real property. While plaintiffs state that Mr. Christou owns the named corporations, they give no indication as to the ownership of the physical property. There are simply not enough facts here to find that Mr. Christou has standing. Therefore, defendant's Motion to Dismiss is GRANTED as to plaintiff Regas Christou.

(2) MONOPOLY & ATTEMPTED MONOPOLY: CLAIMS 2 & 3

Defendants Beta and Mr. Roulier argue that plaintiffs' second claim for monopoly and third claim for attempted monopoly should be dismissed, because plaintiffs have failed to define the relevant market and have failed to make factual allegations that support their monopolization claims.[6] As discussed above, the Court **[**26]** finds that plaintiffs have sufficiently defined the relevant markets to survive a motion to dismiss. Therefore, the Court will address Beta's and Mr. Roulier's remaining argument.

Beta and Mr. Roulier argue that plaintiffs have failed to plead a claim for monopoly because: (1) they are incapable of monopoly or attempted monopoly, because they are not a supplier in the market for A-list DJs; (2) Plaintiffs fail to allege specific barriers to entry or durability; and (3) Plaintiffs have not alleged a specific intent to monopolize.

First, the plaintiffs are not arguing that defendants maintain a monopoly in the market for A-list DJs. Rather, their allegation is that defendants' have created a monopoly in the market for A-list DJ *performances*. Both plaintiffs and defendants are alleged to be members of that market. In their complaint plaintiffs argue that Mr. Roulier opened a competing nightclub, Complaint ¶32, and Mr. Roulier pressured DJs to boycott performances at SOCO's clubs. *Id*. at ¶¶44, 48, 60, 67. Defendants contend that plaintiffs' monopoly claim **[*1071]** must **[**27]** fail, because defendants are purchasers not suppliers of A-list DJs. This misconstrues plaintiffs' argument: plaintiffs allege monopolization in the supply of performances to the public, not A-list DJs themselves.

[6] Plaintiffs do not assert a claim for violation of Sherman Act *§2*'s prohibition of unlawful monopolies against defendant Beatport.

Defendants next argue that plaintiffs' monopolization claim must fail because plaintiffs fail "to specifically allege barriers or durability, and SOCO has not distinguished Beta's relative growth as arising from anything other than Beta's own efforts and good timing." [#32 at 7-8]. I do not agree that plaintiffs have failed to allege these factors. Plaintiffs describe the high entry barriers associated with the live performance market: "the industry expertise needed to manage the required venue; the ability to develop a reputation in the industry as being a desirable and popular venue; the legal and regulatory costs of acquiring events permits and liquor licenses; and the costs of acquiring and maintaining venues for the performance of live music of sufficient size and quality to generate enough revenue to pay A-list DJs' fee." Complaint ¶103. As to durability, plaintiffs state that defendants' activities are ongoing. *See id*. at ¶97. As to defendants' argument that the plaintiffs **[**28]** have not distinguished their growth from anything other than "Beta's own efforts and good timing," defendants need only glance through the complaint to see that plaintiffs accuse Beta of all sorts of nefarious conduct aimed at squeezing plaintiffs out of the market and gaining a monopoly. Whether those allegations are true still must be determined, but plaintiffs' allegations are contained in the Complaint.

Beta and Mr. Roulier also argue that plaintiffs' attempted monopolization claim fails because plaintiffs have not alleged the required elements. In order to make out a claim for attempted monopoly, plaintiffs must allege "(1) relevant market...; (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt." *TV Comm'ns Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992)*.

As discussed above, the Court finds that plaintiffs have adequately pled the relevant market. Plaintiffs have adequately alleged the third and fourth elements as well. Plaintiffs have pled a specific intent to monopolize by stating that "Beta and Mr. Roulier engaged in the predatory and **[**29]** anticompetitive conduct described above, including illegal tying, exclusive dealing, reciprocal dealing, monopoly leveraging, market allocation, group boycott and the concerted combination of these actions with the specific intent to destroy competition and monopolize the relevant market." Complaint ¶106. These alleged activities demonstrate a specific intent to monopolize, as well as actions in furtherance of an attempted monopoly. Plaintiffs elaborate further on these actions in paragraphs 83 through 97 in their complaint.

In order to successfully state a claim for attempted monopoly plaintiffs must satisfy the second element: dangerous probability of success on the merits. In support of this element plaintiffs point to the following statement in their complaint: "Beta and Mr. Roulier currently control significantly more than half the market for live performance by A-list DJs in the Denver metro area, and have demonstrated dangerous probability of achieving monopoly power in the relevant market." Complaint, Doc. #1, ¶ 107. Beta and Mr. Roulier argue that this statement is insufficient and not specific enough to adequately plead the required element. However, this statement taken together **[**30]** with the other allegations in the Complaint **[*1072]** demonstrates allegations of rapid growth and dominance in the relevant market. *See* Complaint ¶¶34, 50-53, 67-68. The Court finds that plaintiffs have adequately stated a claim for attempted monopoly.

(3) ANTITRUST CONSPIRACY: CLAIMS 4 & 5

In their fourth claim for relief, plaintiffs assert an action for Conspiracy to Monopolize in violation of *Section 2* of the Sherman Act. Claim five asserts an action for Conspiracy to eliminate conspiracy by unfair means in violation of *Section 1* of the Sherman Act. Beatport argues that both of these claims fail because (1) plaintiffs do not support their allegation of a specific intent to monopolize; (2) plaintiffs have not demonstrated that the alleged violation cannot be explained by lawful free market behavior, and (3) related entities and individuals cannot conspire with each other to violate antitrust laws.[7] Beta and Mr. Roulier contend that the conspiracy claims must fail because: (1) defendants are not competitors at the same market level; (2) a corporation cannot conspire with its own employees; and (3) plaintiff cannot demonstrate that defendants had a specific intent to monopolize.

[7] Defendants Beta **[**31]** and Mr. Roulier adopt Beatport's argument on this point in their Motion to Dismiss [#32, p. 9].

Conspiracy to Monopolize: Claim 4

To make out a conspiracy to monopolize claim the plaintiff must plead facts which allege "(1) the existence of a combination or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize." *Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1028 (10th Cir. 2002)*.

Plaintiffs have alleged sufficient facts to demonstrate the existence of a conspiracy to monopolize. Specifically, plaintiffs allege that Beatport and Beta are closely tied through common ownership, complaint ¶43, that Beatport and Beta cross-promote, *id*. at ¶44, and Beatport and Beta's financial interests are aligned. *Ibid*. Further, plaintiffs' complaint alleges that defendants communicated with agents and A-list DJs and coerced them to play only at Beta and further the exclusion of SOCO clubs from the market. *Id*. at ¶48-49. Plaintiffs allege that "Defendants agreed to tie access to and promotion by Beatport's electronic marketplace to the condition that DJs boycott **[**32]** SOCO's clubs and perform exclusively at Beta." *Id*. at ¶110. These facts demonstrate evidence of a common scheme.

Plaintiff likewise alleges overt acts committed in furtherance of the conspiracy, i.e., that defendants contacted DJs and agents in order to obtain their monopoly. *Id*. ¶¶48, 49.

The third element requires that plaintiffs demonstrate an appreciable effect on interstate commerce. Plaintiffs allege a substantial effect on the market for A-list DJs. *See* Complaint ¶116. Although plaintiffs focus on the performance market in the Denver metro area, the reach of Beatport's website is international, and the DJs themselves come from areas beyond the Denver metro area. Therefore, plaintiffs have adequately pled the third element.

Finally, plaintiffs must demonstrate that the defendants had the specific intent to monopolize. In their motions to dismiss, Beatport, Beta, and Mr. Roulier argue that plaintiffs have failed adequately to plead this factor. However, the Court finds that the above referenced facts, if taken as true, demonstrate that defendants had a specific intent to conspire to form a monopoly. **[*1073]** Thus, plaintiffs have adequately stated a claim for conspiracy to monopolize.

Conspiracy **[**33]** to Eliminate Competition by Unfair Means: Claim 5

A claim for conspiracy to eliminate competition by unfair means requires the plaintiff to allege facts that show that the "defendant entered a ... conspiracy that unreasonably restrains trade in the relevant market." *TV Communications Network, Inc. v. Turner Network, 964 F.2d 1022, 1027 (10th Cir. 1992)*. The Court must then determine whether the conspiracy "(1) constitutes a per se violation of the statute or (2) its purpose or effect is to create an unreasonable restraint of trade." *Ibid*.

Defendants' arguments can be summarized as follows: (1) defendants cannot conspire with one another, because they are either employees or closely related entities; (2) plaintiffs have not pled sufficient facts under a per se analysis; and (3) plaintiffs have not demonstrated that the defendants' behavior cannot be explained by a lawful purpose.

Defendants argue that "[a] corporation is not capable of conspiring with itself." *Lantec, 306 F.3d at 1028* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769-72, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. Beatport, as well as Beta and Mr. Roulier, argue that related entities cannot, by definition, enter into a conspiracy. Nor **[**34]** can a corporation conspire with its own employees.

Copperweld holds that "wholly owned subsidiar[ies]...are incapable of conspiring with each other for purposes of *§1* of the Sherman Act." *467 U.S. at 777*. *Copperweld* does not hold, as defendants state, that "related entities" cannot conspire with each other. Here, Beatport is not a wholly owned subsidiary of Beta. This Court does not find that the actions of Beta and Beatport "must be viewed as that of a single enterprise for purposes of *§1* of the Sherman Act." *Id. at 771*. Although some common ownership exists between Beta and Beatport, it is not sufficient in this case to warrant dismissal of plaintiffs' antitrust conspiracy claims under *Copperweld*.

Defendants also argue that an entity cannot conspire with its own employees, i.e., Mr. Roulier cannot, by definition, conspire with Beta or Beatport. However, while "a corporation cannot conspire with itself for antitrust purpose...[the Tenth Circuit] recognizes a limited exception to the intra-corporate doctrine where the employees of a corporation have an independent personal stake and thus stand to benefit from conspiring with the corporation to restrain trade." *Bell v. Fur Breeders Agricultural Co-op., 348 F.3d 1224, 1233 (10th Cir. 2003)* **[**35]** (internal citations omitted). As part owner of Beatport and owner of Beta, Mr. Roulier has an "independent personal stake" in restraint of trade of Beta's competitors. This situation sits firmly within the "independent personal stake" exception.

Second, defendants attack plaintiffs' fifth claim because they have not alleged sufficient facts under a per se analysis. In their response, plaintiffs clarify that they are proceeding under a rule of reason analysis. *See Mid-West Underground Storage v. Porter, 717 F.2d 493, 497 (10th Cir. 1983)* (holding that "conspiracies of the type alleged herein should be assessed under the rule of reason."). It is unnecessary for plaintiffs to meet the per se pleading standards.

Beatport also argues that "the complaint contains no facts to suggest that any of the impacts about which plaintiffs complain cannot be explained by lawful behavior." [#15 at 10]. Defendants argue that *Twombly* requires that plaintiffs demonstrate that the alleged antitrust violation **[*1074]** cannot be explained by lawful free market behavior. Instead, per defendants' argument, Beatport's, Beta's, and Mr. Roulier's actions can "just as easily be explained by the fact that in 2008 Beta was **[**36]** a new club that generated intense interest in the marketplace." *Id*. at 10-11. *Twombly* holds that "proof of a §1 conspiracy must include evidence tending to exclude the possibility of independent action." *550 U.S. at 554*. If taken as true, the above discussed facts support viable arguments that tend to exclude the possibility that defendants were motivated by lawful independent purposes. Plaintiffs need not disprove all possible lawful explanations at this stage. Thus, plaintiffs have adequately stated a claim for conspiracy to eliminate competition by unfair means.

Therefore, defendants' motions to dismiss are DENIED as to plaintiffs' claims four and five.

(4) THEFT OF TRADE SECRETS: CLAIM 6

In plaintiffs' sixth claim for relief plaintiffs contend that defendants misappropriated their trade secrets, including login information for profiles on MySpace, lists of MySpace "friends," confidential lists of personal cell phone numbers and email addresses for DJs, agents, and promoters, and customer lists. Beatport moves to dismiss this claim because plaintiffs have (1) failed to allege sufficient allegations to demonstrate that plaintiffs' lists are trade secrets, specifically, that plaintiffs' **[**37]** MySpace profile and "friends" list do not qualify as trade secrets; and (2) plaintiffs do not allege that the misappropriation was known by Beatport.[8]

"Under Colorado law, to prove theft or misappropriation of a trade secret, plaintiff must show: (i) that he or she possessed a valid trade secret, (ii) that the trade secret was disclosed or used without consent, and, (iii) that the defendant knew, or should have known, that the trade secret was acquired by improper means." *Gates Rubber Co. v. Bando Chemical Indus. Ltd., 9 F.3d 823, 847 (10th Cir. 1993)*.

Trade Secrets

A "trade secret" is the "whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value." *C.R.S. §7-74-102(4)*. Additionally, the owner of the trade secret must have "taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access **[**38]** thereto for limited purposes." *Ibid*. Apart from the MySpace profiles and "friends," the other asserted trade secrets allegedly stolen by

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[8] Defendants Beta and Bradley Roulier do not challenge claim 6 in their Motion to Dismiss [#32].

defendants qualify as trade secrets under Colorado law because they are "listings of names, addresses, or telephone numbers, or other information relating to any business...which is secret and of value." *Ibid*. Plaintiffs claim that these lists and online profiles are secured and safeguarded and access is restricted to specific personnel. Complaint ¶129.

Beatport argue that plaintiffs' MySpace profile cannot constitute a trade secret. Plaintiffs argue that this is an issue of first impression in the circuit. The Court has not found relevant case law on point in this or any circuit. However, the Tenth Circuit has outlined several factors that courts should consider in making trade **[*1075]** secret determinations: "(1) whether proper and reasonable steps were taken by the owner to protect the secrecy of the information; (2) whether access to the information was restricted; (3) whether employees knew customers' names from general experience; (4) whether customers commonly dealt with more than one supplier; (5) whether customer information could be readily obtained **[**39]** from public directories; (6) whether customer information is readily ascertainable from sources outside the owner's business; (7) whether the owner of the customer list expended great cost and effort over a considerable period of time to develop the files; and (8) whether it would be difficult for a competitor to duplicate the information." *Hertz v. Luzenac Group, 576 F.3d 1103, 1115 (10th Cir. 2009)* (citing *Colorado Supply Co. v. Stewart, 797 P.2d 1303, 1306-07 (Colo. App. 1990))*.

Beatport contends that information such as a list of MySpace "friends" is broadcast to the public via the Internet and thus cannot be considered a trade secret. Plaintiffs, however, maintain that social networking profiles are customer lists according to the factors laid out in *Colorado Supply* and *Hertz*. First, plaintiffs took reasonable steps to protect the secrecy of the information. Plaintiffs state that they "secured and safeguarded [the profiles] to prevent access to or use by anyone other than those limited personnel requiring access." Complaint ¶129. Plaintiffs secured the profiles through web profile login and passwords. *Id*. at ¶131.

The second factor is similar to the first, asking the Court to inquire **[**40]** whether access to the information was restricted. Plaintiffs have pled that the login and password information was restricted to personnel who required access in order to promote SOCO clubs. *Id*. at ¶129, 131.

The third factor asks whether employees knew the customers' names from general experience. This factor is not specifically addressed in the complaint, but the nature of the alleged trade secrets at issue militate in favor of trade secret status. Social networking sites enable companies, such as the SOCO clubs, to acquire hundreds and even thousands of "friends." These "friends" are more than simple lists of names of potential customers. "Friending" a business or individual grants that business or individual access to some of one's personal information, information about his or her interests and preferences, and perhaps most importantly for a business, contact information and a built-in means of contact. Even assuming that employees generally knew the names of all of the "friends" on SOCO's MySpace pages, it is highly unlikely, if not impossible, that employees knew the contact information and preferences of all those on the "friends" list from general experience.

The fourth factor **[**41]** addresses whether customers dealt with more than one supplier. MySpace members or members of other social networking sites may "friend" as many businesses or individuals as they wish. It is possible if not probable that plaintiffs' MySpace "friends" were friends with other Denver clubs. Nothing prevents Beatport from "friending" an identical list of people.

However, the fifth and sixth factors highlight the trade secret-like use of the MySpace profile and friends lists. Both factors in effect direct the Court to look at whether the alleged misappropriator could have obtained the same information from a public directory or another source outside of the plaintiffs' business. These factors appear to address the crux of the parties' disagreements. Beatport frames the list as a mere list of people's names. In Beatport's estimation this list is open to the public, and anyone could easily see and write down who SOCO's "friends" **[*1076]** are. However, plaintiffs contend that this list is actually akin to a database of contact information. The trade secret is not merely the list of names but their email and contact information as well as the ability to notify them and promote directly to them via their **[**42]** MySpace accounts. Plaintiffs argue that "the critical information consisting of these friends' personal contact information and their permission to be contacted cannot be compiled from publicly available sources." Docket #38, p. 21, ¶5. The names themselves, readily available to the public, are not the important factor. The ancillary information connected to those names cannot be obtained from public directories and is not readily ascertainable from outside sources, and thus this militates in favor of trade secret classification.

The seventh factor asks whether the owner of the customer list expended great cost and effort to develop it. Although plaintiffs' complaint does not plead a specific dollar amount, it appears that SOCO expended at least some cost and effort in developing the social networking aspect of its business. While employed by SOCO, Mr. Roulier was paid to "assist in building, maintaining and using these lists and web profiles." Complaint ¶128. This indicates that SOCO expended some amount of money, time, and resources into developing these lists for promotional purposes.

Finally, the Court must consider whether a competitor could easily duplicate the information. Given **[**43]** adequate time and effort, Mr. Roulier could most likely duplicate or nearly duplicate the list of MySpace friends that SOCO had developed. However, this would involve individually contacting thousands of individuals with friend requests, and it is by no means clear that all of those individuals would grant Beatport permission to contact them. While Mr. Roulier may be able to duplicate a near approximation of the list, duplicating it exactly and doing so within a time frame in which the list would still be useful to him is less likely.

Whether plaintiffs' MySpace friends list is a trade secret is question of fact. *See* *Hertz v. Luzenac Group, 576 F.3d 1103, 1106 (10th Cir. 2009)*. However, given the weight of the *Colorado Supply* factors, the Court finds that plaintiffs have alleged sufficient facts to maintain their trade secret claim at the motion to dismiss stage.

Misappropriation by Beatport

Beatport contends that plaintiffs have not pled sufficient facts to demonstrate that Beatport knew or should have known that the trade secrets were acquired by improper means. Beatport argues that a court in this district has already rejected the proposition that Beatport can be held strictly liable **[**44]** for any misappropriation on the part of its employee, Mr. Roulier. *Ciena Communications v. Nachazel, No. 09-cv-02845, 2010 U.S. Dist. LEXIS 90460, 2010 WL 3489915 (D. Colo. Aug. 31, 2010)*. Beatport further states that this lack of basis warrants an award of attorney's fees and costs pursuant to *C.R.S. §7-74-105*.

Ciena does not stand for the proposition for which Beatport is offering it. It does not hold that an employee's misappropriation can *never* be imputed to the employer, rather, it holds that "[a]n employer who is unaware of an employee's misappropriation of another's trade secret would not be liable...." *2010 U.S. Dist. LEXIS 90460, [WL] at *4*. In *Ciena*, the employee allegedly misappropriated the trade secrets prior to being hired by the new employer. The Court found that the plaintiff had pled insufficient facts to demonstrate that the employee's company had misappropriated any trade secrets or even known of the employee's alleged misappropriation. Plaintiffs here allege that Mr. Roulier misappropriated the trade secrets *while* he was a member and officer at Beatport. In *Ciena*, there were no allegations **[*1077]** that the employee actually used the stolen trade secrets, while here it is alleged that Mr. Roulier misappropriated and used plaintiffs' **[**45]** trade secrets. Mr. Roulier's relationship with the company is also not equivalent. He is a co-founder and officer of Beatport, not a mere employee.

Even if Beatport and Mr. Roulier's relationship were purely employee-employer, however, the language of the statute allows misappropriation to be attributed to the employing company if company "knew or should have known that the trade secret was acquired by improper means." *Gates Rubber Co. v. Bando Chemical Indus., 9 F.3d 823, 847 (10th Cir. 1993)*. Plaintiffs have alleged a public use of the misappropriated trade secrets, i.e., the promotion of Beatport via plaintiffs' MySpace page and friends. That is sufficient, at this stage of the case, to support the implied allegation that Beatport knew or should have known of improper acquisition.

The Court finds that plaintiffs' have sufficiently pled misappropriation of trade secrets as against Mr. Roulier, Beta, and Beatport. Defendants' Motions are DENIED as to claim 6. An award of attorney's fees is not warranted.

(5) RICO: CLAIM 7

Plaintiffs' seventh claim alleges violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962*, against all defendants. Plaintiffs **[**46]** allege that defendants created an informally organized enterprise to pursue the goal of leveraging Beatport's influence to exclude SOCO's clubs from the market for A-list DJs and prevent SOCO from competing with Beta. Beatport, Mr. Roulier, and Beta argue that (1) plaintiffs have pled insufficient facts pursuant to *Fed. R. Civ. P. 8* and *9(b)* to make out the adequate predicate acts and a general racketeering claim, and (2) plaintiffs have failed adequately to plead an "enterprise."

To make out a claim under RICO, plaintiffs must plead sufficient facts to make plausible (1) conduct; (2) of an enterprise; (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. The "threat of treble damages and injury to reputation which attend RICO actions justify requiring plaintiff to frame its pleadings in such a way that will give the defendant, and the trial court, clear notice of the factual basis of the predicate acts." *Cayman Exploration Corp. v. United Gas Pipe Line Company, 873 F.2d 1357, 1362 (10th Cir. 1989)*. The requirement of *Fed. R. Civ. P. 9(b)* that fraud must be pled with particularity applies to RICO claims. *Ibid*. This means that the **[**47]** complaint "must set forth the time, place and contents of the false representations, the identity of the party making the false statements, and the consequences thereof." *Lawrence Nat'l Bank v. Edmonds, 924 F.2d 176, 180 (10th Cir. 1991)*.

Defendants argue that plaintiffs have not met the requirements of *Rule 9(b)* with regard to their predicate acts. The plaintiffs must plead facts that demonstrate that the alleged enterprise engaged in a "pattern of racketeering activity." Defendants must have engaged in racketeering activity as enumerated in *§1961(1)* of RICO. Racketeering activity is defined "to mean any of numerous acts 'chargeable' or 'indictable' under enumerated state and federal laws, including state-law murder, arson, and bribery statutes, federal mail and wire fraud statutes." *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 509, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. These acts are referred to as "predicate acts" and are listed in *§1961*. Where, as here, the alleged predicate offense **[*1078]** involves fraud, "to meet *Rule 9(b)*, a plaintiff must identify with specificity the circumstances constituting the fraud in the predicate acts." *Brooks v. Bank of Boulder, 891 F.Supp. 1469, 1477 (D. Colo. 1995)*. To show a pattern **[**48]** of racketeering activity, plaintiffs "must show the defendant committed racketeering predicate offenses which are related and amount to or pose a threat of continued criminal activity." *Id. at 1477-78* (citing *H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989))*.

Plaintiffs allege that defendants' scheme includes predicate acts of "wire fraud, mail fraud, bank fraud and theft.[9]" Complaint ¶141. Plaintiff's allegations of mail and bank fraud include little more than this bare assertion. Plaintiffs plead no specific facts that indicate mail fraud. *See Id*. at ¶¶137-154. Plaintiffs' allegations of fact regarding bank fraud amount to an allegation that customers who purchased tickets at Beta and the Beatport Lounge used money paid through various financial institutions. To state a claim for bank fraud plaintiffs must plead facts that allege that defendant: "knowingly executes, or attempts to execute, a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses..." *18 U.S.C. § 1344*. **[**49]** The fact that Beta and Beatport customers may have paid through various financial institutions is insufficient to allege bank fraud.

Plaintiffs also argue that they have alleged sufficient facts to make out the predicate act of wire fraud. To do so plaintiffs must demonstrate that the defendants "devised or [intended] to devise any scheme or artifice to defraud...by means of wire, radio, or television communications in interstate or foreign commerce...." *18 U.S.C. §1343*. In support of their wire fraud claim, plaintiffs allege that the "enterprise" communicated to patrons of live performance by A-list DJs in the Denver metro area via MySpace pages belonging to The Church and Vinyl [#1, ¶142]; fraudulent communications to SOCO via phone and email that represented their intention to "alternate" A-list DJs with SOCO's clubs, *id*. at ¶145; and the "Enterprise used interstate wire and mail communications to carry out its activities...." *Id*. at ¶150. These facts are insufficient to meet the specificity requirements of *Rule 9(b)*. Aside from the reference to MySpace communication, **[**50]** plaintiffs have not alleged any specific circumstances, details, or

[9] Theft of trade secrets is not a qualifying "racketeering activity" as defined by the statute. *See 18 U.S.C. § 1961(1)*.

dates that indicate how and when the alleged Enterprise carried out its wire fraud. These facts do not demonstrate a pattern of racketeering activity. *See* *18 U.S.C. §1961(5)*. Plaintiffs do not meet RICO's pleading requirements. *See* *Cayman Exploration Corp., 873 F.2d at 1362*. Therefore, the Court finds that plaintiffs have failed to state a claim with regard to their RICO claim. Defendants' Motion to Dismiss is GRANTED as to Claim 7.

(6) CIVIL CONSPIRACY: CLAIM 9

Beatport argues that plaintiffs' claim for civil conspiracy should be dismissed because they assert "nothing new and fail for the same reasons Plaintiffs' antitrust, RICO, and trade secret claims fail." [#15, p. 19]. To make out the elements of a civil conspiracy claim under Colorado law, plaintiff must show: (1) two **[*1079]** or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof. *Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486, 502 (Colo. 1989)*. That the basis of this claim serves as the factual bases for other claims is not grounds **[**51]** for dismissing plaintiffs' civil conspiracy claims. Plaintiffs' surviving claims may serve to fulfill the third element of "one or more unlawful overt acts."

Therefore, plaintiffs' civil conspiracy claim as asserted against all defendants[10] will not be dismissed. Defendants' Motion to Dismiss is DENIED as to Claim 9.

Defendant Beatport's Motion for Sanctions [#30].

On February 7, 2011 Beatport filed a Motion for Sanctions pursuant to *Fed. R. Civ. P. 11*. The subject of the motion was the Complaint. Beatport argued that not only are Mr. Vail's legal claims insufficient, but that "the nature of the insufficiency demonstrates that Mr. Vail either undertook no legal research whatsoever or ignored well-established law when drafting Plaintiffs' complaint." [#30 at 6]. Further, Beatport states "even a cursory review of an ***antitrust law*** treatise, a review of a few of the leading civil RICO cases, and basic research regarding who can properly be liable for the alleged theft of a trade secret would have revealed the lack of legal foundation of Plaintiffs' allegations." *Ibid*.

Rule 11, as **[**52]** applicable here, provides that when an attorney files a complaint, he "certifies that to the best of [his] knowledge, information and belief, formed after an inquiry reasonable under the circumstances," that (1) it was not filed for an improper purpose, (2) the claims are warranted by existing law or a nonfrivolous argument for extending the law, and (3) there is, or likely will be after a reasonable opportunity for further investigation or discovery, evidentiary support for the factual allegations. *Fed. R. Civ. P. 11(b)*. In other words, an attorney may not file a complaint for which there is not a good faith basis in fact and in law. *Subsection (c)* of the rule authorizes courts to impose appropriate sanctions for violation of the rule.

The motion seeking Rule 11 sanctions was filed before plaintiffs responded to the motion to dismiss. It was filed before plaintiff provided its Rule 26 disclosures. It was, of course, filed before Beatport had any idea how the Court might rule on the motion to dismiss.

The motion contends, first, that plaintiffs' claims were all "frivolous." This section of the motion amounts to a summary of the arguments presented in the motion to dismiss. As it turns **[**53]** out, the Court did not dismiss the antitrust claims other than those of Mr. Christou, notwithstanding Beatport's suggestion that even a cursory review of an antitrust treatise would compel otherwise. The Court did not dismiss the trade secret claim. The Court did dismiss the RICO claims, but the fact that claims do not survive a motion to dismiss does not mean that they were filed in bad faith or that they lacked a good faith basis. Disagreement and fact disputes are the stuff of the adversarial system. The Court does not find that the RICO claims were "frivolous" to the point that they warrant Rule 11 sanctions.

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[10] Defendants Beta and Mr. Roulier did not argue that this claim should be dismissed in their motion to dismiss.

Beatport also argues that plaintiff's counsel did not conduct an adequate pre-filing investigation of the factual bases for the claims. This argument is largely based on defendants' Google research of **[*1080]** the websites of certain DJs. This research purportedly showed either that a DJ did not list dates at Beta (for example, Tiesto, Armin van Buuren, Christopher Lawrence, Sharam, Bad Boy Bill, Deadman5 are shown as having no listings at Beta in 2010) or that a DJ did list dates at plaintiffs' clubs in those years (for example, DJ Rap is shown as having been at two of the plaintiffs' **[**54]** clubs in 2010). The implication is that defendants could not have coerced those DJ's to perform at Beta to the exclusion of plaintiffs' clubs. From that premise, defendants draw the conclusion that plaintiffs' counsel inadequately investigated the antitrust claims.

In fact, the premise itself was mistaken, as defendants appear to admit in their reply. [#47] at 2-3. Moreover, as indicated by the description of certain recorded conversations in plaintiffs' response brief at 4-5 — whether or not those recordings ultimately are admissible under the Rules of Evidence — defendants would have been wise to await the disclosures before assuming and asserting that plaintiffs' counsel had made such an inadequate investigation as to justify Rule 11 sanctions.

In short, having reviewed not only the Complaint and the briefing on the motion to dismiss but also the motion, response and reply concerning Rule 11 sanctions, the Court finds that defendants have not shown the lack of a good faith basis for the allegations of the Complaint that would warrant such sanctions. Rather, it appears to this Court that the motion reflects a lack of judgment. That is not to say, of course, that it is improper to seek **[**55]** sanctions for violations of *Rule 11*. It is to say that using *Rule 11* prematurely and carelessly is improper.

Rule 11(c)(2) provides that the Court may award the party who prevails on a Rule 11 motion its reasonable expenses including attorney's fees incurred with respect to the motion. The Court exercises its discretion in this instance not to impose sanctions. However, with respect to all future matters, the Court will consider sanctions if necessary and appropriate. Please always bear in mind that hard feelings between the parties do not alter counsel's obligation to conduct their zealous representation with the courtesy and civility due to one another.

Order

1. Defendant Beatport's Motion to Dismiss [#15], and defendants Bradley Roulier's and Beta's Motion to Dismiss [#32] are GRANTED in part and DENIED in part. The motions are GRANTED as to all antitrust claims asserted by Mr. Christou individually and as to plaintiffs' RICO claim. The motions are otherwise DENIED.
2. Defendant AM Only's Motion to Dismiss [#25] is DENIED as MOOT.[11]
3. Defendant Beatport's Motion for Sanctions [#30] is DENIED.

DATED this 14th **[**56]** day of March, 2012.

BY THE COURT:

/s/ R. Brooke Jackson

R. Brooke Jackson

United States District Judge

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[11] Defendant Am Only was dismissed with prejudice on September 27, 2011. [#101].

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Bridgeforth v. Schenectady County Cmty. College

United States District Court for the Northern District of New York

March 15, 2012, Decided; March 15, 2012, Filed

1:11-CV-0434 (LEK/DRH)

Reporter

2012 U.S. Dist. LEXIS 35087 *; 2012 WL 893485

OTIS MICHAEL BRIDGEFORTH, Plaintiff, -against- SCHENECTADY COUNTY COMMUNITY COLLEGE, et al., Defendants.

Core Terms

default, loans, due process claim, antitrust claim, anti trust law, allegations, conspiracy to violate, factual allegations, due process of law, motion to dismiss, further order, damages, attend

Counsel: **[*1]** Otis Michael Bridgeforth, Plaintiff, Pro se, Albany, NY.

For Schenectady County Community College Financial Aid Processing, Schenectady County Community College President, Schenectady County Community College Dean of Student Affairs, Schenectady County Community College Dean of Administration, Schenectady County Community College Director of Athletics William Gonzalez, Defendants: Jonathan M. Bernstein, Goldberg, Segalla Law Firm - Albany Office, Albany, NY.

Judges: Lawrence E. Kahn, U.S. District Judge.

Opinion by: Lawrence E. Kahn

Opinion

DECISION and ORDER

I. INTRODUCTION

On April 18, 2011, Plaintiff Otis Michael Bridgeforth ("Plaintiff") filed a Complaint asserting that Defendants: (1) violated his *Fourteenth Amendment* right to due process of law; and (2) engaged in a conspiracy to violate antitrust laws. See Dkt. No. 1 ("Complaint"). Presently before the Court is Defendants' Motion to dismiss Plaintiff's Complaint in its entirety. Dkt. No. 12 ("Motion").

II. BACKGROUND

Plaintiff alleges that he was accepted to attend Schenectady County Community College ("SCCC"). Compl. at 4. However, because he was arrested on a weapons charge in August 2007, Plaintiff never actually attended SCCC. Id. at 8. In September 2007, **[*2]** Defendants placed Plaintiff's federal loans into default, thereby causing a "loss of monetary deprivation and loss of educational and athletic opportunities." Id. at 4. Plaintiff first discovered that he was in default when he contacted the United States Department of Education on February 11, 2010. Id. Plaintiff claims that Defendants placed him in default status without due process of law, and as part of a conspiracy to violate the antitrust laws. See generally id.

III. STANDARD OF REVIEW

To survive a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, a plaintiff's complaint must plead sufficient facts to suggest a plausible claim for relief. *Bell Atlantic v. Twombly, 550 U.S. 544, 563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The court must accept all factual allegations contained in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *In re NYSE Specialists Securities Litig., 503 F.3d 89, 95 (2d Cir. 2007)*. The factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. A complaint is not sufficient if it contains only "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory **[*3]** statements." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 555*).

IV. DISCUSSION

Defendants claim that Plaintiff's due process claims are untimely because they were brought more than three years after Plaintiff's loans were placed into default status in September 2007. Mot. at 3. Plaintiff's § 1983 claims are indeed governed by a three-year statute of limitations. See *Cloverleaf Realty v. Town of Wawayanda, 572 F.3d 93, 94 (2d Cir. 2009)*. However, "a *section 1983* cause of action accrues . . . when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Pearl v. City of Long Beach, 296 F.3d 76, 80 (2d Cir. 2002)* (quotations and citations omitted). According to the Complaint, Plaintiff first became aware that his loans had been placed in default status on February 11, 2010. Compl. at 4. The timeliness of Plaintiff's due process claims — filed on April 18, 2011 — therefore turns on whether Plaintiff should have known about his default status prior to April 18, 2008.

However, it is not necessary for the Court to reach this issue at this time. Plaintiff litigated an identical claim in the District of Delaware, **[*4]** suing American Education Services and the United States Department of Education for violating his due process rights by placing his deferred student loans into default without notifying him, thereby preventing him from receiving funds to continue his education. *Bridgeforth v. Am. Educ. Servs., 412 F. App'x 433 (3d Cir. 2011)*. The Third Circuit affirmed the district court's dismissal of Plaintiff's due process claims as "frivolous," finding that Plaintiff had no property right in either "his loans' not going into default" or in "receiving additional federal grants or loans." *Id. at 435-36*. The Court adopts the reasoning of the Third Circuit, and dismisses Plaintiff's due process claims on that basis.

Finally, Plaintiff's antitrust claim is dismissed because there are insufficient allegations in Plaintiff's Complaint to suggest a plausible antitrust claim. The three elements of an antitrust claim are: (1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages. See *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001)*. Plaintiff's Complaint contains only a naked assertion that Defendants violated relevant ***antitrust law***, without allegations of **[*5]** any specific violation of law, any causally related injury, or any resulting damages; Plaintiff's antitrust claims are therefore also dismissed.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendant's Motion to dismiss (Dkt. No. 12) is **GRANTED**; and it is further

ORDERED, that Plaintiff's Complaint (Dkt. No. 1) is **DISMISSED**;[1] and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

IT IS SO ORDERED.

DATED: March 15, 2012

Albany, New York

/s/ Lawrence E. Kahn

Lawrence E. Kahn

U.S. District Judge

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[1] The Court notes that Plaintiff is a repeat litigator in this District and in many others. Plaintiff has been denied *in forma pauperis* status in accordance with the "three strikes" rule, and was recently barred from commencing litigation in this District without the prior approval of the Chief Judge. See *Bridgeforth v. U.S. Navy Recruitment Office, Civ. No. 1:11-CV-431, 2011 U.S. Dist. LEXIS 135395, 2011 WL 5881778 (N.D.N.Y. Nov. 23, 2011)* (adopting report-recommendation).

Nukote of Ill., Inc. v. Clover Holdings, Inc.

United States District Court for the Northern District of Texas, Dallas Division

March 15, 2012, Decided; March 15, 2012, Filed

3:10-CV-00580-P

Reporter

2012 U.S. Dist. LEXIS 201042 *; 2012 WL 13093942

NUKOTE OF ILLINOIS, INC., Plaintiff, v. CLOVER HOLDINGS, INC. and CLOVER TECHNOLOGIES GROUP, LLC, Defendants.

Prior History: *Nukote of Ill. v. Clover Holdings, Inc., 2011 U.S. Dist. LEXIS 165807 (N.D. Tex., Mar. 8, 2011)*

Core Terms

alleges, cartridges, monopolization, antitrust, contracts, relevant market, trade secret, remanufactured, argues, encouraging, geographic, assisting, misappropriation, participating, confidential, laser, ink, former employee, fiduciary relationship, restraint of trade, motion to dismiss, civil conspiracy, conspiracy, damages, jet, tortious interference, tortious conduct, office supplies, retailers, prices

Counsel: **[*1]** For Nukote of Illinois Inc, Plaintiff, Counter Defendant: Geoffrey S Harper, LEAD ATTORNEY, Winston & Strawn, Dallas, TX USA; Andrew R Graben, Hilgers Graben PLLC, Dallas, TX USA; Christopher G Smith, Canada; Eric W Pinker, Lynn Pinker Cox & Hurst, LLP, Dallas, TX USA; Natalie L Arbaugh, Thomas M Melsheimer, Winston & Strawn LLP, Dallas, TX USA; Victor C Johnson, Dykema Cox Smith, Dallas, TX USA; William Thomas Jacks, Fish & Richardson P.C., Austin, TX USA.

For Clover Holdings Inc, Clover Technologies Group, Llc, Defendants, Counter Claimants: Michael P Lynn, LEAD ATTORNEY, David S Coale, Lynn Pinker Cox & Hurst LLP, Dallas, TX USA; Alex Hartzler, Jenny S Kim, PRO HAC VICE, Neal Gerber & Eisenberg LLP, Chicago, IL USA; Christopher J Schwegmann, Lynn Pinker Cox and Hurst LLP, Dallas, TX USA; Elizabeth Y Ryan, Eric W Pinker, Lynn Pinker Cox & Hurst, LLP, Dallas, TX USA; Jonathan S Quinn, Neal, Gerber & Eisenberg LLP, Chicago, IL USA; Leonard E Hudson, Michael D Richman, PRO HAC VICE, Reed Smith LLP, Chicago, IL USA; Mark E Turk, Lynn Tillotson Pinker & Cox LLP, Dallas, TX USA; Max A Stein, Boodell & Domanskis LLC, Chicago, IL USA.

For Adr Provider, Mediator: Jeff Kaplan, JAMS, Dallas, TX **[*2]** USA.

Judges: JORGE A. SOLIS, UNITED STATES DISTRICT JUDGE.

Opinion by: JORGE A. SOLIS

Opinion

ORDER

Now before the Court is Defendants' Motion to Dismiss pursuant to *Rule 12(b)(6)*, filed on July 1, 2011. (Doc. 58.) Plaintiffs filed a Response on August 5, 2011. (Doc. 61.) Defendant filed a Reply on August 26, 2011. (Doe. 62.)

After reviewing the parties' briefing, the evidence, and the applicable law, the Court DENIES Defendants' Motion to Dismiss.

I. Background

The background information is taken from Plaintiff's First Amended Complaint which the Court accepts as true for the purposes of this motion. Plaintiff Nukote ("Nukote") produced and sold remanufactured inkjet and laser cartridges for over a decade and was one of two major companies capable of creating and selling remanufactured cartridges to the large office supply retailer market (*e.g.*, Office Depot, Staples, Office Max). (Doc. 55 at 4.) Nukote's largest competitor for the last ten years was Defendant Clover ("Clover"). During this time, Nukote sold its inkjet and laser cartridges to Office Depot, while Clover sold to Staples and Office Max. (Doc. 55 at 4.)

Nukote argues that in an attempt to control cartridge prices and the market for empty cartridges, Clover suggested **[*3]** that the two companies work together to raise prices and profits, but Nukote refused. (Doc: 55 at 4.) After these failed attempts, Nukote alleges that Clover attempted to merge with Nukote, but this was also unsuccessful. Next, Nukote argues that Clover implemented a new plan to completely remove Nukote as a competitor in the market, effectively granting Clover a monopoly. (Doc. 55 at 5.) As part of this plan, Nukote alleges that Clover used its resources to obtain confidential information about Nukote's customer base, manufacturing, pricing, and expansion plans.. Additionally, Nukote claims that Clover targeted key Nukote employees for hiring, the first being Steve Noyes ("Noyes") and the second Michael Ducey Jr. ("Ducey"). Although both Noyes and Ducey were subject to Nukote's "Business Practices and Conflict of Interest Statement" (the "Confidentiality Policy"), Nukote alleges that Ducey sent an email to his personal email about highly confidential Nukote trade secrets hours before his resignation. Nukote argues that Clover encouraged Noyes and Ducey to breach the Confidentiality Policy in order to gain valuable information about Nukote. (Doe. 55 at 7.)

After recruiting Nukote employees, **[*4]** Nukote claims that Clover then began to go after Nukote's largest client, Office Depot. In order to obtain Office Depot's business, Nukote claims that Clover misrepresented its abilities and prices and then hired Ippolito "Dino" Gaspardo ("Gaspardo") to gain knowledge of Nukote's manufacturing capacity. Subsequently, Office Depot switched from Nukote to Clover for purchasing remanufactured inkjet and laser cartridges. Nukote claims that the loss of Office Depot's business forced the company into Chapter 11 Bankruptcy. Due to Clover's actions, Nukote argues that it is entitled to $100,000,000 in damages.

II. Legal Standard & Analysis

A. 12(b)(6) Standard

Under *Federal Rule of Civil Procedure 8(a)*, a complaint must contain "a short, plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Federal *Rule 12(b)(6)* provides for the dismissal of a complaint when a defendant shows that the plaintiff has failed to state a claim for which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal v. Ashcroft, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (*quoting* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. The factual matter contained in the complaint must allege actual facts, not legal conclusions **[*5]** masquerading as facts. *Id. at 1949-50* ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" (*quoting* *Twombly, 550 U.S. at 555*)). Additionally, the factual allegations of a complaint must state a plausible claim for relief. *Id.* A complaint states a "plausible claim for relief' when the factual allegations contained therein infer actual misconduct on the part of the defendant, not a "mere possibility of misconduct." *Id.; see also* *Jacquez v. Procunier, 801 F.2d 789, 791-92 (5th Cir. 1986)*.

The Court's focus in a *12(b)(6)* determination is not whether the plaintiff should prevail on the merits but rather whether the plaintiff has failed to state a claim. *Twombly, 550 U.S. at 563 n.8* (holding "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder."); *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)* (*overruled on other grounds)* (finding the standard for a *12(b)(6)* motion is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

B. Count One: Civil Conspiracy [*6]

Nukote alleges that Clover committed civil conspiracy by interfering with Nukote's existing contracts, illegally restraining trade in violation of Texas law, misappropriating its trade secrets and confidential information, and encouraging Nukote employees to breach their fiduciary duties. (Doc. 55 at 10.) Sitting in diversity, the Court applies the substantive law of the forum state. *Aubris Res. LP v. St. Paul Fire & Marine Ins. Co., 566 F.3d 483, 486 (5th Cir. 2009)*. Under Texas law, an actionable civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983)*. Furthermore, civil conspiracy requires specific intent to agree "to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Triplex Commc'n, Inc. v. Riley, 900 S.W.2d 716, 719 (Tex. 1995)*. The essential elements of a civil conspiracy claim are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Id.* Moreover, in Texas, a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable. *Carroll v. Timmers Chevrolet, Inc., 592 S.W.2d 922, 925 (Tex. 1979)*.

As part of its First Amended Complaint, **[*7]** Nukote alleges in Count Two the tort of tortious interference with contracts against Clover. Since "a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendant's liable," this count can support a claim of civil conspiracy. *See* *Walsh v. Am. Tele-Network Corp., 195 F.Supp.2d 840, 850-51 (ED. Tex. 2002)*. Furthermore, Nukote alleges that Clover and its former employees conspired together to put Nukote out of business by participating in unlawful actions, such as interference with contracts, unfair competition by misappropriation, breach of fiduciary duty, etc., and as a result Nukote sustained damages from these actions. Thus, Nukote has stated a claim of civil conspiracy against Clover. Accordingly, the Court DENIES Defendant's Motion to Dismiss Nukote's Civil Conspiracy Claim.

C. Count Two: Tortious Interference with Contracts

Nukote alleges that Clover tortiously interfered with its contracts with Office Depot and S.P. Richards and former Nukote employees and as a proximate result Nukote suffered damages. (Doc. 55 at 11.) Clover argues that Nukote's claim of tortious interference with contracts is actually a claim for fraud and should be plead with the particularity **[*8]** required by *Federal Rule of Civil Procedure 9(b)*. (Doc. 58 at 10.) The basis for Clover's argument proceeds from the fact that Nukote alleges Clover "intentionally" misrepresented its abilities. (Doc. 58 at 10.) However, the Fifth Circuit has recognized that under *Rule 9(b)*, "malice, intent, knowledge, and other conditions of the mind of a person may be averred generally." *Tuchman v. DSC Commc'ns Corp., 14 F.3d 1061, 1068 (5th Cir. 1994)*. Therefore, heightened pleading is not required.

In Texas, the elements for tortious interference with contracts are: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) the act was the proximate cause of damage; and (4) actual damage or loss. *Fluorine on Call, Ltd. v. Fluorogas Ltd., 380 F.3d 849, 864 (5th Cir. 2004)*. Nukote has alleged (1) that a contract existed between Nukote and its former employees, Noyes, Ducey, and Gaspardo, and its former customer, Office Depot; (2) that Clover willfully and intentionally interfered with these existing contracts; (3) this willful and intentional interference was the proximate cause of damages suffered by Nukote; and (4) Nukote sustained actual damages as a result of this interference. The allegations in the Complaint are more than conclusory factual assertions. Therefore, Nukote has stated a cause of action against Clover for tortious **[*9]** interference with contracts. *See* *Walsh, 195 F.Supp.2d at 849-50*. Accordingly, the Court DENIES Defendant's Motion to Dismiss Nukote's Tortious Interference with Contracts claim.

D. Count Three: Unfair Competition by Misappropriation

Nukote alleges that Clover's actions constitute misappropriation of its trade secrets, confidential and other proprietary information, without the consent of Nukote, to the detriment of Nukote, and for Clover's own commercial advantage. (Doe. 55 at 12.) Under Texas law, a plaintiff can recover for misappropriation of a trade secret by establishing that (1) a trade secret existed; (2) the trade secret was acquired through a breach of a confidential relationship or was discovered by improper means; (3) the defendant used the trade secret without the plaintiff's authorization; and (4) the plaintiff suffered damages as a result. *IAC, Ltd. v. Bell Helicopter Textron, Inc., 160 S.W.3d 191, 197 (Tex. App.—Fort Worth 2005, no pet.)*. A trade secret is any formula, pattern, device or compilation of information, which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it. *In re Bass, 113 S.W.3d 735, 739 (Tex. 2003)*. Customer lists, pricing information, client information, customer preferences, buyer contacts, blueprints, marketing strategies, and drawings have all been recognized **[*10]** as trade secrets. *Global Water Group, Inc. v. Atchley, 244 S.W.3d 924, 928 (Tex. App.—Dallas 2008, pet. denied)*.

As part of its trade secret misappropriation claim, Nukote alleges that Clover obtained its customer, pricing and vendor lists, as well as business expansion plans by hiring former Nukote employees, such as Noyes, Ducey, and Gaspardo, and encouraging them to breach their Confidentiality Policy with Nukote. Additionally, Nukote alleges that Clover used this information without its authorization and subsequently experienced damages as a result. Since Texas law recognizes customer lists, pricing and vendor lists and business expansion plans as trade secrets, Nukote's factual allegations state a plausible state law claim for misappropriation of trade secrets. *Twombly, 550 U.S. at 570*. Accordingly, the Court DENIES Defendant's Motion to Dismiss Nukote's Unfair Competition by Misappropriation claim.

E. Count Four: Aiding & Abetting a Breach of Fiduciary Duty

Nukote alleges that even though Clover knew of Nukote's fiduciary relationships with its former employees, Clover willing participated in assisting Nukote's former employees to breach their agreements with Nukote and steal Nukote's trade secrets, confidential, and/or proprietary business information. (Doc. 55 at 13.) Clover argues that it had **[*11]** no knowledge of the fiduciary relationship between Nukote and its former employees, and thus did not knowingly participate in the breach of fiduciary duty. (Doc. 58 at 11.)

Under Texas law, "where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such." *Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 514 (Tex. 1942)*. Therefore, in order to establish a claim for knowing participation in a breach of fiduciary duty under Texas law, a plaintiff must assert: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party was aware that it was participating in the breach of that fiduciary relationship. *Meadows v. Hartford Life Ins. Co., 492 F.3d 634, 639 (5th Cir. 2007)*. In the present case, Nukote has alleged: (1) that Nukote had fiduciary relationships with its former employees; (2) Clover targeted these specific employees because it was aware of these fiduciary relationships; and (3) Clover knew they were participating in the breach of that fiduciary relationship. Thus, Nukote has plead sufficient facts to survive Clover's *12(b)(6)* Motion to Dismiss. Accordingly, the Court DENIES Defendant's Motion to Dismiss Nukote's Aiding and Abetting a **[*12]** Breach of Fiduciary Duty claim.

F. Count Five: Aiding & Abetting: Assisting & Participating

Nukote alleges that Clover aided and abetted Nukote's former employees' tortious conduct by assisting and participating in the tortious conduct. (Doc. 55 at 13.) Clover argues that this claim should be dismissed since Texas law does not recognize a tort in aiding or abetting: assisting and participating. (Doc. 58 at 13.) The *Restatement (Second) of Torts § 876* incorporates this principle, imposing liability on a person for the conduct of another which causes harm if the defendant "does a tortious act in concert with the other or pursuant to a common design with him." *Restatement (Second) of Torts § 876* (1977). However, the Texas Supreme Court has expressly declined to approve this theory of liability. *See* *Gaulding v. Celotex Corp., 772 S.W.2d 66, 71 (Tex. 1989)*. Therefore, whether this theory of liability is recognized in Texas is an open question. *Juhl v. Airington*, 936, S.W.2d 640, 643 (Tex. 1996).

Nevertheless, the Texas Supreme Court stated that if they did adopt *§ 876(a) of the Restatement (Second) of Torts*, they "would require allegations of specific intent, or perhaps gross negligence, to state a cause of action." *Id. at 644*. Nukote argues that in addition to Clover's own participation in tortious conduct against Nukote, Clover intended to provide substantial assistance **[*13]** to aid Nukote's former employees in their tortious conduct against Nukote. Although there is a question of whether this theory of liability is recognized in Texas, Nukote has alleged that Clover had specific intent to assist and participate in the tortious conduct, and thus has plead sufficient facts to state a cause of action based on the Texas Supreme Court's interpretation of this claim. Accordingly, the Court DENIES Defendant's Motion to Dismiss Nukote's Aiding and Abetting: Assisting and Participating Claim.

G. Count Six: Aiding & Abetting: Assisting or Encouraging

Nukote alleges that Clover aided and abetted Nukote's former employees' tortious conduct by assisting and participating in the tortious conduct. (Doc. 55 at 14.) Clover argues that this claim should be dismissed since Texas law does not recognize a tort in aiding or abetting: assisting or encouraging, and that Nukote is actually alleging fraud, which must be plead with particularity under Federal *Rule 9(b)*. (Doc. 58 at 13-14.) Here, however, Nukote's claims are not based on fraud or mistake, but rather tortious acts that Clover assisted or encouraged Nukote's former employees to commit against Nukote with malicious intent. Therefore, **[*14]** since these allegations are not based on fraud or mistake, this claim is not held to the higher pleading standard.

The *Restatement (Second) of Torts § 876(b)* imposes liability on a person for the conduct of another if the defendant, "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Restatement (Second) of Torts § 876* (1977). Essentially, rather than imposing liability for an agreement, this section imposes liability "for substantially assisting and encouraging a wrongdoer in a tortious act." *Juhl, 936 S.W. 2d at 644*. Again, whether this theory of liability is recognized in Texas is an open question. *Id at 643*.

However, the Texas Supreme Court did imply that if they were to adopt *§ 876(b)*, plaintiffs would need to allege substantial assistance in order to state a cause of action. *Id. at 644*. Additionally, the Texas Supreme Court listed the following factors to give guidance to determine whether the defendant substantially assisted the wrongdoer: (1) the nature of the wrongful act; (2) the kind and amount of assistance; (3) the relation of the defendant and the actor; (4) the presence or absence of the defendant at the occurrence of the wrongful act; and (5) the defendant's state of mind. *Id.* Nukote alleges that **[*15]** Clover provided substantial assistance and encouraged Nukote's former employees to breach their fiduciary duty with Nukote and disclose confidential and proprietary information about Nukote in order to gain control of the market for remanufactured ink jet and laser jet cartridges. Moreover, Nukote alleges that as a direct and proximate result of these actions, Nukote suffered damages. Therefore, Nukote has plead enough facts to state a cause of action for Aiding and Abetting: Assisting or Encouraging. Accordingly, the Court DENIES Defendant's Motion to Dismiss Nukote's Aiding and Abetting: Assisting or Encouraging Claim.

H. Count Seven: Agreement in Restraint of Trade in Violation of Texas Law

Nukote alleges that Clover, together with Texas mass merchants, such as Office Depot, have made agreements that constitute restraints on trade and thus violate *section 15.05(a) of the Texas Antitrust Act*. (Doc. 55 at 15.)

Clover argues that this claim should be dismissed because Nukote has not properly alleged the relevant market. (Doc. 58 at 16.) In interpreting *§ 15.05(a) of the Texas Antitrust Act*, the Court should look to federal judicial interpretations of *§ 1 of the Sherman Act*. *DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 687 (Tex. 1990)*. For a plaintiff to prevail on a *§ 1* claim, **[*16]** the plaintiff "must show that the defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market." *Johnson v. Hosp. Corp. of Am., 95 F.3d 383, 392 (5th Cir. 1996)*. Additionally, it is important to note that the Supreme Court held that courts should be reluctant to dismiss antitrust complaints before the plaintiff has an opportunity for discovery. *See Hosp. Bldg. Co. v. Tr. of Rex Hosp., 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*. Moreover, the Supreme Court has held that "the test for sufficiency...is whether the claim is wholly frivolous." *Radovich v. Nat'l Football League, 352 U.S. 445, 453, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)*. Further, "[w]hile the complaint might have been more precise" it would not be dismissed where the court was "not prepared to say that nothing can be extracted from [it] that falls under the Act of Congress." *Id.* Therefore, in order to demonstrate a claim of unreasonable restraint of trade under *§ 1*, Nukote must establish that: (1) Clover and other Texas mass merchants engaged in a conspiracy, (2) the conspiracy had the effect of restraining trade, and (3) trade was restrained in the relevant market. *See Apani SW., Inc. v. Coca-Cola Enters., 300 F.3d 620, 627 (5th Cir. 2002)*. Nukote has properly alleged that Clover and other Texas mass merchants have conspired together to prohibit Nukote from having access to empty ink jet and laser cartridges, and this conspiracy has led to Nukote being excluded from the relevant **[*17]** market.

Additionally, in order to state an antitrust claim, the complaint must plausibly define the relevant product market and geographic market. *Id.* The alleged geographic market must correspond to the commercial realities of the industry and be economically significant. *Id. at 628*. Further, a proposed product market must include all "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. If the alleged relevant market "does not encompass all interchangeable substitute products...the relevant market is legally insufficient, and a motion to dismiss may be granted." *Apani, 300 F.3d at 628*.

In the present case, Nukote plausibly defines the relevant geographic and product market. The relevant geographic market is "the area of effective competition." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. The Supreme Court further defined the area of effective competition as the "area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Id. at 327*. As previously stated, the alleged geographic market must correspond with the commercial realities of the industry, but this area "may be as small as a single metropolitan area." *Brown Shoe Co. v. United States, 370 U.S. 294, 337, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. Furthermore, when examining whether the proposed geographic market is consistent with the "commercial **[*18]** realities" of an industry, courts look to many factors including regulatory restrictions, transportation barriers, and other characteristics of the relevant product market. *Apani, 300 F.3d at 626*. Additionally, the alleged geographic market must be economically significant. *Id. at 628*. Therefore, "when assessing economic significance, a court must determine whether the geographic area contains an appreciable segment of the product market." *Id. at 629*. Nukote limited the relevant market to Texas because they inferred that Texas consumers of remanufactured ink jet cartridges will not turn to office supply retailers outside of Texas to purchase these products. Moreover, Nukote alleged that an appreciable proportion of the sale of remanufactured ink jet cartridges in Texas was affected by the agreement. Thus, the relevant geographic market is large enough to meet the requirements set forth by the Supreme Court, and the injury to competition is sufficiently significant to be a violation of the Act. *Id.*

Additionally, Nukote alleges a plausible relevant product market—the sale of remanufactured ink and laser cartridges at large office supply retailers. In its pleadings, Nukote acknowledges that Texas consumers of ink jet and laser **[*19]** cartridges have two choices; (1) OEM cartridges; or (2) compatible and remanufactured cartridges. (Doc. 55 at 15.) However, Nukote distinguishes the two products based on the price differential between the two products, the remanufactured cartridges distinct quality, unique production facilities, specialized vendors and environmental friendliness. Therefore, the proposed product market Nukote alleges has been affected by the agreement properly excludes OEM cartridges and thus the relevant market is legally sufficient to withstand a motion to dismiss.

After careful analysis, the Court finds that Nukote's claim for agreement in restraint of trade passes the "test of sufficiency." Nukote properly alleged that: (1) Clover and other Texas mass merchants engaged in a conspiracy, (2) the conspiracy had the effect of restraining trade, and (3) the trade was restrained in the relevant market. Accordingly, the Court DENIES Defendant's Motion to Dismiss Nukote's Agreement in Restraint of Trade Claim.

I. Count Eight: Monopolization in Violation of Texas Law

Nukote alleges that the purported agreement in restraint of trade has resulted in Clover obtaining a majority market share for remanufactured **[*20]** ink and laser cartridges to office supply retailers in Texas, and thus, constitutes a monopoly in violation of *§ 15.05(b) of the Texas Antitrust Act*. (Doc. 55 at 18.) Clover argues that this claim should be dismissed because Nukote has not alleged any facts supporting the conclusion that Clover monopolized the market. (Doc. 58 at 24.) To state a claim for monopolization, the plaintiff must allege: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 781 (5th Cir. 1999)*.

The first step in establishing a monopolization claim is for the plaintiff to establish the relevant product market. *Id.* As noted above, Nukote has properly established the relevant product market. Next, the plaintiff must allege the possession of monopoly power in the relevant market and that the monopolization was the result of willful acquisition or maintenance of that power was not the result of a superior product, business acumen, or historic accident. *Id.* Nukote claims that Clover's acquisition of monopoly power is not a "consequence of a superior product, **[*21]** business acumen, or historic accident," but rather the result of the willful acquisition obtained by interfering with Nukote's contracts and misappropriating Nukote's trade secrets. Further, Nukote alleges that Clover entered into exclusive dealing contracts with all of the large office supply retailers in order to maintain its monopoly on remanufactured ink jet and laser cartridges. *See* *E.I. du Pont de Nemours & Co. v. Kolon Indus., 637 F.3d 435, 441 (4th Cir. 2011)* (noting that "exclusive dealing arrangements can constitute an improper means of acquiring or maintaining a monopoly"). Therefore, Nukote has plead sufficient facts to establish a claim for monopolization in violation of Texas law. Accordingly, the Court DENIES Defendant's Motion to Dismiss Nukote's Monopolization Claim.

J. Count Nine: Attempted Monopolization in Violation of Texas Law

Nukote alleges an alternative claim for attempted monopolization in violation of *§ 15.05(b) of the Texas Antitrust Act*. (Doc. 55 at 20.) Clover asserts that Nukote failed to plead any facts asserting that Clover attempted to monopolize the market. (Doc. 58 at 24.) The Supreme Court held that in order "to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant engaged in predatory or anticompetitive conduct **[*22]** with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

The first element of an attempted monopolization claim requires that the plaintiff show that the defendant engaged in anticompetitive or predatory conduct. "Predatory or anticompetitive conduct is that which unfairly tends to be exclusionary or tends to destroy competition." *Great W. Directories v. Sw. Bell Tel. Co., 63 F.3d 1378, 1385 (5th Cir. 1995)*, *withdrawn and superseded in part*, *74 F.3d 613 (1996)*. "Exclusionary conduct is conduct that tends to exclude or restrict competition and is not supported by a valid business reason." *Id.* Furthermore, other courts have held that "[i]n order to rise to a section two violation, however, the exclusionary conduct must appear reasonably capable of contributing significantly to creating or maintaining a monopoly power." *Instructional Sys. Dev. Corp. v. Aetna Cas. And Sur. Co., 817 F.2d 639, 649 (10th Cir. 1987)*. In its pleadings, Nukote alleges that Clover engaged in anticompetitive or predatory conduct by engaging in tortious interference with its contracts, unfair competition by misappropriation, and creating agreements in restraint of trade. Furthermore, Nukote alleges that this conduct was done with the specific intent to monopolize and, if successful, Clover has a dangerous probability of achieving and maintaining monopoly **[*23]** power. Therefore, Nukote has plead sufficient facts to establish an alternative claim for attempted monopolization in violation of Texas law. Accordingly, the Court DENIES Defendant's Motion to Dismiss Nukote's Attempted Monopolization claim.

K. Count Ten: Exclusive Dealing in Violation of Texas Law

Nukote alleges that Clover violated *§ 15.05(c) of the Texas Antitrust Act* by entering into exclusive dealing contracts with all the large office supply retailers, such as Office Depot and S.P. Richards. (Doc. 55 at 21.) Clover argues this claim should be dismissed because Nukote's allegations are not sufficient to state a claim for exclusive dealing. (Doc. 58 at 27.) Exclusive dealing "occurs when a seller agrees to sell its output of a commodity to a particular buyer, or when a buyer agrees to purchase its requirements of a commodity exclusively from a particular seller. *Apani, 300 F.3d at 625*. Moreover, the Supreme Court identified a three-step test to state a claim for exclusive dealing; (1) the relevant product market must be identified; (2) the relevant geographic market must be identified; and (3) the competition foreclosed by the arrangement must constitute a substantial share of the relevant market. *Tampa Elec. Co., 365 U.S. at 327-28*.

As discussed **[*24]** above, Nukote has established the relevant product and geographic market. After the relevant market has been identified, it must then be determined whether the arrangement foreclosed competition in a substantial share of the established market. *Id.* Essentially, the opportunities for other competitors to enter into or remain in the market must be significantly limited. *Id. at 328*. Furthermore, the Supreme Court held that in order "to determine substantiality...it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce in the relevant market...and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." *Id. at 329*. Nukote alleges that Clover has entered into exclusive arrangements with the large office supply retailers to be the exclusive suppliers of remanufactured ink jet and laser cartridges. As a result of these exclusivity contracts, Nukote claims that competition in market for remanufactured ink cartridges has been significantly limited. Therefore, Nukote has plead sufficient facts **[*25]** to survive Defendant's Motion to Dismiss, Accordingly, the Court DENIES Defendant's Motion to Dismiss Nukote's Exclusive Dealing claim.

L. Standing to Assert Antitrust Claims

Finally, in addition to its Motion to Dismiss, Clover asserts that Nukote lacks standing to assert its antitrust claims because it has not shown antitrust injury. In order to have standing to pursue an antitrust suit, a plaintiff must show: (1) injury to the plaintiff proximately caused by the defendants' conduct; (2) antitrust injury; and (3) proper plaintiff status. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc., 123 F.3d 301, 305 (5th Cir. 1997)*. The first and third elements are not disputed here.

Antitrust injury must be established for a plaintiff to bring an action under *§ 1* or *§ 2 of the Sherman Act*. *Id.* The Supreme Court described antitrust injury as "an injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Furthermore, the antitrust "injury should reflect the anticompetitive acts made possible by the violation." *Id.* It should be "the type of loss that the claimed violations...would be likely to cause." *Id.* Moreover, the Fifth Circuit has stated that "antitrust injury for standing purposes should be viewed from the perspective of the plaintiff's position in the marketplace." *Doctor's Hosp., 123 F.3d at 305*. **[*26]** The Fifth Circuit further expanded on the standing issue, stating, "the standing inquiry...ensures that the plaintiff's demand for relief ultimately serves the purposes of the ***antitrust law*** to increase consumer choice, lower prices and assist competition, not competitors." *Id. at 306*. In the present case, Nukote's alleged injury flows from the alleged exclusionary conduct of its competitor, Clover. *See id. at 305* (stating that the plaintiff's alleged losses and competitive disadvantage because of its exclusion fell within the conceptual bounds of antitrust injury). Therefore, Nukote has properly alleged antitrust injury. Accordingly, the Court DENIES Defendant's Motion to Dismiss based on Nukote's lack of standing to bring an antitrust claim.

III. Conclusion

For the foregoing reasons, the Court DENIES the Defendant's Motion to Dismiss.

IT IS SO ORDERED.

Signed this 15th day of March, 2012.

/s/ Jorge A. Solis

JORGE A. SOLIS

UNITED STATES DISTRICT JUDGE

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Fiala v. Wasco Sanitary Dist.

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

March 16, 2012, Decided; March 16, 2012, Filed

10 C 2895

Reporter

2012 U.S. Dist. LEXIS 39534 *; 2012 WL 917851

ED FIALA, individually and on behalf of other similarly situated persons who reside within the Wasco Sanitary District, and TIM KOBLER CUSTOM HOMES, INC., Plaintiffs, vs. WASCO SANITARY DISTRICT, ROBERT SKIDMORE, RAUL BRIZUELA, GARY SINDELAR, CHARLES V. MUSCARELLO, PATRICK GRIFFIN, JERRY BOOSE, KENNETH BLOOD, FOX MILL LIMITED PARTNERSHIP, B&B ENTERPRISES, and HUDSON HARRISON, Defendants.

Subsequent History: Decision reached on appeal by *Fiala v. B&B Enters., 738 F.3d 847, 2013 U.S. App. LEXIS 25705 (7th Cir. Ill., Dec. 26, 2013)*

Related proceeding at *Wasco Sanitary Dist. v. Brizuela, 2018 IL App (2d) 170957-U, 2018 Ill. App. Unpub. LEXIS 2233 (Dec. 17, 2018)*

Related proceeding at *Wasco Sanitary Dist. v. Fox Mill L.P., 2021 IL App (2d) 200650-U, 2021 Ill. App. Unpub. LEXIS 2140 (Dec. 9, 2021)*

Core Terms

state law claim, purchaser, wastewater, second amended complaint, alleges, indirect, reimbursement, regulations, effluent, injuries, funds, alleged injury, connection fee, Defendants', election, taxpayer, cases, health and welfare, property taxes, direct victim, federal claim, state claims, higher fee, designated, developers, relinquish, antitrust, Sanitary, spray[ed, damages

LexisNexis® Headnotes

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

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

A complaint's well-pleaded facts generally are assumed true on *Fed. R. Civ. P. 12(b)(1)* and *Fed. R. Civ. P. 12(b)(6)* motions, and all reasonable inferences are drawn in the plaintiff's favor. Also pertinent at the *Rule 12(b)* stage are exhibits attached to the complaint, *Fed. R. Civ. P. 10(c)*, and exhibits attached to the parties' briefs that are referred to in the complaint and central to the plaintiff's claim. In addition, orders entered and filings made in the trial court and other courts are subject to judicial notice, as are adjudicative facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. To the extent an exhibit or a judicially noticed court document or fact contradicts the complaint's allegations, the exhibit or court document takes precedence.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN2[] Racketeer Influenced & Corrupt Organizations, Claims

See 18 U.S.C.S. § 1964(c).

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN3[] Racketeer Influenced & Corrupt Organizations, Claims

The phrase "injured in his business or property" in 18 U.S.C.S. § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961 et seq., has been interpreted as a standing requirement—rather than an element of the cause of action—which must be satisfied in order to prevail on a RICO claim. Therefore, to establish standing to sue for a violation of 18 U.S.C.S. § 1962, a plaintiff must allege that the defendant's overt act in furtherance of the RICO conspiracy injured the plaintiff's business or property.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN4[] Racketeer Influenced & Corrupt Organizations, Claims

The term "property" in 18 U.S.C.S. § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961 et seq., contemplates something owned or possessed that an individual has a legitimate claim of entitlement to.

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

HN5[] Motions to Dismiss, Failure to State Claim

A legal conclusion couched as a factual allegation need not be accepted as true on a Fed. R. Civ. P. 12(b) motion.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

HN6[] Coverage & Definitions, Discharges

The nature of a Population Equivalent (PE) is established by Illinois law. Different types of residences are designated different numbers of PEs. Ill. Admin. Code, tit. 35, § 370 App. A (designating one PE for an efficiency or studio apartment, 1.5 PEs for a one-bedroom apartment, three PEs for a two- or three-bedroom apartment, 3.5 PEs for a single-family dwelling, and 2.25 PEs for a mobile home). A PE is an average waste loading equivalent to that produced by one person which is defined as 100 gallons per day. 225 ILCS 225/3(6). This unit of measurement is used to estimate the wastewater usage and environmental impact of various structures.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN7[] Clean Water Act, Coverage & Definitions

Ill. Admin. Code, tit. 35, § 301.345, provides that "Population Equivalent" is a term used to evaluate the impact of industrial or other waste on a treatment works or stream. One population equivalent is 100 gallons (380 liters) of sewage per day, containing 0.17 pounds (77 grams) of BOD (5) (five day biochemical oxygen demand) and 0.20 pounds (91 grams) of suspended solids. The impact on a treatment works is evaluated as the equivalent of the highest of the three parameters. Impact on a stream is the higher of the BOD (5) and suspended solids parameters.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN8[] Racketeer Influenced & Corrupt Organizations, Claims

The Seventh Circuit has held not only that personal injuries do not provide standing in civil actions brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, but also that pecuniary losses flowing from those personal injuries are insufficient to confer standing under *18 U.S.C.S. § 1964(c)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN9[] Racketeer Influenced & Corrupt Organizations, Claims

In the context of a civil case brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, personal injuries which may result in pecuniary losses, but are nonetheless insufficient to provide standing under *18 U.S.C.S. § 1964(c)*, have been found to include injury to mental health or emotional distress; sickness, poisoning and emotional distress; emotional distress due to loss of security and peace; injury stemming from the harassment and intimidation of federal witnesses; loss of income due to wrongful death of a family member/source of support; and inability to pursue or obtain meaningful employment. Likewise, RICO plaintiffs may not recover for physical and emotional injuries due to harmful exposure to toxic waste.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN10[] Reviewability of Lower Court Decisions, Preservation for Review

A person waives an argument by failing to make it before the district court. The rule is applied where a party fails to develop arguments related to a discrete issue, and also where a litigant effectively abandons the litigation by not responding to alleged deficiencies in a motion to dismiss.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN11[] Racketeer Influenced & Corrupt Organizations, Claims

The indirect purchaser rule holds that a plaintiff cannot seek damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, where it is an indirect purchaser, meaning where it alleges that it paid the costs of a RICO scheme that were passed on by the scheme's direct victim.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN12[] **Racketeer Influenced & Corrupt Organizations, Claims**

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, does not provide redress for taxpayers who were overcharged due to costs being "passed on" by the scheme's direct victim.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN13[] **Racketeer Influenced & Corrupt Organizations, Claims**

An exception to the "indirect purchaser" rule in cases brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, exists where the direct purchaser is owned or controlled by the wrongdoer. The rationale for this exception, which arose from ***antitrust law***, is that where the wrongdoers control the direct purchaser, the direct purchaser would have little or no incentive to sue on its own behalf, thus leaving the indirect purchaser without recourse for any antitrust injuries.

Business & Corporate Law > ... > Scope of Authority > Meetings > Procedural Matters

HN14[] **Meetings, Procedural Matters**

See *70 ILCS 2805/3(d)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN15[] **Racketeer Influenced & Corrupt Organizations, Claims**

If the dismissal of claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, is for lack of subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*, the court must remand the state law claims without considering whether to retain supplemental jurisdiction under *28 U.S.C.S. § 1367*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

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

HN16[] **Racketeer Influenced & Corrupt Organizations, Claims**

The Seventh Circuit has definitively held that standing under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, implicates subject matter jurisdiction, not the merits of the RICO claim: on that understanding, the dismissal of RICO claims based on standing is for lack of jurisdiction under *Fed. R. Civ. P. 12(b)(1)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN17[] **Racketeer Influenced & Corrupt Organizations, Claims**

The phrase "injured in business or property" in *18 U.S.C.S. § 1964(c)* of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, has been interpreted as a standing requirement—rather than an element of the cause of action—which must be satisfied in order to prevail on a RICO claim. The causation component of *§ 1964(c)*—whether an alleged RICO injury was caused by reason of a violation of the statute—has also been considered a component of standing. As such, the issue represents a jurisdictional requirement which remains open to review at all stages of the litigation.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN18[] **Supplemental Jurisdiction, Pendent Claims**

28 U.S.C.S. § 1367(c)(3) provides that a district court may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it has original jurisdiction. As a general matter, when all federal claims have been dismissed prior to trial, the federal court should relinquish jurisdiction over the remaining pendent state claims. This rule has three exceptions: when the refiling of the state claims is barred by the statute of limitations; where substantial judicial resources have already been expended on the state claims; and when it is clearly apparent how the state claim is to be decided.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN19[] **Supplemental Jurisdiction, Pendent Claims**

28 U.S.C.S. § 1367(c)(1) applies where a state law claim raises a novel or complex issue of State law.

Counsel: [*1] For Ed Fiala, individually, and on behalf of other similarly situated persons who reside within the Wasco Sanitary District, Tim Kobler Custom Homes, Inc., Plaintiffs: Brianne Michelle Connell, James Patrick Newman, William H. Ransom, James P. Newman & Associates, LLC, St. Charles, IL.

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For Raul Brizuela, Robert Skidmore, Gary Sindelar, Defendants: Joel David Bertocchi, Hinshaw & Culbertson LLP, Chicago, IL.

For Wasco Sanitary District, Defendant: David Joel Bressler, LEAD ATTORNEY, Dykema Gossett Rooks Pitts PLLC, Lisle, IL; Charles Anthony LeMoine, Stephen Michael Mahieu, Dykema Gossett PLLC, Chicago, IL.

For Charles V. Muscarello, Defendant: James R. Figliulo, LEAD ATTORNEY, James H. Bowhay, Figliulo & Silverman, Chicago, IL.

For Patrick Griffin, Jerry D Boose, Kenneth Blood, Fox Mill Limited Partnership, B&B Enterprises, Defendants: Robert K. Villa, LEAD ATTORNEY, Griffin Villa Williams LLP, Geneva, IL.

For Hudson Harrison, Defendant: Thomas George DiCianni, LEAD ATTORNEY, Jody Knight, Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., Chicago, IL; Derke Jeffrey Price, **[*2]** Ancel, Glink, Diamond, Bush, DiCianni & Rolek, P.C., Chicago, IL.

Judges: Gary Feinerman, United States District Judge.

Opinion by: Gary Feinerman

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiffs Ed Fiala and Tim Kobler Custom Homes, Inc. brought this action in the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, against Defendants Wasco Sanitary District, Robert Skidmore, Raul Brizuela, Gary Sindelar, Charles Muscarello, Patrick Griffin, Jerry Boose, Kenneth Blood, Fox Mill Limited Partnership ("FMLP"), B&B Enterprises, and Hudson Harrison, alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961 et seq.*, and Illinois law. After the case was removed to federal court, Defendants moved to dismiss under *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. Docs. 18, 21, 24, 28, 32. Because Plaintiffs' alleged injuries do not satisfy the requirements of RICO standing, the RICO claims are dismissed. And having disposed of the only federal claims in the case, the court remands the state law claims to state court.

Background

HN1[] A complaint's well-pleaded facts generally are assumed true on *Rule 12(b)(1)* and *12(b)(6)* motions, and all reasonable inferences **[*3]** are drawn in the plaintiff's favor. *See Reger Dev., LLC v. Nat'l City Bank, 592 F.3d 759, 763 (7th Cir. 2010)*; *Patel v. City of Chi., 383 F.3d 569, 572 (7th Cir. 2004)*. Also pertinent at the *Rule 12(b)* stage are exhibits attached to the complaint, *see Fed. R. Civ. P. 10(c)*; *Witzke v. Femal, 376 F.3d 744, 749 (7th Cir. 2004)*, and exhibits attached to the parties' briefs that are "referred to" in the complaint and "central to [the plaintiff's] claim," *Wright v. Associated Ins. Cos., 29 F.3d 1244, 1248 (7th Cir. 1994)*. *See Hecker v. Deere & Co., 556 F.3d 575, 582-83 (7th Cir. 2009)* (collecting cases). In addition, orders entered and filings made in this and other courts are subject to judicial notice, as are "adjudicative facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *United States v. Stevens, 500 F.3d 625, 628 n.4 (7th Cir. 2007)* (internal quotation marks omitted); *see Cancer Found., Inc. v. Cerberus Capital Mgmt. LP, 559 F.3d 671, 676 n.2 (7th Cir. 2009)*. To the extent an exhibit or a judicially noticed court document or fact contradicts the complaint's allegations, the exhibit or court document takes precedence. **[*4]** *See Forrest v. Universal Sav. Bank, F.A., 507 F.3d 540, 542 (7th Cir. 2007)*. The following facts are stated as favorably to Plaintiffs as permitted by the complaint and other materials that may be considered on a *Rule 12(b)* motion.

Fiala owns a home in the Fox Mill subdivision, which is located within the borders of the Wasco Sanitary District, a municipal entity that provides its constituents with water and sanitary sewer services. Doc. 88 at ¶¶ 1, 3. Kobler is a developer that built homes in Fox Mill. *Id.* at ¶ 2. According to the second amended complaint, which is the operative pleading, Defendants for many years have engaged in an illegal scheme to misdirect funds from the District to B&B and FMLP, which own homes in Fox Mill and which allegedly are corporate alter egos. *Id.* at ¶¶ 18, 19(f), 46(a) & (ww). The scheme allegedly commenced in 1994, when the District and FMLP entered into an annexation agreement ("Fox Mill Agreement") under which the District would annex the Fox Mill subdivision, *id.* at ¶ 20, which in turn would receive water and sewer services from the District, Doc. 1-3 at 10-11. The Fox Mill Agreement further provided that the District would enter into agreements for **[*5]** reimbursement to FMLP for a portion of the cost of wastewater and water facilities constructed or paid for by FMLP. Doc. 1-4 at 2-3. Although the District and FMLP never executed any such agreement, Doc. 88 at ¶ 28, the District has since 1994 reimbursed

FMLP and B&B by allowing them to collect connection fees from existing and prospective District customers, *id.* at ¶ 25.

The complaint alleges that these reimbursements were prohibited by the Sanitary Act of 1936, 70 ILCS 2805/1 et seq., as it stood at the time the Fox Mill Agreement was executed. Doc. 88 at ¶ 27. The Sanitary Act later was amended to permit such reimbursements, but Plaintiffs contend that the amended statute still requires that the connection fees first be paid to the District and only then turned over to FMLP. Doc. 42 at 23. Plaintiffs assert that the District, notwithstanding the amendment, directed developers to pay connection fees directly to FMLP and B&B prior to their receiving sanitation services. Doc. 88 at ¶ 26; Doc. 42 at 2. Kobler paid connection fees to FMLP and B&B, as have numerous others. As a result, funds that should have been used by the District for infrastructure and capacity instead were paid to **[*6]** FMLP or B&B. This diversion of funds has required the District to charge higher fees, assessments, and property taxes, which Fiala would not have paid absent the illegal arrangement.

Defendants allegedly perpetrated this scheme through a host of illegal and fraudulent activities. The District's three trustees during the relevant time period—Skidmore, Brizuela, and Sindelar—had undisclosed financial or familial relations to B&B and its principals, Boose and Blood. Doc. 88 at ¶ 46(s), (t), (y), (z), (aa), (dd), (ee). The trustees filed statements of financial interest that failed to reveal those interests. *Id.* at ¶ 46(u), (y), (z), (aa), (dd), (ee). The trustees, FMLP, B&B, Boose, and Blood, with the assistance of Griffin (B&B's attorney) and Muscarello (the District's attorney), filed or caused to be filed false applications and certifications with state regulators concerning the District's wastewater capacity. *Id.* at ¶ 46(e), (n), (r), (v), (bb), (gg), (hh), (oo).

Harrison is another home developer in the District. In 2005, Harrison sought to annex into the District an area called Norton Farms that he wanted to develop. *Id.* at ¶ 29. The District denied Harrison's request. *Id.* at ¶ 30. **[*7]** Harrison renewed the application in 2008, this time retaining Griffin as his attorney. *Id.* at ¶ 31. Harrison then agreed to pay $2.65 million in exchange for the annexation and the receipt of sufficient wastewater capacity for the homes in Norton Farms ("Norton Farms Agreement"). *Id.* at ¶ 33. The 2008 application was approved. *Id.* at ¶ 32. Plaintiffs maintain that Harrison bribed Brizuela (one of the trustees) by giving him a recorded interest in real property. *Id.* at ¶¶ 46(ss) & (tt); Doc. 42 at 11. Plaintiffs also allege that Harrison's retention of Griffin as his attorney was another bribe intended to gain the District's approval. Doc. 88 at ¶ 46(rr).

The Norton Farms Agreement had negative consequences for Fiala. According to the second amended complaint, Fiala received 3.5 "population equivalents" ("PEs") with the purchase of his home. *Id.* at ¶ 1; Doc. 42 at 27; Doc. 105 at 6. A PE represents the amount of wastewater one individual is expected to generate in one day, which state law estimates to be 100 gallons. *See* 225 ILCS 225/3(6). Applicable regulations assume that a single-family home uses 3.5 PEs. *See* 35 Ill. Admin. Code § 370 App. A. The second amended complaint alleges that **[*8]** Fiala, by virtue of purchasing a single-family home that was connected to the District's facilities, "owns" 3.5 PEs. Doc. 88 at ¶ 1. As a result of the Norton Farms Agreement, one PE was "stolen" from Fiala and every other homeowner in the Fox Mill subdivision and then "sold" to Harrison to give the Norton Farms development sufficient wastewater capacity. *Id.* at ¶ 46(j), (o), (x), (ii), (pp), (vv). Each PE allegedly is worth $10,000. *Ibid.* The District's "sale" of Fiala's and other homeowners' PEs to Harrison increased the District's wastewater usage beyond its capacity, resulting in the spraying of wastewater effluent into public waterways. *Id.* at ¶ 46(ww).

The second amended complaint purports to state claims under RICO and Illinois law. *Id.* at ¶ 15. For the RICO claim, which is set forth in Count I of the second amended complaint, Plaintiffs seek actual damages, treble damages, attorney fees, and costs. *Id.* at p. 46. For the state law claims, which are set forth in Counts II-V, Plaintiffs seek compensatory and punitive damages, and ask the court to nullify the Norton Farms Agreement; to declare that the Fox Mill Agreement does not permit FMLP or B&B to seek the reimbursements; to **[*9]** require that all monies received by B&B, FMLP, or "the B&B Family" be returned to the individuals and entities from whom the monies were wrongfully obtained; to declare that the amendment to the Sanitary District Act of 1936 does not apply retroactively to any project constructed prior to its enactment; and to declare that any excess PEs are the District's property. *Id.* at ¶ 67(a), (b), (c), (e) (f), and p. 50. Plaintiffs ask the court under the Illinois Public Officer Prohibited Activities Act, *50 ILCS 105/3*, to declare that the trustee defendants violated that statute and to nullify any District contract executed while one of the trustees held office, and, pursuant to 50 ILCS 105/4, to remove the trustees from public office and to appoint a receiver until a proper election for successor trustees can be held. *Id.* at ¶¶ 70(a) & (b), 73, 74.

Discussion

Five sets of defendants have filed five separate motions to dismiss. One argument made or adopted by all Defendants is that Plaintiffs lack RICO standing. That argument, which is correct and which disposes of the RICO claims, is addressed first, followed by consideration of the state law claims.

I. RICO Claims

RICO provides that ***HN2***[] "[a]ny person **[*10]** injured in his business or property by reason of a violation of *section 1962* of this chapter may sue ... in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *18 U.S.C. § 1964(c)*. ***HN3***[] "The phrase 'injured in [his] business or property' has been interpreted as a standing requirement—rather than an element of the cause of action—which must be satisfied in order to prevail on a RICO claim." *Evans v. City of Chi., 434 F.3d 916, 924 (7th Cir. 2006)* (citing *Gagan v. Am. Cablevision, Inc., 77 F.3d 951, 958-59 (7th Cir. 1996))*. Therefore, "to establish standing to sue for a violation of *§ 1962*, a plaintiff must allege that the defendant's overt act in furtherance of the RICO conspiracy injured the plaintiff's business or property." *Gagan, 77 F.3d at 959*.

The portions of Plaintiffs' second amended complaint and briefs that conceivably bear upon RICO standing generously can be read to maintain that Plaintiffs suffered the following injuries: (1) Defendants misappropriated one of Fiala's PEs and reassigned it to Harrison's homes in Norton Farms; (2) Defendants' actions "endangered the health **[*11]** and welfare of Fiala and others similarly situated"; (3) because Kobler and other developers paid B&B or FMLP the connection fees that should have been paid to the District, insufficient investments were made in infrastructure and capacity, leading the District to charge Fiala and other homeowners higher fees, assessments, and property taxes to make up the shortfall; (4) as a result of Defendants' actions, Kobler was forced to pay "illegal fees" to B&B that it would not have paid "but for Defendants' wrongful acts." Doc. 42 at 26-27; Doc. 88 at ¶¶ 18, 19(m) 38, 46(ww) & (zz), 51, 59, 62; Doc. 105 at 4-6. Plaintiff forfeited any argument regarding the third and fourth alleged injuries by failing to argue in their briefs that those injuries establish RICO standing. And putting aside forfeiture, none of the alleged injuries satisfy the RICO standing requirement.

A. Misappropriation and Reassignment of PEs

The first alleged injury—the taking and reassignment of Fiala's PE—rests on the premise that PEs are property that Fiala owned and that one PE supposedly was taken from Fiala and reassigned to Norton Farms. After all, if the PEs are not property, then Fiala could not own "his" PEs and **[*12]** a PE could not have been wrongfully taken from him. And if the PE was not wrongfully taken from Fiala, then he cannot be said to have suffered an "injury in business or property" under *18 U.S.C. § 1694(c)*. *See Rylewicz v. Beaton Servs., Ltd., 698 F. Supp. 1391, 1396 (N.D. Ill. 1988)* ***HN4***[] ("The term 'property' [in *§ 1964(c)*] contemplates something owned or possessed that an individual has a legitimate claim of entitlement to.").

The second amended complaint alleges that Fiala "owns 3.5 PEs" by virtue of purchasing a home in the Fox Mills subdivision. Doc. 88 at ¶ 1. ***HN5***[] That allegation is "a legal conclusion couched as a factual allegation," and thus need not be accepted as true on a *Rule 12(b)* motion. *Bonte v. U.S. Bank, N.A., 624 F.3d 461, 465 (7th Cir. 2010)*. In their briefs opposing dismissal, which is where Plaintiffs need to support their legal conclusions, Plaintiffs cite no legal authority for the proposition that a PE is property belonging to a homeowner. Docs. 42, 105. And the legal authority that is available establishes that Fiala did not own any PEs.

HN6[] The nature of a PE is established by Illinois law. Different types of residences are designated different numbers of PEs. *See 35 Ill. Admin. Code § 370* **[*13]** App. A (designating one PE for an efficiency or studio apartment, 1.5 PEs for a one-bedroom apartment, three PEs for a two- or three-bedroom apartment, 3.5 PEs for a single-family dwelling, and 2.25 PEs for a mobile home). A PE is "an average waste loading equivalent to that produced by one person which is defined as 100 gallons per day." *225 ILCS 225/3(6)*. This unit of measurement is used to estimate the wastewater usage and environmental impact of various structures. As the regulations explain:

> *HN7*[] "Population Equivalent" is a term used to evaluate the impact of industrial or other waste on a treatment works or stream. One population equivalent is 100 gallons (380 liters) of sewage per day, containing 0.17 pounds (77 grams) of BOD (5) (five day biochemical oxygen demand) and 0.20 pounds (91 grams) of suspended solids. The impact on a treatment works is evaluated as the equivalent of the highest of the three parameters. Impact on a stream is the higher of the BOD (5) and suspended solids parameters.

35 Ill. Admin. Code § 301.345. The manner in which Illinois law uses this unit of measurement is illustrated by a regulation prohibiting effluent from a "source whose untreated waste load is **[*14]** 10,000 population equivalents or more" from being discharged into the Chicago River System or Calumet River System. *Id.* § 304.120(b).

Illinois law makes clear, then, that the 3.5 PEs assigned to Fiala's single-family home do nothing more, and nothing less, than designate the amount of wastewater the home is presumed to generate. This designation, in turn, is used to estimate the Fiala home's impact on the District's treatment capacity and surrounding environment. Illinois courts refer to PEs in precisely this way and no other. *See, e.g., N. Moraine Wastewater Reclamation Dist. v. Ill. Commerce Comm'n, 392 Ill. App. 3d 542, 912 N.E.2d 204, 217, 332 Ill. Dec. 18 (Ill. App. 2009)*; *Vill. of Fox River Grove v. Pollution Control Bd., 299 Ill. App. 3d 869, 702 N.E.2d 656, 663, 234 Ill. Dec. 316 (Ill. App. 1998)*; *Metro Util. v. Ill. Commerce Comm'n, 193 Ill. App. 3d 178, 549 N.E.2d 1327, 1328, 140 Ill. Dec. 455 (Ill. App. 1990)*; *Greater Peoria Sanitary & Sewage Disposal Dist. v. Pollution Control Bd., 185 Ill. App. 3d 9, 540 N.E.2d 934, 935, 133 Ill. Dec. 68 (Ill. App. 1989)*; *Unity Ventures v. Pollution Control Bd., 132 Ill. App. 3d 421, 476 N.E.2d 1368, 1369-1370, 87 Ill. Dec. 376 (Ill. App. 1985)*.

The nature of PEs under Illinois law conclusively defeats Plaintiffs' submission that the 3.5 PEs are property that Fiala acquired by virtue of purchasing a home in Fox Mills. Plaintiffs do not **[*15]** and could not allege that Fiala's wastewater services were in any way limited by the supposed "theft" of one of his PEs. If Fiala's home produced more than 2.5 PEs (250 gallons) of wastewater on any given day after the "theft" of one PE, he would not have faced any penalty or paid any charges for continuing to flush his toilet or run his shower, dishwasher, or washing machine. Fiala could not sell his PEs to a neighbor, thereby diminishing the amount of water he was entitled to use and increasing the amount of water his neighbor could use. And there is no support in law or logic for Plaintiffs' conclusory allegation that the value of Fiala's home was diminished by the "loss" of one PE, Doc. 42 at 27, for there is no basis to believe that his actual wastewater services were affected in any way by the "loss."

In short, Fiala's PEs are not property and cannot have been taken or stolen from him. The supposed theft therefore does not provide a basis for RICO standing.

B. Harm to Fiala's "Health and Welfare" Due To The Spraying and Discharge of Effluent

The second amended complaint alleges that Defendants "spray[ed] excess effluent in violation of Illinois law and [Environmental Protection **[*16]** Agency ("EPA")] regulations for the purpose of falsifying the capacity of the [District's] system," "spray[ed] effluent when the ground is over saturated in violation of [Illinois Environmental Protection Agency] regulations," and "discharge[d] effluent directly into Mill Creek in violation of both State and Federal EPA regulations." Doc. 88 at ¶ 38. The complaint alleges that these actions "endanger[ed] the health and welfare of the Plaintiffs and the citizens within the [District] and Illinois." *Id.* at ¶ 39. Plaintiffs' briefs do not elaborate on the complaint's allegations, other than to say that "Defendants have also endangered the health and welfare of Fiala and others similarly situated." Doc. 42 at 27.

Plaintiffs nowhere assert that the spraying and discharge of effluent diminished the value of their homes or property. The alleged environmental harms therefore cannot establish RICO standing. ***HN8***[] The Seventh Circuit has held "not only that personal injuries do not provide standing in civil RICO actions, but also that pecuniary losses flowing from those personal injuries are insufficient to confer standing under *§ 1964(c)*." *Evans, 434 F.3d at 926* (citation omitted); *see also* *id. at 931* **[*17]** ("personal injuries and the pecuniary losses stemming therefrom do not establish standing under the civil RICO statute"). As the Seventh Circuit explained:

> ***HN9***[] In the civil RICO context, personal injuries which may result in pecuniary losses, but are nonetheless insufficient to provide standing under *§ 1964(c)* have been found to include injury to mental health or emotional distress; sickness, poisoning and emotional distress; emotional distress due to loss of security and peace; injury stemming from the harassment and intimidation of federal witnesses; loss of income due to wrongful death of a family member/source of support; and inability to pursue or obtain meaningful employment.

Id. at 926 (citations omitted). Likewise, RICO plaintiffs may not recover for "physical and emotional injuries due to harmful exposure to toxic waste." *Genty v. Resolution Trust Corp., 937 F.2d 899, 918-19 (3d Cir. 1991)*. It follows that Plaintiffs cannot seek redress under RICO for the alleged harm to their "health and welfare."

C. Payment of Higher Fees, Property Taxes, and Assessments

As noted above, Plaintiffs allege that because Kobler and other developers paid B&B or FMLP the connection fees that should have **[*18]** been paid to the District, insufficient investments were made in the District's infrastructure and capacity, requiring the District to charge Fiala and other home owners higher fees, assessments, and property taxes to make up the shortfall. Although Plaintiffs specifically disclaim any reliance on Fiala's taxpayer status, Doc. 88 at ¶ 61 ("Plaintiff FIALA is *not* seeking any recovery under [RICO] in his capacity as a taxpayer."), the second amended complaint references Fiala's payment of higher fees, taxes, and assessments, *id.* at ¶¶ 1, 18, 46(ww). In their briefs opposing dismissal, however, Plaintiffs do not argue that the overpayments constitute an injury for purposes of RICO standing. Any RICO standing argument based on the alleged overpayments accordingly has been forfeited. *See* *Alioto v. Town of Lisbon, 651 F.3d 715, 721 (7th Cir. 2011)* ("Longstanding under our case law is the rule that ***HN10***[] a person waives an argument by failing to make it before the district court. We apply that rule where a party fails to develop arguments related to a discrete issue, and we also apply that rule where a litigant effectively abandons the litigation by not responding to alleged deficiencies in a motion **[*19]** to dismiss.") (citations omitted); *Bonte, 624 F.3d at 466* ("Failure to respond to an argument—as the [plaintiffs] have done here—results in waiver."); *Wojtas v. Capital Guardian Trust Co., 477 F.3d 924, 926 (7th Cir. 2007)*; *Cincinnati Ins. Co. v. E. Atl. Ins. Co., 260 F.3d 742, 747 (7th Cir. 2001)* (a party's failure to oppose an argument permits an inference of acquiescence, and "acquiescence operates as a waiver"); *Walsh v. Arrow Fin. Servs., LLC, 2012 U.S. Dist. LEXIS 9972, 2012 WL 255802, at *3 (N.D. Ill. Jan. 27, 2012)* (citing cases); *Shaffer v. Nat'l Passenger R.R. Corp., 2011 U.S. Dist. LEXIS 119727, 2011 WL 4916493, at *2 (N.D. Ill. Oct. 17, 2011)* (citing cases).

Any such argument would have failed in any event due to the "indirect purchaser" rule. ***HN11***[] The rule holds that a plaintiff cannot seek damages under RICO where it is an indirect purchaser, meaning where it alleges that it paid the costs of a RICO scheme that were passed on by the scheme's direct victim. *See* *BCS Servs, Inc. v. Heartwood 88, LLC, 637 F.3d 750, 753-57 (7th Cir. 2011)*. The rule is regularly invoked to defeat the kind of RICO claim at issue in this case. In *Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985)*, for example, the defendant bribed employees of the Cook County **[*20]** Board of Appeals to obtain lower property assessments for his clients. The bribes indisputably violated RICO, and the plaintiff taxpayers sued the defendant on the theory that Cook County had increased their taxes to make up the shortfall caused by the lower assessments given the defendant's clients. *See* *id. at 1174-75*. The Seventh Circuit held that the indirect purchaser rule defeated the claim, explaining that ***HN12***[] RICO does not provide redress for taxpayers who were overcharged due to costs being "passed on" by the scheme's direct victim, which in *Carter* was the County. *Id. at 1175-76*.

Other decisions are in accord. In *Wooten v. Loshbough, 951 F.2d 768 (7th Cir. 1991)*, the plaintiff was a judgment creditor of a company driven into bankruptcy by the defendant's RICO violations. While acknowledging that "the defendants' activities made it less likely that [the plaintiff] would collect her judgment[,]" the court held that her claim was barred by the indirect purchaser rule. *Id. at 769*. And in *Illinois ex rel. Ryan v. Brown, 227 F.3d 1042 (7th Cir. 2000)*, the plaintiff taxpayers brought suit on behalf of the State of Illinois to recoup interest lost due to the state treasurer's placement **[*21]** of state monies in a non-interest bearing account, a decision that allegedly resulted from a bribery scheme that violated RICO. In holding that the plaintiffs were not the scheme's direct victims and thus could not sue under RICO, the Seventh Circuit cited *Carter*, describing it as a case where

> the directly injured party was the county, whose tax collections had been less than they should have been because of the acts of bribery and mail fraud at issue; those plaintiffs claimed that they too were injured because their tax assessments were too *high*, as a result of the depressed levels other people's taxes.

Id. at 1045. The Seventh Circuit ruled that because "the State of Illinois itself was directly injured by the misdirection of its funds into non-interest bearing accounts and the pockets of miscreants[,] ... the State is the proper party to be suing, not the plaintiffs." *Id. at 1045-46*.

As in *Carter, Wooten*, and *Ryan*, the indirect purchaser rule bars Plaintiffs from invoking RICO to recover the amounts by which the District allegedly was compelled to overcharge them due to the siphoning away of money by FMLP and B&B. The direct victim of Defendants' scheme, and thus the only appropriate **[*22]** RICO plaintiff, is the District itself.

Although this result may seem odd at first glance because the second amended complaint names the District as a defendant, the complaint makes clear that the District is *not* a RICO defendant. In its third paragraph, the complaint states: "No money is being sought from the [District] in this action, but instead *they are named herein as an interested party* under Count II with the right to notice that this action may adjudicate *their rights to certain property.*" Doc. 88 at ¶ 3 (emphasis added). Count I is the RICO claim, while Count II seeks equitable and declaratory relief under a variety of state law theories. Moreover, the third paragraph's reference to "their rights to certain property" suggests that Plaintiffs (correctly) view the District as the victim, not the perpetrator, of a RICO scheme allegedly concocted by the other defendants. The point is confirmed by the complaint's first paragraph, which alleges that Fiala brought this suit "in his individual capacity as a homewoner in Fox Mill and as a taxpayer for the misappropriation of general public funds for which *the municipality [the District] has a right to collect*, pursuant to *Golden v. City of Flora[,] ... 408 Ill. 129, 96 N.E.2d 506, 508 (Ill. 1951)*." **[*23]** *Id.* at ¶ 1 (emphasis added). Again, the allegation that the District "has a right to collect" funds that the RICO scheme diverted elsewhere suggests that the District is the scheme's victim and not among its perpetrators. The District's status as a nominal defendant therefore does not undermine the conclusion that it is the direct victim of the alleged RICO scheme and thus the only appropriate RICO plaintiff.

Carter recognizes ***HN13***[↑] an exception to the "indirect purchaser" rule in RICO cases "'where the direct purchaser is owned or controlled by' the wrongdoer." *777 F.2d at 1178* (quoting *Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 n.16, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977))*. The rationale for this exception, which arose from ***antitrust law***, is that where the wrongdoers control the direct purchaser, "the direct purchaser would have little or no incentive to sue on [its] own behalf, thus leaving the indirect purchaser without recourse for any antitrust injuries." *Doe v. Ariz. Hosp. & Healthcare Ass'n, 2009 U.S. Dist. LEXIS 42871, 2009 WL 1423378, at *6 (D. Ariz. Mar. 19, 2009)*. Those circumstances were present at the inception of this lawsuit in April 2010, when the three trustee defendants controlled the District's three-member board. But two **[*24]** of the trustees (Brizuela and Sindelar) were replaced in November 2010, giving majority control of the District's board to non-conflicted trustees. *See* Wasco Sanitary District Trustees, *http://wascosd.org/AboutWSD/Trustees/tabid/110/* Default.aspx (last visited Mar. 15, 2012) (identifying Ryan Strauss as President, Thomas Bihun as Vice President, and Skidmore as Trustee); *Bihun, Strauss win in Wasco Sanitary District*, Kane County Chronicle, Nov. 3, 2010 (reporting that Strauss and Bihun defeated Brizuela and William Scanlon in the November 2010 election), *available at http://fwix.com/news/11230082* (last visited Mar. 15, 2012); Kane County Elections, 2010 General Election Contest Results, *http://www.kanecountyelections.org/ElectionResults/2010-11-02/Contests.asp* (last visited Mar. 15, 2012) (same); Josh Stockinger, *Wasco candidates disagree on legal fees*, Chicago Daily Herald, Oct. 25, 2010, at 4 (reporting that Strauss and Bihun ran as a slate against Brizuela and Scanlon in the November 2010 election).

The non-conflicted trustees have had the authority since November 2010 to seek redress for the alleged siphoning of funds away from it and to FMLP and B&B. *See* 70 ILCS 2805/3(d) **HN14**[] ("[a] **[*25]** majority of the board of trustees shall constitute a quorum"). Because there remains no impediment to suit by the direct purchaser, and because there has been no such impediment since November 2010, the "own or control" exception to the indirect purchaser rule does not apply. It follows—even putting aside Plaintiffs' forfeiture of the argument that the alleged overpayment of fees, property taxes, and assessments provide a basis for RICO standing—that Plaintiffs are not the proper parties to seek redress under RICO for that alleged injury.

D. Payment of "Illegal Fees" by Kobler to B & B

Finally, the second amended complaint alleges that Kobler was injured when forced to pay "illegal fees" to B&B as a result of the reimbursement agreement between the District and B&B. There are two conceivable alleged injuries here. The first is that Kobler "would not have had to pay [the illegal fees] but for the Defendants' wrongful acts." Doc. 88 at ¶ 62. Any argument that this injury provides a basis for RICO standing has been forfeited because Plaintiffs' briefs do not press this point in opposing dismissal; in fact, the briefs do not mention this point at all. *See* *Alioto, 651 F.3d at 721*; *Bonte, 624 F.3d at 466*; **[*26]** *Wojtas, 477 F.3d at 926*; *Cincinnati Ins. Co., 260 F.3d at 747*; *Walsh, 2012 U.S. Dist. LEXIS 9972, 2012 WL 255802, at *3*; *Shaffer, 2011 U.S. Dist. LEXIS 119727, 2011 WL 4916493, at *2*.

The second conceivable injury, which is not forfeited, arises from the allegation that "Kobler ... w[as] induced to pay monies directly to defendants after being falsely advised by defendants that B&B and/or FMLP owned the rights to sell P.E.'s as some type of commodity." Doc. 42 at 27. The argument appears to be that the reimbursement arrangement caused harm because the fees first should be paid to the District and then given to B&B, not paid directly to B&B. This alleged injury does not establish RICO standing. Plaintiffs do not contend that the homes Kobler built did not receive wastewater services in exchange for the payments; indeed, the homes did. Nor do Plaintiffs submit that the fees were any higher than they would have been had the fees been paid directly to the District. Accordingly, the fact that money is paid directly to B&B rather than passed through the District does not deprive Kobler of any money (beyond what it would have paid anyway) or services. It follows that the direct payments did not injure Kobler's "business or property" under *§ 1964(c)* **[*27]** and thus that it cannot predicate RICO standing.

II. State Law Claims

Having dismissed the RICO claims, which are the only federal claims, the court must decide the proper disposition of the state law claims. **HN15**[] If the dismissal of the RICO claims is for lack of subject matter jurisdiction under *Rule 12(b)(1)*, the court must remand the state law claims without considering whether to retain supplemental jurisdiction under *28 U.S.C. § 1367*. *See* *Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)*; *Miller v. Herman, 600 F.3d 726, 730 (7th Cir. 2010)*. In *Evans v. City of Chicago, supra*, **HN16**[] the Seventh Circuit definitively held that RICO standing implicates subject matter jurisdiction, not the merits of the RICO claim:

> **HN17**[] The phrase "injured in business or property" has been interpreted as a standing requirement—rather than an element of the cause of action—which must be satisfied in order to prevail on a RICO claim. The causation component of *§ 1964(c)*—whether an alleged RICO injury was caused "by reason of" a violation of the statute—has also been considered a component of standing. As such, the issue represents a jurisdictional requirement which remains open to review at all stages of the litigation.

434 F.3d at 924 **[*28]** (citations and some internal quotation marks omitted); *accord, e.g.,* *RWB Servs., LLC v. Hartford Computer Grp., Inc., 539 F.3d 681, 686 (7th Cir. 2008)*; *Gagan, 77 F.3d at 958*. On that understanding, the dismissal of the RICO claims is for lack of jurisdiction under *Rule 12(b)(1)*, mandating remand of the state law claims.

It is possible that the Seventh Circuit might revisit the issue and conclude that RICO standing goes to the merits of a RICO claim, thus making *Rule 12(b)(6)* and not *Rule 12(b)(1)* the appropriate vehicle for a dismissal grounded on lack of RICO standing. The Seventh Circuit has long considered antitrust standing, a close cousin of RICO standing, to be non-jurisdictional. *See Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 778 (7th Cir. 1994)* ("despite the suggestive terminology, 'antitrust standing' is not a jurisdictional requirement and is therefore waivable"). And the Second, Third, and Ninth Circuits have held that RICO standing goes to merits and not the court's jurisdiction. *See, e.g., Canyon Cnty. v. Syngenta Seeds, Inc., 519 F.3d 969, 974 n.7 (9th Cir. 2008)* ("we review the question of whether the [plaintiff] satisfies civil RICO's standing requirements under **[*29]** the standard for *Rule 12(b)(6)*"); *Lerner v. Fleet Bank, N.A., 318 F.3d 113, 129-30 (2d Cir. 2003)* (Sotomayor, J.) (RICO standing "is not jurisdictional in nature under *Fed. R. Civ. P. 12(b)(1)*, but is rather an element of the merits addressed under a *Fed. R. Civ. P. 12(b)(6)* motion for failure to state a claim"); *Maio v. Aetna, Inc., 221 F.3d 472, 481 n.7 (3d Cir. 2000)* ("While we have designated *section 1964(c)* as the 'standing' provision of RICO, we point out that our method of analysis in prior cases has been to consider issues of RICO and antitrust standing in the context of reviewing motions to dismiss pursuant to *Rule 12(b)(6)*, despite the fact that the 'injury to business or property' and proximate causation requirements are considered aspects of the plaintiff's 'standing' to sue under *section 1964(c)* of RICO and *section 4* of the Clayton Act.") (citation omitted).

If the Seventh Circuit were to agree with the Second, Third, and Ninth Circuits, then the dismissal of the RICO claims here would be on the merits under *Rule 12(b)(6)*, thus requiring the court to decide whether to retain or relinquish supplemental jurisdiction over the state law claims under *28 U.S.C. § 1367*. (The parties **[*30]** are not diverse, so there is no original jurisdiction under the diversity statute, *28 U.S.C. § 1332*.) Under those circumstances, the court would exercise its discretion under *§ 1367(c)* to relinquish jurisdiction over the state law claims and remand them to state court.

HN18[] *Section 1367(c)(3)* provides that a district court "may decline to exercise supplemental jurisdiction over a claim" if "the district court has dismissed all claims over which it has original jurisdiction." *28 U.S.C. § 1367(c)(3)*. "As a general matter, when all federal claims have been dismissed prior to trial, the federal court should relinquish jurisdiction over the remaining pendant state claims." *Williams v. Rodriguez, 509 F.3d 392, 404 (7th Cir. 2007)*. This rule has three exceptions: "when the [refiling] of the state claims is barred by the statute of limitations; where substantial judicial resources have already been expended on the state claims; and when it is clearly apparent how the state claim is to be decided." *Ibid*. None of those exceptions apply here, making remand appropriate. *See Courtney v. Halleran, 485 F.3d 942, 950-51 (7th Cir. 2007)* (affirming the district court's dismissal of the state law claims under **[*31]** *§ 1367(c)(3)* after it dismissed the RICO claims, which were the only federal claims in the case); *Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 458-59 (7th Cir. 1982)* (suggesting that relinquishing jurisdiction over the state law claims would be appropriate because the RICO claims, which were the only federal claims in the case, had been dismissed).

Remand is independently appropriate under ***HN19***[] *§ 1367(c)(1)*, which applies where a state law claim "raises a novel or complex issue of State law." *28 U.S.C. § 1367(c)(1)*. As noted above, Plaintiffs' state law claims ask the court under the Illinois Public Officer Prohibited Activities Act, *50 ILCS 105/3*, to declare that the District's trustees violated that statute, to nullify any District contract executed while one of the trustees held office, and, under *50 ILCS 105/4*, to appoint a receiver until a proper election for successor trustees can be held. Such claims, which strike at the heart of an Illinois municipality's ability to govern itself, are better resolved by the Illinois judiciary. *See Marshall v. Cnty. of Cook, 2011 U.S. Dist. LEXIS 136959, 2011 WL 5980454, at *4 (N.D. Ill. Nov. 29, 2011)* (citing cases).

Conclusion

For the foregoing reasons, Plaintiffs' RICO claims **[*32]** are dismissed. Jurisdiction is relinquished over the state law claims, which are remanded to the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois. The dismissal of the RICO claims is without prejudice to Plaintiffs pursuing their state law claims in state court.

March 16, 2012

/s/ Gary Feinerman

United States District Judge

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In re Processed Egg Prods. Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

March 19, 2012, Decided; March 20, 2012, Filed

MDL No. 2002; 08-md-02002

Reporter

851 F. Supp. 2d 867 *; 2012 U.S. Dist. LEXIS 37265 **; 2012-1 Trade Cas. (CCH) P77,835

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

Subsequent History: Motion granted by, Without prejudice, Claim dismissed by *In re Processed Egg Prods. Antitrust Litig., 2012 U.S. Dist. LEXIS 48321 (E.D. Pa., Apr. 4, 2012)*

Prior History: *In re Processed Egg Prods. Antitrust Litig., 836 F. Supp. 2d 290, 2011 U.S. Dist. LEXIS 146258 (E.D. Pa., Dec. 19, 2011)*

Core Terms

eggs, unjust enrichment, Defendants', Plaintiffs', purchasers, allegations, indirect, prices, products, unfair, antitrust violation, direct benefit, conspiracy, consumer, antitrust, conferred, factual allegations, cause of action, deceptive, grounds, named plaintiff, motion to dismiss, antitrust claim, anti trust law, courts, cases, trade practice, confer a benefit, deceptive act, conferral

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN1[] **Federal & State Interrelationships, Erie Doctrine**

Where jurisdiction is based on diversity, a court is required to apply the substantive law of the state whose law governs the action.

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

Evidence > Judicial Notice > General Overview

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

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

For purposes of a *Fed. R. Civ. P. 12(b)(6)* motion, a court must accept as true all well-pleaded allegations in the complaint and must construe the pleading in the light most favorable to the plaintiffs. Pursuant to *Fed. R. Civ. P. 8(a)(2)*, a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief, providing the defendant fair notice of what the claim is and the grounds upon which it rests. This standard does not require detailed factual allegations, but a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Consistent with *Rule 12(b)(6)*, a court may consider the allegations contained in the complaint, exhibits attached to the complaint, matters of public record and records of which the court may take judicial notice.

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

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

HN3[] **Motions to Dismiss, Failure to State Claim**

A complaint need allege only enough facts to state a claim of relief that is plausible on its face so as to test whether plaintiffs have nudged their claims across the line from conceivable to plausible to survive a *Fed. R. Civ. P. 12(b)(6)* motion. Thus, a complaint is subject to dismissal when the plaintiff fails to plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN4[] **Heightened Pleading Requirements, Fraud Claims**

To determine whether a particular claim is subject to and meets the *Fed. R. Civ. P. 9(b)* pleading standard, courts hold that where the plaintiff grounds her claims in allegations of fraud--and the claims thus sound in fraud--the heightened pleading requirements of *Rule 9(b)* apply. Conversely, claims that do not sound in fraud are not held to the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*. However, there is no requirement that fraud or mistake be a necessary element of a prima facie claim in order for *Rule 9(b)* to apply. In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be grounded in fraud or to sound in fraud, and the pleading of that claim as a whole must satisfy the particularity requirement of *Rule 9(b)*.

Antitrust & Trade Law > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN5[] **Antitrust & Trade Law**

Antitrust claims generally are not subject to the heightened pleading requirement of *Fed. R. Civ. P. 9(b)*, but *Rule 9(b)* applies when fraud is the basis for the antitrust violation alleged. Where an antitrust claim is based on fraud--on misrepresentations in the information given to consumers and on misrepresentations in the information given to others, and where plaintiffs allege that the defendants accomplished the goal of their conspiracy through fraud, the complaint is subject to *Rule 9(b)*.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN6[] Heightened Pleading Requirements, Fraud Claims

To satisfy the *Fed. R. Civ. P. 9(b)* pleading requirements, a complaint may either describe the circumstances of the alleged fraud with precise allegations of date, time, or place or may use some other means of injecting precision and some measure of substantiation into their allegations of fraud. At the very least, plaintiffs also must allege who made a misrepresentation to whom and the general content of the misrepresentation. This pleading standard not only gives defendants notice of the claims against them, but also combats frivolous suits brought solely to extract settlements from defendants and provides an increased measure of protection for their reputations.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN7[] Heightened Pleading Requirements, Fraud Claims

While a significant purpose of *Fed. R. Civ. P. 9(b)* is to provide notice of the precise misconduct at issue, courts should apply the rule with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants. Accordingly, the particularity rule is somewhat relaxed when key factual information remains within the defendant's control. Relaxation, however, does not translate into, or otherwise authorize, boilerplate and conclusory allegations, and plaintiffs must accompany their legal theory with factual allegations that make their theoretically viable claim plausible. Allegations based upon information and belief are permissible, but only if the pleading sets forth specific facts upon which the belief is reasonably based. A boilerplate allegation that plaintiffs believe the necessary information lies in defendants' exclusive control, if made, must be accompanied by a statement of facts upon which their allegation is based. In cases of corporate fraud, even under a nonrestrictive application of *Rule 9(b)*, pleaders must allege that the necessary information lies within defendants' control, and their allegations must be accompanied by a statement of the facts upon which the allegations are based. In other words, even a relaxed fit requires some tailoring.

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

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN8[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 8 continues to apply even when under *Fed. R. Civ. P. 9(b)* malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. *Fed. R. Civ. P. 9(b)*. For purposes of its meaningful presence in *Rule 9(b)* the word generally is a relative term and it is to be compared to the particularity requirement applicable to fraud or mistake. By way of example, *Rule 9* merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid--though still operative--strictures of *Rule 8*. Plaintiffs must still allege facts that show the court their basis for inferring that the defendants acted with scienter. *Rule 8* does not empower a respondent to plead the bare elements of his cause of action, affix the label general allegation, and expect his complaint to survive a motion to dismiss.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

HN9[] **Justiciability, Mootness**

Both standing and mootness also frequently appear as threshold requirements for the maintenance of federal class actions and must be considered in addition to the requirements of *Fed. R. Civ. P. 23* when deciding whether a particular action may be certified. It is important when considering the applicability of these two doctrines to class actions to keep in mind that these concepts serve both constitutional and prudential concerns: they ensure that a justiciable or live issue is presented, thereby satisfying the U.S. Const. art. III requirement that federal courts only entertain cases or controversies, and they seek to ascertain whether the person asserting the claim is sufficiently interested so that full litigation of the issues involved can be assumed. Notably, this latter concern also is addressed through the *Rule 23* requirements that the class representative be a member of the class, and be an adequate representative for the class.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

HN10[] **Class Members, Named Members**

When a class action is introduced into the standing equation, the requirement that a named plaintiff must have standing to bring it is unaltered. Insofar that a case may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Simply put, one cannot acquire individual standing by virtue of bringing a class action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN11[] **Class Actions, Certification of Classes**

When the issue presented in a motion to dismiss concerns solely whether the named plaintiffs have standing to assert class action claims, the named plaintiffs' standing is a threshold issue, and there is no reason to defer the named plaintiffs' standing determination until class certification.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN12[] Justiciability, Standing

Generally, U.S. Const. art. III standing is a threshold issue for any case, including class actions. U.S. Const. art. III, § 2 limits the federal judicial power to the adjudication of cases and controversies. Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims, and they must be dismissed. Moreover, a plaintiff must demonstrate standing for each claim he seeks to press. Standing as to one claim is simply not communicative across other separate claims for relief.

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

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

HN13[] Motions to Dismiss, Failure to State Claim

A dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN14[] Standing, Injury in Fact

The irreducible constitutional minimum of U.S. Const. art. III standing entails three elements. Those constitutional standing requirements are: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) a showing that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN15[] Standing, Injury in Fact

To establish injury in fact, a plaintiff must allege an injury that is both (1) concrete and particularized and (2) actual or imminent, not conjectural or hypothetical. Each of these definitional strands imposes unique constitutional requirements. An injury is concrete if it is real, or distinct and palpable, as opposed to merely abstract, while an injury is sufficiently particularized if it affects the plaintiff in a personal and individual way. The second requirement--actual or imminent, not conjectural or hypothetical--makes plain that if a harm is not presently or actually occurring, the alleged future injury must be sufficiently imminent. Imminence is somewhat elastic, but requires, at the very least, that the plaintiffs demonstrate a realistic danger of sustaining a direct injury. In other words, there must be a realistic chance--or a genuine probability--that a future injury will occur in order for that injury to be sufficiently imminent.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN16[] **Standing, Injury in Fact**

The consideration of the injury-in-fact element bears particular significance because the nature of a party's injury is relevant to the determination of whether she has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues. While all three of these elements are constitutionally mandated, the injury-in-fact element is often determinative. To meet the standing requirements of U.S. Const. art. III, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. A plaintiff's complaint must establish that he has a personal stake in the alleged dispute, and that the alleged injury suffered is particularized as to him. A court's attention must turn to the named plaintiffs to ask whether they have a personal stake sufficient to confer Article III standing based upon their specific allegations and the relief which they seek.

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN17[] **Standing, Personal Stake**

Standing is a question of whether a plaintiff is sufficiently adverse to a defendant to create a U.S. Const. art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction; cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN18[] **Justiciability, Standing**

Statutory standing is generally described as involving whether a plaintiff comes within the zone of interests for which the cause of action was available. The merits inquiry such as whether a private right of enforcement exists and the statutory standing inquiry often overlap, and the question whether a plaintiff has a cause of action under a statute, and the question whether any plaintiff has a cause of action under the statute are closely connected--indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two. Nonetheless, questions of U.S. Const. art. III standing are distinguishable from both concepts.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN19[] Private Actions, Standing

Statutory standing can be understood as simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place.

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

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN20[] Private Actions, Standing

It is necessary for a court to distinguish U.S. Const. art. III standing issues from statutory standing and cause of action issues because the question whether a plaintiff states a claim for relief goes to the merits' in the typical case, not the justiciability of a dispute, and conflation of the two concepts can cause confusion Statutory standing, that is, the possession of a viable claim or right to relief, not to a jurisdictional requirement, is distinct from jurisdictional standing in that Article III standing is required to establish a justiciable case or controversy within the jurisdiction of the federal courts, whereas lack of antitrust standing affects a plaintiff's ability to recover, but does not implicate the subject matter jurisdiction of the court. Whether a party has standing under Article III is a distinct inquiry from whether the party may assert a cause of action under state or federal law. A party may have standing under Article III, but fail to assert a cause of action under state law.

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

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN21[] Motions to Dismiss, Failure to State Claim

It is firmly established that the absence of a valid, as opposed to arguable, cause of action does not implicate subject-matter jurisdiction, that is, a courts' statutory or constitutional power to adjudicate a case. Jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which the petitioners could actually recover. Rather, a district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another, unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

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

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN22[] Motions to Dismiss, Failure to State Claim

The U.S. Supreme Court has criticized the implications of treating the validity of a cause of action as jurisdictional. Under that approach, each element of every cause of action would have a legitimate claim to being a jurisdictional requirement--essentially eviscerating the distinction between the jurisdictional and merits inquiry, and requiring a court to dismiss a claim for lack of jurisdiction whenever the plaintiff does not prevail. An exception arises when a claim is so insubstantial, implausible, foreclosed by prior decisions of the court, or otherwise completely devoid of merit as not to involve a federal controversy.

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

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN23[] **Private Actions, Standing**

A U.S. Const. art. III standing inquiry simply does not require considering the elements of a state claim as jurisdictional prerequisites. To inject the condition that plaintiffs must satisfy certain elements of state antitrust claims into a constitutional standing analysis would result in an impermissible out-of-the-box merits inquiry. The Article III requirement of remediable injury in fact, except with regard to entirely frivolous claims, has nothing to do with the text of the statute relied upon.

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

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

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

HN24[] **Motions to Dismiss, Failure to State Claim**

Whether a statutory provision that establishes a threshold for relief is jurisdictional or goes to the merits determines whether a failure to comply with the provision is grounds for dismissal, at any time in the litigation, under *Fed. R. Civ. P. 12(b)(1)*, or whether a failure to meet the threshold is merely a basis for summary judgment or for dismissal for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, matters that are subject to very different procedural rules and limits. Under the bright line rule of Arbaugh v. Y & H Corp., federal statutory threshold requirements should not be treated as jurisdictional unless Congress has clearly stated that they are.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN25[] **Standing, Requirements**

The focus of the doctrine of antitrust standing is somewhat different from that of standing as a constitutional doctrine. Harm to an antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact. After all, monetary harm is a classic form of injury in fact. Indeed, it is often assumed without discussion.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Civil Procedure > ... > Justiciability > Standing > Personal Stake

HN26[] **Injunctions, Grounds for Injunctions**

U.S. Const. art. III standing is to be considered in light of the specific allegations and the relief sought, which with respect to injunctive relief requires consideration of whether a plaintiff is likely to suffer future injury.

Governments > Legislation > Interpretation

HN27[] **Legislation, Interpretation**

Because it is presumed that Congress expresses its intent through the ordinary meaning of its language, every exercise of statutory interpretation begins with an examination of the plain language of the statute. When the statute's language is plain, the sole function of the courts--at least where the disposition required by the test is not absurd--is to enforce it according to its terms. When the language of a statute is plain and its meaning clear, the rules of statutory construction do not permit courts to search for meaning beyond the statute's express terms. The most fundamental rule of statutory construction is the plain meaning rule, which provides that if a statute is not ambiguous, then a court must apply the statute according to its terms. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless they are defined by statute or unless a contrary intention plainly appears. Courts give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN28[] **Standing, Requirements**

Under the Iowa Competition Law, the state or a person who is injured or threatened with injury by conduct prohibited under the chapter may bring suit for various specified forms of relief. *Iowa Code § 553.12*. Such prohibited conduct includes a contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market. *Iowa Code § 553.4*. These provisions can be read to permit a broad class of persons to maintain a civil enforcement action so long as they suffer an injury resulting from a violation of the law. Upon an unadorned reading of the Competition Law, a cognizable injury under the statute does not appear to be exclusively restricted to injuries of residents, or injuries sustained intrastate.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN29[] **Standing, Requirements**

The North Dakota Antitrust Act contains broad language: a person threatened with injury or injured in that person's business or property by a violation of this chapter may bring an action for appropriate injunctive or other equitable relief, [and] damages sustained. *N.D.C.C. § 51-08.1-08(2)*. The Act prohibits a contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market. *N.D.C.C. § 51-08.1-02*. A cognizable injury does not appear to be restricted to residents' injuries, or injuries experienced due to transactions occurring within North Dakota's borders.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN30[] **Standing, Requirements**

South Dakota's ***antitrust law*** also grants a private right of action for a person injured by a violation of that antitrust provision and does not contain statutory language that explicitly requires an intrastate injury. Under that law, a person injured in his business or property by a violation of this chapter may bring an action for appropriate injunctive or other equitable relief, damages sustained and, as determined by the court, taxable costs and reasonable attorney's fees. *S.D. Codified Laws § 37-1-14.3*. The law also provides that a contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any part of which is within the state is unlawful. *S.D. Codified Laws § 37-1-3.1*.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN31[] **Standing, Requirements**

The Mississippi ***antitrust law*** states: any person, natural or artificial, injured or damaged by a trust and combine as herein defined, or by its effects direct or indirect, may recover all damages of every kind sustained by him or it and in addition a penalty of $500.00. *Miss. Code Ann. § 75-21-9*. The statute defines a trust or combine, as a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be to restrain trade. *Miss. Code Ann. § 75-21-1*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN32[] **Public Enforcement, State Civil Actions**

Some state antitrust laws can extend to transactions involving interstate commerce and some state statutes, or judicial interpretations of those provisions may expressly address the extraterritorial effects of a state's ***antitrust law***.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

HN33[] Justiciability, Standing

There is no requirement that prudential standing issues must always be resolved before the merits--and certainly not when the parties have not framed prudential standing issues explicitly or suitably for the court's consideration. Although the U.S. Supreme Court in Steel Co. specifically indicated that U.S. Const. art. III jurisdiction is always an antecedent question that decision should not be understood as requiring courts to answer all questions of jurisdiction, broadly understood, before addressing the existence of the cause of action sued upon.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN34[] Public Enforcement, State Civil Actions

Utah Code Ann. § 76-10-918(1) authorized indirect purchasers to recover for violations of the Act.

Governments > Legislation > Effect & Operation > Retrospective Operation

HN35[] Effect & Operation, Retrospective Operation

In Utah, a statute is not to be applied retroactively unless the statute expressly declares that it operates retroactively.

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

Civil Procedure > Remedies > General Overview

HN36[] Deceptive & Unfair Trade Practices, State Regulation

The California Unfair Competition Law (UCL) prohibits engaging in unfair competition, which is defined, among other things, as any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. *Cal. Bus. & Prof. Code § 17200*. A person who has suffered injury in fact and has lost money or property as a result of the unfair competition may bring suit for such a violation. *Cal. Bus. & Prof. Code § 17204*; *Cal. Bus. & Prof. Code § 17203*. *Section 17204* prescribes who may sue to enforce the UCL. To satisfy the narrower standing requirements, a party must (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, that is, caused by, the unfair business practice or false advertising that is the gravamen of the claim. Remedies include injunctive relief, civil penalties, and those remedies that may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *Cal. Bus. & Prof. Code § 17203*. Prevailing plaintiffs are generally limited to injunctive relief and restitution.

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

Civil Procedure > Remedies > Injunctions > General Overview

HN37[] Deceptive & Unfair Trade Practices, State Regulation

Once a plaintiff has satisfied the injury requirement under *Cal. Bus. & Prof. Code § 17203*, such injuries satisfy the plain meaning of *§ 17204*'s lost money or property requirement, qualify as injury in fact, and would permit a plaintiff to seek an injunction against the offending business practice even in the absence of any basis for restitution.

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

HN38[] Deceptive & Unfair Trade Practices, State Regulation

Antitrust violations can constitute unfair competition under the California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200*. *Section 17200* borrows violations from other laws by making them independently actionable as unfair competitive practices, and allows a practice to be deemed unfair even if not specifically proscribed by some other law. The UCL operates as a consumer protection law with antitrust applications and claims under the UCL often accompany, or arise out of, alleged antitrust violations.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

Contracts Law > Remedies > Restitution

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

HN39[] Standing, Requirements

Restitution under *Cal. Bus. & Prof. Code § 17203* is confined to restoration of any interest in money or property, real or personal, which may have been acquired by means of such unfair competition. A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other. But the economic injury that an unfair business practice occasions may often involve a loss by the plaintiff without any corresponding gain by the defendant, such as, for example, a diminishment in the value of some asset a plaintiff possesses. A plaintiff who alleges that a defendant's defamatory statements diminished its assets and reduced its market capitalization adequately alleges California Unfair Competition Law standing.

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

Civil Procedure > Remedies > General Overview

Contracts Law > Remedies > Restitution

HN40[] Deceptive & Unfair Trade Practices, State Regulation

Restitution under the California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200* applies traditional restitution principles: A person who has been unjustly enriched at the expense of another is required to make restitution to the other. A person is enriched if he receives a benefit at another's expense. The term benefit denotes any form of advantage. Thus, a benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss. Even when a person has received a benefit from another, he is required to make restitution only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. For a benefit to be conferred, it is not essential that money be paid directly to the recipient by the party seeking restitution.

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

HN41[] Deceptive & Unfair Trade Practices, State Regulation

The District of Columbia Consumer Protection and Procedures Act (DCCPPA) prohibits unlawful trade practices. The Act defines trade practice to be any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services. *D.C. Code § 28-3901(a)(6)*. The Act enumerates a non-exclusive list of specific practices that constitute violations of the Act. *D.C. Code § 28-3904*. Additionally, the statute obviously contemplates that procedures and sanctions provided by the Act will be used to enforce trade practices made unlawful by other statutes. Trade practices that violate other laws, including the common law, also fall within the purview of the DCCPPA.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN42[] Public Enforcement, State Civil Actions

Violations of the District of Columbia Antitrust Act of 1980, *D.C. Code § 28-4501 et seq.*, can constitute unlawful trade practices within the purview of the District of Columbia Consumer Protection and Procedures Act (DCCPPA). That a price fixing violation of the District of Columbia Antitrust Act is also a violation of the DCCPPA is apparent from the purpose and text of the consumer protection statute. The DCCPPA subsumes a Sherman Act claim and creates an indirect purchaser cause of action for conspiratorial price fixing regardless of whether defendants have engaged in deceptive conduct. The DCCPPA can be used as a remedy for improper trade practices that violate other laws, the statute is broad enough to cover alleged illegal antitrust conspiracy.

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

HN43[] Deceptive & Unfair Trade Practices, State Regulation

The District of Columbia Consumer Protection Act does not require a showing of concealment or deception to support a claim.

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

HN44[] Deceptive & Unfair Trade Practices, State Regulation

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. *Fla. Stat. § 501.204(1)*. The three elements of a FDUTPA claim are (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN45[] **Antitrust & Trade Law, Federal Trade Commission Act**

The first element of a claim under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), *Fla. Stat. § 501.204(1)*, encompasses antitrust violations because the acts proscribed by *§ 501.204(1)* include antitrust violations. Antitrust violations constitute FDUTPA violations, in part, because *§ 501.204(2)* provides that in determining what constitutes an unfair method of competition under *§ 501.204(1)*, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act, *15 U.S.C.S. § 45(a)(1)*. *Section 45(a)(1)* encompasses violations of the antitrust laws. Florida law recognizes that a FDUTPA claim may arise from a violation of antitrust laws such as the Sherman Act and other state antitrust laws because such a violation in and of itself is an unfair method of competition.

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

HN46[] **Deceptive & Unfair Trade Practices, State Regulation**

The Kansas Consumer Protection Act prohibits a supplier from engaging in any deceptive act or practice in connection with a consumer transaction. *Kan. Stat. Ann. § 50-626(a)*. Consumer transaction is defined as a sale, lease, assignment or other disposition for value of property or services within this state to a consumer; or a solicitation by a supplier with respect to any of these dispositions. *Kan. Stat. Ann. § 50-624(c)*. The Act sets forth a non-exclusive list of conduct that whether or not any consumer has in fact been misled constitutes deceptive acts or practices. *Kan. Stat. Ann. § 50-626(b)*. One such deceptive act or practice is the willful failure to state a material fact, or the willful concealment, suppression or omission of a material fact. *Kan. Stat. Ann. § 50-626(b)(3)*.

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

HN47[] **Deceptive & Unfair Trade Practices, State Regulation**

For Plaintiffs to establish a Kansas Consumer Protection Act (KCPA) claim based upon *Kan. Stat. Ann. § 50-626(b)(3)* they must allege these elements: (1) the plaintiffs were consumers; (2) the defendants were suppliers; (3) the defendants willfully failed to state, concealed, suppressed, or omitted, a certain matter or information; and (4) that certain matter or information was a material fact. The use of willful in the KCPA includes an intent to harm the consumer. For purposes of *§ 50-626(b)(3)*, a matter is material if it is one to which a reasonable person would attach importance in determining his choice of action in the transaction involved. However, *§ 50-626(b)(3)* does not proscribe mere nondisclosure of a material fact.

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

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

HN48[] **Deceptive & Unfair Trade Practices, State Regulation**

Generally, a plaintiff is required to provide a defendant with a written demand for relief of the specific deceptive practices claimed before commencing a suit for a Mass. Gen. Laws ch. 93A violation. The relevant statutory language provides: At least 30 days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. *Mass. Gen. Laws. ch. 93A, § 9(3)*. A demand letter listing the specific deceptive practices claimed is a prerequisite to suit and as a special element must be alleged and proved.

However, this prerequisite does not apply if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth.

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

HN49[] Deceptive & Unfair Trade Practices, State Regulation

A party alleging a violation of *Mass. Gen. Laws ch. 93A, § 9(1)*, must establish (1) that the defendant has committed a violation of *Mass. Gen. Laws ch. 93A, § 2*; (2) injury; and (3) a causal connection between the injury suffered and the defendant's unfair or deceptive method, act, or practice. *Mass. Gen. Laws ch. 93A, § 2*, provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

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

HN50[] Antitrust & Trade Law, Federal Trade Commission Act

In analyzing what constitutes unfair methods of competition and unfair or deceptive acts or practices, which are not defined in Mass. Gen. Laws ch. 93A, as court looks to interpretations by the Federal Trade Commission and federal courts of § 5(a)(1) of the Federal Trade Commission Act (FTC Act), *15 U.S.C.S. § 45(a)(1)*. The Federal Trade Commission may, under *§ 45(a)(1)*, enforce the antitrust laws, including the Sherman Act and the Clayton Act, but it is not confined to their specific prohibitions. It may bar incipient violations of those statutes, and conduct which, although not a violation of the letter or spirit of the antitrust laws, is nevertheless either an unfair method of competition, or an unfair or deceptive act or practice. To the extent that the same conduct may violate both the antitrust laws and the FTC Act, such conduct may be the subject of simultaneous parallel enforcement actions.

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

HN51[] Deceptive & Unfair Trade Practices, State Regulation

Allegations that in essence state that the defendants engaged in price-fixing of products at artificially inflated levels to the plaintiff's detriment pleads an unfair method of competition in violation of Mass. Gen. Laws ch. 93A. Thus in Massachusetts, courts have not adhered to the premise that an indirect purchaser cannot sue the manufacturer for antitrust violations.

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

HN52[] Deceptive & Unfair Trade Practices, State Regulation

The New Mexico Unfair Practices Act (NMUPA) provides: Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful. *N.M. Stat. Ann. § 57-12-3*. The Act separately defines both unfair or deceptive trade practice and unconscionable trade practice. The NMUPA defines an unconscionable trade practice as an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment: (1)

takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid. *N.M. Stat. Ann. § 57-12-2(E)*.

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

HN53[] **Deceptive & Unfair Trade Practices, State Regulation**

An inquiry into either definition under the New Mexico Unfair Practices Act, *N.M. Stat. Ann. § 57-12-2(E)*, is necessarily fact-intensive, and a multitude of factors may be appropriate for consideration as to whether an act or practice is an unconscionable trade practice.

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

HN54[] **Deceptive & Unfair Trade Practices, State Regulation**

Allegations that plaintiffs paid artificially inflated prices for certain products, that defendants stabilized prices at noncompetitive levels, and that plaintiffs paid more for these products than they would have paid in the absence of [the alleged antitrust violations, are adequate to plead a claim under the New Mexico Unfair Practices Act, *N.M. Stat. Ann. § 57-12-2(E)*.

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

HN55[] **Deceptive & Unfair Trade Practices, State Regulation**

N.Y. Gen. Bus. Law § 349 prohibits deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state. N.Y. Gen. Bus. Laws *§ 349(a)*. A plaintiff under *§ 349* must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act. Whether a representation or an omission, the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances. A deceptive practice, however, need not reach the level of common-law fraud to be actionable under *§ 349*. In addition, a plaintiff must prove actual injury to recover under the statute, though not necessarily pecuniary harm. Reliance is not an element of a *§ 349* claim. A plaintiff, however, must show that the defendant's material deceptive act caused the injury.

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

HN56[] **Deceptive & Unfair Trade Practices, State Regulation**

To qualify as a prohibited act under *N.Y. Gen. Bus. Law § 349*, the deception of a consumer must occur in New York. Furthermore, an antitrust violation may violate *§ 349*, but only if it is deceptive. *Section 349* only applies to anticompetitive conduct that is premised on the deception of consumers. The absence of the reference to unfair competition or unfair practices in *§ 349* indicates that anticompetitive conduct that is not premised on consumer deception is not within the ambit of the statute.

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

HN57[] Complaints, Requirements for Complaint

In order to sufficiently plead a claim a plaintiff must provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Certainly, while legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.

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

Civil Procedure > Remedies > Damages > Compensatory Damages

HN58[] Deceptive & Unfair Trade Practices, State Regulation

While *N.Y. Gen. Bus. Law § 349* does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm. Actual harm must be caused by a defendant's material deceptive act or practice. In other words, deception does not, in and of itself, constitute an injury.

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

HN59[] Deceptive & Unfair Trade Practices, State Regulation

Section 75-1.1 of the North Carolina Unfair and Deceptive Trade Practices Act provides: Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful. *N.C. Gen. Stat. § 75-1.1(a)*. Certain violations of state and federal law can constitute a per se violation of *§ 75-1.1*.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN60[] Antitrust & Trade Law, Sherman Act

One such per se violation of the North Carolina Unfair and Deceptive Trade Practices Act, *N.C. Gen. Stat. § 75-1.1*, is a violation of federal ***antitrust law***. The substantive provisions of the North Carolina act are reproduced verbatim from § 5 of the Federal Trade Commission Act (FTC), *15 U.S.C.S. § 45(a)(1)*, and because of the similarity in language, it is appropriate to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of *§ 75-1.1*. Section 5 of the Federal Trade Commission Act sweeps within its prohibitory scope conduct also condemned by § 1 of the Sherman Act.

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

HN61[] Deceptive & Unfair Trade Practices, State Regulation

Apart from per se violations, plaintiffs have alternative recourse in pleading a prima facie North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), *N.C. Gen. Stat. § 75-1.1* violation in terms of unfair methods of competition and unfair or deceptive acts or practices. The UDTPA distinguishes between these two concepts.

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

HN62[] **Deceptive & Unfair Trade Practices, State Regulation**

To set forth the elements for a prima facie claim of unfair or deceptive practices under the North Carolina Unfair and Deceptive Trade Practices Act, *N.C. Gen. Stat. § 75-1.1*, North Carolina law requires a plaintiff to demonstrate that: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.

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

HN63[] **Deceptive & Unfair Trade Practices, State Regulation**

No precise definition of unfair methods of competition as used in *N.C. Gen. Stat. § 75-1.1* exists. Rather, a case-by-case assessment is required: Unfair competition has been referred to in terms of conduct which a court of equity would consider unfair. Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others. As used in the North Carolina Unfair and Deceptive Trade Practices Act, the words unfair methods of competition encompass any conduct that a court of equity would consider unfair. More specifically, a practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive.

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

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

HN64[] **Deceptive & Unfair Trade Practices, State Regulation**

The West Virginia Consumer Credit and Protection Act requires that before bringing suit for a violation of the Act a consumer must notify the seller of the alleged violation at issue: No action may be brought pursuant to the provisions of this section until the consumer has informed the seller or lessor in writing and by certified mail of the alleged violation and provided the seller or lessor 20 days from receipt of the notice of violation to make a cure offer: Provided, That the consumer shall have 10 days from receipt of the cure offer to accept the cure offer or it is deemed refused and withdrawn. *W. Va. Code § 46A-6-106(b)*.

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

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

HN65[] **Deceptive & Unfair Trade Practices, State Regulation**

A plaintiff's failure to comply with the mandatory prerequisite set forth in *W. Va. Code § 46A-6-106(b)* bars her from bringing a claim.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN66[] **Types of Contracts, Quasi Contracts**

The elements necessary to allege unjust enrichment vary state by state. Nonetheless, the common denominator is the shared principle that it is unjust for a defendant who is enriched at the expense of the plaintiff to accept and retain the ill-gotten benefit.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN67[] **Types of Contracts, Quasi Contracts**

California courts, including the Supreme Court of California, have acknowledged that parties may pursue causes of action arising from an unjust enrichment claim under California law. Unjust enrichment is a common law obligation implied by law based on the equities of a particular case and not on any contractual obligation. It is of course the law that when one obtains a benefit which may not be justly retained, unjust enrichment results, and restitution is in order.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN68[] **Types of Contracts, Quasi Contracts**

The right to restitution or quasi-contractual recovery is based upon unjust enrichment. Where a person obtains a benefit that he or she may not justly retain, the person is unjustly enriched. The quasi-contract, or contract implied in law, is an obligation, not a true contract, created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN69[] **Types of Contracts, Quasi Contracts**

There is a substantial body of Mississippi case law that treats unjust enrichment as a separate cause of action.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN70[] **Types of Contracts, Quasi Contracts**

The unavailability of an adequate remedy at law is not a consideration in an unjust enrichment claim: A claimant otherwise entitled to a remedy for unjust enrichment, including a remedy originating in equity, need not demonstrate the inadequacy of available remedies at law.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Burdens of Proof

Evidence > Burdens of Proof > Allocation

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

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

HN71[] **Affirmative Defenses, Burdens of Proof**

A plaintiff does not carry the burden of proof, and furthermore generally has no obligation under *Fed. R. Civ. P. 8* to anticipate and plead in opposition to a defense--except, perhaps, when the defense will be an inevitable response given what is pleaded on the face of a complaint. *Fed. R. Civ. P. 8(a)*. Pleading allegations that seek to avoid or defeat a potential affirmative defense are not an integral part of a plaintiff's claim for relief and lie outside his or her burden of pleading. The pleader must be careful not to allege facts that constitute a defense to his claim for relief. A complaint containing such a built-in defense usually is vulnerable under *Fed. R. Civ. P. 12(b)(6)* to a motion to dismiss for failure to state a claim upon which relief can be granted. An affirmative defense must be apparent on the face of the complaint to be subject to a *Rule 12(b)(6)* motion to dismiss.

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

HN72[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8 allows plaintiffs to plead claims in the alternative despite inconsistencies in both legal and factual allegations. *Fed. R. Civ. P. 8(d)(2)*, *(3)*. The Rule has been interpreted to mean that a court may not construe a plaintiff's first claim as an admission against another alternative or inconsistent claim.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN73[] **Types of Contracts, Quasi Contracts**

Plaintiffs need not plead the unavailability of remedy provided by law to state a claim for unjust enrichment under Florida law. The elements of an unjust enrichment claim are a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof. To state a claim for unjust enrichment, a plaintiff must plead the following elements: 1) the plaintiff has conferred a benefit on the defendant; 2) the defendant has knowledge of the benefit; 3) the defendant has accepted or retained the benefit conferred; and 4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN74[] **Types of Contracts, Quasi Contracts**

The unavailability of an adequate remedy at law is not within the parameters of the prima facie claim for unjust enrichment as articulated by Massachusetts courts. The sine qua non of unjust enrichment is that the defendant has been unjustly enriched. Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances are such that, as between the two persons, it is unjust for him to retain it. The term is not descriptive of conduct which, standing alone, would justify an action for recovery. Unjust enrichment is an essentially equitable doctrine requiring proof of some misconduct, fault or culpable action on the part of the defendant as wrongdoer which renders his retention of a benefit at the expense of another contrary to equity and good conscience. Unjust enrichment, as a basis for restitution, requires more than benefit. The benefit must be unjust, a quality that turns on the reasonable expectations of the parties. To recover for unjust enrichment under Massachusetts law, a plaintiff must show that (1) the defendant knowingly received a benefit (2) at his expense (3) under circumstances that would make retention of that benefit unjust.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN75[] **Types of Contracts, Quasi Contracts**

The prima facie elements of an unjust enrichment claim, as articulated by the Supreme Court of Minnesota, do not include the absence of an adequate remedy at law. That court has held that to establish an unjust enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant in equity and good conscience should pay. Unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN76[] **Types of Contracts, Quasi Contracts**

Under Nevada law, the unavailability of an adequate remedy at law is not a part of the prima facie case for unjust enrichment. According to the Supreme Court of Nevada, unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. The essential elements of unjust enrichment are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN77[] **Types of Contracts, Quasi Contracts**

The unavailability of an adequate remedy at law is not counted among the elements of an unjust enrichment claim under New Mexico law. To prevail on a claim for unjust enrichment, one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust. Furthermore, in New Mexico, there is no requirement that the creation of a statutory remedy at law for a particular type of claim will automatically supplant an equitable remedy that addresses the same claim. [Any] major departure from the long tradition of equity practice should not be lightly implied. Likewise, unjust enrichment constitutes an independent basis for recovery in a civil-law action, analytically and historically distinct from the other two principal grounds for such liability, contract and tort.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN78[] **Types of Contracts, Quasi Contracts**

As to unjust enrichment under North Carolina law, the pleading of an absence of an adequate remedy at law is not necessary to state a claim. The Supreme Court of North Carolina has observed that in order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable. The defendant must have consciously accepted the benefit.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN79[] **Types of Contracts, Quasi Contracts**

The prima facie claim for unjust enrichment under South Dakota law does not necessarily involve addressing an adequate remedy at law. In order to establish unjust enrichment, three elements must be proven: (1) a benefit was received; (2) the recipient was cognizant of that benefit; and (3) the retention of the benefit without reimbursement would unjustly enrich the recipient.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN80[] **Types of Contracts, Quasi Contracts**

Proof of an absence of an adequate remedy at law is not required to state a prima facie claim for unjust enrichment in Utah. The Supreme Court of Utah has held that in order to prevail on a claim for unjust enrichment, three elements must be met. First, there must be a benefit conferred on one person by another. Second, the conferee must appreciate or have knowledge of the benefit. Finally, there must be the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. The plaintiff must prove all three elements to sustain a claim of unjust enrichment.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN81[] **Types of Contracts, Quasi Contracts**

To establish a prima facie claim for unjust enrichment under Vermont law, plaintiffs are not obliged to show the unavailability of an adequate remedy at law. The elements of unjust enrichment are: whether (1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

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

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN82[] **Types of Contracts, Quasi Contracts**

As to the jurisdiction of Arizona, the absence of an adequate remedy at law is a prima facie element of a claim for unjust enrichment. The plaintiffs must allege facts which, taken as true, plausibly suggest this element of the claim in order to survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss the unjust enrichment claim dependent upon Arizona state law. In Arizona, the prima facie claim for unjust enrichment includes the element of the absence of an adequate remedy at law. In Arizona, five elements must be proved to make a case of unjust enrichment: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of justification for the enrichment and the impoverishment and (5) an absence of a remedy provided by law.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN83[] **Types of Contracts, Quasi Contracts**

A person of full capacity who, pursuant to a contract with another, has performed services or transferred property to the other or otherwise has conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain, unless the transaction is rescinded for fraud, mistake, duress, undue influence or illegality, or unless the other has failed to perform his part of the bargain.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Exhaustion of Remedies

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN84[] **Types of Contracts, Quasi Contracts**

Under Tennessee law, although the plaintiffs need not be in privity with a defendant to recover under a claim of unjust enrichment, the plaintiffs must allege that they have exhausted all remedies against parties with whom the plaintiffs were in privity of contract. Before recovery can be had against the landowner on an unjust enrichment theory, the furnisher of the materials and labor must have exhausted his remedies against the person with whom he had contracted, and still has not received the reasonable value of his services. Alternatively, such exhaustion need not be demonstrated if the pursuit of the remedies would be futile.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Exhaustion of Remedies

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN85[] **Types of Contracts, Quasi Contracts**

Courts interpreting Tennessee law have found that remedial efforts are futile for purposes of exhaustion in an unjust enrichment claim in several kinds of circumstances. For example, remedial efforts are futile when a plaintiff can demonstrate that the party with whom it was in privity of contract is judgment proof.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Exhaustion of Remedies

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN86[] **Types of Contracts, Quasi Contracts**

Consumer plaintiffs have adequately pleaded futility of pursuing remedies for an unjust enrichment claim under Tennessee law by alleging, among other things, that the re-sellers of a product, that is, the parties in privity of contract with the plaintiffs, were not involved in the producer defendants' price-fixing conspiracy, and thus not liable for or the cause of the plaintiffs' alleged losses resulting from that conspiracy.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN87[] **Federal & State Interrelationships, Erie Doctrine**

Erie requires federal courts to apply the substantive law of the state in which the claim arose.

Governments > Courts > Common Law

Governments > Legislation > Interpretation

HN88[] **Courts, Common Law**

In cases of conflict between legislation and the common law, legislation governs because it is the latest expression of the law. Where there is a limitation by statute which is capable of more than one construction the statute must be given that construction which is consistent with common law. The legislature is presumed to know the common law before a statute was enacted. Absent an indication that the legislature intends a statute to supplant common law, courts should not give it that effect.

Governments > Courts > Common Law

Governments > Legislation > Interpretation

HN89[] **Courts, Common Law**

There is specific Utah law concerning statutory construction. Utah Code Ann. §§ 68-3-1, 68-3-2. A statute preempts a common law claim by specifically adopting a limitation or prohibition on a claim or by comprehensively addressing a particular area of law such that it displaces the common law.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN90[] **Types of Contracts, Quasi Contracts**

Florida courts recognize that some benefit must flow to the party sought to be charged in an unjust enrichment claim. Because the basis for recovery does not turn on the finding of an enforceable agreement, there may be recovery under a contract implied in law even where the parties had no dealings at all with each other. Florida law does not appear to require the conferral of a direct benefit exclusively for an unjust enrichment claim.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN91[] **Types of Contracts, Quasi Contracts**

Kansas law does not require the pleading of a conferral of a direct benefit for an unjust enrichment claim.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN92[] **Types of Contracts, Quasi Contracts**

In New York, a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, but their relationship cannot be too attenuated. This means that a product's indirect purchaser cannot assert an unjust enrichment claim against an entity that manufactured one of that product's ingredients, but that an indirect purchaser can assert such an unjust enrichment claim against the manufacturer of the product itself. Strict privity between the plaintiff and defendant is not required for an unjust enrichment claim.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN93[] **Types of Contracts, Quasi Contracts**

A person who has been unjustly enriched at the expense of another is required to make restitution to the other. In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party and the defendant must have consciously accepted the benefit.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN94[] **Types of Contracts, Quasi Contracts**

North Carolina law embraces a broader definition of "conferral of a benefit" beyond only the conferral of a direct benefit for purposes of an unjust enrichment claim.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN95[] **Types of Contracts, Quasi Contracts**

In Utah, the benefit conferred satisfies the requirement if the defendant's retention of the benefit would be unjust without providing compensation. Unjust enrichment does not result if the defendant has received only an incidental benefit from the plaintiff's service.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN96[] **Types of Contracts, Quasi Contracts**

Utah law does not mandate that a plaintiff demonstrate that she directly conferred a benefit upon a defendant for an unjust enrichment claim.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN97[] **Federal & State Interrelationships, Erie Doctrine**

When a federal court sitting in diversity must make a prediction as to a precise legal issue a certain legal standard must be satisfied. In doing so, the court is required to consult and evaluate particular sources of legal authority: In adjudicating a case under state law, courts are not free to impose their own view of what state law should be; rather, courts are to apply existing state law as interpreted by the state's highest court in an effort to predict how that court would decide the precise legal issues before them. In the absence of guidance from the state's highest court, federal courts must look to decisions of state intermediate appellate courts, of federal courts interpreting that state's law, and of other state supreme courts that have addressed the issue. Federal courts must also consider analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.

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

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

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

Opinion by: GENE E.K. PRATTER

Opinion

[*875] GENE E.K. PRATTER, J.

I. Introduction

Indirect purchasers [1] of domestic eggs and egg products charge producers of those goods, and the producers' trade groups, with conspiring to manipulate the supply of, and thereby fix prices for, domestically-sold eggs and egg products. The Indirect Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint (hereinafter, the "IPSAC") [2] alleges violations of federal and state law. The 22 state jurisdictions at issue geographically reach considerably farther than a rooster's most vigorous crows can be heard. In total, the IPSAC contains 51 claims: a *Section 1* Sherman Act claim for injunctive relief, 20 state antitrust claims, 9 state consumer protection claims, and 21 state unjust enrichment claims. [3]

In response, Defendants have jointly filed the Motion *sub judice* which tries to crack, if not wholly topple, most of the Plaintiffs' claims by seeking full or partial dismissal of all counts. [4] Defendants argue that the IPSAC is deficient in a number of ways, *inter alia*, lack of standing (in the various applications of that term) and failure to state a claim consistent with the demands of *Rules 8* and *9(b)*. As outlined below and as delineated in the accompanying Order, the Court grants the Motion in part and denies it in part.

II. Background

This multidistrict litigation concerns numerous consolidated and coordinated actions based upon allegations of a conspiracy **[*876]** in violation of the Sherman Act among egg producers and trade groups to manipulate the supply of eggs and egg products and thereby affect the domestic prices of those goods. *See* *In re Processed Egg Prods. Antitrust Litig., 588 F. Supp. 2d 1366, 1367 (J.P.M.L. 2008)*. The plaintiffs are direct purchasers (such as grocery stores, commercial food manufacturers, restaurants, other food service providers, and other entities who purchase directly from Defendants or other egg producers) and indirect purchasers (individual consumers who purchased from other parties along the distribution chain) of eggs and egg products. The direct purchaser plaintiffs fall into additional categories: "Direct Purchaser Plaintiffs" who have brought a consolidated class action against Defendants, and "Direct Action Plaintiffs" **[**4]** who are pursuing individual actions against Defendants.

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[1] Indirect purchasers buy products not directly from the product's original source but from other parties further along the distribution chain. *See generally* *Illinois Brick Co. v. Illinois, 431 U.S. 720, 726, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*; **[**2]** IPSAC ¶¶ 19-44, 107-08, 505.

[2] The IPSAC is the operative pleading for the indirect purchaser plaintiffs, replacing or superseding all of the previously-filed individual and consolidated complaints.

[3] This inventory does not include the claims that Plaintiffs withdrew at oral argument. At that time, Plaintiffs withdrew all of their claims arising under Maine or Puerto Rico law. They also withdrew consumer protection claims based upon the laws of Michigan, South Dakota, or Wisconsin.

[4] The Defendants' Motion to Dismiss the Indirect Purchaser Plaintiffs' Second Amended Consolidated Class Action Complaint is filed at Docket No. 332. Plaintiffs responded to the Motion (Doc. **[**3]** No. 355), and Defendants filed a reply brief (Doc. No. 385). The parties submitted several supplemental materials to the Court. At oral argument all counsel ably presented on the Motion, and the transcript of the argument is in the record at Docket No. 597.

In this Opinion the Court addresses one, albeit a multifaceted one, of the Defendants' pending motions to dismiss the IPSAC. [5] The Court previously addressed motions to dismiss filed by virtually the same group of Defendants concerning the Direct Purchaser Plaintiffs' Second Consolidated Amended Class Action Complaint. *See* Sept. 26, 2011 Mem. and Order, 2011 WL 4465355 (Doc. Nos. 562 and 563); Oct. 14, 2011 Mem. and Order, 2011 WL 4945864 (Doc. Nos. 581 and 582); Nov. 30, 2011 Opinion and Order, 2011 WL 5980001 (Doc. Nos. 593 and 594). Much of the history and many of the dynamics of this litigation are outlined in detail in those prior decisions, and will not be repeated here except as appropriate and necessary predicates to the rulings here.

III. Factual Allegations[6]

As the parties are already well-aware, **[**5]** and indeed, have represented to the Court, the IPSAC alleges virtually the same underlying facts as the Direct Purchaser Plaintiffs' complaint, notwithstanding some (generally minor) factual distinctions, and as to be expected, authored in a different drafting style. Both pleadings set forth factual allegations concerning the Defendants' alleged conspiracy to decrease the supply of eggs and thereby increase egg prices, the Defendants' conduct undertaken in relation thereto, and the nature of the egg industry in terms of structure, production practices, and market dynamics. *See* Sept. 26, 2011 Mem. and Order, 2011 WL 4465355, at *1-3 (describing the Direct Purchaser Plaintiffs 'core allegations). Although the two pleadings have much in common, they are nonetheless separate and distinct complaints, and the Court briefly outlines the IPSAC's main allegations as follows.

Plaintiffs—to wit, 23 individuals and three corporations—bring this action on behalf of themselves individually and as class actions on behalf of other similarly situated indirect purchasers. These individual named Plaintiffs are residents of, or incorporated in, Arizona, California, the District of Columbia, Florida, Kansas, **[**6]** Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Mexico, New York, North Carolina, Tennessee, Utah, Vermont, West Virginia, or Wisconsin. IPSAC ¶¶ 19-44. They each purportedly "indirectly purchased shell eggs and/or egg products during the Class Period" and suffered economic injury by paying "supra-competitive prices for shell eggs and egg **[*877]** products" as a result of the Defendants' alleged violations of federal and state law. *Id.* ¶¶ 8, 19-44.

Plaintiffs request federal injunctive relief pursuant to *Section 16* of the Clayton Act on behalf of themselves and a nationwide class. As to the state law claims, Plaintiffs, individually and on behalf of members of the proposed classes, [7] seek a variety of remedies, including, *inter alia*, damages, restitution, and disgorgement.

As alleged, the Plaintiffs' federal and state claims are based upon **[**7]** the Defendants' conduct relating to

> a long-running conspiracy between and among Defendants and certain unnamed co-conspirators extending from at least January 1, 2000 through the present . . . with the purpose and effect of fixing, raising, and maintaining and/or stabilizing prices and restricting output of both shell eggs and egg products (collectively, "eggs") sold indirectly to Plaintiffs and other indirect purchasers in the United States, including the Class Jurisdictions.

IPSAC ¶ 1; *see also id.* ¶¶ 6, 140. Defendants supposedly took "coordinated efforts" to advance the aims of the conspiracy. *Id.* ¶ 7. According to Plaintiffs, coordination among Defendants was facilitated by the trade group Defendants, United Egg Producers ("UEP"), United Egg Association ("UEA"), and United States Egg Marketers ("USEM"); most of the other named Defendants are allegedly members of some of these groups. *See, e.g., id.* ¶¶ 49, 51, 137, 255, 286. Many of the Defendants' decisions, discussions, and agreements concerning various aspects

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[5] The Court is separately addressing the Defendants' other pending motions to dismiss relating to the IPSAC.

[6] Except when distinctions are necessary for clarity, the general use of the term "eggs" and "egg" in this Opinion will be consistent with the IPSAC's definition, *i.e.*, "eggs" is inclusive of "shell eggs" and "egg products."

[7] The members of these proposed classes, individuals and entities, are defined by their state of residency with respect to each of the 22 state jurisdictions at issue and who "indirectly purchased shell eggs and/or egg products produced from shell eggs produced from Defendants' or their co-conspirators' caged birds during the Class Period." *Id.* ¶¶ 108.

of the conspiracy apparently occurred at, or are connected to, these trade groups' committee and member meetings, and were communicated to Defendants through UEP's newsletter. **[**8]** *See, e.g., id.* ¶¶ 143-47, 152-156, 158-167, 170, 173-76, 192-209, 212-17.

The Defendants' "coordinated efforts" allegedly were mechanisms to reduce the supply of eggs in terms of either egg production or availability in the egg market. By reducing the supply of eggs, Defendants apparently sought to manipulate certain features of the domestic egg market as a means of increasing egg prices. Those market features include the price inelasticity of demand for eggs, the lack of product substitutes for eggs, minimal product differentiation among eggs, and industry consolidation. *Id.* ¶¶ 2, 127-31. Because of these market features—and more particularly, the inelasticity of demand—"small reductions in supply can lead to sharp increases in egg prices." *Id.* ¶ 2.

The specific "coordinated efforts" undertaken throughout the alleged conspiracy period entailed various flock reduction, chick hatch reduction, molting, and hen disposal initiatives, as well as the adoption of and compliance with the United Egg Producers Certification Program and the United States Egg Marketers export program. *See, e.g., id.* ¶¶ 6, 170, 219, 293.

The UEP Certification Program originated as an "animal husbandry program" that **[**9]** mandated lower cage space densities for hens, but evolved into a program whereby egg producers would comply with the Program's guidelines in order to be able to sell or market eggs with a logo indicating that the eggs were certified under the Program. *See, e.g., id.* ¶¶ 158, 160, 224, 298. The IPSAC alleges that initially

> [c]ertification required a producer to (a) meet [a] cage space allowance . . . [of an] **[*878]** average of 56 square inches per hen . . . ; (b) commit to meeting the guideline for beak trimming . . . ; (c) commit to meeting the guidelines for molting . . . ; (d) commit to meeting the guidelines for handling and transportation for both pullets and spent hens . . . ; (e) agree to be audited annually by a 3rd party independent auditor to confirm that the company is meeting guidelines; (f) agree to provide UEP with a copy of the audit results upon the completion of each audit; and (g) recognize that passing the audit is necessary in order to maintain the certification status.

Id. ¶ 159. The Certification Program's guidelines also required (or eventually came to require): reduction in chick hatch, 100% of an egg producers' egg production be in compliance with the guidelines, and a **[**10]** prohibition on the practice of "backfilling cages to replace mortality." *See, e.g., id.* ¶¶ 174-75, 202, 295.

The USEM export program "aimed to have its members export shell eggs even when the export prices were lower than domestic egg prices" with the alleged purpose of "raising domestic U.S. prices through reduced supply." *Id.* ¶ 240. One central feature of the export program was that "USEM members that did not provide eggs for the export would agree to 'repay' or 'reimburse' the USEM members that provided eggs for the export in order to 'share' any losses incurred when exporting shell eggs at below-market prices." *Id.* ¶ 243.

As described in the IPSAC, the Defendants' "coordinated efforts" enabled Defendants to realize the ultimate objectives of their conspiracy: decreased egg supply, and thus higher egg prices and greater revenues and profits. *See, e.g., id.* ¶¶ 150, 181-83, 247, 312, 323.

IV. Legal Standards[8]

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[8] The Court's jurisdiction over the Plaintiffs' state law claims is predicated on the diversity of the parties and supplemental jurisdiction. *See* 28 U.S.C. §§ 1332, 1367. **HN1**[] In such circumstances the Court is "required to apply the substantive law of the state whose law governs the action." **[**11]** *Spence v. ESAB Group, Inc., 623 F.3d 212, 217 (3d Cir. 2010)* (citing *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938))*.

Yet many of the parties' arguments concerning the Motion at bar "put in mind of the concept of 'general' common law that prevailed in the era of *Swift v. Tyson.* The assumption is that the common law of the 50 states and the District of Columbia . . . is

A. Rule 12(b)(6)

HN2[] For **[**12]** purposes of this Rule 12(b)(6) motion, the Court must accept as true all well-pleaded allegations in the complaint and must construe the pleading in the light most favorable to the Plaintiffs. *Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008)* (citation omitted). Of course, pursuant to *Federal Rule of Civil Procedure 8(a)(2)*, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief," providing the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp.* **[*879]** *v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (alteration in original) (citation omitted). This standard "does not require 'detailed factual allegations,'" but a "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 555*). Consistent with *Rule 12(b)(6)*, the Court may consider the allegations contained in the complaint, exhibits attached to the complaint, matters of public record and records of which the Court may take judicial notice. *See Tellabs, Inc. v. Makor Issues & Rts., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*; **[**13]** *Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993)*.

HN3[] A complaint need allege "only enough facts to state a claim of relief that is plausible on its face" so as to test whether "plaintiffs . . . have . . . nudged their claims across the line from conceivable to plausible" to survive a Rule 12(b)(6) motion. *Twombly, 550 U.S. at 570*. Thus, a complaint is subject to dismissal when the plaintiff fails to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1949* (citing *Twombly, 550 U.S. at 556*).

B. Rule 9(b)

HN4[] To determine whether a particular claim is subject to and meets the *Rule 9(b)* pleading standard, the Third Circuit Court of Appeals has held that "where the plaintiff grounds [her] claims in allegations of fraud—and the claims thus 'sound in fraud'—the heightened pleading requirements of *Rule 9(b)* apply." *In re Suprema Specialties, Inc. Sec. Litig., 438 F.3d 256, 270 (3d Cir. 2006)*; *see also Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 161-62 (3d Cir. 2004)*. Conversely, "claims . . . that do not sound in fraud are not held to the heightened **[**14]** pleading requirements of *Fed. R. Civ. P. 9 (b)*." *In re Adams Golf, Inc. Secs. Litig., 381 F.3d 267, 273 n.5 (3d Cir. 2004)* (citing *Shapiro v. UJB Fin. Corp., 964 F.2d 272, 288 (3d Cir. 1992))*. However, there is no requirement that fraud or mistake be a necessary element of a *prima facie* claim in order for *Rule 9(b)* to apply. *See Chubb, 394 F.3d at 161* (discussing this law with respect to a *section 11* Securities Act claim); *see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003)* ("In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. *In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event*, the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of *Rule 9(b)*." (emphasis added)).

The Third Circuit Court of Appeals illustrated the application of this standard in the context of an antitrust claim in *Lum v. Bank of America, 361 F.3d 217 (3d Cir. 2004)*, **[**15]** *abrogation on other grounds recognized by In re Insurance Brokerage Antitrust Litig., 618 F.3d 300, 323 n.22 (3d Cir. 2010)*. There, the Court of Appeals recognized that **HN5**[] "antitrust claims generally are not subject to the heightened pleading requirement of *Rule 9(b)*," but

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basically uniform and can be abstracted in a single [encapsulation of 'law']." *Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995)*. Tempting as that potential shortcut might be in the face of such a significant task as presented by the Motion at hand, the Court simply cannot accept such notions.

The purpose of the *Erie* doctrine and "the intent of that decision was to insure that . . . the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)*. Accordingly, the Court adheres to *Erie's* guidance in evaluating the Defendants' Motion and exhorts the parties to do likewise as this litigation proceeds.

that *Rule 9(b)* applies when "[f]raud is the basis for the antitrust violation alleged." *Id. at 220*. In *Lum*, the plaintiffs claimed that the defendant banks "allegedly violated the Sherman Act by agreeing to misrepresent the 'prime rate' [as] the lowest rate available to their most creditworthy borrowers, when in fact" other lower rates **[*880]** below the prime rate were offered to certain other borrowers, and by allegedly giving "false information about their 'prime rate' both to consumers who were seeking credit and to leading financial publications." *Id. at 220*. According to the plaintiffs, such alleged fraudulent conduct inflated the prime rate, and thereby resulted in the plaintiffs "being charged higher interest." *Id.* The Court of Appeals determined that the "antitrust claim is . . . based on fraud—on misrepresentations in the information given to consumers and on misrepresentations in the information given to . . . independent **[**16]** financial publications," *id. at 220*, and "[b]ecause plaintiffs allege that the defendants accomplished the goal of their conspiracy through fraud, the Amended Complaint is subject to *Rule 9(b)*." *Id. at 228*; *see also* *Insur. Brokerage, 618 F.3d at 347-48* (reaffirming the *Lum* rationale concerning the application of *Rule 9(b)* in an antitrust case).

HN6[] To satisfy the *Rule 9(b)* pleading requirements, a complaint may either describe "the circumstances of the alleged fraud with precise allegations of date, time, or place" or may use "some [other] means of injecting precision and some measure of substantiation into their allegations of fraud." *Bd. of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc., 296 F.3d 164, 172 n.10 (3d Cir. 2002)* (citation omitted) (internal quotation marks omitted); *see also* *Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 658 (3d Cir. 1998)*, *abrogation on other grounds recognized by* *Forbes v. Eagleson, 228 F.3d 471, 483-84 (2000)*; *Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984)*. At the very least, "[p]laintiffs **[**17]** also must allege who made a misrepresentation to whom and the general content of the misrepresentation." *Lum, 361 F.3d at 224*. This pleading standard not only gives defendants notice of the claims against them, but also combats "frivolous suits brought solely to extract settlements" from defendants and "provides an increased measure of protection for their reputations." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1418 (3d Cir. 1997)*.

HN7[] While a significant purpose of *Rule 9(b)* is to provide notice of the precise misconduct at issue, courts "should . . . apply the rule with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants." *Rolo, 155 F.3d at 658*. Accordingly, the particularity rule is somewhat relaxed when key factual information remains within the defendant's control. *Burlington Coat, 114 F.3d at 1418*. "Relaxation," however, does not translate into, or otherwise authorize, boilerplate and conclusory allegations, and plaintiffs "must accompany their legal theory with factual allegations that make their theoretically viable claim plausible." *Id.* Allegations "based upon information and belief" are permissible, **[**18]** "but only if the pleading sets forth specific facts upon which the belief is reasonably based." *Hollander v. Ortho-McNeil-Janssen Pharm., Inc., No. 10-cv-0836-RB, 2010 U.S. Dist. LEXIS 113005, 2010 WL 4159265, at *4 (E.D. Pa. Oct. 21, 2010)* (citation and internal quotation marks omitted); *see also* *Weiner v. Quaker Oats Co., 129 F.3d 310, 319 (3d Cir. 1997)* ("[A] boilerplate allegation that plaintiffs believe the necessary information 'lies in defendants' exclusive control,' if made, must be accompanied by a statement of facts upon which their allegation is based." (quoting *Shapiro v. UJB Fin. Corp., 964 F.2d 272, 285 (3d Cir. 1992)* (internal quotation marks omitted)); *Craftmatic Securities Litigation v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1989)* (determining that in cases of corporate fraud, "even under a non-restrictive application of [*Rule 9(b)*], pleaders must allege that the necessary information lies within defendants' control, and their allegations must be accompanied by a statement of the facts **[*881]** upon which the allegations are based"). In other words, even a "relaxed fit" requires some tailoring.

Likewise, ***HN8***[] *Rule 8* continues to apply even when under *Rule 9(b)* "[m]alice, intent, knowledge, and other conditions **[**19]** of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*. For purposes of its meaningful presence in *Rule 9(b)* the word "'generally' is a relative term" and "it is to be compared to the particularity requirement applicable to fraud or mistake." *Iqbal, 129 S. Ct. at 1954*. By way of example, "*Rule 9* merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of *Rule 8*." *Id.*; *cf.* *Burlington Coat, 114 F.3d at 1418* ("[P]laintiffs must still allege facts that show the court their basis for inferring that the defendants acted with 'scienter.'"); *United States ex rel. Pilecki-Simko v. Chubb Instit., 443 Fed. Appx. 754, 2011 WL 3890975, at *3 (3d Cir. 2011)* (unpublished) (recognizing that under *Iqbal* "*Rule 8* does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." (quoting *Iqbal, 129 S. Ct. at 1954*)). [9]

V. Legal Discussion[10]

A. Article III Standing as to Four State Antitrust Claims

Defendants contend that the 26 named Plaintiffs have no standing, as would be demanded by Article III of the Constitution, to pursue antitrust claims under the laws of Iowa, Mississippi, North Dakota, and South Dakota. Specifically, Defendants argue that Plaintiffs have failed to allege an injury that would provide a basis for constitutional standing to bring claims under those four states' antitrust laws. The defense argument is that the named Plaintiffs have "failed to show that they suffered any **[**22]** injury entitling them to bring the[] claims" because no named Plaintiffs are alleged to reside, or to have purchased eggs, *in* those four states. Defs.' Mot. at 5.

Plaintiffs retort that the "named [class] representatives meet normal standing requirements," **[*882]** and that "each of the named Plaintiffs has been injured in the same way by the same conduct that has injured other members of the proposed classes." Pls.' Resp. at 56-57 & n.39. Thus, the Plaintiffs' argument is that because Defendants have not objected to the named Plaintiffs' standing to pursue the IPSAC's federal antitrust claim and other state claims, and given that "each Plaintiff has standing to pursue an action under federal ***antitrust law*** and the laws of several states, there is no longer a question of the court having subject matter jurisdiction over the claims asserted by Plaintiffs on the basis of the facts alleged." *Id.* at 56, 58. Plaintiffs claim that "[i]f a named plaintiff who has standing can, under *Rule 23*'s criteria, represent the interests of out of state class members, then once the class is certified, a plaintiff from each state will be present and 'standing' will be established." *Id.* at 57. Plaintiffs contend **[**23]** that this reasoning leads to the conclusion that at the motion to dismiss stage "it is not necessary that there be named plaintiffs in each state for which damages are sought." *Id.* at 59.

Plaintiffs characterize the defense arguments as raising "what are really [class] certification issues in the guise of standing at this point in the litigation," *id.* at 57, particularly the adequacy of an out-of-state named Plaintiff to serve as class representative as to a particular state claim, *id.* at 56 n.39; Tr. at 91:15-21. They assert that consideration of such issues should be deferred until the class certification stage of this litigation on the grounds that the issues are "premature because class certification issues are 'logically antecedent' to questions about standing in that . . .

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[9] Although it appears that *Rule 9(b)* is generous in permitting a generalized pleading in this regard, one treatise has noted that this sentence **[**20]** "suggests that the [Rule's] draftsmen felt a need to qualify the first sentence to insure that it was not interpreted to require a party pleading fraud or mistake to allege the specific circumstances of fraudulent intent, knowledge of the falsity of a statement, or mistaken belief in its truth." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1301.

[10] Before proceeding further on this Motion, the Court is compelled to comment upon the parties' approach to articulating and supporting their arguments. In many respects, the parties' respective work is indeed impressive. However, at other times, the parties' work product contained deficiencies ranging from a dearth of meaningful (indeed, sometimes even unreliable) citation to legal authority, erroneous characterizations of the opposing parties' arguments (or worse, ignoring those arguments or failing to comprehend and directly address their substance),and complete omission of legal analysis. In some respects this has led to additional challenges for the Court to try to evaluate the efficacy of the arguments. Certainly that effort has been made more time consuming as a result—albeit, there **[**21]** was never quite a need to resort to soliciting all of the queen's horses and all of the queen's men to piece the parties' arguments together. Such advocacy is, fortunately, uncharacteristic of the fine professionals who have, to date, appeared in this case.

At times, the press of business can make consistently high level performance extremely difficult. The Court urges the litigators involved in this case to rededicate themselves to presenting their clients' positions in the most compelling light appropriate whenever possible and to have the well-earned and deserved confidence to forego arguments put forth merely for arguments' sake.

the 'standing' asserted by Defendants would not exist but for Plaintiffs' asserting claims on behalf of a class." Pls.' Resp. at 56-57.

Despite the divergent positions, amid the parties' arguments there is an apparent consensus that the Court may consider the standing of the *named Plaintiffs* at this time. Indeed, Defendants make this assertion outright, whereas embedded in the Plaintiffs' arguments is the contention **[**24]** that named Plaintiffs have standing to bring the four states' antitrust claims at this time and have alleged that they have suffered an injury. But, to the extent that Plaintiffs invoke "logically antecedent" language and charge that Defendants are actually raising questions as to the named Plaintiffs' adequacy as class representatives, they obfuscate the narrower issue raised by Defendants' motion, namely, whether the named Plaintiffs have alleged facts that plausibly demonstrate injury-in-fact sufficient to confer upon them individual Article III standing to bring antitrust claims under the laws of Iowa, Mississippi, North Dakota, and South Dakota. [11] As to this actual issue presented as explained *infra*, the Court **[*883]** concludes that the named Plaintiffs have Article III standing to pursue causes of action under the four states' antitrust laws.

1. Requirements for Article III Standing

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[11] Because the singular issue at bar is the named Plaintiffs' individual Article III standing to bring the antitrust claims under the laws of Iowa, Mississippi, North Dakota, and South Dakota, the issue presented does not arise as a result of, or invoke, issues relating to class certification or implicate the standing of proposed class members. Certainly, **[**25]** sometimes the factors and facts considered during a class certification inquiry overlap with Article III standing, but nonetheless Article III standing is analytically and conceptually distinct from those other matters. *See generally* Wright & Miller, *supra*, §1785.1 (***HN9***[ ] "[B]oth standing and mootness also frequently appear as threshold requirements for the maintenance of federal class actions and must be considered in addition to the requirements of *Rule 23* when deciding whether a particular action may be certified. It is important when considering the applicability of these two doctrines to class actions to keep in mind that these concepts serve both constitutional and prudential concerns: they ensure that a justiciable or live issue is presented, thereby satisfying the Article III requirement that federal courts only entertain cases or controversies, and they seek to ascertain whether the person asserting the claim is sufficiently interested so that full litigation of the issues involved can be assumed. Notably, this latter concern also is addressed through the *Rule 23* requirements that the class representative be a member of the class, and be an adequate representative for the class." **[**26]** (footnotes omitted)).

There is long-standing precedent to the effect that ***HN10***[ ] when a "class action" is introduced into the standing equation, the requirement that a named plaintiff must have standing to bring it is unaltered. Insofar that a case "may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Lewis v. Casey, 518 U.S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)* (quoting *Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40, n. 20, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976))*. Simply put, "one cannot acquire individual standing by virtue of bringing a class action." *See* 1 A. Conte & H. Newberg, *Class Actions* § 2:5 (4th ed. 2002).

Accordingly, there is no reason to defer consideration of the particular Article III standing issue raised by Defendants until class certification. The succinct conclusion in *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 534 (E.D. Pa. 2010)*, is also applicable here: "Named plaintiffs must have case or controversy standing; the potential standing problem **[**27]** in this case is not created by class certification. Therefore class certification is not logically antecedent to the standing problem." Other courts similarly have held that ***HN11***[ ] when the issue presented in a motion to dismiss concerns solely whether the named plaintiffs have standing to assert class action claims, the named plaintiffs' standing is a threshold issue, and there is no reason to defer the named plaintiffs' standing determination until class certification. *See, e.g., In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 153-55 (E.D. Pa. 2009)*; *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 263 F.R.D. 205, 211 (E.D. Pa. 2009)* (hereinafter "*SMW*"); *In re Magnesium Oxide Antitrust Litig., No. 10-5943, 2011 U.S. Dist. LEXIS 121373, 2011 WL 5008090, at *10 (D.N.J. 2011)*; *In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 656 (E.D. Mich. 2011)*.

This Court agrees with the legal analysis articulated in *Flonase* and those other courts' decisions as to these issues involving named plaintiffs' standing, and determines that the rationale advanced by those courts is applicable to this case. In short, the Court concludes that it is not required to defer an Article III standing inquiry **[**28]** as to the named Plaintiffs.

HN12[] Generally, Article III standing is a threshold issue for any case, including class actions. *See Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*; *Ehrheart v. Verizon Wireless, 609 F.3d 590, 606 (3d Cir. 2010)*. Article III, § 2, of the Constitution limits the federal judicial power to the adjudication of "Cases" and "Controversies." "Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims, and they must be dismissed." *Berg v. Obama, 586 F.3d 234, 242 (3d Cir. 2009)* (internal quotation marks omitted). Moreover, "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)*. Standing as to one claim is simply not "communicative" across other separate claims for relief. *Id.* [12]

[*884] ***HN14***[] The "irreducible constitutional minimum" of Article III standing entails three elements. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Those constitutional standing requirements are: "(1) an 'injury in fact'; (2) 'a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court'; and (3) a showing that it 'be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *N.J. Physicians, Inc. v. President of United States, 653 F.3d 234, 238 (3d Cir. 2011)* (quoting *Lujan, 504 U.S. at 560-61*).

Of **[**30]** these three elements, Defendants here place only the injury-in-fact element at issue. The Third Circuit Court of Appeals has articulated the nature of an injury that is sufficient to confer Article III standing:

> ***HN15***[] To establish injury in fact, a plaintiff must allege an injury that is both (1) 'concrete and particularized' and (2) 'actual or imminent, not conjectural or hypothetical.' Each of these definitional strands imposes unique constitutional requirements. An injury is "concrete" if it is "real,", or "distinct and palpable, as opposed to merely abstract," while an injury is sufficiently "particularized" if it "affect[s] the plaintiff in a personal and individual way." The second requirement—"actual or imminent, not conjectural or hypothetical"—makes plain that if a harm is not presently or "actual[ly]" occurring, the alleged future injury must be sufficiently "imminent." Imminence is "somewhat elastic," but requires, at the very least, that the plaintiffs "demonstrate a realistic danger of sustaining a direct injury." In other words, there must be a realistic chance—or a genuine probability—that a future injury will occur in order for that injury to be sufficiently imminent.

Id. at 238 **[**31]** (citations omitted).

HN16[] The consideration of the injury-in-fact element bears particular significance because the nature of a party's injury "is relevant to the determination of whether she has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.'" *Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* (quoting *Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*); *see also Toll Bros., Inc. v. Township of Readington, 555 F.3d 131, 138 (3d Cir. 2009)* ("While all three of these elements are constitutionally mandated, the injury-in-fact element is often determinative."). "To meet the standing requirements of Article III, '[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' For our purposes, the italicized words in this quotation . . . are the key ones. [This Court] ha[s] consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines, 521 U.S. at 818-19* (citations omitted). Accordingly, the Court's **[**32]** attention must turn to the named Plaintiffs to ask whether they have a personal stake sufficient to confer Article III standing based upon "their specific allegations and the relief which they seek." **[*885]** *Goode v. City of*

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[12] Generally, the Third Circuit Court of Appeals considers motions to dismiss for lack of standing as Rule 12(b)(1) motions. *See* ***Ballentine v. United States, 486 F.3d 806, 810, 48 V.I. 1059 (3d Cir. 2007)***. Defendants here have classified their motion as one to dismiss for failure to state a claim under *Rule 12(b)(6)*. Plaintiffs agree with this **[**29]** standard of review. The Court is willing to accept the categorization of the instant challenge as a Rule 12(b)(6) motion, recognizing that it could also be evaluated as a *Rule 12(b)(1)* claim. The difference between *Rule 12(b)(1)* and *Rule 12(b)(6)* does not change the analysis or the outcome. *See Baldwin v. Univ. of Pittsburgh Med. Ctr., 636 F.3d 69, 73 (3d. Cir. 2011)* (noting that ***HN13***[] "[a] dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim").

Phila., 539 F.3d 311, 316 (3d Cir. 2008) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 105-06, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)).

2. Named Plaintiffs' Article III Standing

Defendants argue that all named Plaintiffs in this case lack Article III standing to pursue the four states' antitrust claims "because they do not and cannot allege to have been injured under the laws of these jurisdictions." Defs.' Mot. at 5. As a fundamental premise of their argument, Defendants claim that "each of the relevant states requires at least some part of the alleged injury to have occurred in that particular state," *id.* at 6, and Defendants further posit that meeting this in-state injury requirement can only be accomplished either by an allegation that named Plaintiffs are residents of, or actually purchased eggs in, those states. Here, the IPSAC does neither.

While the Defendants' Motion only asks the Court to decide whether the named Plaintiffs have Article III standing as to the four specific state antitrust **[**33]** claims, their argument—by invoking elements of those claims and arguing that those elements impose certain in-state requirements as to injury—is pecking at similar, but conceptually distinct, questions. These questions ask whether Plaintiffs have a right to maintain a private enforcement action under the states' statutes, and whether the Plaintiffs have a cause of action—which, by way of example, may ask more specifically whether the alleged injury is legally and judicially cognizable. These inquiries go to issues of whether the states' statutes authorize these named Plaintiffs to sue, issues which are sometimes cloaked in terms such as "statutory standing" or "antitrust standing," and question whether the scope of the rights of action under the four states' antitrust statutes include the Plaintiffs' alleged injury.

The Supreme Court has drawn some distinctions among these concepts. In one opinion, the Court defined "standing" and "cause of action" as follows:

> ***HN17***[] *standing* is a question of whether a plaintiff is sufficiently advers[e] to a defendant to create an Art[icle] III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction; *cause of action* **[**34]** is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court . . . .

Davis, 442 U.S. at 239 n.18 (citation omitted). ***HN18***[] The Court has generally described an issue of "statutory standing" as involving whether a plaintiff comes "within the 'zone of interests'" for which the cause of action was available." *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (citing Nat'l R.R. Passenger Corp. v. Nat'l Assn. of R.R. Passengers, 414 U.S. 453, 465 n.13, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974)). [13] The Court has further clarified that "the merits inquiry [such as whether a private right of enforcement exists] and the statutory standing inquiry often 'overlap,'" and that the "question whether *this* plaintiff has a cause of action under the statute, and the question whether *any* plaintiff has a cause of action under the statute are closely connected—indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly **[*886]** artificial to draw a distinction between the two." Id. 97 n.2 (citation omitted). Nonetheless, questions of Article III standing are distinguishable **[**35]** from both concepts.

Indeed,***HN20***[] it is necessary for the Court to distinguish Article III standing issues from "statutory standing" and cause of action issues because "the question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute, and conflation of the two concepts can cause confusion." Bond v. United States, 131 S. Ct. 2355, 2362, 180 L. Ed. 2d 269 (2011) (citation omitted); *cf.* Sullivan, 667 F.3d at 307 & n.35 ("Statutory standing [*i.e.*, "the possession of a viable claim or right to relief, not to a jurisdictional requirement,"] is distinct from jurisdictional standing in that 'Article III standing is required to establish a justiciable case or controversy within the jurisdiction of the federal courts,' whereas 'lack of antitrust standing affects a plaintiff's ability

[13] *Accord* Sullivan v. DB Investments, Inc., 667 F.3d 273, 307 (3d Cir. Dec. 20, 2011) (en banc) (observing that ***HN19***[] "statutory standing" can be understood as "simply another element of proof for an antitrust claim, rather than a predicate for asserting a claim in the first place" (quotations omitted)).

to recover, but does not implicate the subject matter jurisdiction of the **[**36]** court.'" (quoting *Gerlinger v. Amazon.com Inc., 526 F.3d 1253, 1256 (9th Cir. 2008))*; *id. at 349 n.15* (Jordan, J., dissenting) ("Whether a party has standing under Article III is a distinct inquiry from whether the party may assert a cause of action under state or federal law. . . . [T]he Supreme Court made clear that a party may have standing under Article III, but fail to assert a cause of action under state law.").

The Supreme Court's analysis continues:

> ***HN21***[] It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case. . . . '[J]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.' Rather, the district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," unless the claim "clearly appears to be immaterial and made solely for the purpose **[**37]** of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

Steel Co., 523 U.S. at 89 (quoting *Bell v. Hood, 327 U.S. 678, 682, 685, 66 S. Ct. 773, 90 L. Ed. 939 (1946)* (citations omitted)). ***HN22***[] The Supreme Court has "criticized the implications of treating the validity of a cause of action as jurisdictional. . . . Under that approach, each element of every cause of action would have a legitimate claim to being a jurisdictional requirement—essentially eviscerating the distinction between the jurisdictional and merits inquiry (and requiring a court to dismiss a claim for lack of jurisdiction whenever the plaintiff does not prevail)." *Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 80 (3d Cir. 2003)* (citation omitted) (discussing *Steel Co., 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210*). An exception arises when a claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co., 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210* (internal quotation marks omitted); *see also* *Nesbit, 347 F.3d at 80*.

Thus, even if Defendants are correct that the four states' statutes require an intrastate injury—either due to in-state residency or in-state purchase of eggs—such **[**38]** an argument is beside the point. ***HN23***[] An *Article III* standing inquiry simply does not require considering the elements of a state claim as "jurisdictional prerequisites." To inject the condition that Plaintiffs must satisfy certain elements of the **[*887]** state antitrust claims into a constitutional standing analysis would result in an impermissible out-of-the-box merits inquiry. "[T]he Article III requirement of remediable injury in fact . . . (except with regard to entirely frivolous claims) has nothing to do with the text of the statute relied upon." *Steel Co., 523 U.S. at 97 n.2*. [14]

As it happens, the Article III constitutional standing criterion is met here as to the four states' antitrust claims. The IPSAC alleges that the named Plaintiffs paid artificially inflated prices for eggs because of the Defendants' conspiracy. [15] That is, the named Plaintiffs allegedly personally purchased eggs at artificially inflated prices—a

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[14] *Cf.* 2 Moore et al., *Federal Practice* § 12.30 (3d ed. 2011) (***HN24***[] "Whether a statutory provision that establishes a threshold for relief is jurisdictional or goes to the merits determines whether a failure to comply with the provision is grounds for dismissal (at any time in the litigation) under *Rule 12(b)(1)*, or whether a failure to meet the threshold is merely a basis for summary judgment or for dismissal for failure to state a claim under *Rule 12(b)(6)*, matters that are subject to very different procedural rules and limits. Under the "bright line" rule of *Arbaugh v. Y & H Corp.*, [federal] statutory threshold requirements **[**39]** should not be treated as jurisdictional unless Congress has clearly stated that they are.").

[15] *See, e.g.*, IPSAC ¶ 8 ("Plaintiffs . . . have been forced to pay supra-competitive prices for shell eggs and egg products and, thus, as a result of Defendants' illegal actions, have suffered antitrust injury."); *id.* ¶ 18 ("[E]ach Plaintiff purchased shell eggs and/or egg products in the state in which they reside or conduct business and suffered an economic injury as a result of Defendants' illegal conduct described in this Complaint."); *id.* ¶¶ 359, 411, 476, 490 ("As a direct and proximate result of Defendants' unlawful and anticompetitive practices, including combinations and contracts to restrain trade and monopolize the relevant markets, Plaintiff[s] . . . have been injured in their business and/or property in that they paid supra-competitive, artificially inflated prices for shell eggs and egg products.").

monetary injury—which constitutes actual harm. *Cf. Associated Gen. Contractors of Calif. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (***HN25***[] "[T]he focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact . . . ."). After all, "[m]onetary harm is a classic form of injury in fact. Indeed, it is often assumed without discussion." *Danvers Motor Co., Inc. v. Ford Motor Co., 432 F.3d 286, 293 (3d Cir. 2005)* (citation omitted). Furthermore, this injury purportedly was caused by the Defendants' alleged conspiratorial conduct which named Plaintiffs complain violated the **[**40]** four states' laws.

This injury can be redressed, if granted, by the relief sought by named Plaintiffs, which includes, *inter alia*, monetary damages to compensate for their financial harm as a result of conspiracy. *See, e.g.*, IPSAC ¶¶ 9, C, D, E (describing relief requested). [16] *Cf. D.R. Ward Constr. Co. v. Rohm and Haas Co., 470 F. Supp. 2d 485, 492-93 (E.D. Pa. 2006)* (finding **[**41]** that constitutional standing to bring certain state antitrust claims was met because "Plaintiffs allege that they paid inflated prices for products with plastics additives due to an overcharge on plastics additives which was passed on to them from the intervening links within the distribution chain, that plaintiffs' overpayment for products containing **[*888]** plastic additives was caused by the conspiracy among defendants to charge inflated prices for plastics additives, and that judicial relief will compensate plaintiffs for these injuries, restoring plaintiffs to the position they were in prior to the price-fixing scheme"). [17]

Moreover, the named Plaintiffs' four state antitrust claims at issue here are not wholly immaterial, frivolous, or devoid of merit for purposes of constitutional standing. The defense argument that the named Plaintiffs lack injury sufficient to confer standing is contingent upon the claim that the four states' laws do not allow named Plaintiffs to recover for their alleged injuries arising from the Defendants' alleged conspiratorial conduct. Defendants argue that "each of the relevant states requires at least some part of the alleged injury to have occurred in that particular state," and Defendants cite to certain statutory language and one case in support of their construction of the laws. *See* Defs.' Mot. at 6 & n.3.

However, on their faces the four states' statutory provisions can plainly be construed to not require in-state residency or an in-state purchase, but rather only that some of the Defendants' conduct **[**44]** occurred, or the effects of which were felt, within the state—thereby violating the statute. [18] Indeed, **[*889]** when read literally, the

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[16] Furthermore, such relief is afforded in private enforcement actions brought under the four statutes. *See Iowa Code § 553.12* (". . . may bring suit to . . . 2. Recover actual damages . . ."); *Miss. Code Ann. § 75-21-9* (" . . . may recover all damages of every kind sustained by him or it . . ."); *N.D. Cent. Code § 51-08.1-08* (". . . may bring an action for . . . damages sustained . . ."); *S.D. Codified Laws § 37-1-14.3* (". . . may bring an action for . . . damages sustained . . .").

[17] To the extent that named Plaintiffs seek the redress of injunctive relief in relation **[**42]** to any of their federal or state claims, it is less clear from the IPSAC's allegations whether those Plaintiffs have Article III standing for such relief. ***HN26***[] Article III standing is to be considered in light of the specific allegations and the relief sought, which with respect to injunctive relief requires consideration of whether a plaintiff is "likely to suffer future injury." *Lyons, 461 U.S. at 102*; *see also Penn. Prison Soc. v. Cortes, 508 F.3d 156, 165- 68 (3d Cir. 2007)* (discussing case law concerning injury-in-fact and likelihood of facing personal injury); *Clark v. Prudential Ins. Co. of Am., 736 F. Supp. 2d 902, 924-35 (D.N.J. 2010)* (dismissing for lack of Article III standing the portion of a California Unfair Competition Law claim seeking injunctive relief because plaintiff had cancelled her health insurance policy and thus "no longer face[d] a threat of continued harm with regard to [Defendant's] disclosures about the . . . policy"). The IPSAC does not explicitly allege facts that named Plaintiffs face the prospect of future injury, and the IPSAC only alleges that the named Plaintiffs suffered past harm. *See, e.g.*, IPSAC ¶ 19 ("This Plaintiff indirectly purchas*ed* shell eggs **[**43]** and/or egg products during the Class Period and was injured as a result of Defendants' illegal conduct." (emphasis added)). Thus, if Plaintiffs seek leave to amend the IPSAC, clarifying amendments may be appropriate with respect to Article III standing for injunctive relief.

[18] Not only the federal courts embrace the plain meaning rule of statutory construction, but so, too, do the appellate courts of the states here concerned. *See Murphy v. Millennium Radio Group, LLC., 650 F.3d 295, 302 (3d Cir. 2011)* (***HN27***[] "'Because it is presumed that Congress expresses its intent through the ordinary meaning of its language, every exercise of statutory interpretation begins with an examination of the plain language of the statute. . . . When the statute's language is plain, the sole

language of these respective provisions authorizes broad private enforcement, and thereby can be read to afford relief to all persons whose injuries may have occurred outside of the state, but are causally related to an antitrust violation. As to these four statutes, Defendants fail to discount the existence of possible constructions of those statutes other than their own. They cite no legal authority to support their construction of the statutes, nor do they point to legal authority foreclosing alternative interpretations of those states' laws.

For example,***HN28***[] under the Iowa Competition Law, "[t]he state or a person who is injured or threatened with injury by conduct prohibited under this chapter may bring suit" for various specified forms of relief. *Iowa Code § 553.12*. Such prohibited conduct includes a "contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market." *Id. § 553.4*. These provisions can be read to permit a broad class of persons to maintain a civil enforcement action so long as they suffer an injury resulting from a violation of the law. Upon an unadorned reading of the Competition Law, and contrary to the Defendants' position, a cognizable injury under the statute does not appear to be exclusively restricted to injuries of residents, or injuries sustained intrastate.

HN29[] The North Dakota Antitrust Act contains similarly broad language: "[a] person threatened with injury or injured in that person's business or property by a violation of this chapter may bring an action for appropriate injunctive or other equitable **[**47]** relief, [and] damages sustained." *N.D. Cent. Code § 51-08.1-08(2)*. The Act prohibits "[a] contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market." *Id. § 51-08.1-02*. As with the Iowa Competition Law, a cognizable injury does not appear to be restricted to residents' injuries, or injuries experienced due to transactions occurring within North Dakota's borders.

HN30[] South Dakota's ***antitrust law*** also grants a private right of action for a person injured by a violation of that antitrust provision and does not contain statutory language that explicitly requires an intrastate injury. Under that law, "[a] person injured in his business or property by a violation of this chapter may bring an action for appropriate injunctive or other equitable relief, damages sustained and, as determined by the court, taxable costs and reasonable attorney's fees." *See S.D. Codified Laws § 37-1-14.3*. The law also provides: "A contract, combination, or conspiracy between two or more persons in restraint of trade or commerce *any part of which* is within this state is unlawful." *Id. § 37-1-3.1* (emphasis added).

Furthermore, as to these **[**48]** three states' antitrust laws, there is a dearth of interpretative authority with respect to whether and to what extent, if any, there is an "intrastate" requirement as to a presumptive plaintiff's injury in order for that injury to be cognizable. With respect to the Iowa Competition Law specifically, one commentator notes that an "unusual feature of both *Sections 4* and *5* of the Iowa Competition Law is their explicit reference to 'relevant market,' which is defined in *Section 3* of the law to mean 'the geographical area of actual or potential competition in a line of commerce, all or any part of which is within this state.' Neither **[*890]** the phrase 'potential competition' nor the phrase 'within this state' is statutorily defined or judicially interpreted as yet . . . . [T]he latter *may* be a basis

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function of the courts—at **[**45]** least where the disposition required by the test is not absurd—is to enforce it according to its terms.'") (quoting *Alston v. Countrywide Fin. Corp., 585 F.3d 753, 759 (3d Cir. 2009))*; *Boehme v. Fareway Stores, Inc., 762 N.W.2d 142, 146 (Iowa 2009)* ("'When the language of a statute is plain and its meaning clear, the rules of statutory construction do not permit us to search for meaning beyond the statute's express terms.'" (quoting *Rock v. Warhank, 757 N.W.2d 670, 673 (Iowa 2008))*; *Buckel v. Chaney, 47 So.3d 148, 158 (Miss. 2010)* ("'The most fundamental rule of statutory construction is the plain meaning rule, which provides that if a statute is not ambiguous, then this Court must apply the statute according to its terms.'" (quoting *State ex rel. Hood v. Madison Cnty. Bd. of Supervisors, 873 So. 2d 85, 90 (Miss. 2004))*; *State v. Woodrow, 2011 ND 192, 803 N.W.2d 572, 575 (N.D. 2011)* ("Words in a statute are given their plain, ordinary, and commonly understood meaning, unless they are defined by statute or unless a contrary intention plainly appears." (citing *N.D. Cent. Code § 1-02-02*)); *Chapman v. Chapman, 2006 SD 36, 713 N.W.2d 572, 576 (S.D. 2006)* ("'We give words their plain meaning and effect, and read **[**46]** statutes as a whole, as well as enactments relating to the same subject.'" (quoting *State v. Anderson, 2005 SD 22, 693 N.W.2d 675, 681 (S.D. 2005))*.

for restricting state jurisdiction." 1 ABA Section of ***Antitrust Law***, *State Antitrust Practice and Statutes*, ch. 18-1, § 17.a. (4th ed. 2009) (emphasis added) (footnotes omitted). [19]

HN31[] The Mississippi ***antitrust law*** states: "[a]ny person, natural or artificial, injured or damaged by a trust and combine as herein defined, or by its effects direct or indirect, may recover all damages of every kind sustained by him or it and in addition a penalty of five hundred dollars ($500.00)." *Miss. Code Ann. §75-21-9*. The statute defines a "trust or combine," as "a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be . . . [t]o restrain trade." *Id. §75-21-1*. Like the other three previously discussed statutes, one plausible construction of this Mississippi statutory language does not require that cognizable injury be limited to residents' injuries or injuries suffered within the state. [20]

In support of their construction of the Mississippi ***antitrust law***, Defendants cite *In re Microsoft Corporation Antitrust Litigation, No. MDL 1332, 2003 U.S. Dist. LEXIS 15612, 2003 WL 22070561, at *1-2 (D. Md. Aug. 22, 2003)*, for the proposition that "under Mississippi law, following **[**52]** *Standard Oil Co. of Ky. v. State, 107 Miss. 377, 65 So. 468, 471 (Miss. 1914)*, that in order for a claim to come within the scope of the Mississippi antitrust statute, a plaintiff must allege "at least some conduct . . . **[*891]** which was performed wholly intrastate." Defs.' Mot. at 6 n.3. However, this lone legal authority fails to buttress the Defendants' proposed construction of the law. As a starting point, the Defendants' characterization of *Microsoft* is erroneous. Indeed, the ellipses in the quote stand in the place of the words "by Microsoft." That is, the *Microsoft* Court determined that Mississippi requires some of the *defendant's* conduct offensive to the antitrust statute be "performed wholly intrastate." Moreover, the decision simply does nothing to support the Defendants' contention as to the permissible scope of a presumptive plaintiff's injuries for recovery under the law. Whether a defendant's *conduct* need be "performed wholly intrastate" is an entirely distinct issue from whether a plaintiff's *injury* need to have occurred in-state—*i.e.*, where the *effect* of the conduct transpires. Defendants raise no legal authority other than *Microsoft* to support their construction of the law.

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[19] As to the South Dakota ***antitrust law***, some federal courts have determined that in order to allege that a plaintiff is entitled to bring suit thereunder, it must be alleged that *either* a part of the conspiracy or the conspiracy's **[**49]** restraint of trade occurred within South Dakota. *See* *In re New Motor Vehicles Canadian Export Antitrust Litig., 350 F. Supp. 2d 160, 172 (D. Me. 2004)* ("The statutory language is ambiguous as to whether it is a part of the conspiracy or a part of the trade or commerce that must be within the state. Nevertheless, it is logical to assume that the state intended its antitrust coverage to be as broad as possible. Therefore, I conclude that the plaintiffs need only allege that a part of the trade or commerce occurred within South Dakota."); *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 581 (M.D. Pa. 2009)* ("[A] plaintiff must allege only that defendant's conduct produced anticompetitive effects within South Dakota"); *In re Intel Corp. Microprocessor Antitrust Litig., 496 F. Supp. 2d 404, 414 (D. Del. 2007)* (following other courts' determinations that "allegations that part of the trade or commerce occurred within South Dakota were sufficient to bring the related conspiracy into the reach of South Dakota law"); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 516 F. Supp. 2d 1072, 1098 (N.D. Cal. 2007)* (agreeing "that South Dakota's antitrust statute should **[**50]** be read to cover unlawful anticompetitive conduct, as long as any part of it 'is within [South Dakota]'—i.e., as long as any part of it takes place or has an effect within the state").

[20] For purposes of this analysis, the Court need not decide at this time whether the Mississippi **[**51]** statute is ambiguous or whether its plain meaning applies. (This is true for all four state antitrust statutes at issue for that matter). However, one Mississippi court has noted that one statutory provision sets forth the legislative intent of the antitrust statute, which may have some bearing on the construction of the statute:

> Even if the [antitrust] statute was ambiguous, which it clearly is not [with respect to the Attorney General's enforcement of the law], the legislative intent of the act is clearly to 'suppress' all trust and monopolies. *Miss. Code Ann. § 75-21-39* (1972). The Mississippi Code states "[the Mississippi Antitrust Act] shall be liberally construed in all courts to the end that trusts and combines may be suppressed, and the benefits arising from competition in business preserved to the people of this state."

Hood ex rel. State v. BASF Corp., No. 56863, 2006 WL 308378, at *4 (Miss. Ch. Jan. 17, 2006) (unpublished).

In sum, it appears **[**53]** that there is an absence of definitive legal authority as to whether *vel non* an extraterritorial injury that might be traced to an antitrust violation is cognizable under the Iowa, Mississippi, North Dakota, and South Dakota antitrust statutes. Either construction of those four laws is possible and neither can be said to be strained or without appropriate attribute. Indeed, ***HN32***[] some "[s]tate antitrust laws can extend to transactions involving interstate commerce" and "some state statutes, or judicial interpretations of those provisions may expressly address the extraterritorial effects of a state's ***antitrust law***." 1 ABA Section of ***Antitrust Law***, ***Antitrust Law*** *Developments*, 625 (6th ed. 2007). Moreover, the existence of these statutory construction issues certainly suggests that the named Plaintiffs' claims pursuant to these states' antitrust laws cannot be deemed foreclosed by case law, or otherwise completely devoid of merit. *See* Nesbit, 347 F.3d at 80 ("'[D]ismissal for lack of jurisdiction is not appropriate merely because the legal theory alleged is probably false, but only because the right claimed is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise **[**54]** completely devoid of merit as not to involve a federal controversy.'" (quoting Growth Horizons, Inc. v. Delaware Cnty., 983 F.2d 1277, 1280-81 (3d Cir.1993) (internal quotation marks omitted). And, accordingly, the Plaintiffs have Article III standing to bring these claims, and the Court denies the Defendants' motion in this respect. [21]

B. Utah Antitrust Claim[22]

[*892] The Court concludes that it is appropriate to dismiss the Plaintiffs' Utah antitrust claims arising from damages that occurred before May 1, 2006. According to Defendants, May 1, 2006 is the effective date of an amendment to the Utah Antitrust Act—specifically to amend ***HN34***[] Utah Code Ann. § 76-10-918(1)—which authorized indirect purchasers to recover for **[**56]** violations of the Act. Such statutory provisions are sometimes known in antitrust parlance as an "*Illinois Brick* repealer" amendment because such plaintiffs could not, or were not explicitly authorized by law to, recover prior to the amendment. Several courts have observed the nature of the Utah amendment is akin to an *Illinois Brick* repealer. *See* California v. Infineon Techs. AG, No. C 06-4333, 2008 U.S. Dist. LEXIS 120058, 2008 WL 1766775, at *4-5 (N.D. Cal. Apr. 15, 2008) (concluding that the amendment to the Utah Antitrust Act was an *Illinois Brick* repealer and "that indirect purchaser standing was not available prior to 2006"); In re Static Random Access Memory (SRAM) Antitrust Litig., 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289, at *6 (N.D. Cal. Dec. 8, 2010) (reaching the same conclusion). ***HN35***[] In Utah, a "statute is not to be applied retroactively unless the statute expressly declares that it operates retroactively." Goebel v. Salt Lake City S. R.R. Co., 2004 UT 80, 104 P.3d 1185, 1197-98 (Utah 2004). **[**57]** Defendants contend that because the Utah Antitrust Act did not permit indirect purchasers to recover for antitrust injuries prior to the amendment's effective date, dismissal of the Plaintiffs' claims for damages suffered prior to May 1, 2006 is warranted.

Plaintiffs do not dispute the Defendants' characterization of Utah law in any of the aforementioned respects; nor do they dispute the cited legal authority. Indeed, Plaintiffs do not raise any challenge to the defense contention that Plaintiffs cannot recover for claims arising from damages accruing before May 1, 2006 under the Utah Antitrust Act.

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[21] In light of this analysis, the Court is not proceeding to further consider prudential standing concerns at this time. The Court concludes such analysis is also not required at present because Defendants have only challenged the named Plaintiffs' Article III constitutional standing. Furthermore, ***HN33***[] there is no requirement that prudential standing issues must always be resolved before the merits—and certainly not, as in this case, when the parties have not framed prudential standing issues explicitly or suitably for the Court's consideration. *See* Bowers v. Nat'l Collegiate Athletic Ass'n, 346 F.3d 402, 416 (3d Cir. 2003) (recognizing that although the Supreme Court in *Steel Co.* "specifically indicated that 'Article III jurisdiction is always an antecedent question'" that decision "should not be understood as requiring courts to answer all questions of 'jurisdiction,' **[**55]** broadly understood, before addressing the existence of the cause of action sued upon." (footnote omitted) (citing Steel Co., 523 U.S. at 97 n.2)); Jordon v. AG of the United States, 424 F.3d 320, 325 n.8 (3d Cir. 2005) (recognizing same); St. Matthew's Slovak Roman Catholic Congregation v. Most Reverend, 106 F. App'x 761, 766 n.5 (3d Cir. 2004) (unpublished) (recognizing same).

[22] Defendants have characterized this argument as a "standing" issue by claiming that "Plaintiffs have no standing to sue for damages arising before May 1, 2006." Defs.' Mot. at 9. Based on the Court's prior discussion of Article III constitutional standing, "statutory standing," and "antitrust standing," the Court refrains from using the term "standing" in the context of this issue to avoid possible confusion about the precise legal issue at bar.

Accordingly, the Court determines that it is appropriate to grant the Defendants' motion to dismiss the Plaintiffs' claims under the Utah Antitrust Act arising from damages that occurred prior to May 1, 2006. [23]

C. Scope of the IPSAC's Definition of "Egg Products"

Defendants raise a challenge to the scope of the IPSAC's definition of "egg products" with respect to "manufactured products incorporating processed eggs such **[**59]** as baked goods and mayonnaise" on **[*893]** the basis of *Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, and its progeny. The IPSAC defines egg products as "either shell eggs substitutes such as liquid, frozen, and dry eggs, or manufactured products incorporating processed eggs such as baked goods and mayonnaise." IPSAC ¶ 124. Defendants seek to partially dismiss certain of the Plaintiffs' federal and state antitrust claims with respect to alleged injuries relating to purchases of manufactured products incorporating processed eggs.

In response, Plaintiffs agree that the IPSAC definition of egg products is "overly inclusive" by including "manufactured products incorporating processed eggs such as baked goods and mayonnaise," and further "agree to limit the scope of egg products in this action to 'shell substitutes such as liquid, frozen, and dry eggs,' the portion of the definition of egg products set forth in the [IPSAC] that Defendants do not challenge." Pls.' Mot. at 62. Given the Plaintiffs' agreement to narrow the definition, the Court grants without prejudice the Defendants' Motion as to this issue. Plaintiffs may seek leave to proceed with **[**60]** their proposed amendment with the appropriate motion or equivalent procedure to achieve pleading precision on this point as by for example, stipulation, and the Court expects that the amendment or stipulation will be respectful of the discussions among counsel on this point.

D. Separate Egg Products Conspiracy

Defendants argue that Plaintiffs have alleged a separate conspiracy relating to egg products which should be dismissed for failure to state a claim. However, because this challenge hinges?at least to some degree—upon the definition of "egg products" in the IPSAC, and given that the definition of egg products will be amended pursuant to Plaintiffs' aforementioned agreement to do so, it would be improvident for the Court to consider this argument at this time in the absence of the actual amendment or stipulation. Accordingly, the Court denies the Motion in this respect without prejudice to Defendants to raise these or similar arguments based upon the amended definition of "egg products," if the circumstances so warrant. [24]

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[23] To the extent that the defense may have obliquely raised the issue in connection with its Motion, the Court does not address whether the Plaintiffs' claims arising from *conduct* that occurred prior to May 1, 2006 may be dismissed. The Defendants' briefing and oral argument did not present or frame this question in a sufficient fashion that would allow the Court to address it. Similarly, **[**58]** Plaintiffs have articulated only that they oppose the Defendants on this score.

Defendants cite but a single legal authority in connection with this issue, *In re Aftermarket Filters Antitrust Litigation, No. 08-cv-04883, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041 (N.D. Ill. Nov. 5, 2009)*. However, that case only addressed the question of whether "any claim *for relief* prior to the effective date of [the Utah] statute[] must be dismissed" and not the separate and distinct question of whether dismissal of claims arising from conduct occurring before May 1, 2006 was warranted. Mem. of Law in Support of Defs.' Joint Mot. to Dismiss the Consolidated Indirect Purchaser Comp., at 17, *Aftermarket Filters*, No. 08-cv-04883 (Doc. No. 196) (N.D. Ill. Feb. 2, 2009) (emphasis added). Because this issue is largely undefined, particularly in light of the defense's failure to proffer any other supporting legal authority or analysis, the Court declines to undertake the burden of deciding this issue in its present posture.

[24] To determine whether it might be appropriate to raise this or a similar issue again following the Plaintiffs' agreement to amend the definition of "egg products" **[**61]** and whether a Rule 12(b)(6) motion might be the appropriate means to do so, the Defendants should refer to the Court's prior decision on a motion in which most of the same Defendants here raised similar issues directed to the Direct Purchaser Plaintiffs' pleading in this multidistrict litigation. *See* Oct. 14, 2011 Mem. and Order, 2011

E. State Consumer Protection Claims

Defendants move to dismiss all of the Plaintiffs' alleged consumer protection claims under nine states' laws: California, the District of Columbia, Florida, Kansas, Massachusetts, New Mexico, New York, North Carolina, and West Virginia.

1. California

Defendants mount a dual challenge to the Plaintiffs' claim under the California Unfair Competition Law ("UCL"). First, Defendants argue that the alleged claim fails to satisfy both *Federal Rules of Civil Procedure 8* and *9(b)* because the IPSAC does not contain adequate factual allegations of deceptive conduct and instead only relies on alleged antitrust violations. Second, **[**62] [*894]** Defendants contend that, even if the federal pleading standards are met, the IPSAC provides no grounds for the Plaintiffs' claim for restitution under the UCL.

HN36[] The UCL prohibits engaging in "unfair competition," which is defined, *inter alia*, as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. "[A] person who has suffered injury in fact and has lost money or property as a result of the unfair competition" may bring suit for such a violation. *Id. § 17204*; *see also id. § 17203*; *Californians for Disability Rights v. Mervy's, LLC, 39 Cal. 4th 223, 46 Cal. Rptr. 3d 57, 138 P.3d 207, 210 (Cal. 2006)* (explaining how the *Section 17204* "prescribes who may sue to enforce the UCL"); *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 885 (Cal. 2011)* ("To satisfy the narrower standing requirements . . . , a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." (emphasis in original)). Remedies include **[**63]** injunctive relief, civil penalties, and those remedies that "may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." *Cal. Bus. & Prof. Code § 17203*; *see also In re Tobacco II Cases, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20, 29 (Cal. 2009)* ("[P]revailing plaintiffs are generally limited to injunctive relief and restitution." (quoting *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937, 943 (Cal. 2003)*). [25]

Defendants argue that Plaintiffs cannot satisfy the pleading standards in alleging a UCL claim because Plaintiffs "are clearly attempting to restyle a supply control theory into [a] consumer fraud claim[]" by "dress[ing] their antitrust case in the clothes of a consumer fraud claim" and that certain allegations in the IPSAC of fraudulent **[**64]** conduct "are insufficient to comply with Federal *Rule 8*." Defs.' Mot at 22-23. Plaintiffs counter by arguing that the Defendants' alleged antitrust violations are the grounds for their UCL claim, and that the requisite alleged antitrust violation is the unlawful, unfair or fraudulent business act or practice.

Indeed, ***HN38***[] antitrust violations can constitute "unfair competition" under the UCL. *See Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 406 (E.D. Pa. 2010)* (hereinafter "*SMW*") (finding that defendants "by filing sham lawsuits designed to prevent the entry of generic alternatives into the market for Wellbutrin SR," which plaintiffs allege to be "an unfair and illegal business practice," is "anti-competitive conduct [that] falls under the broad scope of the CUCL"); *see also Korea Supply, 63 P.3d at 943* ("*Section 17200* 'borrows' violations from other laws by making them independently actionable as unfair competitive practices," and allows "'a practice [to be] deemed unfair even if not specifically proscribed by some other law.'" (quoting *Cel-Tech Commc'ns Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d*

WL 4945864 (denying without prejudice the motion to dismiss a distinct antitrust claim as to egg products in the direct purchaser class action plaintiffs' Second Consolidated Amended Class Action Complaint).

[25] ***HN37***[] Once a plaintiff has satisfied the injury requirement under *Section 17203 of the UCL*, "[s]uch injuries satisfy the plain meaning of *section 17204*'s 'lost money or property' requirement, qualify as injury in fact, and would permit a plaintiff to seek an injunction against the offending business practice even in the absence of any basis for restitution." *Kwikset, 246 P.3d at 895*.

*[*895] 527, 540 (Cal. 1999))*; 1 *State Antitrust Practice, supra*, **[**65]** ch. 6-61 to -62, §§ 1.a., l.c. (describing the UCL to "operate[] as a consumer protection law with antitrust applications" and that "claims under the UCL often accompany, or arise out of, alleged antitrust violations"). Defendants do not directly dispute that the UCL prohibits antitrust violations. Instead, they contend, more generically, that some consumer fraud causes of action "require Plaintiffs to plead more than simply the elements of an antitrust violation," such as deceptive conduct and reliance. Defs.' Reply at 8. Be that as it may, the Defendants do not demonstrate that such circumstances exist here, and they do not identify such additional elements for a UCL claim arising from an alleged antitrust violation.

The Court agrees that it is an analytically sensible and entirely fair operation of pleading standards and substantive law to conclude that the IPSAC's allegations giving rise to alleged antitrust violations also give rise to the Plaintiffs' UCL claim. Plaintiffs have alleged that they suffered injury in fact and lost money or property due to the Defendants' practices of "unfair competition." *See, e.g.*, IPSAC ¶ 332 ("As a direct and proximate result of Defendants' unlawful **[**66]** practices, including combinations and contracts to restrain trade and allocate relevant markets, Plaintiff [and class members] have been injured in their business and/or property in that they paid more for shell eggs and egg products than they otherwise would have paid in the absence of Defendants' unlawful conduct."). The IPSAC alleges, supported by other factually specific allegations concerning the contours of the conspiracy, that Defendants committed "unlawful, unfair or fraudulent business act[s] or practices[s] in violation of" the UCL by "engaging in a continuing unlawful trust and concert of, the substantial terms of which were to fix, raise, stabilize, and maintain prices of, allocate markets for, and restrain and manipulate the supply of shell eggs and egg products at supra-competitive levels." IPSAC ¶¶ 329-30. More specifically, such conduct entails the Defendants purportedly advancing the goals of their antitrust conspiracy through eight alleged "collective actions," which included various flock reduction and early molting initiatives, and actions taken in connection with the United Egg Producers Certification Program and the United States Egg Marketers export program. **[**67]** Whatever else it may be, if it occurred, the unlawful price-fixing alleged in the IPSAC surely would constitute unfair competition within the meaning of the UCL.

Defendants have not contended that the IPSAC fails to allege an antitrust violation for purposes of bringing a UCL claim (except with respect to injuries relating to certain egg products), nor have they raised any arguments that Plaintiffs have failed to sufficiently allege their separate California antitrust claim under *Section 16720, California Business and Professions Code*. *See* IPSAC ¶¶ 325-28. Thus, the Defendants' argument does not support the conclusion that Plaintiffs have failed to meet the *Rule 8* pleading requirements as to their UCL claim.

Contrary to the Defendants' contention otherwise, case law from the Third Circuit does not require that the heightened pleading standard under *Rule 9(b)* be applied to the Plaintiffs' UCL claim. This particular alleged violation of the UCL is simply not grounded in fraud nor does it "sound in fraud." The Plaintiffs' UCL claim arises from the alleged conduct—namely, the alleged conspiracy to reduce the supply of eggs as allegedly advanced by the eight collective actions—which, as **[*896]** alleged, **[**68]** is not based on fraudulent acts. [26] As such, the UCL claim does not entirely rely on a course of fraudulent conduct, in contrast to the Third Circuit's *Lum* case, so as to require the application of *Rule 9(b)*.

As to the Defendants' second challenge to the Plaintiffs' UCL claim, the Court concludes that Plaintiffs have sufficiently alleged their eligibility for seeking restitution. The California Supreme Court has explained:

> ***HN39***[] Restitution under *section 17203* [of the UCL] is confined to restoration of any interest in "money or property, real or personal, which may have been *acquired* by means of such unfair competition." (Italics added.) A restitution order against a defendant thus requires both **[**69]** that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other. . . . But the economic injury that an unfair business practice occasions may often involve a loss by the plaintiff without any

[26] Even Defendants argue that insofar that the IPSAC alleges that the logo for the Animal Care Certified program was misleading, "these allegations do not form the basis of Plaintiffs' consumer fraud claims" and that "Plaintiffs' causes of action make it exceedingly clear that Plaintiffs are seeking damages resulting only from the allegedly 'artificially high' egg prices and are concerned with Defendants' conduct only as it relates to the alleged reduction in the supply of eggs." Defs.' Mot. at 39-40.

> corresponding gain by the defendant, such as, for example, a diminishment in the value of some asset a plaintiff possesses. (*See* *Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal. App. 4th 688, 716, 61 Cal. Rptr. 3d 29* [a plaintiff who alleged that a defendant's defamatory statements diminished its assets and reduced its market capitalization adequately alleged UCL standing]; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. (2005) 129 Cal. App. 4th 1228, 1240, 1262, 29 Cal. Rptr. 3d 521* [a plaintiff whose home and car were vandalized by defendant animal rights protesters adequately alleged lost property under Prop. 64].)

Kwikset Corp., 246 P.3d at 895 (parentheticals and brackets in original).

Thus, the issue at hand is whether Plaintiffs have connected their alleged loss—which they claim is the loss of "money by paying more than they should have for eggs as a result of Defendants' unfair method of competition," Pls.' Resp. at 24—with **[**70]** a "corresponding gain" by and of the Defendants. Defendants argue that while such a gain might be demonstrated by alleging that Plaintiffs "purchased eggs originating from any of the Defendants," Plaintiffs have failed to do so. Defs.' Mot. at 33. For example, an allegation that a plaintiff "paid money to a retailer to purchase [defendant] Microsoft's product based on false or misleading statements on the product package" would demonstrate eligibility for restitution because it can be inferred that the plaintiffs' payment for the product to the retailer benefitted Microsoft. *Shersher v. Superior Court, 154 Cal. App. 4th 1491, 65 Cal. Rptr. 3d 634, 636 (Cal. Ct. App. 2007)*. Presumably, Defendants here argue that these Plaintiffs have not met the *Shersher* standards.

However, legal authority also exists to propose that a "corresponding gain" may be able to be a more broadly-defined benefit conferred upon the defendant by a plaintiff. *Troyk v. Farmers Group, Inc., 171 Cal. App. 4th 1305, 90 Cal. Rptr. 3d 589 (Cal. Ct. App. 2009)*, reflects reasoning that ***HN40***[] restitution under the UCL applies traditional restitution principles:

> " 'A person who has been unjustly enriched at the expense of another is required **[*897]** to make restitution to the other.' **[**71]** (*Rest., Restitution, § 1*.) 'A person is enriched if he receives a benefit at another's expense. (*Id.*, com. a, p. 12.) The term "benefit" "denotes any form of advantage." (*Id.*, com. b, p. 12.) Thus, a benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss. Even when a person has received a benefit from another, he is required to make restitution "only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it." (*Id.*, com. c, p. 13.)' (*Ghirardo v. Antonioli [14 Cal. 4th 39, 57 Cal. Rptr. 2d 687, 924 P.2d 996 (Cal. 1996)])* 'For a benefit to be conferred, it is not essential that money be paid directly to the recipient by the party seeking restitution.' (*California Federal Bank v. Matreyek (1992) 8 Cal. App. 4th 125, 132, 10 Cal. Rptr. 2d 58* . . . .)" . . . .

Id. at 617 (quoting *County of Solano v. Vallejo Redevelopment Agency, 75 Cal. App. 4th 1262, 90 Cal. Rptr. 2d 41, 52 (Cal. Ct. App. 1999))*.

In this manner, the factual allegations that relate to the Plaintiffs' California unjust enrichment claim are relevant as to the UCL claim. As discussed in greater detail *infra*, in relation to the arguments focused on the Plaintiffs' unjust **[**72]** enrichment claims—and specifically the general discussion concerning the conferral of benefits upon Defendants [27]—there are factual allegations in the IPSAC that suggest that Defendants acquired a "corresponding gain" resulting from the Plaintiffs' alleged purchase of eggs at an over-inflated price due to the Defendants' alleged unfair business practice. *See* IPSAC ¶¶ 332-34. [28] Accordingly, at this time, the Court cannot conclude as a matter

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[27] The Court notes that Defendants have not sought dismissal of the California unjust enrichment claim on the basis of failure to adequately plead the "conferral of a benefit," although, as discussed *infra*, the defense does challenge certain of the unjust enrichment claims on that and other grounds.

[28] The Court reads the reference to Arizona in the last sentence of the referenced pleading paragraph to be a typographical error, given that these allegations are essentially cookie-cutter as to each state unjust enrichment claim:

of law that the Plaintiffs' claim for restitution under the UCL must be dismissed. The Court denies the Defendants' motion to dismiss.

2. District of Columbia

Defendants contest the Plaintiffs' claim under the District of Columbia Consumer Protection and Procedures Act ("DCCPPA") for failure to state a claim under the pleading standards of *Rules 8* and *9(b)* because, according to Defendants, "more than simply the elements of an antitrust violation" must be alleged. Defendants also argue that a DCCPPA claim requires pleading unconscionable conduct but the IPSAC fails to sufficiently plead that element.

HN41[] The DCCPPA prohibits "unlawful trade practices." The Act defines "trade practice" to be "any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer **[*898]** goods or services." *D.C. Code § 28-3901(a)(6)*. The Act enumerates a **[**74]** non-exclusive list of specific practices that constitute violations of the Act. *See* *D.C. Code § 28-3904*; *District Cablevision Ltd. Partnership v. Bassin, 828 A.2d 714, 723 (D.C. 2003)*. Additionally, "the statute obviously contemplates that procedures and sanctions provided by the Act will be used to enforce trade practices made unlawful by other statutes." *See* *Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs, 566 A.2d 462, 466 (D.C. 1989)*; *see also* *Bassin, 828 A.2d at 723* ("Trade practices that violate other laws, including the common law, also fall within the purview of the CPPA.").

Just as the California UCL encompasses violations of the California ***antitrust law***, ***HN42***[] violations of the District of Columbia Antitrust Act of 1980, *D.C. Code § 28-4501, et seq.*, can constitute unlawful trade practices within the purview of the DCCPPA. *See Marbry v. EMI Music Distrib.*, Civil Action No. 3731-00, 129 Daily Wash. L. Rptr. 2065, 2067 (D.C. Super. Ct. June 12, 2001) ("That a price fixing violation of the [District of Columbia] Antitrust Act is also a violation of the CPPA is apparent from the purpose and text of the consumer protection statute.") [29]; *Chocolate, 602 F. Supp. 2d at 584* **[**75]** ("[T]he DCCPPA subsumes a Sherman Act claim and creates an indirect purchaser cause of action for conspiratorial price fixing regardless of whether defendants have engaged in deceptive conduct."); *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1126 (N.D. Cal. 2008)* ("In light of this case law expansively interpreting the DCCPPA as a 'comprehensive' statute designed to remedy 'all improper trade practices,' the Court finds that plaintiffs may maintain a claim for defendant's alleged price-fixing under the statute . . . ." (citing *Bassin, 828 A.2d at 722-23*)); *New Motor Vehicles, 350 F. Supp. 2d at 183* ("Since *Bassin* declares that the DCCPPA can be used as a remedy for improper trade practices that violate other laws, the statute is broad enough to cover the alleged illegal [antitrust] conspiracy here.").

Likewise, the Court's rationale which led to the conclusion that Defendants had not demonstrated that Plaintiffs had failed to plead a California UCL claim also applies here. Plaintiffs have alleged that their DCCPPA claim is based upon the alleged antitrust violation. *See, e.g.*, IPSAC ¶ 340-41 (alleging that "Defendants agreed to, and did in fact, act in restraint of trade or commerce by unfairly and deceptively fixing, raising, stabilizing, and maintaining prices of,

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> The Defendants were able to achieve their increased revenues and profits from their sales of **[**73]** eggs to California indirect purchasers because the demand for eggs by indirect purchasers is relatively price inelastic, as Defendants understood. Thus, the ability of Defendants to profit from their sales of eggs to indirect purchasers in California was connected to and due to the increased prices paid for Defendants eggs by indirect purchasers in [California].

Id.

[29] *Marbry* explicitly addressed a defense argument on a motion to dismiss an indirect purchaser class action on a theory of a price-fixing conspiracy among distributors of compact discs ("CDs"), which contended that the DCCPPA "protects against deceptive trade practices, not unfair competition. Since plaintiff has not alleged any misrepresentation that deceived her, **[**76]** the consumer protection count, defendants say, must be dismissed." *Marbry*, 129 Daily Wash. L. Rptr. at 2067. The Court disagreed, noting, *inter alia*, that the "CPPA's list of unlawful trade practices is not exclusive and includes trade practices made illegal by later-enacted statutes. . . . If selling CDs is a trade practice, price fixing CDs, just as plainly, is an improper trade practice under the CPPA for which a consumer has the right to bring a lawsuit . . . ." *Id.*

allocating markets for, and restraining and manipulating the supply of shell eggs and egg products at supracompetitive levels" and that this "conduct constitutes 'unlawful trade practices'" under the DCCPPA). Defendants do not raise any objections to the **[**77]** effect that Plaintiffs have inadequately alleged an antitrust violation. [30]

[*899] Defendants also have raised no valid arguments that an antitrust violation by itself cannot comprise an unlawful trade practice within the meaning of the DCCPPA. The DCCPPA prohibits "unlawful trade practices," and, although certain of the enumerated "unlawful trade practices" as defined by *D.C. Code § 28-3904* may require the element of unconscionable conduct to be alleged, Defendants have not identified any authority that suggests that an allegation of "unconscionable conduct" is required in order for a violation of the Antitrust Act to constitute an unlawful trade practice under the DCCPPA for pleading purposes. [31] Indeed, credible judicial analysis rejects this exact argument. *See* *Aftermarket Filters, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at *9* **[**78]** (***HN43***[]) "[T]he District of Columbia Consumer Protection Act . . . does not require a showing of concealment or deception to support a claim."). Consequently, both of the Defendants' arguments—that Plaintiffs have failed to state a claim for relief consistent with the demands of *Rule 8* and that Plaintiffs "must plead that the defendant engaged in 'unconscionable' conduct" under the DCCPPA—are unpersuasive.

Furthermore, the Court's reasoning as to why a *Rule 9* pleading standard does not apply to the Plaintiffs' UCL claim applies to the DCCPPA claim as well. The Plaintiffs' claim for the DCCPPA violation is based upon factual allegations that **[**80]** do not entirely rely on fraud, and thus the Plaintiffs' DCCPPA claim does not sound in fraud so as to require the application of *Rule 9* under Third Circuit case law.

Neither of the Defendants' objections to the Plaintiffs' DCCPPA claim are meritorious, and the Court denies the Defendants' Motion as to the Plaintiffs' DCCPPA claim.

3. Florida

Defendants move to dismiss the claim that their alleged conduct violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). They argue this claim is deficient under the pleading standards **[*900]** of *Rules 8* and

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[30] Plaintiffs have brought a District of Columbia antitrust claim (*see* IPSAC ¶¶ 336-39) which they argue is the basis for their DCCPPA claim. *See* Pls.' Resp. at 5 ("[T]he CPPA claims in this case . . . are based on violation of another D.C. law (its ***antitrust law***) . . . ."). Defendants do not argue that Plaintiffs have failed to state a D.C. antitrust claim, except with respect to injuries relating to certain egg products.

[31] The two cases upon which Defendants rely for this position are inapposite. Neither of those cases, *In re Flash Memory Antitrust Litigation, 643 F. Supp. 2d 1133 (N.D. Cal. 2009)* and *In re Graphics Processing Units Antitrust Litigation, 527 F. Supp. 2d 1011 (N.D. Cal. 2007)*, addressed the question of whether a violation of the D.C. ***antitrust law*** is an unlawful trade practice under the DCCPPA.

For example, in *Flash Memory*, that court determined that the antitrust price-fixing theory at issue could be brought under the DCCPPA because the Act "proscribes the imposition of prices that are 'unconscionably high,' i.e., prices that are 'unreasonably favorable' to the seller, where 'the buyer did not have a meaningful choice of alternatives under the circumstances.'" *Id. at 1157-58*. In reaching this **[**79]** conclusion, the court relied on a District of Columbia Court of Appeals case that addressed *D.C. Code § 28-3904(r)*, a DCCPPA provision that prohibits "mak[ing] or enforc[ing] unconscionable terms or provisions of sales or leases." *Id. at 1158* (citing *Ford v. Chartone, Inc., 908 A.2d 72 (D.C. 2006))*. Because the court's attention was directed to those issues, *Flash Memory* did not speak to whether a violation of the D.C. ***antitrust law*** is an unlawful trade practice, which is what Plaintiffs argue here and, as discussed above, does not require alleging unconscionable conduct.

Moreover, to the extent that Defendants, by citing *D.C. Code § 28-3904(r)*, contend that Plaintiffs have brought a DCCPPA claim pursuant to that provision, *see* Pls.' Reply at 16, they are in error. Plaintiffs confirmed at oral argument that their DCCPPA claim rests on the Defendants' alleged violation of the D.C. Antitrust Act and not *subdivision (r)*. *See* Tr. at 95:22-96:2; 96:17-21.

9(b), contending that a claim under the FDUTPA requires Plaintiffs to plead allegations of fraudulent conduct, even when the unfair method of competition is alleged to be antitrust violations.

HN44[] The FDUTPA prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Fla. Stat. § 501.204(1)*. The three elements of a FDUTPA claim are "'(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.'" *In re Flonase Antitrust Litig., No. 08-CV-3301, 815 F. Supp. 2d 867, 2011 U.S. Dist. LEXIS 109572, 2011 WL 4464823, at *13 (E.D. Pa. Sept. 26, 2011)* (quoting *Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006))*.

HN45[] The **[**81]** first element of the claim encompasses antitrust violations because "the acts proscribed by subsection *501.204(1)* include antitrust violations." *Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 104 (Fla. Dist. Ct. App. 1996)*; *see also In re Florida Microsoft Antitrust Litig.*, No. 99-27340, 2002 WL 31423620, at *2-3 (Fla. Cir. Ct. Aug. 26, 2002) (citing same); *Marco Island Cable, Inc. v. Comcast Cablevision of South, Inc., No. 2:04-CV-26-FTM-29DNF, 2006 U.S. Dist. LEXIS 45116, 2006 WL 1814333, at *6 (M.D. Fla. July 3, 2006)* (citing same); *Flonase, 2011 U.S. Dist. LEXIS 109572, 2011 WL 4464823, at *14* (citing same); *RDK Truck Sales & Serv. Inc. v. Mack Trucks, Inc., No. 04-4007, 2009 U.S. Dist. LEXIS 43245, 2009 WL 1441578, at *20 (E.D. Pa. May 19, 2009)* (citing same). Antitrust violations constitute FDUTPA violations, in part, because "*section 501.204(2)* provides that in determining what constitutes an 'unfair method of competition' under subsection *501.204(1)*, 'due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. *5(a)(1)* of the Federal Trade Commission Act, *15 U.S.C. 45(a)(1)*.' *Section 5(a)(1)* of the FTC Act encompasses violations of the antitrust laws." *Mack, 673 So. 2d at 104*. **[**82]** It follows that Florida law recognizes that a FDUTPA claim may arise from a violation of antitrust laws such as the Sherman Act and other state antitrust laws because such a violation in and of itself is an unfair method of competition. *See id.* (citing *F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*. [32]

Thus, contrary to the Defendants' arguments otherwise, no allegations of fraudulent conduct must be pled in order for Plaintiffs to sufficiently allege under *Rule 8* a FDUTPA claim based upon an antitrust violation. Indeed, once again, Plaintiffs are alleging that the Defendants' alleged antitrust violation is itself the unfair method of competition prohibited by the FDUTPA. *See, e.g.*, Pls.' Resp. at 4-5; IPSAC ¶¶ 348-49 (alleging that "Defendants agreed to, and did in fact, act in restraint of trade or commerce by unfairly and **[**83]** deceptively fixing, raising, stabilizing, and maintaining prices of, allocating markets for, and restraining and manipulating the supply of shell eggs and egg products at supracompetitive levels . . . ." and such conduct "constitute[s] unfair and deceptive trade practices in violation of [the FDUTPA]"). Defendants do not contend that Plaintiffs wholly have failed to sufficiently allege antitrust violations. Accordingly, their argument that the IPSAC fails to state a FDUTPA claim falls short. [33]

[*901] The Court denies the Defendants' motion as to the FDUTPA claim.

4. Kansas

Defendants argue for the dismissal of the Plaintiffs' claim under the Kansas Consumer Protection Act ("KCPA") because "Kansas law does not permit Plaintiffs to reformulate or rephrase their antitrust claims as [KCPA] claims" and thus the IPSAC's allegations do **[**84]** not support a cognizable claim under the KCPA. Defs.' Mot at 28-29. They also contend that Plaintiffs fail to state a KCPA claim in satisfaction of the pleading standards of *Rules 8* and *9(b)*.

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[32] Although Defendants generally argue that "consumer fraud causes of action require Plaintiffs to plead more than simply the elements of an antitrust violation," Defs.' Reply at 8, they have not provided any authority that this is true under Florida law in circumstances where an alleged antitrust violation is the purported unfair method of competition.

[33] Additionally, for the same reasons the Court already discussed in relation to the consumer protections claims of California and the District of Columbia, the Plaintiffs' factual allegations that give rise to their antitrust and consumer protection claims under Florida law do not sound in fraud so as to require the application of *Rule 9* under Third Circuit case law.

HN46[] The KCPA prohibits a supplier from "engag[ing] in any deceptive act or practice in connection with a consumer transaction." *Kan. Stat. Ann. § 50-626(a)*. "Consumer transaction" is defined as "a sale, lease, assignment or other disposition for value of property or services within this state . . . to a consumer; or a solicitation by a supplier with respect to any of these dispositions." *Kan. Stat. Ann. § 50-624(c)*. The Act sets forth a non-exclusive list of conduct that "whether or not any consumer has in fact been misled" constitutes "deceptive acts or practices." *Kan. Stat. Ann. § 50-626(b)*. One such "deceptive act or practice" is "the willful failure to state a material fact, or the willful concealment, suppression or omission of a material fact." *Kan. Stat. Ann. § 50-626(b)(3)*. Plaintiffs claim this provision as the basis for their KCPA claim. Pls.' Resp. at 21.

HN47[] For Plaintiffs to establish their KCPA claim based upon *Section 50-626(b)(3)* they must allege these elements: (1) Plaintiffs were consumers; **[**85]** (2) Defendants were suppliers; (3) Defendants willfully failed to state, concealed, suppressed, or omitted, a certain matter or information; and (4) that certain matter or information was a material fact. *See* Pattern Instructions Kan. 4th Civil § 129.04; *see also Cole v. Hewlett Packard Co., 84 P.3d 1047, at *7 (Kan. Ct. App. 2004)*. The "use of 'willful' in the KCPA includes an intent to harm the consumer." *Unruh v. Purina Mills, LLC, 289 Kan. 1185, 221 P.3d 1130, 1139 (Kan. 2009)*. For purposes of *Section 50-626(b)(3)*, a "'matter is material if it is one to which a reasonable person would attach importance in determining his choice of action in the transaction involved.'" *Farrell v. Gen. Motors Corp., 249 Kan. 231, 815 P.2d 538, 548 (Kan. 1991)* (quoting *Griffith v. Byers Constr. Co., 212 Kan. 65, 510 P.2d 198, 205 (Kan. 1973))*. However, "*K.S.A. 50-626(b)(3)* does not proscribe mere nondisclosure of a material fact." *Heller v. Martin, 14 Kan. App. 2d 48, 782 P.2d 1241, 1244 (Kan. App. 1989)*; *see also* Pattern Instructions Kan. 4th Civil § 129.04.

In contrast to the California, the District of Columbia, and Florida claims discussed above, Plaintiffs contend that their KCPA claim is "not merely a restatement of [their] Kansas antitrust claims." Pls.' **[**86]** Resp. at 20. Rather, Plaintiffs contend in their briefing that their KCPA claim is one arising from a subset of the broader conduct attributed to the alleged conspiracy to reduce the supply of eggs:

> Defendants engaged in unfair and deceptive acts by public[ly] claiming to reduce their flock size pursuant to recommended animal husbandry guidelines—which are by definition guidelines promoting the health of the chickens and quality of the eggs—to obtain consumer-oriented certification from the UEP . . . when in fact the guidelines were nothing more than a cover for Defendants' illegal conspiracy to limit supply.

[*902] *Id.* However, the Court need not consider whether a KCPA claim arising from such delineated conduct states a claim for relief consistent with the applicable pleading standards because the Plaintiffs' proffered description of their claim does not comport with the IPSAC.

As alleged in the IPSAC, the KCPA claim is premised upon allegations relating to the entire conspiracy to reduce the supply of eggs. As alleged, "Defendants agreed to, and did in fact, act in restraint of trade or commerce by unfairly and deceptively fixing, raising, stabilizing, and maintaining prices of, allocating **[**87]** markets for, and restraining and manipulating the supply of shell eggs and egg products at supracompetitive levels" and "[b]y reason of the foregoing, Defendants and their co-conspirators have engaged in conduct that constitutes deceptive and unconscionable acts and practices" under the KCPA. IPSAC ¶¶ 367-68.

A fair reading of these allegations suggests that the purported deceptive activity is broadly comprised of the entire alleged agreement to reduce the supply of eggs and the collective various alleged actions undertaken to advance the object of the agreement. These allegations (as well as the other IPSAC allegations specifically pled as to the KCPA claim which allege, *inter alia*, the effects of the conduct, unequal bargaining power, and so forth, *see id.* ¶¶ 369-72—none of which invoke any element of a KCPA claim under *Section 50-626(b)(3)*) simply do not plausibly suggest that Defendants willfully failed to state, concealed, suppressed, or omitted a certain matter or information to which a reasonable person would attach importance in determining his choice of action in the transaction involved.

Given that the Plaintiffs' KCPA claim as articulated in the operative pleading does not **[**88]** satisfy *Rule 8*, the Court grants the Defendants' motion to dismiss this claim without prejudice. [34]

5. Massachusetts

Defendants attack Plaintiffs' Massachusetts Consumer Protection Act ("G.L. ch. 93A") claim because of the Plaintiffs' failure to allege compliance with the Act's pre-suit notification procedures. They also claim that Plaintiffs have failed to state a claim consistent with the demands of *Rules 8* and *9(b)* because Plaintiffs do not sufficiently plead allegations of fraudulent conduct and that allegations of antitrust violations alone are inadequate to allege a violation of G.L. ch. 93A.

HN48[] Generally, a plaintiff is required to provide a defendant with a written demand for relief of the specific deceptive practices claimed before commencing a suit for a G.L. ch. 93A violation. The relevant statutory language provides:

> At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant **[**89]** and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent.

Mass. Gen. Laws. ch. 93A § 9(3); *see also In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 539-40 (E.D. Pa. 2010)*. "A demand letter listing the specific deceptive practices claimed is a prerequisite to suit and as a special element must be alleged and proved." *Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 333 N.E.2d 202, 204 (Mass. 1975)*; *see also* *Spring v. Geriatric Auth. of Holyoke, 394 Mass. 274, 475 N.E.2d 727, 735 (Mass. 1985)* (citing same). **[*903]** However, this prerequisite does "not apply . . . if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth." *Mass. Gen. Laws ch. 93A § 9(3)*; *see also* *Okoye v. Bank of New York Mellon, No. 10-11563-DPW, 2011 U.S. Dist. LEXIS 82769, 2011 WL 3269686, at *4 (D. Mass. July 28, 2011)*.

Invoking the exception, Plaintiffs contend that the requirement of pre-suit notification does not pertain to them because the IPSAC does not allege that Defendants, as the "prospective respondents," maintain places of business or keep assets within Massachusetts. Defendants do not dispute this rebuttal. **[**90]** Indeed, no such dispute would be sensible, given that the IPSAC plainly does not recite any factual allegations that the Defendants' places of business or assets are located in Massachusetts. Accordingly, pleading pre-suit notification is not required here.

HN49[] "A party alleging a violation of *G.L. c. 93A, § 9(1)*, must establish (1) that the defendant has committed a violation of *G.L. c. 93A, § 2*; (2) injury; and (3) a causal connection between the injury suffered and the defendant's unfair or deceptive method, act, or practice." *Herman v. Admit One Ticket Agency LLC, 454 Mass. 611, 912 N.E.2d 450, 454 (Mass. 2009)*. *G.L. ch. 93A, § 2*, provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful."

The Massachusetts Supreme Court has recognized:

> ***HN50***[] In analyzing what constitutes unfair methods of competition and unfair or deceptive acts or practices, which are not defined in G.L. c. 93A, this court looks to interpretations by the Federal Trade Commission and Federal courts of *§ 5(a)(1)* of the Federal Trade Commission Act (FTC Act) . . . . The Federal Trade Commission may, under *§ 5(a)(1)* of the FTC Act, enforce the antitrust **[**91]** laws, including the Sherman Act and the Clayton Act, but it is not confined to their specific prohibitions. . . . It may bar incipient violations of those statutes, . . . , and conduct which, although not a violation of the letter or spirit of the antitrust laws, is

[34] The Court need not determine or even address whether the pleading satisfies *Rule 9(b)* at this time. However, the Court recognizes that Plaintiffs did not raise any objection to the Defendants' claim that *Rule 9* pleading standards apply to the KCPA claim.

> nevertheless either an unfair method of competition, or an unfair or deceptive act or practice . . . . To the extent that the same conduct may violate both the antitrust laws and the FTC Act, such conduct may be the subject of simultaneous parallel enforcement actions.

Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 762 N.E.2d 303, 309 (Mass. 2002) (citations and footnote omitted). Consistent with this rationale, the court concluded that ***HN51***[] allegations that "in essence state that the defendants engaged in price-fixing of . . . products at artificially inflated levels to [the plaintiff's] detriment" plead an "unfair method of competition" in violation of G.L. ch. 93A. *Id.* [35] "Thus in Massachusetts, **[*904]** courts have not adhered to the premise that an indirect purchaser cannot sue the manufacturer for antitrust violations." *Flonase, 692 F. Supp. 2d at 545*.

This summary of Massachusetts law demonstrates that Defendants err in contending that Plaintiffs are impermissibly bringing an antitrust case restyled as a consumer protection violation under the Massachusetts Consumer Protection Act. Plaintiffs are alleging that the purported conspiracy to reduce the **[**93]** supply of eggs and egg products and thereby artificially increase those products' prices is a G.L. ch. 93A violation. *See* IPSAC ¶¶ 389-90 (pleading that "Defendants agreed to, and did in fact, act in restraint of trade or commerce by unfairly and deceptively fixing, raising, stabilizing, and maintaining prices of, allocating markets for, and restraining and manipulating the supply of shell eggs and egg products at supracompetitive levels" and that as a result "Defendants and their co-conspirators engaged in '"unfair methods of competition and unfair or deceptive acts or practices"' in knowing and willful violation of M.G.L.A c. 93A"). As the Court has already noted, Defendants do not argue that the IPSAC's allegations are insufficient to state federal and other state antitrust claims (except as to injuries relating to certain egg products), and Defendants even appear to argue that the allegations plead antitrust violations. *See* Defs.' Reply at 8. Given that Massachusetts allows indirect purchasers to bring what are in essence antitrust violations pursuant to G.L. ch. 93A, no allegations of fraudulent conduct must be pled in order to sufficiently allege a G.L. ch. 93A claim. [36]

In sum, the Defendants' arguments do not raise any valid basis for dismissing the Massachusetts law claim, and the Court denies their motion in this respect.

6. New Mexico

Defendants also argue that Plaintiffs insufficiently plead an "unconscionable trade practice" within the meaning of the New Mexico Unfair Practices Act ("NMUPA"), and thus fail to state a claim based upon a violation of that Act.

HN52[] The NMUPA provides: "Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." *N.M. Stat. Ann. § 57-12-3*. The Act separately defines both "unfair

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[35] The court summarized the plaintiff's complaint as follows:

> The plaintiff alleges that, **[**92]** beginning in January, 1990, the defendants conspired among themselves to restrain free trade of vitamin products by suppressing and eliminating competition. The conspiracy consisted of formal and informal collusion by the defendants to: (1) fix, increase, and maintain prices for vitamin products; (2) coordinate price increases among themselves for the sale of vitamin products; (3) allocate among themselves the volume of sales and market shares of vitamin products; (4) allocate among themselves all or part of certain contracts to supply vitamin products to various customers; and (5) refrain from submitting bids, or submit collusive, noncompetitive, and rigged bids. The effect of the defendants' alleged conduct was to restrict competition in the sale of vitamin products in Massachusetts and to force consumers to pay prices for such products that were artificially inflated.

Id. at 306-07.

[36] Furthermore, **[**94]** because the factual allegations of the contours of the alleged conspiracy and the "collective efforts," as discussed above in relation to the other state antitrust claims, do not sound in fraud, heightened pleading under *Rule 9(b)* is not required.

or deceptive trade practice" and "unconscionable trade practice," but the Court need evaluate only the latter concept in order to resolve this Motion. The NMUPA defines an "unconscionable trade practice" as:

> an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or **[**95]** loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:
>
> (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; *or*
> (2) results in a gross disparity between the value received by a person and the price paid.

N.M. Stat. § 57-12-2(E) (emphasis added).

These provisions of the NMUPA appear largely undeveloped, and there is only sparse case law that has addressed either of the two definitions of "unconscionable trade practice." The law has developed **[*905]** enough, however, for the Court to appreciate that ***HN53***[] an inquiry into either definition is necessarily fact-intensive, and a multitude of factors may be appropriate for consideration as to whether an act or practice is an "unconscionable trade practice."

For example, as to the second definition of an "unconscionable trade practice" involving "gross disparity" between price paid and "value received," Defendants have argued that in Hernandez v. Wells Fargo Bank N.M., N.A., 2006 NMCA 18, 139 N.M. 68, 128 P.3d 496, 499 (N.M. Ct. App. 2005), the Court's single use of "benefit received" in place of "value **[**96]** received" is meaningful. *See id.* (concluding that Plaintiff "does not raise an evidentiary issue that there was a gross disparity between the overdraft fee and the benefit received"). That is, according to Defendants, "*value* received" is defined as "*benefit* received." Expanding upon this notion, Defendants argue that, assuming the truth of the IPSAC's allegations, the pleading highlights that egg consumers actually receive the benefit of the bargain even when purchasing eggs at certain artificially elevated prices because there are "many benefits of eggs" and the high inelasticity of consumer demand serves to reflect consumers' perceived benefits from eggs. Defs.' Reply at 17 (citing IPSAC ¶¶ 127, 145, 181); *see also* IPSAC ¶ 128. In economic terms, Defendants appear to argue that consumers derive a high level of utility from eggs, and that this utility is the measure of "benefit received" and, thus, of "value received."

However, the Defendants' reading of *Hernandez* and arguments based upon that reading are not entirely, much less inexorably, justified. Rather, the *Hernandez* usage of "benefit received" can be read as merely a synonym for "value received," not intended to convey any substantive **[**97]** difference of "message." Indeed, although the *Hernandez* Court uses the term "benefit received," it does not further elaborate or provide any discussion that might illuminate the meaning of the term, including whether *vel non* it implicates consumer utility. [37]

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[37] What Defendants appear to discount in *Hernandez* is that court's recognition that the value received for a good or service must be evaluated by considering the specific factual circumstances of the good or service and its purchase. This includes considering factors specific to the production side of that good or service, including, *inter alia*, the provider's costs, industry regulation, general industry practices, actions of the providers' competitors, and a providers' business plan and marketing strategy. *See* Hernandez, 128 P.3d at 498 (discussing how, at summary judgment, a defendant bank's proffered affidavit attesting to these factors in relation to the service at issue, a bank's overdraft fees, "meets the requirements of a prima facie showing that there is no gross disparity between the value received by Plaintiff and the fee he paid for that value"). Additionally, LensCrafters, Inc. v. Kehoe, No. 28,145, 2010 N.M. App. Unpub. LEXIS 426, 2010 WL 4924992, at *8 (N.M. Ct. App. Oct. 15, 2010), **[**98]** *writ. cert. granted*, ***150 N.M. 560, 263 P.3d 902 (N.M. 2011)***, suggests that facts concerning the nature of the specific good or service at issue might also require evaluation. *See id.* (determining that, to the extent that the NMUPA might apply to a lease of equipment, as a subpart of a lease for office space, to withstand summary judgment, a plaintiff would need to present "evidence to evaluate the equipment portion of the sublease agreement or any apportionment of the overall lease to the equipment" in order to determine whether a provision allowing for a $12,000 per year increase in rent "was a gross disparity in value between what [plaintiff] was paying in rent and what he received under the equipment portion of the agreement"). These cases, then, suggest that a variety of factors may be appropriately considered in determining whether gross disparity between value received and price paid exists.

At this time, the Court need only address whether the IPSAC's allegations plead the second definition of "unconscionable trade practice" under the NMUPA. **[*906]** In this respect, Plaintiffs plead that the act or practice that constitutes the unconscionable trade practice in violation of the NMUPA is that "Defendants **[**99]** agreed to, and did in fact, act in restraint of trade or commerce by unfairly and deceptively fixing, raising, stabilizing, and maintaining prices of, allocating markets for, and restraining and manipulating the supply of shell eggs and egg products at supracompetitive levels." IPSAC ¶¶ 440-41. The IPSAC alleges that "as a direct and proximate result of" that conduct, "Plaintiff and the New Mexico Indirect Purchaser State Class have been injured." *Id.* ¶ 445. The IPSAC alleges that Plaintiffs "have been injured in their businesses and property in that they have paid more for shell eggs and processed egg products than they otherwise would have paid in the absence of Defendants' unlawful conduct." *Id.* ¶ 314; *see also id.* ¶ 8 (alleging that the injury is the payment of "supra-competitive prices for shell eggs and egg products").

Defendants quantify the alleged artificially-inflated price increase by example, alleging that Defendants attributed their alleged export program—one of the eight collective actions allegedly advancing the conspiracy to reduce the supply of eggs—to a 40% increase in the domestic prices of eggs. *See id.* ¶ 247 ("As the *Wall Street Journal* reported on September 23, **[**100]** 2008: The industry group [UEP] itself credited the [export] campaign with helping to boost domestic egg prices, which rose more than 40% in the next year."). In light of these allegations, and given this early stage of the litigation, the Court concludes that dismissal of the NMUPA claim as a matter of law is not warranted at this time. [38]

The case law discussed above demonstrates that a fact-intensive inquiry is required to determine whether Defendants' engaged in conduct related to the sale of eggs that resulted in a "gross disparity" between the benefit received and the price paid. Moreover, although Defendants have proposed one approach to pleading gross disparity (one not entirely supported by the legal authority cited), they have not identified any case law specific to the NMUPA that has held that gross disparity between value received and price paid cannot be sufficiently pled **[**101]** based upon factual allegations that Plaintiffs paid artificially-inflated prices for eggs as a result of a supply-side price-fixing conspiracy. [39]

Indeed, there is case law that has concluded otherwise. Several federal courts that have considered similar factual allegations (some even less specific than those in the IPSAC) have determined that such allegations are sufficient to state a NMUPA claim based upon gross disparity and are sufficient to withstand a motion to dismiss. *See, e.g., TFT-LCD, 586 F. Supp. 2d at 1127* (denying motion to dismiss NMUPA claim based **[**102]** upon allegations that "defendants' conspiracy resulted in significant artificial increases in the **[*907]** price of LCDs, which resulted in a 'gross disparity' between the value received by the New Mexico plaintiff and class and the prices paid by them for LCD"); *Chocolate, 602 F. Supp. 2d at 586* (determining ***HN54***[] allegations that plaintiffs "paid 'artificially inflated prices for' chocolate candy products . . . , that defendants stabilized prices at noncompetitive levels . . ., and that plaintiffs 'paid more for [chocolate candy] products than they would have paid in the absence of [the alleged] antitrust violations,'" were adequate to plead a claim under the NMUPA); *Aftermarket Filters, 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at *9* ("[P]laintiffs plead that they paid 'supra-competitive' prices for the filters they received. This allegation is sufficient to allege gross disparity [for purposes of pleading an NMUPA claim].").

Accordingly, the Court denies the motion to dismiss the NMUPA claim. [40]

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[38] Because the allegations that give rise to the NMUPA claim are based upon the second definition of "unconscionable trade practice" and those allegations do not sound in fraud, consideration of *Rule 9(b)* is not required here for reasons previously discussed *supra* in relation to other state antitrust claims.

[39] Although Defendants contend that the NMUPA requires Plaintiffs to plead "something more than merely alleging that the price of a product was unfairly high," the case cited by Defendants in support of this position does not appear to have reached that conclusion based upon consideration of New Mexico law. *See In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1029-30 (N.D. Cal. 2007)* (citing the consumer protection laws of Arkansas and the District of Columbia for the proposition that "pleading unconscionability requires something more than merely alleging that the price of a product was unfairly high").

7. New York

Defendants move to dismiss the Plaintiffs' claim brought pursuant to General Business Law *§ 349* of the New York Consumer Protection Statute. They argue that Plaintiffs do not state such a claim for relief because, *inter alia*, the IPSAC does not contain factual allegations that plausibly suggest that the conduct purported to be the basis for the *Section 349* claim caused the Plaintiffs' harm.

HN55[] General Business Law *§ 349* prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Laws *§ 349(a)*. As the Court of Appeals of New York has summarized:

> A plaintiff under *section 349* must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act. Whether a representation or an omission, the deceptive practice must be "likely to mislead a reasonable consumer acting reasonably under the circumstances." A deceptive practice, however, need not reach the level of common-law fraud to be actionable under *section 349*. In addition, **[**104]** a plaintiff must prove "actual" injury to recover under the statute, though not necessarily pecuniary harm.
>
> Further, as we have repeatedly stated, reliance is not an element of a *section 349* claim. The plaintiff, however, must show that the defendant's "material deceptive act" caused the injury.

Stutman v. Chem. Bank, 95 N.Y.2d 24, 731 N.E.2d 608, 611-612, 709 N.Y.S.2d 892 (N.Y. 2000) (internal citations omitted).

HN56[] "[T]o qualify as a prohibited act under the statute, the deception of a consumer must occur in New York." *Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 774 N.E.2d 1190, 1195, 746 N.Y.S.2d 858 (N.Y. 2002)*. Furthermore, "[a]n antitrust violation may violate *section 349*, but only if it is deceptive." *New Motor Vehicles, 350 F. Supp. 2d at 197*; *see also* *New York v. Daicel Chem. Indus., Ltd., 42 A.D.3d 301, 303, 840 N.Y.S.2d 8 (N.Y. App. Div. 2007)* (" . . . General Business Law *§ 349* . . . only applies to anti-competitive conduct that is premised on the deception of consumers."); *In re Automotive Refinishing Paint Antitrust Litig., 515 F. Supp. 2d 544, 554 (E.D. Pa. 2007)* ("A number of courts and commentators have observed that the absence of the reference to unfair competition or unfair practices in *§ 349* 'indicates that anticompetitive conduct **[**105]** that is not premised on consumer deception is **[*908]** not within the ambit of the statute.'" (quoting *Leider v. Ralfe, 387 F. Supp. 2d 283, 295 (S.D.N.Y. 2005))*.

Plaintiffs argue that their *Section 349* claim arises from "Defendants deceptively hid[ing] their price-fixing conspiracy from Plaintiffs, affecting the broad public interest in New York[,] . . . by provid[ing] pretextual reasons for rising prices, citing, among other reasons, animal husbandry guidelines as the reason for curtailments in supply." Pls.' Resp. at 26. However, this theory does not plainly emanate from the actual allegations pled by the Plaintiffs as to the *Section 349* claim as articulated in the IPSAC. To the extent that the IPSAC arguably invokes concepts of "hiding" and "pretext," it appears that to do so Plaintiffs primarily rely on the vague, convenient catch-all adverb "deceptively" that does appear in their pleading.

The IPSAC alleges that "Defendants agreed to, and did in fact, act in restraint of trade or commerce by unfairly and *deceptively* fixing, raising, stabilizing, and maintaining prices of, allocating markets for, and restraining and manipulating the supply of shell eggs and egg products at supracompetitive **[**106]** levels." IPSAC ¶ 454 (emphasis added). As alleged, this "knowing and willful conduct of the Defendants . . . constitutes materially misleading consumer-oriented deceptive acts or practices within the meaning of *N.Y. Gen. Bus. Law § 349*

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[40] In light of the Court's determination that Plaintiffs may proceed with their NMUPA claim at this time, the Court does not determine whether Plaintiffs have also stated such a claim pursuant to the first definition of an "unconscionable **[**103]** trade practice."

[because] Defendants' actions materially misled New York consumers and resulted in consumer injury and broad adverse impact on the public at large, and harmed the public interest of New York State in an honest marketplace in which economic activity is conducted in a competitive manner." *Id.* ¶ 455. According to the IPSAC, "[a]s a result of Defendants' illegal conduct Plaintiffs and members of the New York Indirect Purchaser State Class paid supra-competitive, artificially inflated prices for shell eggs and egg products" and Plaintiffs are "seeking actual damages only for their injuries." *Id.* ¶¶ 457-58.

Plaintiffs defend these allegations by claiming that there is case law to suggest that allegations that plead "in a conclusory fashion that defendants engaged in deceptive conduct" in order to conceal the alleged price-fixing conspiracy satisfies the requisite pleading standard. Pls.' Resp. at 25. But this argument is at odds with and is directly contradicted **[**107]** by the principle that ***HN57***[] in order to sufficiently plead a claim a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (citation omitted). Certainly, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal, 129 S. Ct. at 1950*. Arguably, some factual allegations in support of the *Section 349* claim that are not conclusory may be nesting in the IPSAC—but it is not clear from the IPSAC or the Plaintiffs' briefing on which precise factual allegations the *Section 349* claim relies (and, accordingly, whether they plausibly suggest a *Section 349* claim).

Regardless, there are insufficient factual allegations in the IPSAC to plausibly suggest that the alleged "hiding" of the antitrust conspiracy from Plaintiffs through pretextual explanations for rising egg prices actually caused the Plaintiffs' alleged injury. "***HN58***[] [W]hile the statute does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not **[**108]** necessarily pecuniary, harm." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 647 N.E.2d 741, 745, 623 N.Y.S.2d 529 (N.Y. 1995)*; *Small v.* ***[*909]*** *Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 56, 720 N.E.2d 892, 698 N.Y.S.2d 615 (N.Y. 1999)* (recognizing that actual harm must be caused by a defendant's material deceptive act or practice). In other words, "deception does not, in and of itself, constitute an injury." *Cox v. Microsoft Corp., 809 N.Y.S.2d 480 (Table), 10 Misc. 3d 1055[A], 2005 N.Y. Misc. LEXIS 2712, 2005 WL 3288130, at *4 (N.Y. Sup. Ct. 2005)*.

As Defendants correctly argue, the IPSAC does not plausibly suggest that the purported pretextual explanations for the rising egg prices are the actual cause of the Plaintiffs' alleged harm of paying artificially-inflated prices for eggs. Indeed, as this articulation of the Plaintiffs' *Section 349* claim demonstrates, Plaintiffs would have paid artificially-inflated egg prices *before* Defendants allegedly began to offer pretextual reasons for those increases. Moreover, there are no factual allegations, or causation theories proffered, by Plaintiffs that would suggest that the Defendants' alleged misleading conduct caused artificially-inflated egg prices *after* the challenged conduct allegedly occurred. Because this element **[**109]** of a *Section 349* claim has not been sufficiently pled, Plaintiffs cannot have stated a claim that Defendants have violated *Section 349* for purposes of meeting the demands of *Rule 8*. [41] The Court grants without prejudice the Defendants' motion to dismiss this claim.

8. North Carolina

Defendants urge that the Plaintiffs' claim under *Section 75-1.1* of the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") be dismissed on the grounds that the IPSAC does not allege facts suggesting that a plaintiff detrimentally relied on a deceptive statement or misrepresentation. They assert this claim is deficiently pled under *Rules 8* and *9(b)*.

HN59[] *Section 75-1.1* of the UDTPA provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *N.C. Gen. Stat. §75-1.1(a)*. Certain violations of state and federal law can constitute a *per se* violation of *Section 75-1.1*. *See generally* Noel L.

[41] Given the Court's decision, the Court need not address at this time whether *Rule 9(b)* applies here.

Allen, *North Carolina Unfair Business Practice* § 9.04 (3d ed. 2004) (Oct. 2011 Supplement) (discussing *per se* violations **[**110]** of Section 75-1.1).

The Fourth Circuit Court of Appeals has found that ***HN60***[] one such *per se* violation is a violation of federal ***antitrust law***. *See* *ITCO Corp. v. Michelin Tire Corp., 722 F.2d 42, 48 (4th Cir. 1983)* ("[Plaintiff] asserts that anticompetitive actions which run afoul of the proscriptions of the Sherman Act—in particular, actions in furtherance of a horizontal conspiracy to fix prices—are also actions banned by the North Carolina act. We agree."), *aff'd on rehearing*, *742 F.2d 170 (4th Cir. 1984)*; *see also* Allen, *supra*, §§ 16.10, 26.01. In reaching this conclusion, the Court of Appeals explained:

> Highly persuasive to us is the fact that the substantive provisions of the North Carolina act are reproduced *verbatim* from *§ 5* of the Federal Trade Commission Act, *15 U.S.C. § 45(a)(1)*, and that the North Carolina Supreme Court, consistent with that observation, had held that "[b]ecause of the similarity in language, it is appropriate for us to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of . . . *§ 75-1.1*." Of course, it is an accepted tenet of basic ***antitrust law*** that *§ 5* of the Federal Trade Commission **[*910]** Act sweeps within its prohibitory **[**111]** scope conduct also condemned by *§ 1* of the Sherman Act.

ITCO Corp., 722 F. 2d at 48 (internal citations omitted). [42]

HN61[] Apart from *per se* violations, plaintiffs have alternative recourse in pleading a *prima facie* UDTPA violation in terms of "unfair methods of competition" and "unfair or deceptive acts or practices." The UDTPA distinguishes between these two concepts. *See* *Henderson v. U.S. Fidelity & Guar. Co., 346 N.C. 741, 488 S.E.2d 234, 239 (N.C. 1997)*.

As for the latter concept, ***HN62***[] to set forth the elements for a *prima facie* claim of "unfair or deceptive practices," North Carolina law requires a plaintiff to demonstrate that: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury **[**112]** to the plaintiff." *Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704, 711 (N.C. 2001)* (citing *Spartan Leasing Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476, 482 (N.C. Ct. App. 1991))*.

As to the former concept, according to the Court of Appeals of North Carolina, ***HN63***[] "[n]o precise definition of 'unfair methods of competition' as used in *[Section 75-1.1*] exists." *United Laboratories, Inc. v. Kuykendall, 102 N.C. App. 484, 403 S.E.2d 104, 109 (N.C. Ct. App. 1991)* (quoting *McDonald v. Scarboro, 91 N.C. App. 13, 370 S.E.2d 680, 684 (N.C. Ct. App. 1988))*. Rather, a case-by-case assessment is required:

> Unfair competition has been referred to in terms of conduct "which a court of equity would consider unfair." . . . Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others.

Id.; *see also* Universal Furniture Intern., Inc. v. Collezione Europa USA, Inc., 618 F.3d 417, 439 (4th Cir. 2010) ("As used in the UDTPA, the words 'unfair methods of competition' encompass 'any conduct that a court of equity would consider unfair.' **[**113]** . . . More specifically, a 'practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive.'" (citing *Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145, 148 (4th Cir. 1987)))*. [43]

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[42] The legal authority is opaque as to whether a violation of North Carolina antitrust constitutes a *Section 75-1.1* claim. *See* Allen, *supra*, § 27.01 (recognizing that "some courts and commentators have viewed the Chapter 75 antitrust prohibitions to be coincidentally illegal under *§ 75-1.1*, [and] at least one court has regarded part of former *N.C. Gen. Stat. § 75-5* to be outside the scope of § 75.1-1" (footnote omitted)).

[43] There is no unequivocal law in North Carolina that bars consumers from bringing a UDTPA claim based upon an "unfair method of competition." *See* John F. Graybeal, *Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina*, *80*

The Defendants' objections to the UDTPA claim are based entirely upon the contention that Plaintiffs must allege their reliance on a defendant's statement or misrepresentation and have failed to do so. This argument directly invokes a *prima facie* claim for an "unfair or deceptive practice." However, as the foregoing summary of North Carolina law concerning the UDTPA demonstrates, a *Section 75-1.1* claim may also arise in the form of a *per se* violation, such as a violation of the **[**114]** Sherman **[*911]** Act, or an "unfair or deceptive practice," which defies a precise legal test. As such, for a *Section 75-1.1* violation, a plaintiff is not always obligated to plead allegations of reliance on a statement or misrepresentation, and therefore, the Defendants' argument does not compel dismissal as a matter of law.

Furthermore, given that a violation of the Sherman Act constitutes a *per se* violation of *Section 75-1.1*, and acknowledging that Defendants have not raised any arguments on the grounds that Plaintiffs entirely have failed to sufficiently allege federal antitrust violations, for that reason alone the motion to dismiss this claim cannot succeed. A fair reading of the IPSAC's allegations suggests that the Defendants' alleged federal antitrust violation is the basis for the *Section 75-1.1* claim. *See, e.g.*, Pls.' Resp. at 4-5; IPSAC ¶¶ 466-67, 469 (alleging that "Defendants agreed to, and did in fact, act in restraint of trade or commerce by unfairly and deceptively fixing, raising, stabilizing, and maintaining prices of, allocating markets for, and restraining and manipulating the supply of shell eggs and egg products at supracompetitive levels . . . ." and that the "Defendants' **[**115]** unlawful practices, including combinations and contracts to restrain trade and allocate the relevant markets" constitutes the violation of *Section 75-1.1*). [44]

Thus, it is appropriate to deny the Defendants' motion as to the *Section 75-1.1* claim.

9. West Virginia

Defendants argue for the dismissal of the Plaintiffs' West Virginia Consumer Credit and Protection Act ("WVCCPA") on the grounds that Plaintiffs failed to allege that they satisfied the statutorily-required pre-suit notice and provision for an opportunity to cure.

HN64[] The WVCCPA requires that before bringing suit for a violation of the Act a consumer must notify the seller of the alleged violation at issue:

> [N]o action may be brought pursuant to the provisions of this section until the consumer has informed the seller or lessor in writing and by certified mail of the alleged violation and provided the seller or lessor twenty days from receipt of the notice of violation to make a cure offer: *Provided*, That the consumer shall have ten **[**116]** days from receipt of the cure offer to accept the cure offer or it is deemed refused and withdrawn.

W. Va. Code § 46A-6-106(b) (emphasis in original). [45]

Plaintiffs admit that they have failed to allege pre-suit notification. At oral argument, Defendants agreed to allow Plaintiffs to cure the omissions via amendment. Tr. 81:4-82:3. Accordingly, the Court grants the motion to dismiss the WVCCPA claim without prejudice to Plaintiffs to undertake to cure the acknowledged shortcoming. [46]

N.C. L. Rev. 1927, 1991-98 (2002) (discussing North Carolina law concerning whether consumers, as opposed to competitors, may pursue an unfair method of competition claim under the UDTPA). Defendants have raised no arguments for dismissal on this basis.

44 The Court determines that the antitrust conspiracy alleged does not sound in fraud for the reasons already discussed *supra* in relation to other state claims. Thus, *Rule 9(b)* does not apply to this claim.

45 Considering a summary judgment motion, one court recently concluded that***HN65***[] "the plaintiff's failure to comply with the mandatory prerequisite set forth in *Section 46A-6-106(b)* bar[red] her from bringing a claim." *Stanley v. Huntington Nat. Bank, No. 1:11CV54, 2012 U.S. Dist. LEXIS 9448, 2012 WL 254135, at *7 (N.D. W.Va. Jan. 27, 2012)*.

[*912] ***F. State Unjust Enrichment Claims***

Defendants move to dismiss all 21 of the Plaintiffs' unjust enrichment claims. Plaintiffs have brought those claims under the laws of Arizona, California, the District of Columbia, Florida, Iowa, **[**117]** Kansas, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin.

At the outset, the Court notes that the *prima facie* elements for various state unjust enrichment claims are not entirely birds of a feather. That is, it is well-accepted that***HN66***[] the "elements necessary to allege unjust enrichment vary state by state." *Flonase, 692 F. Supp. 2d at 541* (citing *Powers v. Lycoming Engines, 245 F.R.D. 226, 230-31 (E.D. Pa. 2007)*, *vacated on other grounds*, *328 F. App'x 121 (3d Cir. 2009)* (unpublished); and *Restatement (First) of Restitution § 1* (1937)); *see also* *SMW, 737 F. Supp. 2d at 424*. Nonetheless, the common denominator is the shared principle that it is unjust for a defendant who is enriched at the expense of the plaintiff to accept and retain the ill-gotten benefit. *See Flonase, 692 F. Supp. 2d at 541*; *SMW, 737 F. Supp. 2d at 424*; *see generally Restatement (First) of Restitution § 1*; Restatement (Third) of Restitution and Unjust Enrichment *§ 1* (2011).

As to virtually each of the Plaintiffs' unjust enrichment claims—excepting those brought under the laws of Arizona, North **[**118]** Dakota, and Tennessee—the IPSAC poses the following three cookie-cutter allegations:

> A. By engaging in the unlawful conduct described herein, Defendants received higher prices for their eggs that were sold to indirect purchasers in the [*Name of State*] than would have been possible absent the illegal conduct. *See, e.g.*, IPSAC ¶¶ 333, 345, 353.
>
> B. The Defendants were able to achieve their increased revenues and profits from their sales of eggs to [*Name of State*] indirect purchasers because the demand for eggs by indirect purchasers is relatively price inelastic, as Defendants understood. Thus, the ability of Defendants to profit from their sales of eggs to indirect purchasers in [*Name of State*] was connected to and due to the increased prices paid for Defendants eggs by indirect purchasers in [*Name of State*]. *See, e.g.*, IPSAC ¶¶ 334, 346, 354.
>
> C. Defendants were enriched by their illegal activities at the expense of [*Name of State*] indirect purchasers of eggs and thus Defendants should be ordered to make restitution for the benefit of [*Name of State*] indirect purchasers because it would be unjust to allow Defendants to retain the benefits of their sales of eggs at illegally inflated prices. **[**119]** *See, e.g.*, IPSAC ¶¶ 335, 347, 355.

Defendants raise several arguments for dismissal of the unjust enrichment claims—some specific to certain state's laws and others more broadly generalized to the law of several states. The Court addresses these arguments in turn.

1. Unjust Enrichment Claim: North Dakota

Defendants have raised several grounds for the dismissal of the Plaintiffs' North Dakota unjust enrichment claim. Plaintiffs have stated that they "do not contest dismissal of the North Dakota claims for unjust enrichment." Pls. Resp. at 52 n.34. Therefore, the Court grants the Defendants' motion to dismiss the unjust enrichment claim under North Dakota law, and will proceed to discuss in this decision the Plaintiffs' remaining 20 unjust enrichment claims.

[*913] **2. Unjust Enrichment as an Independent Cause of Action: California and Mississippi**

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[46] Because the Court is dismissing for lack of pre-suit notification allegations, the Court does not address Defendants' arguments for dismissal on the basis of *Rules 8* and *9(b)*.

Defendants claim that neither the laws of California nor Mississippi recognize unjust enrichment as an independent cause of action. Rather, in those states, Defendants contend, the principles of unjust enrichment apply only as a measure of damages. Plaintiffs defend the IPSAC by asserting that both of these states' courts recognize a separate cause of action **[**120]** for unjust enrichment. The Court concludes that the Plaintiffs' position on this point is the correct one.

HN67[] California courts, including the Supreme Court of California, have acknowledged that parties may pursue causes of action arising from an unjust enrichment claim under California law. *See, e.g., Ghirardo v. Antonioli, 14 Cal. 4th 39, 57 Cal. Rptr. 2d 687, 924 P.2d 996, 1002-03 (Cal. 1996)* (recognizing that although plaintiff did not have a statutory claim for relief, he "was, however, entitled to seek relief under traditional equitable principles of unjust enrichment" and articulating the legal standard for such a claim as one where "an individual may be required to make restitution if he is unjustly enriched at the expense of another"); *Federal Deposit Ins. Corp. v. Dintino, 167 Cal. App. 4th 333, 346, 84 Cal. Rptr. 3d 38 (Cal. Ct. App. 2008)* ("[U]njust enrichment is a common law obligation implied by law based on the equities of a particular case and not on any contractual obligation."); *First Nationwide Sav. v. Perry, 11 Cal. App. 4th 1657, 1662-63, 15 Cal. Rptr. 2d 173 (Cal. Ct. App. 1992)* (articulating the contours of an unjust enrichment claim under California law); *Marina Tenants Assn. v. Deauville Marina Dev. Co., 181 Cal. App. 3d 122, 134, 226 Cal. Rptr. 321 (Cal. Ct. App. 1986)* ("It is **[**121]** of course the law that when one obtains a benefit which may not be justly retained, unjust enrichment results, and restitution is in order."). [47] Granted, there appears to be something of a schism among California state courts as to this point of law. *See Graphics Processing Units, 527 F. Supp. 2d at 1029* (citing various state appellate cases to demonstrate that "California courts are split on whether unjust enrichment can exist as a separate claim"). Yet even Defendants concede that there are "cases that have allowed unjust enrichment causes of action" in California. Defs.' Reply at 27. Given that California courts have not uniformly or definitively barred an independent cause of action for unjust enrichment, this Court cannot agree with Defendants that as a matter of law Plaintiffs may not pursue an unjust enrichment claim under California law. The Court will permit this claim to move ahead, and denies the Motion as to this issue.

Likewise, with respect to Mississippi, there is considerable authority that supports the existence of an independent state law claim for unjust enrichment. *See, e.g., Owens Corning v. R.J. Reynolds Tobacco Co., 868 So. 2d 331, 342-43 (Miss. 2004)* (evaluating whether a Mississippi unjust enrichment claim survives summary **[*914]** judgment); *Omnibank of Mantee v. United Southern Bank, 607 So. 2d 76, 92-93 (Miss. 1992)* (summarizing Mississippi case law as to guiding principles pertaining to an unjust enrichment claim); *Dorsey Miss. Sales, Inc. v. Newell, 251 Miss. 77, 168 So. 2d 645, 651 (Miss. 1964)* (discussing Mississippi law as to an unjust enrichment **[**123]** claim based upon quasi-contract theory). One federal district court recently examined the precise issue *sub judice* with a thoughtful survey of Mississippi law, as applied by Mississippi courts and federal courts sitting in diversity, and concluded that ***HN69***[] "there is a substantial body of Mississippi case law that treats unjust enrichment as a separate cause of action." *See In re Light Cigarettes Mktg. Sales Practices Litig., 751 F. Supp. 2d 183, 194-95 (D. Me. 2010)*. This Court embraces that district court's sound analysis and ultimate conclusion of law by reference here. *See id. 193-96*. Accordingly, the Court will not dismiss as a matter of law the Plaintiffs' Mississippi unjust enrichment claim on these grounds.

3. Absence of Adequate Remedy at Law: 10 Jurisdictions

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[47] *See also* 1 Witkin Summary Cal. Law Contracts § 1013 (***HN68***[] "The right to restitution or quasi-contractual recovery is based upon *unjust enrichment.* Where a person obtains a *benefit* that he or she may not *justly retain*, the person is unjustly enriched. The quasi-contract, **[**122]** or contract 'implied in law,' is an *obligation* (not a true contract . . .) created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money."); *see generally* Douglas L. Johnson & Neville L. Johnson, *What Happened To Unjust Enrichment In California? The Deterioration of Equity in the California Courts*, *44 Loy. L.A. L. Rev. 277 (2010)* (advancing the thesis that an independent cause of action for unjust enrichment exists under California law).

Defendants move to dismiss the unjust enrichment claims under the laws of 10 states—Arizona, Florida, Massachusetts, Minnesota, Nevada, New Mexico, North Carolina, South Dakota, Utah, and Vermont—on the grounds that Plaintiffs have failed to allege the absence of an adequate remedy at law. According to Defendants, the absence of an adequate remedy at law is a "necessary element" of an equitable claim for unjust enrichment under **[**124]** these states' laws.

As discussed above, the elements necessary to establish an unjust enrichment vary state by state, and some jurisdictions require proof of elements that others do not require. Consequently, an evaluation of the Defendants' argument simply requires determining whether the absence of an adequate remedy at law is actually an element of the *prima facie* case for unjust enrichment under the law of a given state—for which Plaintiffs would have the burden of proof. Some jurisdictions may only recognize this legal precept as an affirmative defense or some other equitable consideration, [48] while others may not embrace it in any form. [49]

If the first scenario applies, the Plaintiffs must plead that element of the *prima facie* claim under state law. If the latter several scenarios apply, Plaintiffs have no **[*915]** obligation **[**126]** to plead the unavailability of an adequate remedy at law. Certainly, when a jurisdiction does not recognize such a legal principle in the context of unjust enrichment, it need not be pled. And even if a jurisdiction recognizes an adequate remedy at law as an affirmative defense or equitable consideration, ***HN71***[] a plaintiff does not carry the burden of proof, and furthermore generally has no obligation under *Federal Rule of Civil Procedure 8* to anticipate and plead in opposition to that defense—except, perhaps, when the defense will be an inevitable response given what is pled on the face of the complaint. *See* *Fed. R. Civ. P. 8(a)*; Wright & Miller, *supra*, § 1276 (recognizing that pleading "allegations that seek to avoid or defeat a potential affirmative defense . . . are not an integral part of the plaintiff's claim for relief and lie outside his or her burden of pleading"); *id.* § 1226 ("The pleader must be careful not to allege facts that constitute a defense to his claim for relief . . . . A complaint containing [such] a built-in defense usually is vulnerable under *Rule 12(b)(6)* to a motion to dismiss for failure to state a claim upon which relief can be granted."); *see also* *Rycoline Prods., Inc. v. C & W Unlimited, 109 F.3d 883, 886 (3d Cir. 1997)* **[**127]** (acknowledging that an affirmative defense must be apparent on the face of the complaint to be subject to a *Rule 12(b)(6)* motion to dismiss).

Furthermore, under any of the aforementioned scenarios, that a complaint alleges an unjust enrichment claim and also brings alternative claims for relief that might constitute adequate remedies at law is of no consequence under the pleading constraints of the Federal Rules of Civil Procedure. ***HN72***[] *Rule 8* allows plaintiffs to plead claims in the alternative despite inconsistencies "in both legal and factual allegations." *Indep. Enters. Inc. v. Pittsburgh Water and Sewer, 103 F.3d 1165, 1175 (3d Cir. 1997)*; *see* *Fed. R. Civ. P. 8 (d)(2)*, *(3)*. The Rule "has been interpreted to mean that a court may not construe a plaintiff's first claim as an admission against another alternative or inconsistent claim." *Indep. Enters., 103 F.3d at 1175* (internal quotations and brackets omitted). It follows that regardless of *whether or not* a jurisdiction requires proving the absence of an adequate remedy at law as part of the

[48] *See* *66 Am. Jur. 2d Restitution and Implied Contracts § 28* (recognizing that an adequate remedy at law can be a defense to unjust enrichment); 3 Dan B. Dobbs, *Law of Remedies* §12.8(2) at 204 (2d ed. 1993) (recognizing that the adequacy test need not be a part of the *prima facie* case and can be "one factor to be considered in deciding whether relief is warranted").

[49] This latter proposition is illustrated by the *Restatement (Third) of Restitution* (2011). Section 4(2) of the Restatement provides that ***HN70***[] the unavailability of an adequate remedy at **[**125]** law is not a consideration in an unjust enrichment claim: "A claimant otherwise entitled to a remedy for unjust enrichment, including a remedy originating in equity, need not demonstrate the inadequacy of available remedies at law." *Id.* § 4(2). As the comment to Section 4(2) explains: "Although some remedies in restitution are indeed equitable in origin, there is no requirement that a claimant who seeks any of the remedies described in this Restatement must first demonstrate the inadequacy of a remedy at law. An argument to the contrary should appear antiquated today, but § 4(2) is included to remove any doubt." *See also* 1 George E. Palmer, Law of Restitution § 1.6 at 34 (1978) ("Although an occasional decision suggests that restitution will be denied when alternative remedies are considered adequate, innumerable cases demonstrate that this is incorrect." (footnote omitted)). Moreover, the Restatement does not include "adequate remedy at law" among the possible defenses to unjust enrichment. *See id.* §§ 62-70.

prima facie claim for unjust enrichment, an unjust enrichment claim cannot be deficient on the grounds that the complaint also alleges claims at **[**128]** law for alternative forms of relief.

As a starting point, the Court concludes that the absence of an adequate remedy at law is *not* an element of the *prima facie* case for unjust enrichment under the laws of 9 of the jurisdictions at issue—Florida, Massachusetts, Minnesota, Nevada, New Mexico, North Carolina, South Dakota, Utah, and Vermont. [50] Defendants **[*917]** have

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[50] The Court reaches this conclusion based upon the following assessment of the laws of the nine states.

Florida

HN73[] Plaintiffs need not plead the unavailability of remedy provided by law to state a claim for unjust enrichment under Florida law. The Supreme Court of Florida has acknowledged that the "elements of an unjust enrichment claim are 'a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.'" *Florida Power Corp. v. City of Winter Park, 887 So. 2d 1237, 1241 n.4 (Fla. 2004)*. **[**129]** (citing *Ruck Bros. Brick, Inc. v. Kellogg & Kimsey, Inc., 668 So. 2d 205, 207 (Fla. Dist. Ct. App. 1995))*. Lower courts in Florida have held that to "state a claim for unjust enrichment, a plaintiff must plead the following elements: 1) the plaintiff has conferred a benefit on the defendant; 2) the defendant has knowledge of the benefit; 3) the defendant has accepted or retained the benefit conferred; and 4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it." *Golden v. Woodward, 15 So.3d 664, 670 (Fla. Dist. Ct. App. 2009)*; *see also* ***Henry M. Butler, Inc. v. Trizec Properties, Inc., 524 So. 2d 710, 711-12 (Fla. Dist. Ct. App. 1988)*** (articulating same).

Massachusetts

HN74[] The unavailability of an adequate remedy at law is not within the parameters of the *prima facie* claim for unjust enrichment as articulated by Massachusetts courts:

> [T]he sine qua non of unjust enrichment is that the defendant has been unjustly enriched.
>
> "Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances are such that, as between the two persons, it is unjust for him to retain it."
>
> . . . **[**130]** . The term is not descriptive of conduct which, standing alone, would justify an action for recovery. Unjust enrichment is an essentially equitable doctrine requiring proof of some misconduct, fault or culpable action on the part of the defendant as "wrongdoer" which renders his retention of a benefit at the expense of another contrary to equity and good conscience.

DeSanctis v. Labell's Airport Parking Inc., 1991 Mass. App. Div. 37, 40 (Mass. App. Ct. 1991) (citation omitted). "Unjust enrichment, as a basis for restitution, requires more than benefit. The benefit must be *unjust*, a quality that turns on the reasonable expectations of the parties." *Community Builders, Inc. v. Indian Motocycle Assocs., Inc., 44 Mass. App. Ct. 537, 692 N.E.2d 964, 979 (Mass. App. Ct. 1998)*. The First Circuit Court of Appeals articulated the elements for unjust enrichment under Massachusetts law, which are in accord with the aforementioned standards: "To recover for unjust enrichment under Massachusetts law, [plaintiff] must show that (1) [defendant] knowingly received a benefit (2) at his expense (3) under circumstances that would make retention of that benefit unjust." *Frappier v. Countrywide Home Loans, Inc., 645 F.3d 51, 58 (1st Cir. 2011)* **[**131]** (citing *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 552 F.3d 47, 57 (1st Cir. 2009))*.

Minnesota

HN75[] The *prima facie* elements of an unjust enrichment claim, as articulated by the Supreme Court of Minnesota, do not include the absence of an adequate remedy at law. That court has held:

> To establish an unjust enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant "in equity and good conscience" should pay. *Klass v. Twin City Fed. Sav. and*

cited no authority that disturbs this conclusion. It follows that Plaintiffs are not required to plead factual allegations

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> Loan Ass'n, 291 Minn. 68, 190 N.W.2d 493, 494-95 (1971). "[U]njust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully." First Nat'l Bank v. Ramier, 311 N.W.2d 502 (Minn. 1981).

ServiceMaster of St. Cloud v. GAB Business Services, Inc., 544 N.W.2d 302, 306 (Minn. 1996).

Nevada

HN76[] Under Nevada law, the unavailability of an adequate remedy at law is not a part of the *prima facie* case for unjust enrichment. According to the Supreme Court of Nevada:

> "Unjust enrichment is the unjust retention of a benefit **[**132]** to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." Nevada Industrial Dev. v. Benedetti, 103 Nev. 360, 363 n.2, 741 P.2d 802, (1987). This court has observed that the essential elements of unjust enrichment "are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit." Unionamerica Mtg. v. McDonald, 97 Nev. 210, 212, 626 P.2d 1272 (1981).

Topaz Mut. Co., Inc. v. Marsh, 108 Nev. 845, 839 P.2d 606, 613 (Nev. 1992).

New Mexico

HN77[] The unavailability of an adequate remedy at law is not counted among the elements of an unjust enrichment claim under New Mexico law. "To prevail on a claim for unjust enrichment, 'one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust.'" City of Rio Rancho v. Amrep Southwest Inc., 2011 NMSC 37, 150 N.M. 428, 260 P.3d 414, 428-429 (N.M. 2011) (citing Ontiveros Insulation Co. v. Sanchez, 2000 NMCA 51, 129 N.M. 200, 3 P.3d 695 (N.M. Ct. App. 2000)).

Furthermore, in New Mexico, "[t]here is no requirement that the creation of a statutory remedy at law for **[**133]** a particular type of claim will automatically supplant an equitable remedy that addresses the same claim. [Any] major departure from the long tradition of equity practice should not be lightly implied." Starko, Inc. v. Presbyterian Health Plan, Inc., Nos. 27,992, 29,016, 2012 NMCA 53, 276 P.3d 252, 2011 N.M. App. LEXIS 136, 2011 WL 6429048 (N.M. Ct. App. Dec. 15, 2011) (quoting Sims v. Sims, 1996 NMSC 78, 122 N.M. 618, 930 P.2d 153 (N.M. 1996)). "Likewise, . . . 'unjust enrichment constitutes an independent basis for recovery in a civil-law action, analytically and historically distinct from the other two principal grounds for such liability, contract and tort.'" *Id.* (quoting Hydro Conduit Corp. v. Kemble, 110 N.M. 173, 793 P.2d 855, 860 (N.M. 1990)).

North Carolina

HN78[] As to unjust enrichment under North Carolina law, the pleading of an absence of an adequate remedy at law is not necessary to state a claim. The Supreme Court of North Carolina has observed:

> In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be **[**134]** gratuitous and it must be measurable. . . . [T]he defendant must have consciously accepted the benefit.

Booe v. Shadrick, 322 N.C. 567, 369 S.E.2d 554, 556 (N.C. 1988); *see also* Progressive American Ins. Co. v. State Farm Mut. Auto. Ins. Co., 184 N.C. App. 688, 647 S.E.2d 111, 116 (N.C. Ct. App. 2007) (quoting same).

South Dakota

HN79[] The *prima facie* claim for unjust enrichment under South Dakota law does not necessarily involve addressing an adequate remedy at law. "In order to establish unjust enrichment, three elements must be proven: (1) a benefit was received; (2)

suggesting such an absence as to those states' unjust enrichment claims.

HN82[] As to the jurisdiction of Arizona, the Court determines that the absence of an adequate remedy at law is a *prima facie* element of a claim for unjust enrichment. [51] Plaintiffs must allege facts which, taken as true, plausibly suggest this **[**136]** element of the claim in order to survive a **[*918]** 12(b)(6) motion to dismiss the unjust enrichment claim dependent upon Arizona state law. [52]

The Defendants' argument thus follows that the IPSAC's allegations specific to Arizona are insufficient to comply with the Plaintiffs' obligation to plead that "they lack an adequate remedy at law." The IPSAC's allegations as to Arizona specifically plead:

> The enrichment of Defendants that occurred because of Defendants' illegal activities was without legally cognizable justification. *To the extent legal remedies do not sufficiently accomplish disgorgement* of Defendants' illegal profits from their sales to indirect purchasers in Arizona, Defendants should be ordered to

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the recipient was cognizant of that benefit; and (3) the retention of the benefit without reimbursement would unjustly enrich the recipient." *Mack v. Mack, 2000 SD 92, 613 N.W.2d 64, 69 (S.D. 2000)*; *see also* *Hofeldt v. Mehling, 2003 SD 25, 658 N.W.2d 783, 788 (S.D. 2003)* (same).

Utah

HN80[] Proof of an absence of an adequate remedy at law is not required to state a *prima facie* claim for unjust enrichment in Utah. The Supreme Court of Utah has held:

> In order to prevail on a claim for unjust enrichment, three elements must be met. *See* *Berrett v. Stevens, 690 P.2d 553, 557 (Utah 1984)*. First, there must be a benefit conferred on one person by another. *See id.* Second, the conferee must appreciate **[**135]** or have knowledge of the benefit. *See id.* Finally, there must be "the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value." *Id.* The plaintiff must prove all three elements to sustain a claim of unjust enrichment.

Desert Miriah, Inc. v. B & L Auto, Inc., 2000 UT 83, 12 P.3d 580, 582-83 (Utah 2000).

Vermont

HN81[] To establish a *prima facie* claim for unjust enrichment under Vermont law, Plaintiffs are not obliged to show the unavailability of an adequate remedy at law. "[T]he elements of unjust enrichment [are]: whether '(1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value.'" *Reed v. Zurn, 187 Vt. 613, 992 A.2d 1061, 1066 (Vt. 2010)* (quoting *Center v. Mad River Corp., 151 Vt. 408, 561 A.2d 90, 93 (Vt. 1989))*.

[51] In Arizona, the *prima facie* claim for unjust enrichment includes the element of the absence of an adequate remedy at law. "In Arizona, five elements must be proved to make a case of unjust enrichment: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of justification for the enrichment and the impoverishment and (5) *an absence of a remedy provided by law.*" *See* *Community Guardian Bank v. Hamlin, 182 Ariz. 627, 898 P.2d 1005, 1008 (Ariz. Ct. App. 1995)* (citing *Sierra Vista v. Cochise Enters., 144 Ariz. 375, 697 P.2d 1125, 1131 (Ariz. Ct. App. 1984))* (emphasis added); *accord* *State v. Arizona Pension Planning, 154 Ariz. 56, 739 P.2d 1373, 1376 (Ariz. 1987)*.

[52] Defendants contend that the standard for "determining whether a remedy is 'adequate" is "the 'availability' of a remedy not the 'likelihood of its success.'" Defs.' Mot. at 50 (quoting *Tudor Development Group, Inc. v. U.S. Fidelity & Guar. Co., 968 F.2d 357, 364 (3d Cir. 1992))*. However, in proposing this legal standard, which appears to be an articulation of Pennsylvania **[**137]** law, Defendants identify no legal authority that demonstrates that this standard is recognized under the law of Arizona. In the absence of legal authority, the Court cannot conclude that the Defendants' proposed standard for "adequate remedy at law" is the standard applied in Arizona. Certainly, the Court has insufficient basis to presume that the highest court in that state would embrace such a requirement.

> make restitution for the benefit of Arizona indirect purchasers because it would be unjust to allow Defendants to retain the benefits of their sales of eggs at illegally inflated prices.

IPSAC ¶¶ 324 (emphasis added). **[**138]** In light of *Rule 8(d)(2)*'s permissiveness of alternative pleading, given the IPSAC's italicized language above, and allowing for all inferences to be drawn in favor of Plaintiffs, the Court cannot rule as a matter of law that Plaintiffs have failed to plausibly suggest that there is an absence of an adequate remedy at law. The factual allegations in the IPSAC are consistent with the absence of an adequate remedy at law as to the recovery of either all or part of the Defendants' enrichment as connected to the Plaintiffs' impoverishment.

In sum, the Court denies the Defendants' motion to dismiss the 10 state unjust enrichment claims on the grounds of the availability of an adequate remedy at law.

4. Benefit of Bargain: 20 Jurisdictions

Defendants attack generally all 20 of the Plaintiffs' remaining unjust enrichment claims on the grounds that unjust enrichment is unavailable as an "independent cause of action" when Plaintiffs have received the "benefit of the bargain" for which they contracted. Based upon the lone two cases Defendants cite as authority for their argument, the Court discerns that Defendants are invoking the principle embodied in *Section 107(1) of Restatement (First) of Restitution*:

> ***HN83***[] A **[**139]** person of full capacity who, pursuant to a contract with another, has performed services or transferred property to the other or otherwise has conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain, unless the transaction is rescinded for fraud, mistake, duress, undue influence or illegality, or unless the other has failed to perform his part of the bargain.

See also *New Motor Vehicles, 350 F. Supp. 2d at 210* (citing same); *Intel Corp., 496 F. Supp. 2d at 421* (citing same).

However, Defendants do not raise appropriate grounds for such a dismissal because their argument is based upon what is essentially a model law rather than actual law. Beyond raising the principle, as articulated by the First Restatement, **[*919]** and broadly contending that it should be the basis for dismissing all 21 unjust enrichment claims, Defendants have not cited any jurisdiction-specific authority to demonstrate that any of the 21 jurisdictions have actually adopted this legal principle as part of their unjust enrichment jurisprudence. Even assuming, *arguendo*, that all of those jurisdictions might have adopted the principle, Defendants have not **[**140]** established whether those jurisdictions apply it in the manner that Defendants propose. As repeated (and, indeed, already demonstrated) above, states have differing bodies of law on unjust enrichment. Because Defendants have expressed their argument in terms of a model principle of unjust enrichment—as opposed to the actual law of the 21 jurisdictions at issue—the Court determines that it cannot dismiss the Plaintiffs' unjust enrichment claims on these conceptual grounds as a matter of law. The Court denies the motion in this respect.

5. Exhaustion of Remedies: Tennessee

HN84[] Under Tennessee law, although Plaintiffs "need not be in privity with a defendant to recover under a claim of unjust enrichment," Plaintiffs must allege that they have exhausted all remedies against parties with whom Plaintiffs were in privity of contract. *Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 525 (Tenn. 2005)*; *see also* *Paschall's, Inc. v. Dozier, 219 Tenn. 45, 407 S.W.2d 150, 155 (Tenn. 1966)* ("[B]efore recovery can be had against the landowner on an unjust enrichment theory, the furnisher of the materials and labor must have exhausted his remedies against the person with whom he had contracted, and still has **[**141]** not received the reasonable value of his services."). Alternatively, such exhaustion need not be demonstrated "if the pursuit of the remedies would be futile." *Freeman, 172 S.W.3d at 526*; *see also* *Window Gallery of Knoxville v. Davis, No. 03A01-9906-CH-00225, 1999 Tenn. App. LEXIS 775, 1999 WL 1068730, at *2, 4 (Tenn. Ct. App. Nov. 24, 1999)* (observing the same). According to Defendants, dismissal of the Plaintiffs' Tennessee unjust enrichment claim is warranted because Plaintiffs have failed to allege facts that plausibly suggest either the satisfaction of the "exhaustion-of-remedies element" or the futility of such remedial efforts.

HN85[] Courts interpreting Tennessee law have found that remedial efforts are futile in several kinds of circumstances. For example, one Tennessee court has held that remedial efforts are futile when a plaintiff can demonstrate that the party with whom it was in privity of contract is "judgment proof." *See Bank of Nashville v. Chipman, No. M2010-01581-COA-R3-CV, 2011 Tenn. App. LEXIS 425, 2011 WL 3433012, at *5-6 (Tenn. Ct. App. Aug. 5, 2011)*. In that case, the plaintiff bank had entered into a loan agreement with a husband who never repaid the loan and then transferred all of his personal assets, except for his **[**142]** IRA, to his wife. *2011 Tenn. App. LEXIS 425, [WL] at *5-6*. The appellate court recognized that there was sufficient evidence that the husband had no personal assets, and hence sufficient evidence of futility, and upheld the trial court's finding that the wife was unjustly enriched. *2011 Tenn. App. LEXIS 425, [WL] at *6*.

Some federal courts sitting in diversity have found that ***HN86***[] consumer plaintiffs have adequately pled futility of pursuing remedies under Tennessee law by alleging, *inter alia*, that the resellers of a product (*i.e.*, the parties in privity of contract with plaintiffs) were not involved in the producer defendants' price-fixing conspiracy, and thus not liable for or the cause of the plaintiffs' alleged losses resulting from that conspiracy. *See In re TFT-LCD Antitrust Litig., 599 F. Supp. 2d 1179, 1192-93 (N.D. Cal. 2009)*; *In re Chocolate Confectionary Antitrust Litig., 749 F. Supp. 2d 224, 242 (M.D. Pa. 2010)*. Plaintiffs argue that these cases are instructive here, and the Court agrees.

[*920] The IPSAC sets forth factual allegations that plausibly suggest that Plaintiffs suffered losses due to the Defendants' alleged conspiracy to reduce the supply of eggs and thereby increase egg prices, and the Defendants' alleged conduct in furtherance of that **[**143]** conspiracy. Plaintiffs have also alleged that "the parties from whom indirect purchasers bought the eggs directly were not, so far as indirect purchasers are aware, a party to, or involved in, the Defendants' illegal activities which caused the increased egg prices to Tennessee indirect purchasers." IPSAC ¶ 505. In light of these facts pled, Plaintiffs have plausibly suggested that the pursuit of any remedies against the parties from whom they directly purchased eggs (and thus presumably with whom Plaintiffs were in privity of contract) would be futile because those parties are, as alleged, not directly or indirectly liable for the Plaintiffs' losses due to their lack of involvement in the conspiracy. *Cf. TFT-LCD (Flat Panel), 599 F. Supp. 2d at 1192-93* ("Plaintiffs respond that futility is self-evident in these circumstances where the alleged price-fixing was done by the defendants in the manufacture of LCD panels and LCD products, and there has been no allegation that the resellers were involved in the conspiracy. The Court agrees that under the facts alleged in the complaint, futility is evident."). [53]

Accordingly, the Court denies the Defendants' motion to dismiss the Tennessee unjust enrichment claim on these grounds.

6. Unjust Enrichment Claim Prior to May 1, 2006: Utah

In tandem with their previously-discussed argument that the Utah Antitrust Act does not permit indirect purchasers to recover damages accruing before May 1, 2006, Defendants also claim that the Plaintiffs' Utah claim for unjust enrichment arising from conduct occurring prior to May 1, 2006 should be dismissed. It appears **[**145]** that Defendants are contending that, as a general rule of thumb, indirect purchasers should be barred from pursuing an unjust enrichment claim in those jurisdictions where indirect purchasers cannot obtain relief under that jurisdiction's

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[53] It does not appear that Plaintiffs must plead facts that demonstrate the futility **[**144]** of other types of remedies against the egg resellers because the IPSAC does not allege any facts that might suggest such alternative means of relief for the Plaintiffs' losses, such as, by way of example, an unjust enrichment claim against the resellers. *Cf. Chocolate, 749 F. Supp. 2d at 242* (determining that at the motion to dismiss stage the consumer "plaintiffs simply lack a *cognizable remedy* against the direct purchasers" (emphasis added)). However, whether Plaintiffs will be able to successfully demonstrate *on the merits* the futility of exhausting all remedies against egg resellers (*assuming* that they were in privity of contract with Plaintiffs for purposes of Tennessee law) is an open question.

antitrust and/or consumer protection laws due to lack of standing or otherwise. Defendants contend that Utah qualifies as one such jurisdiction—at least prior to the May 1, 2006 effective date of the Utah Antitrust Act amendment that provides for indirect purchaser recovery under the Act. *See* Utah Code Ann. § 76-10-918. To be clear, Defendants do not challenge the Plaintiffs' pursuit of an unjust enrichment claim for alleged conduct that occurred on or after May 1, 2006. Thus, Defendants are only challenging the temporal scope of the Utah unjust enrichment claim and seeking partial dismissal of this claim. [54]

[*921] At this time, the Court does not find that the Plaintiffs' unjust enrichment claim for conduct occurring before May 1, 2006 must be dismissed as a matter of law. Simply put, Defendants have not presented this issue to the Court in a manner conducive to resolution. Indeed, no party has called upon any legal authority specific to Utah law on this issue, and this issue, by involving questions of common law preclusion and conflicts with statutory law, is one that must be addressed by examining the specific body of law of the jurisdiction at issue. *See* *Erie, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188* (requiring ***HN87***[] federal courts to apply the substantive law of the state in which **[**147]** the claim arose).

This analytical approach should not be remarkable given that courts have approached similar questions as to a particular jurisdiction's preclusion of an unjust enrichment claim in the context of indirect purchasers by examining the law of the specific jurisdiction. *See, e.g.,* *In re Microsoft Corp. Antitrust Litig., 241 F. Supp. 2d 563, 565 (D. Md. 2003)* (concluding that because a Kentucky court "held that a more specific statute controls over a more general one [under Kentucky law]," "a claim for damages for antitrust violations cannot be asserted under the Kentucky Consumer Protection Act where they cannot be asserted under Kentucky's version of the Sherman Act" and "[t]his same reasoning equally applies to a common law claim for unjust enrichment arising from antitrust violations"); *In re Microsoft Corp. Antitrust Litig., 401 F. Supp. 2d 461, 464 (D. Md. 2005)* (determining that "the specific bar on indirect purchaser recovery incorporated into South Carolina's antitrust statutes prohibits Plaintiff's general common-law claim [for unjust enrichment]" because South Carolina law recognizes that "Where conflicting provisions exist, the last in point of time or order **[**148]** of arrangement prevails. . . . Specific laws prevail over general laws"); *Aikens v. Microsoft Corp., 159 F. App'x 471, 477 (4th Cir. 2005)* (unpublished) (analyzing Louisiana's Civil Code, which provides that "the unjust enrichment remedy is 'subsidiary' in nature and 'shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule'" and recognizing that "the [indirect purchaser] plaintiffs cannot sue to recover monetary damages under Louisiana ***antitrust law***" to conclude plaintiffs "cannot employ a subsidiary unjust enrichment claim to circumvent this rule"); *cf.* *Mack v. Bristol-Myers Squibb Co., 673 So. 2d at 103* (concluding that the "DTPA should . . . be construed harmoniously and consistently with the Florida legislature's clear intent to allow only direct purchasers to sue for alleged price-fixing conspiracies" because the Florida Supreme Court has observed that "[c]ourts should avoid a construction which places in conflict statu[t]es which cover the same general field"; rather, where two statutes "relat[e] to the same purpose" they should be construed in harmony" (quoting *City of Boca Raton v. Gidman, 440 So. 2d 1277, 1282 (Fla. 1983))*.

Defendants **[**149]** have referenced—through citation rather than analytical discussion—the rationales of several federal courts in support of their argument. Defs.' Mot. at 43 (citing *Flonase, 692 F. Supp. 2d at 541-43*; *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 936-37 (3d Cir. 1999)*; and *TFT-LCD **[*922]** (Flat Panel), 599 F. Supp. 2d at 1191*). By invoking those authorities, Defendants appear to rely on those cases' expression of the general principle—albeit, a principle not based upon or attributed to the laws of any specific jurisdictions—that a common law claim cannot circumvent, "end run," undermine, or subvert a statute. *See, e.g., Flonase, 692 F. Supp. 2d at 542* ("Certain states have adopted *Illinois Brick* and deny indirect purchaser

[54] Defendants originally presented this argument in a far broader context, claiming generally that the Court should dismiss the "Plaintiffs' tag-along unjust enrichment claims in states where Plaintiffs' lack standing to bring their primary claims or where the primary claim fail[s] as a matter of law. Thus, for the same reasons that each of Plaintiffs['] **[**146]** statutory claims fail, their unjust enrichment claims should be dismissed as well." Defs.' Mot. at 43. Defendants did not identify the specific unjust enrichment claims that they were seeking to dismiss. Following the Plaintiffs' response brief, Defendants limited their argument to a charge that "Plaintiffs are attempting . . . an 'end run' around the *Illinois Brick* prohibitions of . . . Utah. . . . As such, Plaintiffs may not bring an unjust enrichment claim under . . . Utah law for conduct that occurred prior to May 1, 2006." Defs.' Reply at 23.

plaintiffs recovery under their state antitrust statutes. These states have adopted the policy of *Illinois Brick* to allow only direct purchasers, and not indirect purchasers, to recover from a defendant for antitrust violations. Allowing indirect purchasers to recover and recoup a benefit from the defendant under an unjust enrichment theory would circumvent the policy choice of *Illinois Brick.*"); TFT-LCD (Flat Panel), 599 F. Supp. 2d at 1191 **[**150]** (recognizing that "a number of cases . . . stand for th[e] general proposition" that indirect purchasers "may not circumvent the restrictions on antitrust claims under [certain states] by reframing those claims as unjust enrichment actions"); *see also* New Motor Vehicles, 350 F. Supp. 2d at 209 (recognizing that permitting "freestanding" unjust enrichment claims "could result in restitution undermining another body of substantive law, to the extent that the scope of antitrust laws and consumer protection statutes is designed to permit unfettered economic activity in matters that are not within their proscription"; and that permitting "parasitic" unjust enrichment claims "would subvert the statutory scheme to allow these same indirect purchasers to secure, for the statutory violation, restitutionary relief at common law (or in equity)"). [55]

However, even if the general principles, as expressed by those **[**152]** cases, are recognized across various state jurisdictions, that does not mean that a given jurisdiction, such as Utah, has adopted a particular legal principle or whether that principle is the only guidance that bears consideration. *Compare* 2B N. Singer & J. Singer, *Sutherland on Statutory Construction* § 50.1 (7th ed. 2008) (***HN88***[] "In cases of conflict between legislation and the common law, legislation governs because it is the latest expression of the law.") *with id.* ("Where there is a limitation by statute which is capable of more than one construction the statute must be given that construction which is consistent with common law. . . . The legislature is presumed to know the common law before a statute was enacted. Absent an indication that the legislature intends a statute **[*923]** to supplant common law, courts should not give it that effect." (footnote omitted)).

The cases upon which Defendants rely in no way indicate how *Utah law* treats the interplay between its statutory and common law schemes, and when common law might be precluded by statute (and statutory interpretation).***HN89***[] There is specific Utah law concerning statutory construction. *See, e.g.*, Utah Code Ann. §§ 68-3-1, 68-3-2 (before and **[**153]** after May 11, 2010 amendment); Daniels v. Gamma West Brachytherapy, LLC, 2009 UT 66, 221 P.3d 256, 270 (Utah 2009) ("A statute preempts a common law claim by specifically adopting a limitation or prohibition on a claim or by comprehensively addressing a particular area of law such that it displaces the common law."). Furthermore, unjust enrichment claims have deep roots in Utah law both pre-and post-dating *Illinois Brick. See, e.g.,* Baugh v. Darley, 112 Utah 1, 184 P.2d 335, 337-40 (1947); Desert Miriah, Inc. v. B & L Auto, Inc., 2000 UT 83, 12 P.3d 580, 582-83 (Utah 2000). Defendants have not broached such matters; nor have they addressed whether or what role, if any, equity and the court's jurisdiction in equity might bear upon or play in determining the issue presented.

Moreover, Defendants have not established that the law of Utah ever affirmatively adopted the rationale of *Illinois Brick* as a "policy", statute, or otherwise prior to May 1, 2006. *Cf.* In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 723 (D. Md. 2001) ("Some states . . . have adopted the policy that . . . . '[a]llowing [plaintiffs] to sue under

[55] To the extent that Defendants rely on *Steamfitters* Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d at 936-37, such reliance is misplaced. In *Steamfitters*, the Third Circuit Court of Appeals, addressing Pennsylvania law, distinguished unjust enrichment claims based upon tort from unjust enrichment claims based upon breach of contract. **[**151]** The Court of Appeals determined that when an unjust enrichment claim is based upon a tort, its causation analysis is essentially the same as the tort. The court had earlier determined that the plaintiff's tort claim failed because causation was too remote. And in applying that same causation analysis to the unjust enrichment claim, the court determined that, *like the tort claim*, the unjust enrichment claim could be dismissed for remoteness. The court was thus treating the analyses under the two claims as if they were the same.

As a result, the court held, "We can find no justification for permitting plaintiffs to proceed on their unjust enrichment claim once we have determined that the District Court properly dismissed the traditional tort claims because of the remoteness of plaintiffs' injuries from defendants' wrongdoing." Id. at 937. Consequently, this statement cannot be read, as Defendants appear to believe, to stand for the proposition that dismissal of the tort claim in itself was the reason why the unjust enrichment claim was dismissed. Rather, the court dismissed both claims based on the same underlying rationale.

[the state deceptive trade practices act] on allegations that are virtually identical to the antitrust **[**154]** allegations . . . would essentially permit an end run around the policies allowing only direct purchasers to recover under the Antitrust Act.' . . . Nevertheless, this policy has not been universally adopted. . . . In my judgment, [defendant] Microsoft paints with too broad a brush in seeking to extend this policy to states that have not affirmatively adopted it." (internal citations omitted)). [56] Likewise, Defendants have not addressed whether the specific amendments to the Utah Antitrust Act have any bearing on this issue. *See, e.g.*, Utah Code Ann.§ 76-10-918 ("Actions may be brought under this section regardless of whether the plaintiff dealt directly or indirectly with the defendant. This remedy is an additional remedy to any other remedies provided by law. It may not diminish or offset any other remedy.").

This panoply of issues—and even others that have not been mentioned [57]—could have considerable bearing upon the disposition of the Defendants' argument for dismissal. **[*924]** But in the absence of analysis of any of these matters or in the context of any law specific to Utah, the Court cannot meaningfully discern their implications, and thus cannot appropriately or confidently rule as a matter of law on the partial dismissal of the Plaintiffs' claim. Therefore, the Court denies the Defendants' motion in this respect. [58]

7. Standing to Assert Unjust Enrichment Claim for Egg Products: New York

Defendants contend that the Plaintiffs' unjust enrichment claim under New York law fails insofar that the Plaintiffs' alleged losses resulting from "egg products" purchases of "manufactured products incorporating processed eggs such as baked goods and mayonnaise" are too remote to support such a claim. Defendants previously objected under *Associated General Contractors* to the breadth of the IPSAC's definition of "egg products" due to its inclusion of "manufactured products incorporating processed eggs," and now invoke those arguments as grounds for dismissing the Plaintiffs' New York unjust enrichment claim as to injuries due to purchases of "manufactured products incorporating processed eggs."

As previously discussed, Plaintiffs have agreed **[**157]** to narrow the IPSAC's definition of "egg products" to not include "manufactured products incorporating processed eggs," and because this definition is central to the Defendants' arguments, the Court will refrain from considering the Defendants' argument at present without the actual amendment. Consequently, Court denies the Motion without prejudice to Defendants to raise these grounds for dismissal of the New York unjust enrichment claim based upon the amended definition of "egg products" as may then become appropriate.

8. Benefits Conferred on Defendants: 16 Jurisdictions

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[56] This Court earlier observed in this Opinion that there is legal authority that has determined that indirect purchasers cannot not recover for damages accruing prior to the May 1, 2006 effective date of the amendment to the Utah Antitrust Act. However, the Court granted the Defendants' motion insofar that Plaintiffs did not dispute this authority and did not raise any objections **[**155]** to Defendants' arguments. The Court's decision thus did not address or identify the specific operative law invoked by Defendants in support of their argument and whether such law constituted an affirmative adoption of *Illinois Brick* as a policy prior to May 1, 2006.

[57] This category of factors might include, *inter alia*, consideration of the Plaintiffs' theory of their Utah unjust enrichment claim—whether the claim is "parasitic" or "freestanding"—and the factual allegations pled in support of the claim. *See* *New Motor Vehicles, 350 F. Supp. 2d at 209* (discussing how indirect purchasers could have brought their unjust enrichment claim under either theory); *D.R. Ward, 470 F. Supp. 2d at 506* **[**156]** (recognizing that "equitable remedies for unjust enrichment claims are often awarded when state statutory claims prove unsuccessful" (citing *In re Cardizem Antitrust Litig., 105 F. Supp. 2d 618, 669 (E.D. Mich. 2000))*.

[58] Of course, Defendants may renew this argument—insofar that Defendants choose to further and appropriately develop the argument—at another stage in this litigation.

All parties agree that an unjust enrichment claim under the laws of 16 jurisdictions—the District of Columbia, Florida, Iowa, Kansas, Massachusetts, Minnesota, Nevada, New Mexico, New York, North Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin—requires Plaintiffs to plead as an element of the claim that they conferred a benefit upon Defendants. However, the parties dispute two matters concerning the requisites for pleading this element as to the 16 claims: (1) whether the IPSAC is devoid of factual allegations that Plaintiffs *conferred any* benefit upon Defendants; and (2) whether 10 of **[**158]** the 16 jurisdictions at issue require (or likely would require) the conferral of a "direct benefit" as opposed to an "indirect benefit." The Court discusses these narrow issues in turn. [59]

a. Factual Allegations of Any Benefit Conferred

Defendants claim that the IPSAC does not allege that Plaintiffs conferred *any* benefit upon Defendants, and as a result, all 16 claims are deficient. Defendants initially posit that the only way to satisfy this element is for Plaintiffs to allege that they either "(1) purchased eggs that originated from Defendants' birds or (2) purchased eggs directly from Defendants." **[*925]** Defs.' Mot. at 23-24. According to Defendants, these are the only types of allegations that can show that Plaintiffs conferred a benefit on Defendants for purposes of the law of each of the 16 jurisdictions. As the parties' briefing proceeded, Defendants recalibrated and narrowed **[**159]** their original argument. Nonetheless, this argument in its original and modified forms does not provide appropriate grounds for dismissal of the 16 claims at this time.

To start, Defendants failed to cite any persuasive legal authority in support of their initial claim that the two particular types of factual allegations as to the origin of the eggs purchased are necessary in all 16 jurisdictions at issue. Defendants have generally cited in a footnote one case per jurisdiction only to show that "a claim for unjust enrichment requires a plaintiff to plead and prove that it conferred a benefit upon the defendant." Defs.' Mot. at 44. Instead, Defendants have only cited *Myzel v. Fields, 386 F. 2d 718, 744 n.21 (8th Cir. 1967)*, for the proposition that "Plaintiffs fail to meet this requirement [of pleading the conferral of benefit element] because no named Plaintiff alleges that it purchased eggs originally for any of the Defendants, let alone a specific Defendant." Defs.' Mot. at 44. Relying on the Restatement (First) of Restitution, *Myzel* merely articulates the observation that "an action for money had and received or for unjust enrichment differs at common law from tortious conversion **[**160]** primarily on the basis that all the defendants may be held jointly liable in tort, while only those who have benefited are liable, and then only to the extent thereof, in an action for unjust enrichment." *Id. at 744 n.21*. The case simply does not do the legwork that is necessary to support Defendants' argument specific to each of the 16 jurisdictions.

Although Defendants appear to narrow the issue presented in their reply brief, the recalibrated argument does not comport with the IPSAC's allegations. Defendants raise no objections to the Plaintiffs' rebuttal that it is unnecessary to plead factual allegations concerning specifics about the origins of their purchases and that the 16 jurisdictions are permissive in allowing the "conferral" to be non-monetary form of advantage. Indeed, Defendants accept this proposition of law, stating that "restitution is typically available where—to take a textbook example—a doctor provides medical assistance to the incapacitated victim of an automobile accident." Defs.' Reply at 25. Even so, Defendants argue: "However, the IPSAC is devoid of any allegations of any such non-monetary 'benefit' that Plaintiffs conferred on Defendants." *Id.*

The Defendants' **[**161]** characterization of the IPSAC is incorrect as the IPSAC has alleged certain factual allegations to show that the Defendants' alleged benefit is conferred by virtue of the *act* of the named Plaintiffs' purchasing eggs. Specifically, Plaintiffs allege that the egg market has particular "structural features":

> (a) the lack of product differentiation or high substitutability of product between different producers; (b) the prevalence of cross marketing arrangements that facilitate price communication between rivals; (c) relative concentration within the industry; and (d) high demand price inelasticity.

[59] The Defendants have presented these issues in such a way that the Court is *not* being asked to address any questions involving whether for purposes of *Rule 12(b)(6)* Plaintiffs have sufficiently alleged facts that plausibly suggest the "conferral of a benefit" element, as defined by each of the jurisdictions' law.

IPSAC ¶ 119. Plaintiffs further plead as to each of the 16 jurisdictions that Defendants leveraged these particular facets of the egg market to advance the aims of their alleged conspiracy, thereby receiving the "benefit" of increased revenues and profits because the prices in the egg market as a whole were artificially inflated:

> The Defendants were able to achieve their increased revenues and profits **[*926]** from their sales of eggs to [*Name of State*] indirect purchasers because the demand for eggs by indirect purchasers is relatively price inelastic, as Defendants understood. Thus, the ability of Defendants **[**162]** to profit from their sales of eggs to indirect purchasers in [*Name of State*] was connected to and due to the increased prices paid for Defendants eggs by indirect purchasers in [*Name of State*].

See, e.g., IPSAC ¶¶ 346, 354, 361.

This narrative of factual allegations plausibly suggests that the Plaintiffs' losses in purchasing eggs at artificially-inflated prices are connected to the Defendants' benefits. A fundamental function of the egg market as alleged in the IPSAC is the demand for eggs, as manifested by consumer purchases of eggs. Thus, even if Plaintiffs did not purchase eggs from a retailer who purchased from a specific Defendant, Defendants nevertheless obtained the benefit of Plaintiffs purchasing eggs at an artificially inflated price because each and every egg purchase by consumers would contribute to increasing (or sustaining at an artificial level) egg prices in a market in which the alleged supply of eggs was artificially decreased. In other words, the claim is that Defendants allegedly manipulated the supply curve of the market recognizing that because demand was inelastic and eggs are essentially a commodity good (*i.e.*, minimal product differentiation), prices would increase **[**163]** in response to, and as a result of, consumer purchases regardless of whether they were purchased from a Defendant or a non-conspirator. Accordingly, any demand-side activity in the egg market, *i.e.*, the Plaintiffs' purchases, would financially benefit Defendants generally because their eggs would be selling at a market price that was artificially inflated. *See also* IPSAC ¶ 56 n.4 (describing the company, Urner Barry, Inc., as "a price reporting service for the egg industry . . . [which produces] newsletters [that] publish egg price quotations that are widely relied on in the setting of wholesale egg prices under spot purchasers and long-term contracts"). [60]

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[60] However, to the extent that Plaintiffs also argue that the IPSAC has factual allegations from which it can be inferred that the eggs purchased originated with the Defendants, this approach is unsuccessful. The Plaintiffs' characterizations of the IPSAC are inconsistent with the actual allegations.

In defining the various state class members, the IPSAC alleges as to each class that "[a]ll individuals and entities residing in [*Name of State*] that indirectly purchased shell eggs and/or egg products produced from shell eggs produced **[**164]** from Defendants' or their co-conspirators' caged birds." IPSAC ¶ 108. However, as Defendants correctly argue, there are no factual allegations as to the origin of the eggs purchased by the *named individual Plaintiffs. See* IPSAC ¶¶ 19-44 ("This Plaintiff indirectly purchased shell eggs and/or egg products during the Class Period and was injured as a result of Defendants' illegal conduct."). The claims brought by the named individual Plaintiffs are the focus of this motion to dismiss.

Plaintiffs argue that "the policies at issue - the conspiracy—are the official policies of a membership organization[] representing 'more than 95% of [the] nation's laying hens' and essentially all the largest producers." Pls.' Resp. at 41 (citing IPSAC ¶¶ 47-51). By highlighting this allegation, Plaintiffs attempt to imply that 95% of laying hens in the egg industry were subject to the alleged conspiracy, and as such, when Plaintiffs made any egg purchase, they more than likely were purchasing from the Defendants. However, the factual allegation cited describes UEP alone and not the named Defendants as a group, so the allegation can only stand for what it says: UEP as an organization represents 95% of domestic **[**165]** laying hens (by representing 198 producer members, IPSAC ¶ 136).

While UEP as an organization might represent that percentage of laying hens, that does not necessarily mean that 95% of laying hens were covered by the alleged conspiracy. As alleged, UEP was not an egg producer itself. *See also id.* ¶ 283 ("UEP has declared that it did not sell eggs to consumers."); *id.* ¶ 284 ("UEP does not 'market' its members' products."). And given the alleged operation of the conspiracy, it would be incumbent upon producers to effectuate the eight "coordinated actions," and thus adopt and institute UEP's policies. If follows that the hens that UEP "represents," are not hens controlled by UEP, and thus would not reflect the number of hens actually producing "conspiracy eggs." *See also id.* ¶ 162 ("As of May 6, 2002, 123 companies with ownership of 167 million hens filed for "Application of Certification" and agreed to implement the guidelines

[*927] Thus, contrary to the Defendants' argument otherwise, Plaintiffs have pled factual allegations that plausibly suggest that they conferred a non-monetary form of advantage—the act of purchasing eggs. As alleged, these acts, given the conditions of the egg market and the Defendants' conduct in furtherance of the conspiracy, allowed Defendants to obtain the benefit of "increased revenues and profits from their sales of eggs."

The Defendants' final retuning of their argument also does not provide sufficient grounds for dismissal. Defendants assert, "even if such allegations were found in the IPSAC, and even if Plaintiffs had explained how they 'conferred' this 'benefit' on Defendants, Plaintiffs have not cited a single authority permitting an unjust enrichment claim based on such an allegation." Defs.' Reply at 25 n.18. Even assuming this is true, Defendants likewise **[**167]** have not cited any authority (and certainly no authorities specific to each of the 16 jurisdictions) that bars an unjust enrichment claim based upon such a factual premise as a matter of law. But Defendants have accepted the Plaintiffs' legal proposition that a "'benefit' conferred can be *any form of advantage*, not just the indirect payment of money." Defs.' Reply at 25 (emphasis added). This legal proposition embraces the notion that a plaintiff can "confer" her conduct to enrich a defendant. It follows that the Court cannot conclude at this time as a matter of law as to the 16 jurisdictions at issue that the Plaintiffs' factual allegations that their acts of purchasing eggs conferred the Defendants' benefit of increased revenues from their egg sales are insufficient to show that plaintiffs conferred *any* benefit upon Defendants. [61] In this respect, the Defendants' motion to dismiss is denied.

<u>b. Conferral of a "Direct Benefit"</u>

For reasons previously discussed, *supra*, Plaintiffs have not alleged that they directly **[**168]** conferred a benefit upon Defendants. In other words, Plaintiffs have not pled facts to show that the named Plaintiffs' purchased eggs directly from Defendants. [62] Defendants argue that this deficiency is fatal to the Plaintiffs' unjust enrichment claims in 10 jurisdictions—the District of Columbia, Florida, Kansas, Minnesota, New York, North Carolina, South Dakota, Utah, Vermont, and West Virginia. As to those jurisdictions, Defendants contend that only by pleading a **[*928]** direct purchase from Defendants can Plaintiffs maintain this claim.

Thus, the issue presented by the Defendants' next argument is whether the law of those 10 jurisdictions require (or likely would require) the conferral of a "direct benefit" as opposed to an "indirect benefit." If a jurisdiction requires such a "direct benefit" to state a claim, then dismissal of the Plaintiffs' claim is warranted. The Court proceeds to examine what the law of the 10 jurisdictions requires as to this element in terms of two categories: (1) 5 jurisdictions that Defendants claim require a "direct **[**169]** benefit," and (2) 5 jurisdictions that Defendants claim *likely* require a "direct benefit."

i. Claimed "Direct Benefit" Jurisdictions

Defendants claim that "Plaintiffs must prove that they *directly* conferred a benefit on Defendants" as to unjust enrichment claims brought under the laws of Florida, Kansas, New York, North Carolina, and Utah. The Court

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including increasing space allowance on 100% of their facilities. As of July 1, 2002, it was 137 companies, representing 188 million layers.").

Regardless, to the extent that Plaintiffs are attempting to intimate that the IPSAC alleges that the Defendants' laying **[**166]** hens collectively produced 95% (or an otherwise high percentage) of the egg market (including egg products as currently defined by the IPSAC) and thus that the Plaintiffs' alleged egg purchases were originally produced by Defendants, this is unproductive. There are no allegations that directly or inferentially support such a claim.

[61] This is not to say that at another stage of the litigation that similar arguments—arguments further developed in relation to jurisdiction-specific law—might or might not prevail.

[62] Defendants appear to argue that by definition only direct purchasers, and not indirect purchasers, can meet this "direct benefit" requirement.

determines that none of these states' laws *necessarily* require as a matter of law for Plaintiffs to "prove that they *directly* conferred a benefit on Defendants" in order to state an unjust enrichment claim.

aa. Florida

Defendants rely on *Peoples National Bank of Commerce v. First Union National Bank of Florida, 667 So. 2d 876 (Fla. Dist. Ct. App. 1996)* and several cases that adopt its rationale, including *Extraordinary Title Services, LLC v. Florida Power & Light Co., 1 So.3d 400 (Fla. Dist. Ct. App. 2009)*, to argue that Florida law requires pleading that a plaintiff directly confer a benefit upon a defendant. In *Peoples National*, the state court determined that the plaintiff "could not and did not allege that it had directly conferred a benefit on the defendants" and that "if any benefit was conferred upon each [defendant] in the form of overpayments, **[**170]** it could only have been conferred upon them by [a third-party with which plaintiff and defendants had entered into a loan agreement], not [defendant]." *Peoples National, 667 So. 2d at 879*.

The Court agrees that it appears the courts in *Peoples National* and the cases cited by Defendants have determined that an allegation or evidence of a "direct benefit" is required. Nonetheless, there exists other valid Florida law that does not require direct interactions between the plaintiff and defendant in order for a benefit to have been conferred. *See* *Variety Children's Hosp., 385 So. 2d 1052,1053-54 (Fla. Dist. Ct. App. 1980)* (holding that a mother was unjustly enriched when a "the hospital rendered its services to her child" because she received the "'legal' benefit" of fulfilling her lawful "duty to provide support for a minor child"); *Hillman Constr. Corp. v. Wainer, 636 So. 2d 576, 577-78 (Fla. Dist. Ct. App. 1994)* (determining that a general contractor plaintiff had sufficiently stated a claim for unjust enrichment against a commercial rental property owner because contractor had made "several improvements [to the property] which ha[d] enhanced the value of the premises and allowed the owner **[**171]** to relet them at an increased rent" after a former commercial tenant, who had contracted with the contractor to perform the services but failed to pay the contractor and filed for bankruptcy); *Merkle v. Health Options, Inc., 940 So. 2d 1190, 1199 (Fla. Dist. Ct. App. 2006)* (concluding that a medical service provider plaintiff had an unjust enrichment claim against HMO defendants for medically treating the HMOs' subscribers).

Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp., 899 So. 2d 1222 (Fla. Dist. Ct. App. 2005), illustrates how Florida law allows unjust enrichment claims to arise from the conferral of an **[*929]** indirect benefit. In *Shands*, the state appellate court held that the plaintiff had sufficiently pled that the defendant "was unjustly enriched at [the plaintiff's] expense." *Id. at 1228*. The plaintiff, a hospital, alleged that it conferred a benefit on the defendant, a third-party healthcare claims administrator, by providing medical services to the members of a PPO pursuant to a hospital provider agreement. *Id. at 1227*. The agreement's "terms conditioned [the hospital's] obligation to give discounts on receipt of timely payments." *Id.* The claims administrator who **[**172]** was under a separate contract with the PPO, however, "did not make timely payments" and "did not make undiscounted payments," which resulted in underpayments to the hospital. *Id.* Thus, as alleged, the administrator, "despite the underpayments, . . . continued to reap the full benefit of [the hospital]'s services, which enabled [the administrator] to avoid breaching [its contract with the PPO] (and incurring liability for penalties)." *Id. at 1227-28*. Based upon these allegations, the court determined that, as pled, the administrator "was unjustly enriched by the value of services [the hospital] provided (in excess of the discounted rates at which [the hospital] was paid, when paid at all) to the extent they resulted in economic benefit conferred on [the administrator] under [the contract with the PPO]." *Id. at 1228*.

This line of cases demonstrates that ***HN90***[] Florida courts recognize "that *some* benefit must *flow* to the party sought to be charged." *Coffee Pot Plaza Partnership v. Arrow Air Conditioning and Refrigeration, Inc., 412 So. 2d 883, 884 (Fla. Dist. Ct. App. 1982)* (emphasis added) (citing *Variety Children's Hosp., 385 So. 2d at 1053*)); *see also* *Commerce P'ship 8098 LP v. Equity Contracting Co., 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997)* **[**173]** ("Because the basis for recovery does not turn on the finding of an enforceable agreement, there may be recovery under a contract implied in law even where the parties had no dealings at all with each other." (citing *Variety Children's Hosp., 385 So. 2d at 1053*)).

Given that Florida law does not appear to require the conferral of a direct benefit exclusively, as Defendants claim, the Court cannot dismiss the Florida unjust enrichment claims as a matter of law by reason of a failure to adequately allege that Plaintiffs conferred a direct benefit upon Defendants.

bb. Kansas

The Court is not persuaded that ***HN91***[] Kansas law requires the pleading of a conferral of a direct benefit. In support of their position, Defendants cite one, unpublished decision from the Tenth Circuit Court of Appeals, *Spires v. Hospital Corporation of America, 289 F. App'x 269, 273 (10th Cir. 2008)* (unpublished), that the Court finds to be inapposite. That case addressed the issue of "unjust enrichment against parent corporations in the context of veil-piercing." *Id. at 273 & n.2*. No other legal authority to support such a theory of unjust enrichment under Kansas law has been cited to the Court.

Moreover, Defendants have **[**174]** not raised any objections to the Plaintiffs' claim that "there is no requirement of a 'direct benefit' or even an in-kind benefit passing from plaintiffs to defendants under Kansas law," nor did Defendants challenge the cases cited by Plaintiffs in support of that claim. Pls.' Resp. at 45. [63] Indeed, the Court confirms that the cases cited by Plaintiffs demonstrate that Kansas law does not mandate the conferral of a direct **[*930]** benefit under an unjust enrichment. *See, e.g., Peterson v. Midland Nat'l Bank, 242 Kan. 266, 747 P.2d 159, 166-67 (Kan. 1987)* (observing that unjust enrichment can "arise[] . . . where an expenditure by one person adds to the property of another" and that plaintiff's "delivery of hay to the cattle which otherwise would have died" constituted a benefit to defendant, which had a security interest in the cattle, under circumstances where a plaintiff was hired by a third-party upon defendant's promise that it "would bear the cost" of delivering the feed); *Sec. Ben. Life Ins. Corp. v. Fleming Cos., 21 Kan. App. 2d 833, 908 P.2d 1315, 1323 (Kan. App. 1995)* (determining that allegations that plaintiff installed a new cash register system to improve a grocery store owned by a party that transferred the store **[**175]** to the defendants as collateral for an unpaid loan the day the system installation was completed were sufficient to state an unjust enrichment claim).

In sum, Kansas unjust enrichment law allows claims for the conferral of indirect benefits. Thus, a failure to plead a "direct benefit" cannot be appropriate grounds for dismissal, and the Court will not dismiss the Plaintiffs' unjust enrichment claim under Kansas law.

cc. New York

In *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760 (N.Y. 2007)*, the Court of Appeals of New York held ***HN92***[] "a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment," but their relationship cannot be "too attenuated." One federal court has explained that this means that "a product's indirect purchaser cannot assert an unjust enrichment claim against an entity that manufactured one of that product's ingredients," but that an "indirect purchaser can assert such an unjust enrichment claim against the manufacturer of the product itself." *Waldman v. New Chapter, Inc., 714 F. Supp. 2d 398, 403-04 (E.D.N.Y. 2010)*; **[**176]** *see also* *SMW, 263 F.R.D. at 216* (recognizing that "strict privity between the plaintiff and defendant is not required" and discussing instances when "New York courts have found numerous relationships 'too attenuated' to support" an unjust enrichment claim).

This case law demonstrates that the Defendants' contention that "Plaintiffs must prove that they *directly* conferred a benefit on Defendants" is misplaced as to New York law. New York law does not require such a direct relationship. Indeed, the solitary case that Defendants cited in support of their position, *In re Bayou Hedge Funds Investment Litigation, 472 F. Supp. 2d 528, 532 (S.D.N.Y. 2007)*, was issued a month earlier than *Sperry*, and does not embody the current state of New York law. *Cf.* *Waldman, 714 F. Supp. 2d at 403* ("Defendant accurately describes

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[63] Defendants do not address the Plaintiffs' argument on this point of Kansas law, suggesting that Defendants have abandoned this argument.

New York law in 1997, as the S.D.N.Y. understood it. But this is not the law today, as promulgated by New York's own courts.").

Thus, although Plaintiffs have not alleged facts suggesting the conferral of a direct benefit, such a deficit is not in and of itself fatal to a New York unjust enrichment claim as a matter of law. The motion to dismiss on these grounds is denied.

dd. North [177] Carolina**

Defendants argue that North Carolina law requires Plaintiffs to plead the conferral of a direct benefit in order to state an unjust enrichment claim as announced by *Effler v. Pyles, 94 N.C. App. 349, 380 S.E.2d 149, 152 (N.C. Ct. App. 1989)*. In *Effler*, in evaluating a summary judgment motion, the appellate court determined that the plaintiff did not confer a benefit upon the defendant. The plaintiff was the former mother-in-law of a man who had remarried; the defendant was the man's second wife. *Id. at 150*. The mother-in-law was the co-signer of a note that **[*931]** enabled her daughter, the first wife, and her then-son-in-law to buy a house. *Id.* The man and the first wife had promised the mother-in-law that they would make the payments on the loan. *Id.* After the first wife died, the mother-in-law made loan payments for the property after the man stopped making the payments. *Id.* Later, the man conveyed the property to himself and his second wife as tenants by the entireties, and then the couple sold the house, but did not apply the proceeds to the note that plaintiff had co-signed. *Id.* The mother-in-law brought the unjust enrichment claim against the second wife, contending that the second wife benefitted **[**178]** from the funds that were not applied to the plaintiff's note. *Id.* The court concluded:

> Plaintiff has not shown that she conferred a benefit on defendant [second wife]. [Second wife] received title to the property through her husband. Although he had previously acquired his interest in this property with plaintiff's assistance, this does not satisfy plaintiff's burden of showing that she conferred a benefit directly on defendant [second wife].

Id. at 152.

Defendants rely on the holding's reliance on the word "directly" as an accurate embodiment of North Carolina law, and highlight that another court has recognized the same. *See* Defs.' Mot. at 45 n.23 (citing *Baker Constr. v. City of Burlington, 200 N.C. App. 435, 683 S.E.2d 790 (N.C. Ct. App. 2009)* (Table) (unpublished)). In *Baker*, the appellate court remarked, citing *Effler*, that "this Court has limited the scope of a claim of unjust enrichment such that the benefit conferred must be conferred directly from plaintiff to defendant, not through a third party." *683 S.E.2d 790*. Indeed, several other state courts have read *Effler's* usage of "directly" similarly. *See* *Norman Owen Trucking, Inc. v. Morkoski, 131 N.C. App. 168, 506 S.E.2d 267, 274 (N.C. Ct. App. 1998)* (recognizing **[**179]** that an "essential element of plaintiff's claim" requires showing the "direct receipt by [defendant] of any benefit in consequence of plaintiff's performance of its contract with [a third-party]" and "show[ing] that [defendant] 'consciously accepted'"); *see also* *Town of Carolina Shores v. Continental Ins. Co., Inc., No. 7:10-CV-13-D, 2010 U.S. Dist. LEXIS 114017, 2010 WL 4338437, at *5 (E.D.N.C. Oct. 26, 2010)* ("The benefit would not be conferred directly from [defendant] to [plaintiff]. Rather, the benefit would be conferred through a third party, the Town. Furthermore, as mentioned, [plaintiff] acquired [the property] through a foreclosure sale.").

Nonetheless, the Court is not convinced at this time that the Supreme Court of North Carolina would agree with this narrow, highly technical, approach to an unjust enrichment theory of liability. First, there is some indication in *Effler* itself that its usage of the word "directly" is an aberration in North Carolina law because the decision references no case law or legal authority that might explain its specific rationale on this point or word choice. Indeed, "the *Effler* court relied on the North Carolina Supreme Court's decision in *Booe v. Shadrick, 322 N.C. 567, 369 S.E.2d 554 (N.C. 1988)*. **[**180]** *Booe* did not, however, require that a benefit be direct to state an unjust enrichment claim." *TFT-LCD (Flat Panel), 599 F. Supp. 2d at 1190*. Another North Carolina court has restricted the *Effler* holding to its facts, stating that the "'direct benefit' rule does not address such a scenario [as presented by the facts of the case] and, accordingly, does not foreclose equitable relief on these facts." *Perkins v. HealthMarkets, Inc., No. 06 CVS 21053, 2007 NCBC LEXIS 25, 2007 WL 2570242, at *9 (N.C. Super. Ct. July 30, 2007)* (unpublished).

[*932] Second, and more significantly, a Supreme Court of North Carolina decision issued subsequent to *Effler* is instructive on that court's more expansive view of unjust enrichment and the role or particulars of the conferral of a benefit element. In *Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (N.C. 1992)*, the Supreme Court addressed the issue of whether a general contractor plaintiff, which had entered into an agreement to build a restaurant with the property owner and completed the construction before the owner defaulted on its construction loan with bank defendant, had stated a claim for unjust enrichment against the defendant bank. The defendant bank did not **[**181]** allegedly "benefit directly" from plaintiff within the meaning of *Effler.* The plaintiff alleged that the defendant bank was unjustly enriched at plaintiff's expense because the bank did not disburse the funds remaining in the construction loan to plaintiff, but also acquired the completed building as a security for the loan, thereby receiving the benefit it had bargained under the loan agreement with the property owner. *Id. at 919, 922*. Based upon those facts alleged, the court agreed that the bank defendant was unjustly enriched. *Id. at 922*.

That the claim in *Embree* arose in the context of an equitable lien is of little consequence because it is still invokes the same principles of unjust enrichment that are recognized under North Carolina law. [64] Indeed, both the *Embree* and *Effler* decisions rely on *Booe. See Embree, 411 S.E.2d at 923* (***HN93***[] "'A person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" (quoting *Booe, 369 S.E.2d at 555-56*)); *Effler, 380 S.E.2d at 152* ("In **[**182]** order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party [and] the defendant must have consciously accepted the benefit.'" (quoting *Booe, 369 S.E.2d at 555*)).

Accordingly, the Court determines that ***HN94***[] North Carolina law embraces a broader definition of "conferral of a benefit" beyond only the conferral of a *direct* benefit. *See also TFT-LCD (Flat Panel), 599 F. Supp. 2d at 1190* (following *Booe's* articulation of an unjust enrichment claim in lieu of *Effler* and recognizing that *Booe*" did not . . .require **[**183]** that a benefit be direct to state an unjust enrichment claim"); *SMW, 737 F. Supp. 2d at 442* ("Because the cases following *Effler* place into serious question any argument that *Effler* stands for a direct benefit requirement in North Carolina, I do not believe this is a valid ground for dismissal of plaintiffs' North Carolina unjust enrichment claim."); *Metric Constructors, Inc. v. Bank of Tokyo-Mitsubishi, Ltd., 72 F. App'x 916, 921 (4th Cir. 2003)* (unpublished) (recognizing that *Embree* "suggests a broader approach to unjust enrichment than is indicated by *Effler's* 'direct benefit' rule"). Therefore, the Court cannot agree that North Carolina law on unjust enrichment requires Plaintiffs to allege a "direct benefit," and denies the motion to dismiss in this regard.

ee. Utah

The Court does not adopt the Defendants' claim that Utah law necessarily **[*933]** requires a plaintiff to plead the conferral of a "direct benefit." Defendants have cited several Utah Supreme Court cases that have used the term "direct benefit" in the decisions. However, in those cases the usage of the term does not conform with the Defendants' characterization of the law. [65]

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[64] *See id. at 923* (recognizing that a remedy for unjust enrichment is an equitable lien); *see generally* ***Restatement (First) of Restitution § 4*** ("In situations in which a person is entitled to restitution, he is entitled, in an appropriate case, to one or more of the following remedies: . . . (d) a decree by a court of equity that a lien upon the subject matter or its proceeds be established, enforced, discharged, or reduced."); *Restatement (Third) of Restitution & Unjust Enrichment* ***§ 56*** ("An equitable lien secures the obligation of the defendant to pay the claimant the amount of the defendant's unjust enrichment as separately determined.").

[65] One of those cases cited, *Concrete Products Co. v. Salt Lake County, 734 P.2d 910 (Utah 1987)*, **[**184]** is entirely inapposite because its facts are based upon the finding that the defendant received no benefit whatsoever. *See id. at 912* (recognizing that as a result of the plaintiffs' supply of concrete for curbs and gutters for a development in the county, the defendant, the County, would not receive a benefit because the "County will raise no revenue from the curbs and gutters, nor will it acquire a building with intrinsic value. Instead, it will incur the expenses of cleaning and maintaining curbs and gutters with no resale value or intrinsic economic worth.").

In *Baugh v. Darley, 112 Utah 1, 184 P.2d 335 (Utah 1947)*, the Supreme Court determined that the real estate agent plaintiff had not unjustly enriched the defendant, a former owner of a property that was sold to plaintiff. The Court recognized:

> The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. . . . Services officiously or gratuitiously furnished are not recoverable. . . . *Nor are services performed by the plaintiff for his own advantage, and from which the defendant benefits incidentally, recoverable.*
> . . . .
>
> Services performed by the plaintiff outside the terms of **[**185]** the agreement [of sale] would, of course, ordinarily be voluntary and, therefore, such services could not in any case be recoverable regardless of the statute of frauds. However, one might perform work or services intended for his own benefit, or for the benefit of another, in reliance upon as distinguished from in pursuance of an unenforceable agreement. Generally, unless such services enhance or benefit the property of the defendant or otherwise confer on him a direct benefit, they do not form the basis for a contract imposed by law because there is no 'unjust enrichment' as that term is used in law. Where such services operate to confer a direct benefit upon the defendant, they may be recoverable.

Id. at 337 (emphasis added).

In another case cited by Defendants, *Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998)*, the Supreme Court more recently addressed the conception of "direct benefit" under Utah law. In *Jeffs*, the court observed that *Darley* spoke to the third element of unjust enrichment under Utah law, "the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value," rather **[**186]** than the first element, namely, "a benefit conferred on one person by another." *Id.* (quoting *Am. Towers Owners Ass'n v. CCI Mech., Inc., 930 P.2d 1182, 1192 (1996)*, *abrogated on other grounds by* *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC, 2009 UT 65, 221 P.3d 234 (2009))*. The court further explained that "direct benefit" should be understood in the broader context of the principles of unjust enrichment:

> We addressed the third element in *Baugh v. Darley, 112 Utah 1, 184 P.2d 335 (1947)*. This court stated:
> Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. The benefit may be ... beneficial services conferred . . . .
> . . . .
>
> **[*934]** Services officiously or gratuitously furnished are not recoverable. Nor are *services performed by the plaintiff for his own advantage, and from which the defendant benefits incidentally, recoverable.*
>
> *Id. at 337* (internal citations omitted). Here, the claimants improved the land in reliance upon the [owner defendant]'s representations that they could live on the land for the rest of their lives. Even though the claimants intended to benefit from the improvements by occupying them **[**187]** during their lifetimes, the claimants' services still conferred a direct, not incidental, benefit on the [owner defendant].

Id. at 1248 (emphasis added).

Both of these decisions demonstrate that the use of "direct" is used to draw a distinction from "incidental," as in the realm of a "by-product," specifically to explicate that "services performed by the plaintiff for his own advantage" cannot constitute grounds for unjust enrichment. Indeed, the Supreme Court of Utah has articulated this principle another way:

> ***HN95***[] The benefit conferred satisfies this requirement if the defendant's retention of the benefit would be unjust without providing compensation. . . . [U]njust enrichment does not result if the defendant has received only an incidental benefit from the plaintiff's service . . . .

Emergency Physicians Integrated Care v. Salt Lake County, 2007 UT 72, 167 P.3d 1080, 1086 (Utah 2007); *see also* Berrett v. Stevens, 690 P.2d 553, 558 (Utah 1984) ("The value of services performed by a person for his own advantage and from which another benefits incidentally are not recoverable."). Furthermore, Utah law recognizes that benefits under unjust enrichment are broadly defined. Darley, 184 P.2d at 337 ("The benefit **[**188]** may be an interest in money, land, chattels, or choses in action; beneficial services conferred; satisfaction of a debt or duty owed by him; or anything which adds to his security or advantage."). Thus, neither of the cases cited by Defendants provides sufficient support for their argument that under Utah law "Plaintiffs must prove that they *directly* conferred a benefit on Defendants," *i.e.*, pleading that Plaintiffs purchased directly from Defendants.

Accordingly, the Court concludes that **HN96**[] Utah law does not mandate that a plaintiff demonstrate that she directly conferred a benefit upon a defendant. The Court denies the motion in this respect.

ii. Likely "Direct Benefit" Jurisdictions

Defendants argue that the courts of five jurisdictions—the District of Columbia, Minnesota, South Dakota, Vermont, and West Virginia—"have not ruled on whether a plaintiff must directly confer a benefit upon defendant." Defs.' Mot. at 46. Nonetheless, they contend that it is appropriate for the Court to predict that these five jurisdictions would require a plaintiff to confer a direct benefit on a defendant in order to field an unjust enrichment claim solely because some other jurisdictions require the same **[**189]** unjust enrichment elements and have held that the conferral of a direct benefit is required.

The Third Circuit Court of Appeals has explained that **HN97**[] when a federal court sitting in diversity must make a prediction as to a precise legal issue a certain legal standard must be satisfied. In doing so, the Court is required to consult and evaluate particular sources of legal authority:

> In adjudicating a case under state law, we are not free to impose our own view of what state law should be; rather, we are to apply existing state law as interpreted by the state's highest court in an effort to predict how that court would decide the precise legal issues before us. Kowalsky v. Long Beach Township, 72 F.3d 385, 388 **[*935]** (3d Cir. 1995). In the absence of guidance from the state's highest court, we must look to decisions of state intermediate appellate courts, of federal courts interpreting that state's law, and of other state supreme courts that have addressed the issue. Wiley, 995 F.2d at 459-60. We must also consider "analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." McGowan v. University of Scranton, 759 F.2d 287, 291 (3d Cir. 1985) **[**190]** (quoting *McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 663 (3d Cir. 1980))* (internal quotation marks omitted).

Koppers Co., Inc. v. Aetna Cas. and Sur. Co., 98 F.3d 1440, 1445 (3d Cir. 1996).

Defendants have urged the Court to predict that the five jurisdictions likely would require a "direct benefit" if the issue was presented to those jurisdictions' highest courts. However, aside from arguing that the Court should look to the five jurisdictions that Defendants claim do require a direct benefit (a conclusion that the Court declined as to each of those jurisdictions, *supra*), Defendants have provided no other legal authority from which the Court might predict, consistent with the Third Circuit standard, whether those five jurisdictions would require pleading a "direct benefit." Certainly, especially in a far-ranging case such as this, the task is decidedly daunting to collect and analyze non-definitive case law and then predict what various courts around the country would do with a case, recognizing that it is entirely possible that those predictions may—indeed, likely will—be not entirely consistent. But given the posture of these issues as presented to the Court at this time, **[**191]** it is virtually impossible for the Court to undertake this task with any certainty now. Plaintiffs have argued that "in light of the general principles underlying such [unjust enrichment] actions—to prevent parties from benefitting from their wrongdoing—[which] apply in all states, absent strong evidence from the relevant state courts, this court should not imply such a requirement." Pls. Resp. at 42. Defendants have not raised any argument disagreeing with this proposition.

Furthermore, Plaintiffs contend the unjust enrichment claims do "not require such a direct benefit," and provide moderate analysis of the "conferral of a benefit" requirement on a state-by-state basis as to the District of Columbia, Minnesota, South Dakota, Vermont, and West Virginia. Pls.' Resp. at 42-43, 47, 49-52. In their reply brief, Defendants do not address such analyses whatsoever with respect to the claims brought under the laws of the District of Columbia, Minnesota, and Vermont. Through their silence, it appears Defendants have no objections to the Plaintiffs' justifications for their claims. Insofar that Defendants have apparently protested certain of the Plaintiffs' supporting legal authority as to **[**192]** unjust enrichment claims of South Dakota and West Virginia, the Court does not agree with the Defendants' contention that *W.J. Bachman Mechanical Sheetmetal Co., Inc. v. Wal-Mart Real, 2009 SD 25, 764 N.W.2d 722, 732-33 (S.D. 2009)*, or *Prudential Insurance Co. of America v. Couch, 180 W. Va. 210, 376 S.E.2d 104, 109 (W.Va. 1988)*, support their claim that Plaintiffs must allege that they directly conferred a benefit on Defendants. [66]

It follows that the Court declines at this time to make the predictions of law for **[*936]** which Defendants advocate. The Court determines that it is appropriate to deny the motion to dismiss the unjust enrichment claims under the laws of the District of Columbia, Minnesota, South Dakota, Vermont, and West Virginia on the grounds that Plaintiffs failed to allege that they conferred a direct benefit upon Defendants.

VI. Conclusion

For the foregoing reasons, the Court denies in part and grants in part the Defendants' motion consistent with the **[**193]** terms delineated in this Opinion. Insofar that the Court grants in part the Motion without prejudice, Plaintiffs may seek leave to amend their complaint upon the appropriate motion, or stipulation, provided that they do so promptly.

An appropriate Order follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

ORDER

AND NOW, this 19th day of March, 2012, upon consideration of the Defendants' Motion to Dismiss the Indirect Purchaser Plaintiffs' Second Amended Consolidated Class Action Complaint (Docket No. 332), and the Indirect Purchaser Plaintiffs' response (Doc. No. 355), the Defendants' reply (Doc. No. 385), and the parties' supplemental filings thereto, and for the reasons stated in the accompanying Opinion, it is hereby ORDERED that the Motion (Doc. No. 332) is GRANTED in part and DENIED in part consistent with the terms of the Court's Opinion. [1]

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[66] The Defendants' contention that these two cases support their position is contradicted by the Defendants' original position that these jurisdictions "have not ruled on whether a plaintiff must directly confer a benefit upon defendant." Defs.' Mot. at 46.

[1] To wit, the Court dismisses the Utah Antitrust Act claim with respect to alleged damages occurring prior to May 1, 2006 contained in Count XXII.

The Court dismisses without prejudice: (1) the federal and state antitrust claims with respect to alleged injuries relating to purchases of manufactured products incorporating **[**194]** processed eggs contained in Counts I, II, III, IV, VI, VII, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XX, XXII, XXIII, XXIV, and XXV; (2) the Kansas Consumer Protection Act claim contained in Count VII; (3) the General Business Law *§ 349* of the New York Consumer Protection Statute claim contained in Count XVI; (4)

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

United States District Judge

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the West Virginia Consumer Credit and Protection Act claim contained in Count XXIV; and (5) the North Dakota unjust enrichment claim contained in Count XVIII.

Additionally, pursuant to the Indirect Purchaser Plaintiffs' withdrawal of certain claims at oral argument, the following claims are dismissed: (1) all claims brought under Maine law contained in Count VIII; (2) all claims brought under Puerto Rico law contained in Count XIX; (3) the claim brought under *Mich. Comp. Laws Ann. §§ 445.901, et seq.* contained in Count X; (4) the claim brought under *S.D. Codified Laws Ann. §37-24, et seq.* contained in Count XX; and (5) the claim brought under *Wis. Stat. §§ 100.18, et seq.* contained in Count XXV.

Insofar that the Court grants in part the Motion without prejudice, Plaintiffs may seek leave to amend their complaint upon the appropriate motion, or stipulation, provided that **[**195]** they do so promptly.

Conn. Ironworkers Emplrs. Assoc. v. New Eng. Reg'l Council of Carpenters

United States District Court for the District of Connecticut

March 20, 2012, Decided; March 20, 2012, Filed

No. 3:10cv165 (SRU)

Reporter

2012 U.S. Dist. LEXIS 37523 *; 193 L.R.R.M. 3222; 2012-1 Trade Cas. (CCH) P77,930

Connecticut Ironworkers Employers Assoc., et al., Plaintiffs, v. New England Regional Council of Carpenters, Defendant.

Subsequent History: Summary judgment denied by, Judgment entered by, Motion denied by, As moot *Conn. Ironworkers Emplrs. Assoc. v. New Eng. Reg'l Council of Carpenters, 2016 U.S. Dist. LEXIS 6230 (D. Conn., Jan. 20, 2016)*

Core Terms

signatory, subcontracting, job site, exemption, antitrust, proviso, collective bargaining agreement, pension fund, anti trust law, motion to dismiss, relevant market, collective bargaining, bid, construction industry, labor organization, Metal, allegations, perform work, collective-bargaining, non-statutory, construction manager, anticompetitive, contractors, Parties, clauses, subcontractors, performing, Trades, general contractor, monopoly power

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview

HN1[] **Labor & Employment Law, Collective Bargaining & Labor Relations**

29 U.S.C.S. § 152(5) defines a labor organization as: any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN2[] **Collective Bargaining & Labor Relations, Unfair Labor Practices**

29 U.S.C.S. § 187 sets forth that it shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in *29 U.S.C.S. § 158(b)(4)*.

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

HN3[] Motions to Dismiss, Failure to State Claim

A motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)* is designed merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof.

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

HN4[] Motions to Dismiss, Failure to State Claim

When deciding a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, the court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiffs, and decide whether it is plausible that plaintiffs have a valid claim for relief.

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

HN5[] Motions to Dismiss, Failure to State Claim

Under Bell Atl. Corp. v. Twombly, factual allegations must be enough to raise a right to relief above the speculative level, and assert a cause of action with enough heft to show entitlement to relief and enough facts to state a claim to relief that is plausible on its face. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. The plausibility standard set forth in Twombly and Ashcroft v. Iqbal obligates the plaintiff to provide the grounds of his entitlement to relief through more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. Plausibility at the pleading stage is nonetheless distinct from probability, and a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the claims is improbable, and recovery is very remote and unlikely.

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

HN6[] Defenses, Demurrers & Objections, Motions to Dismiss

The party who seeks to exercise the jurisdiction of the court bears the burden of establishing the court's jurisdiction. To survive a *Fed. R. Civ. P. 12(b)(1)* motion, a plaintiff must clearly allege facts demonstrating that the plaintiff is a proper party to invoke judicial resolution of the dispute. Although the plaintiff bears the ultimate burden of establishing jurisdiction by a preponderance of the evidence, until discovery takes place, a plaintiff is required only to make a prima facie showing by pleadings and affidavits that jurisdiction exists. When considering a party's standing, a court accepts as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. If a plaintiff has failed to allege facts supportive of standing, it is within the court's discretion to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of standing.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN7[] Collective Bargaining & Labor Relations, Unfair Labor Practices

As a general rule, agreements to refrain from dealing with others are vulnerable to challenge under federal antitrust laws unless they are protected by both the construction industry proviso and by an exemption from antitrust scrutiny.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

HN8[] **Collective Bargaining & Labor Relations, Duty to Bargain**

See *29 U.S.C.S. § 158(e)*.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

HN9[] **Union Violations, Union Refusal to Bargain**

The United States Supreme Court holds that literal compliance with the Construction Industry Proviso is insufficient and that § 8(e) of the National Labor Relations Act, *29 U.S.C.S. § 158(e)*, should be interpreted in light of its statutory setting and the circumstances surrounding its enactment.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

HN10[] **Union Violations, Union Refusal to Bargain**

Section 8(e) of the National Labor Relations Act, *29 U.S.C.S. § 158(e)*, applies to union signatory subcontracting clauses so long as they are sought or negotiated in the context of a collective bargaining agreement, and the proviso does not shelter only clauses aimed at preventing shoulder-to-shoulder friction.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN11[] **Exemptions & Immunities, Labor**

Certain clauses in collective bargaining agreements, even those concerning the construction industry, can act as a direct restraint on the business market in a manner having substantial anticompetitive effects, both actual and potential. Restrictive clauses may be challenged under federal antitrust laws unless the clause is protected by both the construction industry proviso and an antitrust labor exemption.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN12[] **Exemptions & Immunities, Labor**

Courts have long recognized the tension between national antitrust policy and national labor policy. In light of the competing interests of congressional policy favoring both collective bargaining under the National Labor Relations Act (NLRA) and free competition in business, two antitrust exemptions are recognized. The statutory exemption provides that union activity is exempt from antitrust liability so long as the union acts in its self-interest and does not combine with non-labor groups. The non-statutory exemption provides that, where the alleged anticompetitive conduct is inherent in the collective-bargaining process, concerns only the parties to the collective bargaining relationship, and relates to wages, hours, conditions of employment, or other relevant subjects of collective bargaining, the restraints are lawful.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN13[] **Labor, Nonstatutory Exemptions**

A court assessing whether an agreement is protected by the non-statutory exemption should consider the relative impact of the agreement on the product market and the interests of the union members. The court should first consider whether the agreement at issue furthers goals that are protected by national labor law and are within the scope of traditionally mandatory subjects of collective bargaining. Second, the court should consider whether the agreement imposes a direct restraint on the market that has substantial anticompetitive effects that do not follow naturally from the collective bargaining agreement. If the agreement is a legitimate collective bargaining agreement, then the "touchstone in assessing its validity must be the policies embodied in federal labor law. Traditionally, mandatory subjects in a collective bargaining agreement include wages, hours, fringe benefits, workplace conditions, and other subjects that are more likely to embody legitimate employee concerns about compensation, workplace, or security, and less likely to be restraints on competition. Accordingly, agreements between unions and firms that do not employ the unions' members are treated as encompassing non-mandatory subjects.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN14[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. Pleading a *§ 1* claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made in restraint of trade. A plaintiff must offer plausible grounds to infer an agreement, which means enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN15[] **Exemptions & Immunities, Labor**

Generally, restrictions on entities with whom contractors can subcontract are entirely permissible so long as those restrictions affect only the parties to the agreements, and the agreements concern wages, hours, or conditions of employment in the context of bona fide arm's length bargaining.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN16[] Exemptions & Immunities, Labor

An agreement between a union and an employer outside a collective bargaining relationship, which imposes a direct restraint upon a business market, and which is not justified by congressional labor policy because it has actual or potential anticompetitive effects that would not flow naturally from the elimination of competition over wages and working conditions, is not exempt from antitrust scrutiny.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN17[] Monopolies & Monopolization, Actual Monopolization

A *15 U.S.C.S. § 2* claim, unlike a *15 U.S.C.S. § 1* claim, is aimed at a pernicious market structure in which the concentration of power saps the salubrious influence of competition. To establish a defendant's liability under *§ 2* of the Sherman Act, a plaintiff must show (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Monopoly power is a matter of capacity — the possession of power to control prices or exclude competition. Before monopoly power may be assessed, the relevant geographic and product markets must be defined.

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

HN18[] Attempts to Monopolize, Elements

A claim of attempted monopolization requires the plaintiff to plead (1) anticompetitive conduct; (2) intent to monopolize; and (3) a dangerous probability of obtaining monopoly power.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN19[] Standing, Requirements

A private plaintiff must demonstrate standing in order to bring a federal antitrust action. In the Second Circuit, the court assumes the existence of a violation when addressing the issue of standing. In evaluating whether a plaintiff has standing, the district court must consider whether a plaintiff has pled: (1) an injury in fact to a plaintiff's business or property; (2) that is not remote from or duplicative of that sustained by a more directly injured party; (3) that qualifies as an antitrust injury; and (4) that translates into reasonably quantifiable damages.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN20[] Standing, Requirements

Mere injury or the possibility of injury is not enough to confer standing; the plaintiffs must demonstrate an antitrust injury. The antitrust injury requirement obligates a plaintiff to demonstrate, as a threshold matter, that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. The requirement to demonstrate standing applies with equal force to claims, such as those here, for equitable relief.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN21[] **Collective Bargaining & Labor Relations, Unfair Labor Practices**

Section 8(b)(4) of the National Labor Relations Act, *29 U.S.C.S. § 158(b)(4)*, makes it unlawful to, inter alia, threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where the object thereof is forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

Counsel: **[*1]** For Connecticut Ironworkers Employers Assoc Inc, CT corp & assoc of employers, Associated Sheet Metal & Roofing Contractors of CT Inc, CT corp & assoc of employers, MRS Ent Inc, CT corp, Barrett Inc, CT corp, Ernest Peterson Inc, CT corp, Berlin Steel Construction Co., CT corp, Plaintiffs: George J. Kelly, Jr., LEAD ATTORNEY, Siegel, O'Connor, O'Donnell & Beck, Hartford, CT; Paul C Hetterman, LEAD ATTORNEY, Bartley Goffstein, LLC, St. Louis, MO; Richard D. O'Connor, LEAD ATTORNEY, Siegel, O'Connor, Zangari, O'Donnell & Beck, Hartford, CT; Ronald C. Gladney, LEAD ATTORNEY, PRO HAC VICE, Bartley Goffstein, LLC, St. Louis, MO.

For Pension Fund, Sheet metal workers local No 40, ERISA, Pension Plan, Iron Workers' Local Nos 15 & 424, ERISA, Plaintiffs: Paul C Hetterman, LEAD ATTORNEY, Bartley Goffstein, LLC, St. Louis, MO; Ronald C. Gladney, LEAD ATTORNEY, PRO HAC VICE, Bartley Goffstein, LLC, St. Louis, MO.

For Iron Workers Local No 15, Intl Assoc of Bridge, Structural, Ornamental & Reinforcing, unincorporated assoc, labor organization, Iron Workers Local 37, Intl Assoc of Bridge, Structural, Ornamental & Reinforcing, unincorporated, labor organization, Iron Workers Local 424, Intl assoc **[*2]** of bridge, structural, ornamental & reinforcing, unincorporated labor organization, Sheet Metal Workers Local 38, Unincorporated assoc & labor organization, Sheet Metal Workers' Local No 40, Unincorporated assoc & labor organization, International Union of Painters & Allied Trades District Council 11, AFL-CIO, CLC,unincorporated assoc & labor organization, Intl Union of Painters, Allied Trades Local Unions,Glaziers Local Union Nos 1333 & 1274, Glaziers Union No 1333, Uninc assoc & labor organization, Glaziers Union Local No 1274, Uninc assoc & labor organization, Plaintiffs: Paul C Hetterman, LEAD ATTORNEY, Bartley Goffstein, LLC, St. Louis, MO; Ronald C. Gladney, LEAD ATTORNEY, PRO HAC VICE, Bartley Goffstein, LLC, St. Louis, MO; Thomas W. Meiklejohn, LEAD ATTORNEY, Livingston, Adler, Pulda, Meiklejohn & Kelly, Hartford, CT.

For New England Regional Council of Carpenters, Defendant: Christopher N. Souris, LEAD ATTORNEY, Krakow & Souris, LLC-MA, Boston, MA; Alexander Sugerman- Brozan, Krakow & Souris, LLC, Boston, MA.

Judges: Stefan R. Underhill, United States District Judge.

Opinion by: Stefan R. Underhill

Opinion

RULING AND ORDER ON MOTION TO DISMISS

This case arises out of the negotiation and enforcement of` a union **[*3]** signatory subcontracting clause in the New England Regional Council of Carpenters' ("Council of Carpenters") collective bargaining agreements ("agreements") with non-party construction companies and construction managers ("construction employers"). Plaintiffs allege that the Council of Carpenters attempted to and has successfully prevented plaintiffs from bidding on, being awarded, benefitting from and performing construction work typically performed by the plaintiff union organizations. The union signatory subcontracting clause in the agreements broadens the scope of work that must be allocated to the Council of Carpenters' members ("Carpenters") in a manner that excludes signatories of the plaintiff unions from competing for work even though the construction employers do not currently employ or intend to employ Carpenters on the job sites at issue.

For example, plaintiffs allege that Fusco, Inc., the construction manager on a New London school project, entered into an agreement with the Council of Carpenters that shifts relevant work traditionally performed by the members of plaintiff unions to the "general trades" category. Carpenters typically perform "general trades" work. Accordingly, **[*4]** Carpenters can now "claim" work on the job site and plaintiff employers can no longer bid on the work traditionally performed by its signatory plaintiff unions. The use of a union signatory subcontracting clause to give a particular union a monopoly in a particular market is not necessarily unlawful. Plaintiffs allege that, because there are no Carpenters performing bargaining unit work on the disputed job sites, there can be no legitimate business purpose for the exclusion of the plaintiff organizations/employers. The exclusion of plaintiffs from the marketplace absent a legitimate business justification, plaintiffs contend, constitutes a restraint on trade in violation of *sections 1* and *2* of the Sherman Act and a violation of labor laws.

Defendant counters that this is nothing more than a jurisdictional dispute between labor organizations, and that its union signatory subcontracting clause is lawful and expressly permitted by the National Labor Relations Act ("NLRA") and the non-statutory labor exemption to the antitrust laws. Although courts generally accept that a certain amount of anti-competitive conduct will occur in the labor organization arena, not every anti-competitive act **[*5]** is protected by the NLRA or the labor exemption to the antitrust laws. Accepting the allegations in the complaint as true, the agreements between the Council of Carpenters and the construction employers are not true collective bargaining agreements because those agreements do not embody a desire to set the terms and working conditions of Carpenters working on the identified job sites. Accordingly, the agreements are not axiomatically either exempt from scrutiny under the NLRA or subject to the antitrust labor exemption. For the following reasons, the Council of Carpenters' motion to dismiss (doc. # 17) is granted in part and denied in part.

I. Background

The facts relied on in this ruling are drawn from the complaint. For present purposes, I accept the material allegations of the complaint as true and draw all reasonable inferences in favor of the plaintiffs.

A. <u>The Parties</u>

1. *Defendant*

The Council of Carpenters is a labor organization that engages in organized labor activities in the New England region. The Council of Carpenters has entered into collective bargaining agreements with non-party general contractors and construction companies including Suffolk Construction, Fusco Co., Dimeo **[*6]** Construction, Bond Brothers, Turgeon Construction Co., and Berry & Son.

2. *Plaintiff Employer Association Parties*

Connecticut Ironworkers Employers Assoc., Inc. is a Connecticut corporation that engages in collective bargaining on behalf of employers who do business with various labor organizations, including plaintiff labor organizations.

Associated Sheet Metal and Roofing Contractors of Connecticut, Inc. ("Sheet Metal Contractors") is a Connecticut corporation that engages in collective bargaining on behalf of member employers and with Plaintiff Sheet Metal Workers Local Unions concerning relevant work.

3. *Plaintiff Employer Parties*

M.R.S. Enterprises ("M.R.S.") is a Connecticut corporation that employs plaintiff union members in the relevant market area and negotiates collective bargaining agreements with plaintiff unions.

Barrett, Inc. ("Barrett") is a Connecticut corporation that performs relevant work within the relevant market area and employs Sheet Metal Workers union members.

Ernest Peterson ("Peterson") and Berlin Steel Construction Co. ("Berlin Steel") are **[*7]** Connecticut corporations that perform relevant work in the relevant market area and employ plaintiff union organizations' members.

4. *Plaintiff Pension Fund Parties*

Sheet Metal Workers' Local No. 40 Pension Fund ("Local 40 Fund"), a defined benefit pension plan under ERISA, is comprised of members of the Sheet Metal Worker's Local No. 40 whose members perform relevant work in the relevant market area. Local 40 Fund is not permitted to carry a "funding standard account deficiency" at the end of its 13-year rehabilitation. If employers who are signatories to the Local 40 Fund are forced to allocate work to non-members of Local 40, the pension fund will be underfunded and may trigger withdrawal liability that would jeopardize the pension rights of the participants.

Iron Workers' Local Nos. 15 and 424 Pension Funds ("Local 15 Fund" and "Local 424 Fund") are defined benefit pension plans under ERISA and are comprised of members of The International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers' Local Nos. 15 and 424 ("Locals 15 and 424"). The members of Locals 15 and 424 perform relevant work in the relevant market area. The plaintiff Pension Funds are also subject **[*8]** to funding requirements as well and their signatory employers also risk the triggering of withdrawal liability in the event of a funding deficiency.

Contributions to the plaintiff Pension Funds are based on a fixed sum per hour worked. If plaintiff employers and labor union organization members are frozen out of relevant work then plaintiff employers, union organization members, and employer associations will face increased pension contributions to compensate for the reduction of hours performed by union members. In some instances the plaintiff employers who are forced to hire Carpenters may be exposed to double payments if the plaintiff employers are required to fund plaintiff pension funds as well as benefit funds for defendant Carpenters.

5. *Plaintiff Labor Organization Parties*[1]

The plaintiff labor organization parties (collectively "the unions" or "union plaintiffs" or "union members") are comprised of the following organizations: The International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers' Local Nos. 15, 37 and 424; Sheet Metal Workers' Local Nos. 38 and 40; Painters, Drywall Finishers, Glaziers and Allied Trades District Council 11 of the International Union of Painters and Allied Trades ("IUPAT"), AFL-CIO; IUPAT Glaziers Locals No. 1331 and 1274. Each is an unincorporated association and labor organization that engages in collective bargaining and enforcement of collective bargaining agreements with signatory employers on behalf of its members.

B. Relevant Work and Market Area

The "relevant work" at issue in the case includes: exterior building enclosure systems such as exterior metal panels, composite wall panels, foam panels, and insulated panel systems; exterior panelized window systems, punched windows, curtain walls, store fronts; and metal roofing systems and related components. The relevant work typically falls within the jurisdiction of Iron Workers, **[*10]** Glaziers, and Sheet Metal Workers, but not Carpenters. The "relevant market area" is Connecticut, Rhode Island, and Western Massachusetts.

C. Facts Alleged in the Complaint

The Council of Carpenters negotiated a union signatory subcontracting clause into certain agreements with construction employers that barred signatories to those agreements from subcontracting work to any firm that is not also a signatory of the Council of Carpenters. The agreements, characterized as collective bargaining agreements, do not concern job sites at which Carpenters perform relevant work. The Council of Carpenters enforces the union

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[1] Several of the plaintiffs are unincorporated associations and labor organizations within the meaning of *29 U.S.C. § 152(5)*. ***HN1***[] *Section 152(5)* defines a labor organization as: "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, **[*9]** wages, rates of pay, hours of employment, or conditions of work."

signatory subcontracting clause of the agreements to the exclusion of the plaintiff labor organizations, who cannot perform relevant work; plaintiff employers, who cannot bid on relevant work; and the remaining plaintiffs, who cannot benefit from the performance of such work. The language of the union signatory subcontracting clause requires that relevant work traditionally performed by Iron Workers, Sheet Metal Workers, and Glaziers within the relevant market area be performed by Carpenters regardless of who bid the work. This arrangement, plaintiffs argue, conflicts with **[*11]** the traditional course of conduct in the relevant market area. Traditionally, relevant work such as metal siding, exterior siding systems, or metal installations was performed by Iron Workers, Sheet Metal Contractors, and Glaziers.

Prior to 2009, the Council of Carpenters had never sought to bid on or perform relevant work, and the collective bargaining agreements entered into by the Council of Carpenters from 1999 through April 2010 do not claim the relevant work. Since 2008, however, the Council of Carpenters has sought to amend its current agreements to broaden the scope of work claimed by the Council of Carpenters to include relevant work traditionally performed by plaintiff union organizations. In doing so, the union signatory subcontracting clause of the agreements prohibits its signatories from hiring subcontractors to perform relevant work who are not also signatories with the Council of Carpenters. The above-described conduct is aimed at monopolizing the relevant work in the relevant market area to the exclusion of the plaintiff employers and plaintiff union organizations.

The exclusion of plaintiff employers and union organizations serves no legitimate business justification **[*12]** because, as six of the seven specific examples set forth in the Complaint demonstrate, Carpenters do not actually perform relevant work on the job sites covered by the union signatory subcontracting clause. The plaintiffs identify the following examples:

1. *360 State Street Project, New Haven, Connecticut*

The State Street Project was performed under a Project Labor Agreement. Plaintiff unions were party to the agreement. Article III of the Agreement stated that work assignments shall be based on subcontractor preference. Although Carpenters were not performing bargaining unit work at the job site, Suffolk Construction, the construction manager on the site, had an agreement with the Council of Carpenters that only the Council of Carpenters' signatories could perform relevant work on the job site. One subcontractor, after lengthy negotiation, was permitted to perform work claimed by Glaziers with members of Glaziers even though that subcontractor did not have an agreement with the Council of Carpenters.

2. *New Rowe Residences, New Haven, Connecticut*

The Council of Carpenters worked in concert with Dimeo Construction, construction manager on the project, to assign metal siding work (traditionally **[*13]** defined as "Division 7" work) to Carpenters. By reclassifying the work as "General Trades" or "Carpenters" and stating that "all work to be completed with Union Carpenters," the parties prevented plaintiff employers and signatories to plaintiff unions from bidding on the work. The agreement to reserve relevant work for Carpenters does not serve a legitimate business purpose because Dimeo does not intend to have Carpenters perform bargaining unit work on the job site.

3. *St. Francis Hospital, Hartford, Connecticut*

Turner Construction is the construction manager for the St. Francis Hospital, Hartford, Connecticut project. No Carpenters are performing bargaining work at the job site. The Council of Carpenters, nonetheless, attempted to coerce Turner Construction into telling plaintiff employers that they cannot bid the relevant work unless all work is awarded to Carpenters. Turner did not acquiesce to the pressure.

4. *Bryant University Project, Smithfield, Rhode Island*

Bond Brothers, the construction manager at the Bryant University Project in Smithfield, Rhode Island, is a signatory to the Council of Carpenters. Bond Brothers has included in its "scope checklist" for "glass and glazing" **[*14]** (relevant work) that all glass/glazing subcontractors must also be signatories to the Council of Carpenters. Accordingly, plaintiff employers and/or signatories to plaintiff unions were prohibited from bidding on the job even though the construction manager had no intention of using Carpenters to perform the relevant work.

5. *Immaculate Conception Catholic Regional School, Cranston, Rhode Island*

M.R.S. was awarded a contract to perform relevant work on the job site. E. Turgeon ("Turgeon") was the general contractor. On May 14, 2009, Turgeon sent a letter to M.R.S. notifying it that the contract would be cancelled because M.R.S. intended relevant work to be performed by plaintiff union members and that Turgeon had an exclusive relationship with the Council of Carpenters and M.R.S. was not a signatory to the Council of Carpenters.

6. *Bay State Medical Center Hospital Project, Springfield, Massachusetts*

The project was governed by a Project Labor Agreement. Plaintiff unions and construction manager, Berry & Son, Inc., were party to the Project Labor Agreement, which provided that subcontractors would appropriately assign all work in question. Nonetheless, a separate memorandum of understanding **[*15]** between Berry & Son and the Council of Carpenters stated that certain work would be performed only by Carpenters, including work traditionally performed by Glaziers. The memorandum of understanding violated the terms of the Project Labor Agreement. Carpenters are not, however, performing any bargaining unit work on the project and Berry & Son does not intend for Carpenters to perform work on the job site. Plaintiff unions and employers were not permitted to bid on the project because of the agreement between Berry & Son and the Council of Carpenters, notwithstanding the Project Labor Agreement.

7. *Schools Project, New London, Connecticut*

Fusco, Inc. is the construction manager on the job site. Originally the scope of work on the project included relevant work, which is traditionally performed by plaintiff unions. Fusco redrafted the specifications and scope of work to include a "General Trades" category. Fusco reclassified the "Roofing Package" as work included in "General Trades." Signatories of the Council of Carpenters traditionally bid on General Trades work. The effect of the change was to preclude plaintiff labor organizations and their signatory contractors from bidding the work **[*16]** in question. Fusco, however, does not have Carpenters performing bargaining unit work on the site.

D. Counts One and Two

In count one of the complaint, plaintiffs allege that the conduct set forth above constitutes a violation of *sections 1* and *2* of the Sherman Act. The complaint alleges that the Council of Carpenters, in concert with its signatories, has attempted to restrain trade by prohibiting contractors unaffiliated with the Council of Carpenters from bidding, being awarded, and performing work traditionally performed by plaintiff union members. That conduct, plaintiffs allege, exceeds that allowed by the labor exemptions in that it consists of an agreement between a labor organization and an employer that serves no legitimate business purpose and, although characterized as done pursuant to a collective bargaining agreement, is outside the collective bargaining process. Plaintiffs also claim that the agreements at issue are designed to expand the Council of Carpenters' jurisdiction and restrict the jurisdiction of plaintiffs. All plaintiffs seek declaratory relief and M.R.S. seeks damages.

In count two, M.R.S. alleges a violation of ***HN2***[] *29 U.S.C. § 187*, which sets forth that "[i]t shall **[*17]** be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in *section 158(b)(4)* of this title." [2] M.R.S. alleges that the Council of Carpenters has engaged in conduct that encourages and induces individuals, including general contractors and construction managers affiliated with the Council of Carpenters, to refrain from engaging in commerce with plaintiffs. In doing so, the Council of Carpenters is attempting to force M.R.S. to enter into an agreement with the Council of Carpenters or accept being frozen out of the bidding process. M.R.S. seeks actual damages for the loss of the Immaculate Conception Catholic Regional School Project.

II. Standard of Review

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[2] Initially, count two was brought on behalf of all plaintiffs. Plaintiffs have conceded that only M.R.S. has standing to pursue the claims alleged in count two. Doc. # 23 at 25. Accordingly, count two is dismissed with respect to all plaintiffs except M.R.S.

HN3[] A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is designed "merely to assess the legal feasibility of a complaint, **[*18]** not to assay the weight of evidence which might be offered in support thereof." *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984)* (quoting *Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980))*.

HN4[] When deciding a motion to dismiss pursuant to Rule 12(b)(6), the court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiffs, and decide whether it is plausible that plaintiffs have a valid claim for relief. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996)*.

HN5[] Under *Twombly*, "[f]actual allegations must be enough to raise a right to relief above the speculative level," and assert a cause of action with enough heft to show entitlement to relief and "enough facts to state a claim to relief that is plausible on its face." *550 U.S. at 555, 570*; *see also Iqbal, 129 S. Ct. at 1940* ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). The plausibility standard set forth in *Twombly* and *Iqbal* obligates the **[*19]** plaintiff to "provide the grounds of his entitlement to relief" through more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly, 550 U.S. at 555* (quotation marks omitted). *Plausibility* at the pleading stage is nonetheless distinct from *probability*, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the claims] is improbable, and . . . recovery is very remote and unlikely." *Id. at 556* (quotation marks omitted).

Defendant also moves to dismiss the claims of the plaintiff union and pension funds for lack of standing. ***HN6***[] The party who seeks to exercise the jurisdiction of the court bears the burden of establishing the court's jurisdiction. *Thompson v. County of Franklin, 15 F.3d 245, 249 (2d Cir. 1994)*. To survive a Rule 12(b)(1) motion, a plaintiff must clearly allege facts demonstrating that the plaintiff is a proper party to invoke judicial resolution of the dispute. *Id.* Although the plaintiff bears the ultimate burden of establishing jurisdiction by a preponderance of the evidence, "until discovery takes place, a plaintiff is required only to make a prima facie showing by pleadings and affidavits **[*20]** that jurisdiction exists." *Koehler v. Bank of Bermuda, 101 F.3d 863, 865 (2d Cir. 1996)*. "When considering a party's standing, we 'accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Thompson, 15 F.3d at 249* (quoting *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))*. If a plaintiff has failed to allege facts supportive of standing, it is within the court's discretion to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of standing. *Id.*

III. Discussion

Council of Carpenters moves to dismiss the complaint for failure to state a claim for violations of *sections 1* and *2* of the Sherman Act. ***HN7***[] As a general rule, agreements to refrain from dealing with others, such as the union signatory subcontracting clause at issue here, are "vulnerable to challenge under federal antitrust laws unless they are protected by both the construction industry proviso and by an exemption from antitrust scrutiny." *Local 210, Laborer's Intern. Union of North America v. Labor Relations Division Assoc. General Contractors of America, N.Y.S. Chapter, Inc., 844 F.2d 69, 73 (2d Cir. 1988)*. **[*21]** The Council of Carpenters contends that the Construction Industry Proviso of section 8(e) of the NLRA and the non-statutory labor exemption to the antitrust laws permit defendant to enter into the challenged union signatory subcontracting clause. Defendant further claims that plaintiffs fail to meet the requirements of *Twombly* and *Iqbal* in pleading an antitrust claim and that the union and pension fund plaintiffs lack standing to bring their claims. Before considering the adequacy of the pleadings, I address the application of the construction industry proviso and non-statutory labor exemption from the antitrust laws to the union signatory subcontracting clause.

A. The Construction Industry Proviso

In 1959, Congress enacted the Landrum-Griffin amendments to the NLRA. The amendments included section 8(e), codified at *29 U.S.C. §158(e)*, and commonly referred to as the "hot-cargo" provision, which provides:

> ***HN8***[] It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any **[*22]** of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: ***Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work:** *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall **[*23]** prohibit the enforcement of any agreement which is within the foregoing exception.

(emphasis in bold added). The bolded language is commonly referred to as the Construction Industry Proviso ("proviso") and generally exempts those in the construction industry from the prohibitions of section 8(e). Defendant contends that plaintiffs' antitrust claims fail because the union signatory subcontracting clause with the construction employers is entirely lawful under the proviso. Plaintiffs counter that exemption under the proviso is an affirmative defense and therefore inappropriate in a pre-answer Rule 12(b)(6) motion. Because the facts supporting the defense appear on the face of the complaint it is properly raised in a Rule 12(b)(6) motion. *McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004)*; *see also generally* *Cal. State Council of Carpenters v. Associated General Contractors of Cal., Inc., 648 F.2d 527, 532-33 (9th Cir. 1980)* (discussing labor's antitrust exemptions raised in motion to dismiss), *rev'd in part on other grounds,* *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*.

Plainly read, the proviso would seem to shelter the union signatory **[*24]** subcontracting agreements because the proviso expressly states that section 8(e) does not apply to agreements that limit the contracting of construction site work. In *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, however, ***HN9***[] the Supreme Court held that literal compliance with the proviso is insufficient and that section 8(e) should be interpreted in light of its "statutory setting and the circumstances surrounding its enactment." *421 U.S. 616, 628, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*. After a review of the legislative history of section 8(e), the Court held that, even though Congress expressly permitted labor organizations and employers in the construction industry to enter into agreements otherwise prohibited, Congress intended the proviso to apply only to agreements in the context of a collective-bargaining relationship. *Id. at 629-33*. The Court, principally concerned with job sites at which union workers and nonunion workers were employed, i.e., shoulder-to-shoulder friction, went on to state that agreements "with 'stranger' contractors, not limited to any particular job site" were not agreements obtained in the context of a collective-bargaining relationship. *Id. at 631-33*. The collective-bargaining **[*25]** process concerns only the parties to the collective bargaining relationship, and relates to wages, hours, conditions of employment, or other relevant subjects of collective bargaining. *Id. at 622*. Accordingly, under the holding of *Connell*, the Council of Carpenters' union signatory subcontracting clause falls within the protective reach of the proviso only if the agreements containing the clause were obtained in the context of a collective-bargaining relationship.

Plaintiffs contend that the union signatory subcontracting clauses at issue here, although incorporated into agreements purporting to be collective bargaining agreements, are not protected by the proviso because the agreements are not true collective bargaining agreements. The agreements between the Council of Carpenters and the construction employers, plaintiffs allege, do not encompass the traditional subjects of collective bargaining but serve only to expand the Carpenters' scope of work and jurisdiction and to freeze plaintiff unions out of the market. Although the complaint does not explicitly allege that the agreements were obtained outside the context of a collective-bargaining agreement, the complaint does state that **[*26]** Carpenters do not perform work on the job sites at issue nor does the Council of Carpenters intend its members to perform work on those job sites. The complaint also alleges that there is no legitimate business purpose for the subcontracting agreements.

The Council of Carpenters counters that, because plaintiffs refer to the agreements as collective-bargaining agreements, plaintiffs are estopped from denying the validity of the agreements. It also contends, relying on the Supreme Court's holding in *Woelke & Romero Framing, Inc. v. N.L.R.B., 456 U.S. 645, 102 S. Ct. 2071, 72 L. Ed. 2d 398 (1982)*, that it does not matter whether its members are performing work on the specified job sites in order for its agreements to fall under the proviso's protection. Both arguments fail at this stage.

Regardless of the term used to describe the agreements between the Council of Carpenters and the construction employers, if the agreements do not embody the traditional subjects of collective bargaining, the union signatory subcontracting clause of the agreement is not protected by the proviso. The holding in *Woelke* that the union signatory subcontracting clause in that case was lawful even though the underlying concern was not shoulder-to-shoulder **[*27]** friction between union and non-union members, as had been the issue in *Connell*, has no bearing on the facts of the instant case. The *Woelke* Court considered the impact of section 8(e) on union signatory subcontracting clauses sought in the context of the renegotiation of a collective bargaining agreement. *Id. at 648*. The Court held that ***HN10***[] section 8(e) applies to union signatory subcontracting clauses so long as they are sought or negotiated in the context of a collective bargaining agreement, and that the proviso did not shelter only clauses aimed at preventing shoulder-to-shoulder friction. *Id. at 654*. Here, plaintiffs allege that the union signatory subcontracting clauses between the Council of Carpenters and the construction employers are not part of a true collective bargaining agreement. Accordingly, even if it is permissible for the Council of Carpenters to enter into union signatory subcontracting clauses pertaining to job sites at which it does not have members performing work or intending to perform work, the Council of Carpenters must nevertheless demonstrate that the clause was sought or negotiated in the context of a collective-bargaining relationship — a showing that has **[*28]** not been made at the pleading stage in this case.

B. Non-Statutory Labor Exemption to the Antitrust Laws

Defendant also moves to dismiss on the basis that its agreements are shielded from antitrust scrutiny by the non-statutory labor exemption to the antitrust laws. The defense appears on the face of the complaint and therefore it is properly raised in a Rule 12(b)(6) motion. *McKenna, 386 F.3d at 436*. In *Connell*, the Court recognized that ***HN11***[] certain clauses in collective bargaining agreements, even those concerning the construction industry, can act as a "direct restraint on the business market" in a manner having "substantial anticompetitive effects, both actual and potential." *421 U.S. at 625*. Restrictive clauses like the one at issue in this case may be challenged under federal antitrust laws unless the clause is protected by both the construction industry proviso *and* an antitrust labor exemption. *Local 210, 844 F.2d at 73*.

"[T]he [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. **[*29]** Nevertheless, "[i]t would be a surprising thing if Congress, in order to prevent a misapplication of [antitrust] legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aide business groups to frustrate its primary objective." *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809-10, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*.

HN12[] Courts have long recognized the tension between national antitrust policy and national labor policy. In light of the competing interests of congressional policy favoring both collective bargaining under the NLRA and free competition in business, two antitrust exemptions are recognized. *Connell, 421 U.S. at 622*. The statutory exemption provides that union activity is exempt from antitrust liability "so long as [the] union acts in its self-interest and does not combine with non-labor groups." [3] *United States v. Hutcheson, 312 U.S. 219, 232, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*. The non-statutory exemption provides that, where the alleged anticompetitive conduct is inherent in the collective-bargaining process, concerns only the parties to the collective bargaining relationship, and relates

[3] Defendant has not claimed that the challenged agreements fall within the statutory exemption. In any event, the agreements would not fall under the statutory exemption because the agreements concern union and non-labor party conduct. *See Local 210, 844 F.2d at 79*.

to wages, hours, conditions of employment, or other relevant subjects **[*30]** of collective bargaining, the restraints are lawful. *See* Connell, 421 U.S. at 622. Having already concluded that protection by the proviso is not apparent from the complaint, I consider whether the non-statutory labor exemption to the antitrust laws bars plaintiffs' claims.

In this circuit, ***HN13***[] a court assessing whether an agreement is protected by the non-statutory exemption should consider the relative impact of the agreement on the product market and the interests of the union members. *See* Local 210, 844 F.2d at 79. The *Local 210* decision also instructs the district court to balance the conflicting policies embodied in labor and antitrust laws. The court should first consider whether the agreement at issue furthers goals that are protected by national labor law and are within the scope of traditionally mandatory subjects of collective bargaining. Second, the court should consider whether the agreement imposes a direct restraint **[*31]** on the market that has substantial anticompetitive effects that do not follow naturally from the collective bargaining agreement. If the agreement is a legitimate collective bargaining agreement, then the "touchstone in assessing its validity must be the policies embodied in federal labor law." *Id. at 81*. Traditionally, mandatory subjects in a collective bargaining agreement include wages, hours, fringe benefits, workplace conditions, and other subjects that are more likely to embody legitimate employee concerns about compensation, workplace, or security, and less likely to be restraints on competition. *See* 1B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, at ¶ 256d3 (3d ed. 2007). Accordingly, agreements between unions and firms that do not employ the unions' members are treated as encompassing non-mandatory subjects. *Id.*

Accepting the allegations in the complaint as true, it is not evident from the face of the complaint that collective-bargaining agreements between the Council of Carpenters and the construction employers further goals that are protected by national labor law and are within the scope of traditionally mandatory subjects of collective bargaining and the restraints **[*32]** imposed on the marketplace naturally flow from the collective bargaining agreements. If plaintiffs prove that the agreements between Carpenters and construction employers are not true collective-bargaining agreements because the agreements do not set wages, hours, terms and conditions of work and other relevant subjects of collective bargaining, the union signatory subcontracting clause would not have been obtained within the collective-bargaining relationship and would not be entitled to protection under the non-statutory labor exemption. Accordingly, the motion to dismiss on those grounds is denied.

C. Antitrust Injury

1. *Section 1*

HN14[] *Section 1* of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. Pleading a section 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made" in restraint of trade. *Twombly, 550 U.S. at 556*. A plaintiff must offer "plausible grounds to infer an agreement," which means "enough facts to raise a reasonable expectation that **[*33]** discovery will reveal evidence of illegal agreement." *Id.*

Here, plaintiffs allege that the union signatory subcontracting clause violates antitrust laws because the Council of Carpenters has no legitimate business reason for restricting plaintiffs' ability to bid on, be awarded, perform, and benefit from performing work on the job sites. ***HN15***[] Generally, restrictions on entities with whom contractors can subcontract are entirely permissible so long as those restrictions affect only the parties to the agreements, and the agreements concern wages, hours, or conditions of employment in the context of bona fide arm's length bargaining. *Areeda* ¶ 256d at 113-14. Courts have found antitrust violations where agreements concern other issues. *Connell, 421 U.S. at 625-26* (even where the goal of the union is legal, i.e., organizing as many subcontractors as possible, agreements outside those of a lawful collective bargaining agreement cannot claim a non-statutory exemption from the antitrust laws). ***HN16***[] An agreement between a union and an employer,

> outside a collective bargaining relationship, which imposes a direct restraint upon a business market, and which is not justified by congressional labor policy **[*34]** because it has actual or potential anticompetitive effects that would not flow naturally from the elimination of competition over wages and working conditions, is not exempt from antitrust scrutiny.

Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council, 609 F.2d 1368, 1373 n.99 (3d Cir. 1979), *cert denied*, *459 U.S. 916, 103 S. Ct. 229, 74 L. Ed. 2d 182 (1982)*.

Here, if the Council of Carpenters' union signatory subcontracting clauses are not part of a bona fide arm's length collective bargaining relationship and serve only to exclude plaintiffs' union members from job sites without also protecting the wages, hours and working conditions of Carpenters, the agreements could violate antitrust laws. Defendant counters that plaintiffs' contention that the Council of Carpenters has entered into the union signatory subcontracting clauses in an attempt to expand work jurisdiction to work not traditionally performed by its members in the relevant market areas necessarily defeats the allegation that the Council of Carpenters lacks a legitimate purpose in entering into the agreements. Even if the Council of Carpenters has entered into the agreements in an effort to expand its scope of work and jurisdiction, doing **[*35]** so does not negate the anti-competitive impact of the agreements if the Council of Carpenters has not negotiated the agreements within the context of a collective bargaining relationship. Indeed, if plaintiffs prove that the agreements are not part of a legitimate collective bargaining process, it does not matter what plaintiffs allege the Council of Carpenters' ultimate goal might be. Accepting as true that Carpenters do not intend to perform work on the six job sites identified in the complaint, it is plausible that discovery will reveal that those agreements are not the by-product of a collective-bargaining relationship and therefore violate the antitrust laws. Accordingly, the motion to dismiss for failure to state a section 1 claim is denied.

2. *Section 2*

Plaintiffs have alleged that the Council of Carpenters has attempted to monopolize the relevant work in the relevant market area for Carpenters in violation of *15 U.S.C. § 2*. Compl. at ¶ 61. ***HN17***[] A *section 2* claim, unlike a section 1 claim, is aimed at a "pernicious market structure in which the concentration of power saps the salubrious influence of competition." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979)*, **[*36]** *cert denied*, *444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)*. To establish a defendant's liability under *section 2* of the Sherman Act, a plaintiff must show "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. "Monopoly power 'is a matter of capacity — the possession of power to control prices or exclude competition.'" *Broadcast Music, Inc. v. Hearst/ABC Viacom Entm't Servs., 746 F. Supp. 320, 327 (S.D.N.Y. 1990)* (citing *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d at 272*). "Before monopoly power may be assessed, the relevant geographic and product markets must be defined." *Broadcast Music, Inc., 746 F. Supp. at 327*.

Here, the geographic market is the New England region and the relevant product market is the construction industry. Accepting the allegations in the complaint as true, the Council of Carpenters possesses the monopoly power to exclude competition **[*37]** from the construction industry within the New England region. The inquiry next turns to whether plaintiffs have adequately pled attempted monopolization. ***HN18***[] To do so requires the plaintiff to plead "(1) anticompetitive conduct; (2) intent to monopolize; and (3) a dangerous probability of obtaining monopoly power." *Delaware & Hudson Ry., 902 F.2d at 180*. For the reasons already discussed, the plaintiffs have sufficiently alleged anticompetitive conduct. *See* Section C (1), *supra.* With respect to the two remaining elements, accepting as true that the Council of Carpenters has monopoly power, plaintiffs have sufficiently alleged that the Council of Carpenters intends for its agreements to exclude others from the market and, if successful, it follows that there exists a dangerous probability that the Council of Carpenters would obtain monopoly power. Accordingly, the motion to dismiss for failure to state a *section 2* claim is denied.

D. Standing of Union and Pension Funds to Bring Antitrust Claims

Defendant also moves to dismiss the claims of the plaintiff unions and pension funds on the ground that the harms complained of are too remote and indirect to confer standing. [4] ***HN19***[] A private plaintiff **[*38]** must demonstrate standing in order to bring a federal antitrust action. *See* *Cargill, Inc. v. Monfort of Colo., 479 U.S. 104, 110, 107 S. Ct. 484, 93 L. Ed. 2d 427* & nn.5-6 (1986). In the Second Circuit, the court assumes the existence of a violation when addressing the issue of standing. *Daniel v. American Bd. of Emergency Med., 428 F.3d 408, 436-37 (2d Cir. 2005)*. In evaluating whether a plaintiff has standing, the district court must consider whether plaintiff has pled: (1) an injury in fact to plaintiff's business or property, (2) that is not remote from or duplicative of that sustained by a more directly injured party, (3) that qualifies as an antitrust injury, and (4) that translates into reasonably quantifiable damages. *Id.*

HN20[] Mere injury or the possibility of injury is not enough to confer standing; the plaintiffs must demonstrate an antitrust injury. "The antitrust injury requirement obligates a plaintiff to demonstrate, as a threshold matter, 'that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market; to prove it has been harmed as **[*39]** an individual competitor will not suffice.'" *George Haug Co. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136, 139 (2d Cir. 1998)* (quoting *Capital Imaging v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993))*. The requirement to demonstrate standing applies with equal force to claims, such as those here, for equitable relief. *See generally* *Cargill, Inc., 479 U.S. at 111-12*.

Assuming for the purposes of this motion that the challenged agreements are anti-competitive, the agreements first and foremost harm the plaintiff employers — M.R.S., Barrett, Peterson, and Berlin Steel. The plaintiff employers have been prevented from bidding on the following projects: New Rowe Residences, Bryant University, Immaculate Conception Catholic Regional School (M.R.S. only), Bay State Medical Center, and the New London Schools. [5] The plaintiff employers have suffered a lost opportunity to compete. That is a recognized injury under ***antitrust law***.

The union plaintiffs have also **[*40]** stated an injury that is recognized under ***antitrust law***. The facts alleged in the complaint indicate that Council of Carpenters prevented members of the plaintiff-unions from bidding on relevant work. In arguing that the this harm is too indirect to support standing, the Council of Carpenters relies heavily on *Associated General Contractors of Cal v. Cal. State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. That case, however, is distinguishable. In *Associated General Contractors*, the defendant was an employer association that had allegedly attempted to coerce general contractors and potential clients to hire non-union contractors and subcontractors. *Id. at 902-03*. The Supreme Court held that the union-plaintiffs' injury was too remote to confer standing.

In conducting its standing inquiry, the Court noted that it was "appropriate to focus on the nature of the plaintiff's alleged injury," because "the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market." *Id. at 908*. The Court held that there was no standing in part because "the Union **[*41]** was neither a consumer nor a competitor in the market in which trade was restrained." *Id. at 909*.

In this case, in contrast, the plaintiff-unions are competitors in the market in which trade was restrained. Here, the defendant-union has allegedly attempted to block rival unions from job sites. In essence, the defendant-union is attempting to monopolize work that had previously been performed by the plaintiff-unions' members, and push the plaintiff-unions out of the relevant market. The plaintiff-unions thus are part of the class the Sherman Act was designed to protect, because the harm here goes to "the central interest in protecting the economic freedom of the participants in the relevant market." *Id. at 908*.

Finally, in *Associated General Contractors*, the allegations were much vaguer than the allegations in this case. Specifically, in *Associated General Contractors* there was no allegation that any construction "firm was prevented

[4] Note that the Council of Carpenters did not move to dismiss the claims by the employer association plaintiffs on standing grounds.

[5] With respect to the 360 State Street and St. Francis projects, the complaint states that the plaintiffs were not prevented from bidding on those projects because the contractors did not acquiesce to pressure from Carpenters.

from doing business with any union firms." *Id. at 911*. Here, such allegations form the basis for the complaint. In short, the plaintiff-unions have alleged sufficient facts to demonstrate that they have standing to bring this case, and the motion to dismiss **[*42]** the union plaintiffs for lack of standing is denied.

Unlike the unions' injuries, the possibility of injury to the pension fund plaintiffs is both remote and indirect. The pension fund plaintiffs argue that they risk becoming underfunded at some point in the future if Carpenters are permitted to enforce the union signatory subcontracting clause. The injury is wholly indirect, being based entirely on the consequences of direct harm to the union plaintiffs, and thus too remote to confer standing. The pension fund plaintiffs have failed to demonstrate an antitrust injury that would confer standing for a claim for money damages.

Although the pension fund plaintiffs appear to acknowledge that they do not have standing to pursue a claim for money damages, they argue that they do have standing to pursue a claim for declaratory or injunctive relief. The pension fund plaintiffs are correct that the "antitrust standing analysis is more flexible and less demanding for claims for injunctive relief than it is for those seeking money damages, because 'one injunction is as effective as 100, and . . . 100 injunctions are no more effective than one.'" *Freedom Holdings, Inc. v. Cuomo, 592 F. Supp. 2d 684, 693 (S.D.N.Y. 2009)* **[*43]** (quoting *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111 n.6, 107 S. Ct. 484, 93 L. Ed. 2d 427*). Nevertheless, even a plaintiff seeking injunctive relief must satisfy Article III standing requirements, and thus assert an injury that is "sufficiently direct and non-speculative." *Id. at 694*. The injury of the pension fund plaintiffs is completely indirect and speculative, and as such, cannot satisfy even the lower standing requirements for injunctive relief. Accordingly, the motion to dismiss the pension fund plaintiffs for lack of standing is granted.

E. Labor Law Violation

In the second count, M.R.S. alleges that the Council of Carpenters, in concert with its signatory construction employers, has violated *29 U.S.C. § 158(b)(4)* (section 8(b)(4) of the NLRA) by encouraging and inducing its signatory contractors to refrain from engaging and entering into contracts with M.R.S. in violation of *29 U.S.C. § 187*. M.R.S. claims that the Council of Carpenters attempted to force M.R.S. to enter into agreements with the Council of Carpenters for work not traditionally performed by Carpenters and thus to expand the relevant work performed by Carpenters into the jurisdiction of work traditionally performed by plaintiffs. **[*44]** Furthermore, M.R.S. contends that the conduct is aimed at expanding the Council of Carpenters' representation to employees performing work not traditionally performed in the relevant market area. This includes job sites in which there are no Carpenters performing bargaining unit work.

HN21[] Section 8(b)(4) of the NLRA makes it unlawful to, *inter alia*, threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where the object thereof is forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. Here, M.R.S. alleges that Carpenters forced Turgeon, a Carpenters signatory, to cease doing business with M.R.S. in violation of section 8(b)(4).

Council of Carpenters moves to dismiss the claim on the basis that M.R.S. fails to state a claim under section 8(b)(4); defendant also argues that, because M.R.S. allegedly could not transact business in Rhode Island at the time the May 2009 contract was rescinded, its claim must fail. Defendant maintains that, because the union signatory subcontracting clause **[*45]** is part of a valid collective bargaining agreement, any restraint is protected by the construction industry proviso. Because it is not settled that the challenged union signatory subcontracting agreements are part of a valid collective bargaining agreement, whether the agreements are protected by the construction industry proviso is an open question. Furthermore, whether M.R.S. could transact business in Rhode Island cannot be determined from the face of the complaint. Accordingly, the motion to dismiss the second count of the complaint is denied.

IV. Conclusion

Accepting as true the allegations in the complaint, the challenged agreements between Carpenters are not necessarily protected by the construction industry proviso or the non-statutory labor exemption to the antitrust laws. Accordingly, the plaintiffs have stated an antitrust claim. Nevertheless, the pension fund plaintiffs have asserted an injury that is both indirect and speculative, and thus, the motion to dismiss count one for lack of standing is granted with respect to those plaintiffs. The motion to dismiss count one is denied in all other respects.

So ordered.

Dated at Bridgeport, Connecticut this 20th day of March 2012.

/s/ **[*46]** Stefan R. Underhill

Stefan R. Underhill

United States District Judge

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Cason-Merenda v. Detroit Med. Ctr.

United States District Court for the Eastern District of Michigan, Southern Division

March 22, 2012, Argued; March 22, 2012, Decided; March 22, 2012, Filed

Case No. 06-15601

Reporter

862 F. Supp. 2d 603 *; 2012 U.S. Dist. LEXIS 38810 **; 2012-1 Trade Cas. (CCH) P77,893

PAT CASON-MERENDA and JEFFREY A. SUHRE, on behalf of themselves and others similarly situated, Plaintiffs, v. DETROIT MEDICAL CENTER, HENRY FORD HEALTH SYSTEM, MOUNT CLEMENS GENERAL HOSPITAL, INC., ST. JOHN HEALTH, OAKWOOD HEALTHCARE INC., BON SECOURS COTTAGE HEALTH SERVICES, WILLIAM BEAUMONT HOSPITAL, and TRINITY HEALTH CORP., Defendants.

Subsequent History: Reconsideration denied by *Cason-Merenda v. Detroit Med. Ctr., 2012 U.S. Dist. LEXIS 72593 (E.D. Mich., May 24, 2012)*

Related proceeding at *William Beaumont Hosp. v. Fed. Ins. Co., 2013 U.S. Dist. LEXIS 35558 (E.D. Mich., Mar. 13, 2013)*

Prior History: *Cason-Merenda v. Detroit Med. Ctr., 2010 U.S. Dist. LEXIS 145416 (E.D. Mich., Oct. 18, 2010)*

Core Terms

Plaintiffs', surveys, Defendants', conspiracy, exchanges, wages, competitors, employees, Guidelines, third-party, disaggregated, e-mail, sponsored, nurses, direct contact, antitrust, circumstantial evidence, wage-related, decisions, compensation-related, anticompetitive, effects, contacts, class period, participating, summary judgment, human resources, workforces, discloses, practices

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

HN2[] Summary Judgment, Evidentiary Considerations

In deciding a motion brought under Fed. R. Civ. P. 56, the court must view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences. Yet, the nonmoving party may not rely merely on allegations or denials in its own pleading, but must, by affidavits or as otherwise provided in Rule 56, set out specific facts showing a genuine issue for trial. Rule 56(e)(2). Moreover, any supporting or opposing affidavits must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. Rule 56(e)(1). Finally, a mere scintilla of evidence is insufficient to withstand a summary judgment motion; rather, there must be evidence on which the jury could reasonably find for the non-moving party.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN3[] Sherman Act, Claims

In the Sixth Circuit, motions for summary judgment are disfavored in antitrust litigation. This general rule does not preclude the use of summary judgment in an antitrust case in which there clearly are no genuine issues of fact to try, indeed, the very purpose of a motion for summary judgment, to eliminate a trial where it would be unnecessary and merely result in delay and expense, warrants summary disposition of such cases when appropriate. Accordingly, the absence of any relevant probative evidence in support of a litigant's antitrust claims will expose such claims to summary judgment disposition.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN4[] Sherman Act, Claims

Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations. 15 U.S.C.S. § 1. To establish a claim under § 1, the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets, that the objects of and conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN5[] **Sherman Act, Claims**

If the challenged anticompetitive practice is deemed illegal per se, further examination of the practice's impact on the market or the pro-competitive justifications for the practice is unnecessary for finding a violation of ***antitrust law***. Rather, in the case of practices that are proscribed per se, the plaintiff need only prove that (1) two or more entities engaged in a conspiracy, combination, or contract, (2) to effect a restraint or combination prohibited per se (wherein the anticompetitive effects within a relevant geographic and product market are implied), (3) that was the proximate cause of the plaintiff's antitrust injury.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN6[] **Sherman Act, Claims**

A conspiracy among competing entities to fix wages, like an analogous horizontal price-fixing conspiracy, would be subject to per se treatment. Absent direct evidence of an explicit agreement among the entities to fix wages, the requisite conspiracy may be established through circumstantial evidence of business behavior which evidences a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN7[] **Sherman Act, Claims**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a *§ 1* of the Sherman Act case. Thus, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. The plaintiffs, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed the plaintiffs. "Mistaken inferences" in assessing the evidence of a claimed antitrust conspiracy are especially costly, because they chill the very conduct the antitrust laws are designed to protect.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

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

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

HN8[] Sherman Act, Claims

The Sixth Circuit has adopted a two-part inquiry for evaluating the propriety of summary judgment in an antitrust conspiracy case. First, the court must determine whether plaintiffs' evidence of conspiracy is ambiguous, that is, whether it is as consistent with the defendants' permissible independent interests as with an illegal conspiracy. If so, the court must inquire whether the plaintiffs have produced evidence that tends to exclude the possibility that the defendants were pursuing these independent interests. A plaintiff thus fails to demonstrate a conspiracy if, using ambiguous evidence, the inference of a conspiracy is less than or equal to an inference of independent action.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN9[] Sherman Act, Claims

The defendants' uniformity in their actions as merely one of several important factors a court should evaluate in determining whether a plaintiff's circumstantial evidence of antitrust conspiracy is sufficient to withstand summary judgment.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN10[] Sherman Act, Claims

Plaintiffs need not prove parallel pricing in order to prevail on an antitrust conspiracy claim based on circumstantial evidence. Parallel pricing is merely one such form of circumstantial evidence upon which a plaintiff may permissibly rely to establish concerted action in violation of *§ 1* of the Sherman Act.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN11[] Sherman Act, Claims

While evidence of parallel conduct provides one means by which a plaintiff in a *§ 1* of the Sherman Act case may make a circumstantial showing of concerted activity, the case law establishes no hierarchy of the sorts of circumstantial evidence a plaintiff must produce to withstand summary judgment. Rather, circumstantial evidence of any sort will do, provided that it demonstrates business behavior which evidences a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN12[] **Sherman Act, Claims**

The analysis of a per se claim for antitrust conspiracy is governed by the over-arching requirement that plaintiffs' evidence must reasonably tend to prove that defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective and must further tend to exclude the possibility that defendants were acting independently.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN13[] **Sherman Act, Claims**

Plaintiffs need not produce evidence of a formal agreement among the defendants in order to prove that the engaged in a conspiracy in violation of *§ 1* of the Sherman Act. The typical price-fixing agreement is usually accomplished in a manner that can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN14[] **Sherman Act, Claims**

The Sixth Circuit has identified four factors that a court should consider in evaluating the circumstantial evidence offered in support of a § 1of the Sherman Act conspiracy claim: (1) whether the defendants' actions, if taken independently, would be contrary to their economic self-interest; (2) whether the defendants have been uniform in their actions; (3) whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether the defendants have a common motive to conspire.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN15[] **Sherman Act, Claims**

The exchange of price data, or wage data, among competitors does not invariably have anticompetitive effects, but may to the contrary increase economic efficiency and render markets more, rather than less, competitive.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN16[] **Sherman Act, Claims**

If one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and diffused.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN17[] **Sherman Act, Claims**

Exchanges of information may form the basis for a recovery under *§ 1* of the Sherman Act, so long as it can be shown that they affected wage determinations made during the class period.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN18[] **Sherman Act, Claims**

An agreement need not dictate every conceivable aspect of each conspirator's behavior in order to violate *§ 1* of the Sherman Act.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN19[] **Sherman Act, Claims**

The exchange of wage data and other information among competitors does not invariably have anticompetitive effects, but rather may in certain circumstances increase economic efficiency and render markets more, rather than less, competitive.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN20[] **Sherman Act, Claims**

In the absence of a purpose or effect to restrain competition, or some other evidence of an actual agreement to restrain competition, the exchange of price data does not offend *§ 1* of the Sherman Act.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN21[] **Sherman Act, Claims**

If the factual context renders the plaintiffs' antitrust conspiracy claim implausible, if the claim is one that simply makes no economic sense, the plaintiffs must come forward with more persuasive evidence to support their claim than would otherwise be necessary. More evidence is required the less plausible the charge of collusive conduct.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN22[] **Sherman Act, Claims**

Under either the per se or the rule of reason theory of antitrust violation, the plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. A private plaintiff must make this same showing of antitrust injury, i.e., that the plaintiff has been adversely affected by an anticompetitive aspect of the defendant's conduct, in order to recover damages under a per se theory. This causal link between an antitrust violation and antitrust injury must be proved as a matter of fact and with a fair degree of certainty.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN23[] **Sherman Act, Claims**

The exchange of wage data and other information among competitors does not invariably have anticompetitive effects.

Antitrust & Trade Law > Sherman Act > Claims

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

HN24[] **Sherman Act, Claims**

A private plaintiff in an antitrust case may recover damages only for losses attributable to a competition-reducing aspect or effect of the defendant's behavior.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN25[] **Sherman Act, Claims**

Under a conventional rule-of-reason approach, a court must engage in a thorough analysis of the relevant market and the effects of the restraint in that market. Even in cases where a challenged practice is subject to scrutiny under the rule of reason, rather than subject to condemnation as per se unlawful, the practical difference between these two analytical approaches is sometimes negligible, and the courts occasionally find that a less searching rule of reason analysis is sufficient under the facts of a particular case. The court's categories of analysis of anticompetitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear. Because the purpose of the rule of reason inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.

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Judges: PRESENT: Honorable Gerald E. Rosen, Chief United States District Judge.

Opinion by: Gerald E. Rosen

Opinion

[*605] **OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on March 22, 2012

PRESENT: Honorable Gerald E. Rosen Chief Judge, United States District Court

I. INTRODUCTION

In this case, the Plaintiff registered nurses ("RNs"), Pat Cason-Merenda and Jeffrey A. Suhre, seek to recover on behalf of themselves and a class of RNs against eight Detroit-area hospitals, alleging that the Defendant health care providers have violated § 1 of the federal Sherman Act, *15 U.S.C. § 1*, by (i) conspiring among themselves and with other local hospitals to hold down the wages of RNs employed by these institutions, and (ii) exchanging compensation-related information among themselves in a manner that has reduced competition among Detroit-area hospitals in the wages paid to RNs. This Court's subject matter jurisdiction rests upon Plaintiffs' assertion of claims arising **[**4]** under federal law. *See 28 U.S.C. § 1331*.

Through the motions presently before the Court, the five remaining Defendants seek awards of summary judgment in their favor on each of Plaintiffs' claims against them. [1] In separate motions brought by Defendant Detroit Medical Center and the four other Defendant hospitals — specifically, Defendants Henry Ford Health System, Mount Clemens General Hospital, Inc., William Beaumont Hospital, and Trinity Health Corp. —Defendants argue that Plaintiffs have failed to produce either direct or circumstantial evidence of any agreement among Detroit-area hospitals to fix RN compensation, and that the evidence, to the contrary, reflects independent decisionmaking by each of the Defendant health care institutions. The five moving Defendants further contend that the record fails to establish any anticompetitive effects resulting from the exchange of compensation-related information among Detroit-area hospitals. [2]

These two summary judgment motions have been fully and thoroughly briefed by the parties. [3] In addition, the Court held **[*606]** an August 11, 2011 hearing on these motions, at which counsel offered extensive and skillful argument in support of their respective positions. Having reviewed the parties' briefs and the accompanying, voluminous record, and having carefully considered the arguments of counsel at the August 11 hearing, the Court now is prepared to rule on Defendants' motions for summary judgment. This opinion and order sets forth the Court's rulings on these motions.

II. FACTUAL AND PROCEDURAL BACKGROUND

According to **[**7]** Plaintiffs' third corrected class action complaint, Plaintiff Pat Cason-Merenda is a registered nurse ("RN") who has been employed by the Defendant Detroit Medical Center ("DMC") since November of 2002. During this same time frame, Plaintiff Jeffrey A. Suhre has worked as an RN at Providence Hospital, a health care facility owned and operated by Defendant St. John Health. In their complaint, Plaintiffs allege that the eight Defendant hospitals, along with other hospitals in the Detroit metropolitan area, have conspired among themselves to depress the level of compensation paid to their RN workforces, and that they have implemented a scheme of exchanging compensation-related information that has reduced competition among Detroit-area hospitals in the compensation of their RN employees. In bringing these claims under federal ***antitrust law***, Plaintiffs seek to represent a class of individuals who were employed as RNs by any of the Defendant hospitals at any time from December 12, 2002 through the present. [4]

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[1] Following lengthy negotiations overseen by a court-appointed special master, Professor Eric Green, three of the eight Defendant hospitals — St. John Health, Oakwood Healthcare Inc, and Bon Secours Cottage Health Services — agreed to settle the claims **[**5]** against them, and these settlements were embodied in final orders and judgments entered by the Court on September 8, 2010. More recently, following the August 11, 2011 hearing on the five remaining Defendants' summary judgment motions, the Court appointed the Honorable Layn R. Phillips as special master to conduct further settlement negotiations. To date, this latest round of extensive and complex negotiations has yielded tentative settlements between Plaintiffs and two more Defendant hospitals, Mount Clemens General Hospital, Inc. and William Beaumont Hospital. Because these latter settlements have not yet been finalized or formally submitted to the Court for approval, the Court will continue to include Mount Clemens and Beaumont among the group of five remaining Defendant hospitals referenced in the balance of this opinion.

[2] In addition to joining in the motion brought by the other Defendant hospitals, Defendant Mount Clemens General Hospital separately moved for summary judgment on the ground that the wages paid to its largely unionized RN workforce have been determined solely through a lawful collective bargaining process, and have not been affected by any alleged conspiracy to **[**6]** fix RN compensation or any sharing of wage-related information with other local hospitals. In light of the tentative settlement reached between Plaintiffs and Mount Clemens, the Court denies this separate motion without prejudice, and will revisit this motion only in the event that this settlement is not finalized.

[3] Because of the considerable overlap in the arguments advanced in the summary judgment motions filed by the Detroit Medical Center and the four other Defendant hospitals, Plaintiffs have filed a single, consolidated response in opposition to these two motions.

[4] Plaintiffs' pending motion for class certification defines the class somewhat more narrowly, but this broader characterization suffices for present purposes. In addition, the Court **[**8]** notes that the December 2002 commencement of the class period

A. The Exchange of Compensation-Related Information Among the Defendant Hospitals

Although Plaintiffs have accused the Defendant hospitals of committing two distinct violations of federal ***antitrust law***, these two theories of recovery rest upon a common factual predicate — namely, that Defendants have routinely engaged in substantial exchanges of information about how they compensate their RN workforces. Accordingly, the Court finds it appropriate to recount in considerable detail the evidence in the record reflecting these exchanges of wage-related information. In particular, Plaintiffs have identified three principal mechanisms through which this information has been shared among Detroit-area hospitals: (i) direct **[**9]** contacts between employees of the various hospitals who were involved in the process of determining RN compensation at their respective institutions; (ii) health care industry organizations and meetings that addressed nursing issues, including compensation; and (iii) third-party surveys of RN compensation sponsored by the Defendant hospitals. The Court reviews each of these mechanisms in turn.

1. Direct Exchanges of Wage-Related Information Among Employees of Detroit-Area Hospitals

The record reveals that it was not uncommon — particularly in the early days of **[*607]** the relevant time period from December of 2002 forward — for an employee of one of the Defendant hospitals to contact his or her counterpart at another Detroit-area hospital and obtain information relating to the compensation of RNs. Indeed, as Plaintiffs observe, each of the Defendant hospitals has acknowledged in the course of this litigation that its employees communicated with employees of other hospitals during the pertinent time period regarding RN compensation. (*See* Plaintiffs' Consolidated Response Br. at 14 (citing Defendants' answers and interrogatory responses).) As detailed below, these direct contacts took a variety **[**10]** of forms.

First, from 1989 until October of 2003, Thomas Dabrowski of Defendant William Beaumont Hospital conducted quarterly surveys of the compensation paid to nurses and other employees at a number of Detroit-area hospitals. (*See* Plaintiffs' Response, Ex. 12, compilation of survey results for October 2002, January 2003, April 2003, and July 2003.) Each of the Defendant hospitals other than Bon Secours participated in at least one of these surveys. [5] The participant hospitals then were provided with aggregated survey results, [6] which disclosed, among other information, the average minimum and maximum pay ranges and actual pay rates for a number of positions. As Plaintiffs observe, the information provided by the participant hospitals typically reflected current (as opposed to historical) pay rates and ranges, (*see, e.g.*, Plaintiffs' Response, Exs. 13, 30), and on at least one occasion, one of

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presumably reflects the four-year statute of limitations for federal antitrust claims, *see* 15 U.S.C. § 15b, with this suit having been filed in December of 2006. Finally, because two of the Defendant hospitals, Beaumont and Trinity, were not added as parties until June of 2007, the limitation period for the claims against these Defendants presumably extends back only to June of 2003, rather than December of 2002.

[5] As Plaintiffs note, the human resources manager for Defendant Mount Clemens, Paula Mutch, testified at her deposition that "[i]t was practice in Mount Clemens to participate **[**11]** in third-party surveys, so the hospital did not participate in direct surveys," and she further clarified that "direct" meant "hospital-to-hospital" surveys. (Plaintiffs' Response, Ex. MM, Mutch Dep. at 40.) This testimony, however, is contradicted by the evidence showing that Mount Clements did, in fact, participate in at least two of the surveys conducted by Mr. Dabrowski of Beaumont Hospital. (*See* Plaintiffs' Response, Exs. 12C, 12D.) Although Defendants complain that Plaintiffs have "misquote[d]" this testimony and taken it "out of context," (Defendants' Reply Br. at 7 n.7), the Court fails to see how Ms. Mutch's testimony can be squared with the record on this point.

[6] The parties draw a distinction in their briefs between "aggregated" compensation data —in which the information from a number of sources is combined and reported collectively — and "disaggregated" data — in which the information received from each source is kept and reported separately, albeit sometimes with a generic name (*e.g.*, "Hospital A") substituted for the true source of the data. As discussed below, this distinction between "aggregated" and "disaggregated" data has significance under a statement issued by **[**12]** the U.S. Department of Justice and Federal Trade Commission in August of 1996, which sets forth the antitrust enforcement policies of these federal agencies with regard to certain forms of joint activity in the health care industry. *See* U.S. Dep't of Justice & Federal Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care (1996) ("DOJ/FTC Guidelines") (attached as Ex. 32 to Defendant DMC's Motion for Summary Judgment).

the survey participants, Defendant Trinity, disclosed its plan for a future merit increase, (*see* Plaintiffs' Response, Ex. 14). [7]

In addition to these regular Beaumont surveys, the Defendant hospitals requested and provided RN compensation-related information **[*608]** on an *ad hoc* basis. Plaintiffs have produced, for example, **[**13]** a number of documents exchanged among the Defendant hospitals in 2001 — before the commencement of the class period in December of 2002 —disclosing various aspects of their respective RN compensation packages. (*See* Plaintiffs' Response, Ex. 5 (Henry Ford providing information to Bon Secours); Ex. 6 (summary of information obtained by Oakwood from a number of the Defendant hospitals); Ex. 7 (Oakwood providing nurse wage information to Trinity); Ex. 8 (Henry Ford disclosing information it obtained about retention bonus practices of several Defendant hospitals); Ex. 9 (Oakwood advising Beaumont of its practices regarding shift differential pay).) These *ad hoc* information exchanges continued into 2002, (*see, e.g.*, Plaintiffs' Response, Ex. 17 (February 2002 e-mail in which Trinity human resources employee states that she spoke to a Mount Clemens employee about nurse technician rates and "in exchange" obtained the latter hospital's physician assistant rates); Ex. 21 (Beaumont responding in July 2002 to Oakwood request for information); Ex. 22 (March 2002 fax from Trinity to Oakwood providing a copy of Trinity's "Salaried Employee Merit" policy); Ex. 26 (Henry Ford document dated May 2002 **[**14]** disclosing information learned in survey of signing bonuses paid by other Defendant hospitals); Ex. 27 (November 2002 chart summarizing information obtained by Henry Ford regarding other Defendant hospitals' projected merit increases for 2003); Ex. 31 (Oakwood providing current wage information in mid-2002 in response to survey by Trinity)), and also extended into the post-December 2002 class period, (*see, e.g.*, Plaintiffs' Response, Ex. 15 (May 2003 email exchange between DMC and St. John employees disclosing nurse pay rates); Ex. 19 (September 2004 e-mail exchange between DMC and Beaumont employees disclosing the two hospitals' most recent bedside nurse pay increases); Ex. 23 (April 2003 e-mail from St. John employee reporting information obtained from Mount Clemens); Ex. 25 (December 2006 chart compiled by Mount Clemens consultant reporting signing bonuses and loan forgiveness programs offered by other Detroit-area hospitals); Ex. 28 (December 2006 response by Bon Secours employee to St. John's request for information regarding signing bonuses and loan forgiveness); Ex. 32 (May 2003 e-mail from St. John employee reporting information obtained from Beaumont regarding pay raises awarded **[**15]** earlier that month and new RN pay ranges); Ex. 33 (July 2005 e-mail from DMC employee reporting call received from St. John employee disclosing St. John's and Oakwood's midnight shift premiums for RNs); Ex. 94 (March 2006 e-mail correspondence indicating that St. John's personnel "check[ed] with our competition" to determine how a proposed pay increase compared with the increases given by Oakwood and Henry Ford); Ex. 102 (September 2004 Beaumont report of survey of other Detroit-area hospitals regarding recent pay increases for bedside nurses)).

More generally, the record discloses that Defendants' human resources and compensation staff retained contact lists of their counterparts at other Detroit-area hospitals. (*See* Plaintiffs' Response, Ex. 10A (June 2002 contact list maintained by Oakwood's compensation department in order to survey "local competitors" as part of a "job evaluation process"); Ex. 10B (contact list maintained by St. John); Ex. 10C (June 2003 contact information maintained by DMC for use in conducting "local surveys"); Ex. 10D (June 2006 list of contacts used by DMC to obtain compensation-related information from Henry Ford); Ex. JJ, Logan Dep. at 72-73 (testifying **[**16]** to a **[*609]** list of contacts maintained at Henry Ford prior to August of 2003).) The documentary record, as well as the deposition testimony of certain of these employees, reflects a widespread belief in the *quid pro quo* nature of these contacts — that is, an understanding that if one of the Defendant hospitals wished to obtain compensation-related information from other Detroit-area hospitals, the best way to achieve this result was to share its own information with these other institutions. (*See, e.g.*, Plaintiffs' Response, Ex. 10E (January 2006 memo from DMC's director of compensation to her staff stating that "I am a big believer in networking and always find my compensation colleagues to be very generous in sharing information, and of course appreciate any information in return"); Ex. 16

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[7] As noted, Beaumont's direct hospital-to-hospital surveys ceased in October of 2003, when a Beaumont management official issued a memo stating that the hospital would thereafter rely on twice-yearly surveys conducted by a third party, Sullivan, Cotter & Associates. (*See* Plaintiffs' Response, Ex. 11.) This memo further urged hospital officials to "[a]ttempt to use published salary survey information if at all possible," and stated that "[a]d hoc survey requests should be limited to positions that are critical or where there is a recruiting and/or retention issue." (*Id.*)

(undated fax from Trinity human resources employee to her counterpart at Oakwood stating that "I'm returning your wage survey and hope you can help me out with one I'm conducting"); Ex. 20 (July 2003 e-mail from Oakwood's chief nursing officer, Barbara Medvec, authorizing the disclosure of certain wage information to a St. John's hospital "if **[**17]** you can also get what they are currently at and/or considering"); Ex. D, Barcome Dep. at 83 (explaining that Trinity would participate in surveys even if it was not given the results, "[b]ecause then if we wanted to have that information, then more than likely they would share it with us"); Ex. M, Dabrowski Dep. at 60-61 (testifying that he felt comfortable calling his counterparts at other hospitals when he had questions, and that they would likewise call him with their questions).) As aptly summarized by Jan Wiseman of Trinity's corporate compensation department in a January 2007 e-mail, "I know that in the past, there have been many informal calls made between organizations and that information has been pretty freely shared." (Plaintiffs' Response, Ex. 35.) [8]

[*610] 2. The Exchange of Wage-Related Information at Industry Meetings or Through Health Care Industry Organizations

Plaintiffs next point to certain health care industry meetings and organizations as mechanisms through which the Defendant hospitals exchanged wage-related information. First, Plaintiffs cite working group meetings attended by the chief executive officers of some of the Defendant hospitals in 2004 through 2006. Yet, as Defendants point out, there is no evidence in the record that issues of nurse compensation were discussed at these meetings, or that compensation-related information **[**20]** was exchanged.

Nonetheless, other industry organizations, as well as contacts established through these organizations, evidently provided a means for disseminating wage-related information among employees of the Defendant hospitals. First, in late 2005, a "Health Care Roundtable" was formed as a subgroup of the Michigan Ontario Compensation Association ("MOCA"), an all-industry organization. This group met quarterly and although its membership is not clear, all eight Defendant hospitals evidently received notice of its meetings. (*See* Plaintiffs' Response, Ex. 38.) [9]

When members of the Health Care Roundtable were invited to propose topics for discussion at a scheduled meeting in January of 2006, Carolyn LeGault of Trinity's corporate compensation group suggested that the group could address "market sensitive jobs, recruitment challenges and how current pay plans are affected by the external market and competition for a limited pool of candidates." (Plaintiffs' Response, Ex. 37.) In response, Eileen

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[8] Defendants again complain that Plaintiffs have presented this quote in a misleading light, given that Wiseman was responding to an e-mail from an employee at a Trinity hospital in Grand Rapids (and not a Detroit-area hospital) referencing a past practice of calling competing hospitals for salary information and asking whether this was "still permissible." (Plaintiffs' Response, Ex. 35.) Yet, while Wiseman's comment may have **[**18]** been prompted by an inquiry from a Grand Rapids employee, her response — prefaced as it was by the words "I know" —presumably was based upon her personal knowledge of what she referred to as a past practice of "many informal calls" and "pretty freely shared" information. (*Id.*) Before moving to Trinity's corporate compensation department, Wiseman was employed from 1997 to 2003 as a compensation analyst and compensation specialist at Trinity's St. Joseph Mercy Hospital in Ann Arbor. (*See* Plaintiffs' Response, Ex. DDD, Wiseman Dep. at 12-13.) In that position, she likely would have been familiar with St. Joseph Mercy-Ann Arbor's participation in the April and July 2003 wage surveys conducted by Beaumont, (*see* Plaintiffs' Response, Exs. 12C, 12D), and she testified that she provided compensation-related information to her counterparts at other hospitals on at least a "sporadic basis" while employed at St. Joseph Mercy, (Wiseman Dep. at 121). Thus, there is an evidentiary basis for Wiseman's claim of personal knowledge as to a past practice of informal contacts and freely shared information. In addition, the record certainly includes examples of Trinity's contacts with other Detroit-area **[**19]** hospitals to exchange wage-related information, (*see, e.g.*, Plaintiffs' Response, Exs. 7, 17, 31), and Wiseman's statement could well have been informed by these instances of information sharing. Regardless, then, of Wiseman's somewhat ambiguous deposition testimony as to her awareness of the exchange of salary information between Trinity and other hospitals, (*see* Defendants' Reply, Ex. SSS, Wiseman Dep. at 101-02), her above-quoted statement need not be read as limited to Grand Rapids hospitals or based on something other than her own knowledge and experience as a compensation professional at Trinity.

[9] In addition, all eight Defendant hospitals participated in a 2006 salary survey conducted by MOCA. (*See* Plaintiffs' Response, Ex. 72.)

Vernor of DMC stated that she was "so glad those are **[**21]** issues you want to address, Carolyn, as those are issues for the DMC as well, but I did not think other health care systems would want to discuss their trade secrets!" (*Id.*) The minutes of the January 2006 meeting indicate that the attendees discussed "[m]arket [s]ensitive" positions, including RNs, and addressed the problem of "[b]idding wars" that "inflate market rates" and cause employees to "go down [the] street for $.10/hr[.]" (Plaintiffs' Response, Ex. 39.)

Following this meeting, Amy Lumetta of Henry Ford sent an e-mail to MOCA's then-president, Carol Breen, expressing an interest in "continuing the discussion from the last round table, but trying to focus a bit more on the pay practices, etc. vs. supply and demand concerns," and suggesting that the results of a MOCA survey of Detroit-area hospitals' pay practices for market sensitive jobs could be used "as a reference point in the discussion." (Plaintiffs' Response, Ex. 40.) The minutes of the Health Care Roundtable's April 2006 meeting reflect that this survey was, in fact, a principal topic of discussion, with an outside presenter opining that health care institutions "always use[] compensation-relat[ed] solutions" to their **[**22]** RN shortages but urging them to "shift their thinking to break this cycle." (Plaintiffs' Response, Ex. 41.) [10]

[*611] Next, employees of the Defendant hospitals exchanged compensation-related information and discussed their pay **[**23]** practices at meetings of the Health Care Recruiters Association of Metropolitan Detroit ("HCRAMD"). Frances Dombrowski of Beaumont — who served as vice president of the HCRAMD in 2006 and president in 2007 —testified that this organization helped its members to "understand the [nursing] market [and] what was happening with other organizations," with one relevant aspect of this market being compensation. (Plaintiffs' Response, Ex. N, Dombrowski Dep. at 33-34.) Ms. Dombrowski was aware of discussions at the HCRAMD meetings regarding the pay practices of the member health care institutions, and she agreed that one of the benefits of membership in the organization was the opportunity to obtain this information from other members. (*See id.* at 54-56.) Likewise, Alicia Horvath of Bon Secours — who served as vice president of the HCRAMD in 2002 and president in 2003 — agreed that it was "typical" for members to share RN compensation information at meetings, and for members to discuss salary ranges, planned raises, and the timing of annual increases. (Plaintiffs' Response, Ex. AA, Horvath Dep. at 101-02, 110; *see also* Ex. XX, Stacey Dep. at 30-31 (Gloria Stacey of Mount Clemens testifying that **[**24]** information relating to nurse compensation was exchanged at HCRAMD meetings "[m]aybe a couple times a year"); Ex. 24 (sheet circulated by Ms. Stacey at an HCRAMD meeting requesting information from other hospitals regarding the hiring bonuses paid to ICU nurses); Ex. 43 (minutes of January 2002 HCRAMD meeting reflecting that members shared details of their retention/sign-on bonuses).)

Beyond their interactions at meetings, employees of the Defendant hospitals used their membership in the HCRAMD as a mechanism for obtaining compensation-related information from other hospitals. Ms. Dombrowski of Beaumont testified that she received e-mails from other HCRAMD members sharing pay information. (*See* Dombrowski Dep. at 86-87.) In addition, Plaintiffs have produced a number of documents evidencing exchanges of compensation-related information among HCRAMD members. (*See, e.g.*, Plaintiffs' Response, Ex. 45A (August 2003 e-mail to members reporting disaggregated results — with each participating hospital identified by name —of survey of RN wages, along with dates of anticipated pay increases); Ex. 45B (August 2004 e-mail from Henry Ford seeking pay information for operating room nurses, with response **[**25]** from Mount Clemens providing the name and contact information for its nurse recruiter); Ex. 45C (October 2004 response by Henry Ford to member's request for pay and other information for licensed practical nurses ("LPNs")); Ex. 45D (June 2005 Oakwood document compiling information learned from HCRAMD members regarding scholarship and loan forgiveness programs for nurses); Ex. 45E (July 2005 e-mail from St. John employee seeking (and receiving) information from

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[10] Beyond the matters actually discussed at the roundtable meetings, these gatherings provided an opportunity for employees who handled compensation-related issues at their respective Detroit-area hospitals to meet their counterparts at other local institutions. Following one of these meetings in late 2005, Eileen Vernor of DMC circulated to her co-workers a list of "health care compensation contacts" who had attended the meeting, stating that "[t]hese may or may not be familiar names but could be useful as you market pric[e] jobs or benchmark compensation practices." (Plaintiffs' Response, Ex. 10E.) Vernor further opined that "[o]pportunities to meet [these individuals] face-to-face are always valuable in reinforcing these contacts and establishing relationships," with these "compensation colleagues" having proved "to be very generous in sharing information." (*Id.*) Thus, she urged her co-workers to attend the forthcoming January 2006 roundtable meeting hosted by DMC.

HCRAMD members regarding midnight shift premiums); Ex. 45F (September 2005 Henry Ford e-mail reporting sign-on bonus and loan forgiveness information obtained from other HCRAMD members); Ex. 45G (December 2005 e-mail from St. **[*612]** John employee to other HCRAMD members summarizing information received from membership regarding new nurse graduate pay practices).)

Finally, Plaintiffs point to the Southeast Michigan Healthcare Workforce Partners as a means though which human resources executives at the Defendant hospitals met and discussed compensation-related issues. According to St. John's senior vice president and chief worklife officer, Mary Naber, the members of this group pooled their money to hire a third party, Watson Wyatt, to **[**26]** "conduct a survey about the workforce labor shortage," and the resulting survey report included nurse compensation data. (Plaintiffs' Response, Ex. NN, Naber Dep. at 166-67, 175.) The group then met to discuss the survey data and to "plan[] tactics . . . from the data." (*Id.*)

3. The Exchange of Wage-Related Information Through Third-Party Surveys

The Defendant hospitals observe, and Plaintiffs acknowledge, that salary surveys conducted by third parties are commonly used in a wide range of industries, including health care, as a legitimate tool in establishing competitive wage rates. As the parties recognize, an August 1996 policy statement issued by the U.S. Department of Justice and the Federal Trade Commission expressly addresses such surveys, explaining that these federal agencies "will not challenge, absent extraordinary circumstances, provider participation in written surveys of . . . wages, salaries, or benefits of health care personnel," so long as (i) the survey in question is "managed by a third-party," (ii) the "information provided by survey participants is based on data more than 3 months old," (iii) "there are at least five providers" participating in the survey, with no **[**27]** participant's data "represent[ing] more than 25 percent" of a given reported statistic, and (iv) the "information disseminated is sufficiently aggregated such that it would not allow recipients to identify the . . . compensation paid by any particular provider." DOJ/FTC Guidelines, Statement 6(A) at 63. In Plaintiffs' view, however, the record in the present case indicates that at least some of the third-party surveys sponsored or relied upon by the Defendant hospitals in determining their RN compensation have deviated in one or more respects from the criteria set forth in the DOJ/FTC Guidelines.

First, Plaintiffs have produced evidence that from January of 2001 [11] to March of 2004, the results of various third-party surveys were reported to the sponsoring Defendant hospitals with unmasked, named hospital data, including wage rates and effective dates. (*See* Plaintiffs' Response, Ex. 46 (compiling several third-party surveys sponsored by Defendants Henry Ford and St. John, the results of which were reported to the sponsoring hospitals in disaggregated form and with the name of each participating hospital (and its data) expressly identified).) [12] In addition, Oakwood's former director **[**28]** of compensation, Rhonda Bunce, testified **[*613]** that she had received the results of nurse compensation surveys with individual hospitals explicitly identified. (*See* Plaintiffs' Response, Ex. J, Bunce Dep. at 82.) Similarly, Linda Budd of Budd & Associates — a one-person firm frequently used by the Defendant hospitals to conduct wage surveys — testified that she initially reported the results of surveys with the participating hospitals identified by name, but that she switched to code letters "after a few years." (Plaintiffs' Response, Ex. I, Budd Dep. at 34.)

Plaintiffs also point to instances where a Defendant hospital was given a "key" that permitted it to identify the hospitals participating in a third-party survey. Ms. Bunce of Oakwood, for example, testified that she had received keys that would enable her to identify the hospitals that had participated in third-party surveys sponsored by Oakwood. (*See* Bunce Dep. at 84-85.) In addition, the record includes evidence that Ms. Budd provided St. John

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[11] As Plaintiffs point out, this was the earliest date for which documents were produced during discovery in this case. (*See* 8/29/2007 Order at 4 (ordering the production of documents dating back to January 1, 2001).)

[12] Notably, in a document prepared by St. John's wage and salary division, a report of the results of a July 2002 third-party survey — with disaggregated, unmasked hospital-by-hospital RN wage data for most of the Defendant hospitals in this case — is immediately preceded by a description of the DOJ/FTC Guidelines, including the recommendation that only aggregated salary data should be disclosed. (*See* Plaintiffs' Response, **[**29]** Ex. 46C.)

with a key that would enable it to identify each hospital's data as reported in a March 2004 survey, (*see* Plaintiffs' Response, Ex. 48), and that Ms. Budd once advised a Bon Secours employee that Oakwood was "Hospital L," but that "[y]ou never heard that from me!," (Plaintiffs' Response, Ex. 49).

Next, Plaintiffs point to several instances in which survey results were reported in disaggregated form, under circumstances that made it possible for the Defendant hospitals to "break the code" and determine which data corresponded to which hospital. At times, for example, Ms. Budd would provide updated survey results to a sponsoring hospital with a new participant identified by the next consecutive letter of the alphabet, making it easy **[**30]** to identify this new participant and its corresponding data. (*See* Plaintiffs' Response, Ex. 50 (compiling examples of this practice in updated survey data provided by Ms. Budd to the sponsoring hospital, Mount Clemens, in October of 2006).) In other instances, a Defendant hospital could be identified through characteristics unique to it but known to other hospitals — *e.g.*, the time of year that a given hospital awarded pay increases, (*see* Plaintiffs' Response, Exs. 51, 52, 56), or a reference to job titles that were unique to a particular institution, (*see* Plaintiffs' Response, Exs. 53, 54). As stated by Ann Vano, St. John's former director of compensation, there were "many sources" from which she could determine which hospital corresponded to which letter code. (Plaintiffs' Response, Ex. BBB, Vano Dep. at 77.)

Moreover, while the DOJ/FTC Guidelines advocate the disclosure of only aggregated data, the results of third-party surveys often were reported to the Defendant hospitals in disaggregated form. Most notably, until some time in 2004, Ms. Budd provided disaggregated data to all of the hospitals involved in her surveys, both sponsors and participants. (*See* Plaintiffs' Response, Ex. **[**31]** 57; *see also* Budd Dep. at 154-55.) When sponsors began to complain that they were receiving the same data as participants, Ms. Budd ceased to supply the survey participants with disaggregated data, but continued to provide this data to the survey sponsors. (*See* Budd Dep. at 154-55; *see also* Plaintiffs' Response, Ex. 122 (disaggregated data from August 2004 survey provided to sponsor Mount Clemens).) Even then, Ms. Budd provided the disaggregated results of a November 2005 Oakwood-sponsored survey to Henry Ford, stating that she was "[a]lways happy to oblige [her] old 'alma mater'" where she had worked before forming her own business. (Plaintiffs' Response, Ex. 196; *see also* Ex. 200 (providing disaggregated results of November 2002 St. John-sponsored survey to non-participant Bon Secours as a "freebie," **[*614]** with Ms. Budd noting "don't say I never gave you anything").) Similarly, in 2004, Defendant Henry Ford sponsored a "Nursing Pay Policy Survey" in which the participants — including each of the eight Defendant hospitals —were asked to share a wide range of competitively sensitive information, including whether the participant targeted its RN base pay to a market percentile and, if so, **[**32]** what this percentile was. (*See* Plaintiffs' Response, Ex. 74.) The results of this survey were reported in disaggregated form, albeit with the participating hospitals identified by letter codes rather than by name. (*Id.*)

In addition, the results reported in Ms. Budd's surveys sometimes ran counter to the recommendation in the DOJ/FTC Guidelines that participant data should be more than three months old. (*See* Plaintiffs' Response, Ex. 58 (compiling examples of survey data reported by Ms. Budd that were less than three months old).) At least on some occasions, it apparently was a matter of some importance that the survey data be as up-to-date as possible. As one example, Rachelle Hulett, DMC's director of compensation programs, sent a March 25, 2002 e-mail to Ann Vano of St. John in connection with a critical jobs survey sponsored by St. John and conducted by Ms. Budd, stating that "[a]s promised, we will report our 2002 ranges (effective April)." (Plaintiffs' Response, Ex. 64.) [13] In another instance, St. John requested in early March of 2004 that Ms. Budd conduct a "brief survey to see if the RN data reported in their December [2003] survey is already obsolete," (Plaintiffs' Response, **[**33]** Ex. 66), even though St. John had received this survey data just two months earlier, in January of 2004, (*see* Plaintiffs' Response, Ex. 46E). [14] Indeed, Plaintiffs have identified several instances of the Defendant hospitals divulging information in third-party surveys as to their projected ***future*** pay increases, with the bulk of this data reported in a disaggregated format.

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[13] As Plaintiffs note, the results of this survey reflect that one participant did, in fact, report data effective April of 2002, making it evident to St. John that this data had been supplied by DMC.

[14] Again, Plaintiffs note that Ms. Budd evidently complied with this request and provided updated survey data to St. John in March of 2004. (*See* Plaintiffs' Response, Ex. 46G.)

(*See* Plaintiffs' Response, Ex. 71 (compiling surveys conducted by Ms. Budd each year between 2001 and 2005 of the participating hospitals' planned pay increases for the coming year); Ex. 72 (report of similar survey conducted by MOCA Health Care Roundtable in 2006 to determine the participating hospitals' planned 2007 pay increases, albeit with results reported in aggregated form).)

Finally, Plaintiffs point to evidence that certain surveys were "third-party" **[**34]** in name only, with participant data routed through the sponsoring hospital on its way to the third party. In June of 2003, for instance, DMC provided its average rates of pay for a number of positions directly to Oakwood for inclusion in a survey sponsored by the latter hospital, and Oakwood then forwarded this information to Ms. Budd so that it could be incorporated into the results of her "third-party" survey. (*See* Plaintiffs' Response, Exs. 60, 61.) Again in January of 2004, Oakwood personnel gathered survey data directly from several other health care institutions and forwarded this information to Ms. Budd, who combined this data with information received directly from other hospitals and distributed the results of this "third-party" survey to the participants. (*See* Plaintiffs' Response, Ex. QQ, Perez Dep. at 40-41; Ex. 62.) More generally, the record discloses instances in which the sponsoring institutions **[*615]** were significantly involved in the design of surveys and the presentation of their results, which seemingly runs counter to the notion of a "third-party" survey. (*See* Plaintiffs' Response, Ex. MM, Mutch Dep. at 92, 106-07 (Mount Clemens employee testifying that she instructed **[**35]** Ms. Budd as to which categories of nurses to include in her survey and what types of information to gather); Ex. I, Budd Dep. at 183 (testifying that Henry Ford devised the questions to ask in a 2005 survey); Ex. 59 (compilation of e-mails sent by Oakwood and St. John employees to Ms. Budd between 2001 and 2003, specifying such details as the survey participants, the positions to be addressed in the survey, the specific information to be obtained regarding these positions, and the manner in which the results should be presented).)

B. The Role of Competitor Wage Information in Defendants' Compensation Decisions

Plaintiffs concede that there is "no smoking gun here," (Plaintiffs' Response Br. at 7) — *i.e.*, no direct evidence of an agreement among the Defendant hospitals to depress the wages of their RNs. Likewise, nothing in the record explicitly contradicts the evidence presented by Defendants — principally in the form of declarations offered by high-ranking executives at each of the Defendant hospitals — that they looked to the wages paid by other hospitals as merely one of several factors used in establishing the rates of compensation for their RN workforces, and that each Defendant **[**36]** institution independently set its own RN compensation rates. Nonetheless, Plaintiffs point to evidence that they view as illustrating each Defendant hospital's significant — and, in Plaintiffs' view, inappropriate — use of and reliance upon compensation-related information that it obtained directly from competitors, or that otherwise failed to comport with the "safety zone" criteria set forth in the DOJ/FTC Guidelines for the exchange of wage data among health care providers. The evidence pertaining to each Defendant hospital is summarized below, albeit with the three settling Defendants omitted from this review. [15]

1. Detroit Medical Center

According to Robert Griswold, Jr., DMC's director of compensation, his institution has a compensation policy of "try[ing] to approximate the median of the market, giving consideration to our budget constraints and ability to pay." (Plaintiffs' Response, Ex. V, Griswold 9/17/2008 Dep. at 26.) In order to implement this policy, DMC's compensation team would "look at the survey data that we have to establish what the market is," and arrive at a "market pricing" from which a recommendation would be forwarded to management. (Plaintiffs' Response, Ex. U, Griswold

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[15] Although this survey of the record focuses on the five remaining Defendants, this should not be construed as suggesting that the conduct of the three settling Defendant hospitals is wholly irrelevant to the proper disposition of Plaintiffs' claims against the remaining Defendants. Rather, the activities of each alleged co-conspirator in the claimed antitrust conspiracy may properly be considered in resolving Plaintiffs' claims, even if a particular co-conspirator is no longer (or has never been) a party to the case. Accordingly, while the compensation practices of the **[**37]** settling Defendants have been omitted from the present review, some of these practices are mentioned later in this opinion as pertinent to the Court's analysis of the parties' arguments in support of or opposition to Defendants' motions.

4/10/2008 Dep. at 21; *see also* Ex. EE, Krueger Dep. at 26.) These market analyses were based in part upon two third-party surveys commissioned by DMC during and shortly before the class period — **[*616]** one conducted by Towers Perrin in 2001-02, and the second conducted by Sullivan Cotter in 2003. (*See* Defendants' Motion, Ex. L.1, Krueger Decl. at ¶ 7.) In addition, DMC participated **[**38]** in wage surveys conducted or sponsored by other hospitals — *e.g.*, the surveys conducted by Beaumont between October 2002 and July 2003, (*see* Plaintiffs' Response, Ex. 12), and the surveys conducted by Linda Budd, (*see* Plaintiffs' Response, Ex. V, Griswold Dep. at 47) — because this participation would enable DMC to "get a copy of the results for free." (*Id.*)

Yet, if no published survey data was available, DMC's manager of compensation programs, Rachelle Hulett, testified that it was acceptable to directly contact the hospital's competitors. (*See* Plaintiffs' Response, Ex. BB, Hulett Dep. at 96-97.) As corroboration for this testimony, Plaintiffs point to specific occasions when such contacts occurred. In August of 2006, for example, DMC's then-director of compensation, Eileen Vernor, directed Thomasine Krueger of the compensation team to obtain wage information from DMC's Detroit-area competitors. (*See* Plaintiffs' Response, Ex. EE, Krueger Dep. at 49.) Notably, Krueger refused to do so, stating her view that Vernor's request was "outside the [antitrust] guidelines that we try to follow." (*Id.* at 50.) Krueger testified that Vernor was "angry" with this refusal and instructed her to get **[**39]** another member of the compensation team to obtain the information, (*id.*), and Vernor ultimately contacted the other hospitals herself to secure the desired wage data, (*see* Plaintiffs' Response, Ex. CCC, Vernor Dep. at 165; *see also* Ex. 157 (wage data obtained from Beaumont, Henry Ford, and St. John, including scheduled St. John pay increase in September 2006)). [16] Apart from this incident, Plaintiffs have produced evidence of other instances in which DMC employees — often at the instruction of their superiors — directly contacted competing hospitals to obtain wage-related information. (*See* Plaintiffs' Response, Ex. 160 (February 2001 e-mail from Ruthann Liagre, DMC's then-vice president of human resources, asking Ms. Krueger to make a "couple of quick phone calls to our closest competitors" to inquire about their certification bonuses); Ex. 162 (August 2003 e-mail from Ms. Hulett stating that the "VPs are very interested in what other health care systems do for PDL [professional development ladder], in terms of how they pay (hours worked, benefit level, ladder level, etc.)," and asking Ms. Cracium to "do a call around to see what's up"); Ex. 163 (Ms. Liagre conducting a "[q]uick and **[**40]** dirty" September 2003 survey of other health care systems' projected or scheduled pay increases, and then reporting this information to DMC's chief operating officer, Gwen MacKenzie); Ex. 164 (June 2006 e-mail from Ms. Krueger reporting staff nurse pay rates obtained from "SUPER confidential" source at Henry Ford, apparently at the request of DMC's director of human resources, Paulette Griffin).)

[*617] Once **[**41]** the compensation team gathered this data, whether from surveys or through direct contacts, and formulated its "market pricing" recommendations, the recommendations and underlying "base rate information" were forwarded to DMC's "executive leadership for decision-making by them." (Plaintiffs' Response, Ex. V, Griswold Dep. at 165.) As one example, the data obtained by Ms. Vernor through her August 2006 contacts with other Defendant hospitals was forwarded to Deloris Hunt, DMC's corporate vice president of human resources, and this information evidently was shared with DMC's chief executive officer, Mike Duggan, at a meeting shortly thereafter. (*See* Plaintiffs' Response, Ex. 165.) [17] The wage rates for nurses at competitor hospitals also were provided to Michael Prusaitis, DMC's director of patient care budget monitoring, for use in DMC's budgeting process. (*See* Plaintiffs' Response, Ex. CCC, Vernor Dep. at 172-74; Ex. SS, Prusaitis Dep. at 13.)

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[16] As Plaintiffs observe, another member of the compensation team had reminded Ms. Vernor about the antitrust guidelines just a few months earlier. Specifically, upon receiving Vernor's January 2006 e-mail (quoted earlier) in which she advised the team of some "health care compensation contacts" and characterized these colleagues as "very generous in sharing information," (Plaintiffs' Response, Ex. 10E), team member Cynthia Cracium responded that "[a] few years ago, many of our former contacts made the decision to work through 3rd party agencies due to the anti-trust laws, and we lost some valuable contacts," and she further stated that "[i]t's still very awkward asking for information directly from other hospitals due to the legal issues that could arise." (Plaintiffs' Response, Ex. 158.)

[17] When asked at his deposition whether he thought it was appropriate for DMC's human resources personnel to communicate with other hospitals about the pay packages offered by their respective institutions, Mr. Duggan responded that "I never gave **[**42]** [it] any thought one way or the other." (Plaintiffs' Response, Ex. O, Duggan Dep. at 57.)

Plaintiffs view the record as revealing, at least in one instance, that this data gathered from other hospitals formed the basis for a lower merit pay increase than had been recommended. Specifically, they point to a December 2005 memo stating that DMC's compensation department had recommended a 3 percent merit increase for 2006, but that only a 2 percent merit increase had been approved. (*See* Plaintiffs' Response, Ex. 166.) When asked to identify the basis for this 2 percent merit increase, as opposed to the 3 percent increase advocated by the compensation department, Mr. Duggan testified that "I would certainly not raise [employee] wages unnecessarily given the narrow margin that we're always operating on to keep our hospitals open," and he explained that "I try to raise in every specialty what is necessary to keep us competitive and keep our positions filled, and I try not to pay more than that because it jeopardizes the viability of our hospital system." (Plaintiffs' Response, Ex. O, Duggan Dep. at 53.) [18]

2. Henry Ford Health System

According to Robert G. Riney, Henry Ford's executive vice president and chief operating officer, Henry Ford has established "market targets" for each job title, and the market target for "market sensitive positions" — a category that includes RNs — is "the 66th percentile of the market." (Defendants' Motion, Ex. N, Riney Decl. at ¶ 11; *see also* Plaintiffs' Response, Ex. Y, Harland Dep. at 53, 55-56.) In assessing how the actual wage rates paid **[**44]** to Henry Ford employees compare to these market targets, and in determining more generally the salary structures and pay practices for RNs and other positions, **[*618]** a team of executives on the "Total Rewards Committee" relies in part on a "Competitive Pay Analysis" prepared each year by Henry Ford's compensation department. (*See* Riney Decl. at ¶ 11.) In this Competitive Pay Analysis, the compensation department makes recommendations as to the percentage wage increases for market sensitive positions and all other positions. (*See id.* at ¶ 15; *see also* Plaintiffs' Response, Ex. 117 (November 2002 Competitive Pay Analysis making recommendations for 2003).)

In formulating its Competitive Pay Analysis each year, Henry Ford's compensation department relied in part upon information it gathered or learned regarding local competitors' pay rates and projected increases. (*See* Harland Dep. at 19; *see also* Plaintiffs' Response, Ex. PP, Parkinson-Tripp Dep. at 46, 109.) In the early days of the class period, there were occasions when employees in the compensation department would obtain this information by directly contacting their counterparts at other Detroit-area hospitals. (*See* Plaintiffs' Response, **[**45]** Ex. 118 (November 2002 e-mail stating that compensation department employee had been directed to "call around to local competitors to get a feel for what they are projecting"); Ex. 119 (report of information learned from other local hospitals regarding projected 2003 merit increases). [19]) In 2003, however, the compensation department staff were reminded of the antitrust guidelines regarding exchanges of information among competitors, (*see* Plaintiffs' Response, Ex. KK, Lumetta Dep. at 33-34), [20] and Henry Ford employees thereafter largely ceased to request compensation-related information directly from competitors, (*but see* Plaintiffs' Response, Ex. 109 (September 2005 fax from human resources employee with chart of compensation data from other Detroit-area hospitals and names of contacts from whom this information evidently was obtained); Ex. 116 (minutes of July 2006 meeting indicating

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[18] DMC complains in its reply brief that Plaintiffs have misrepresented Mr. Duggan's testimony **[**43]** on this point. In testimony immediately preceding the above-quoted passage, Mr. Duggan noted that the 2 percent merit increase for 2006 was only one of the pay increases for which nurses could be eligible — for example, nurses could receive additional increases by moving to a higher step in DMC's "Promoting Excellence" program, (*see* DMC's Motion, Ex. 4, Krueger Decl. at ¶¶ 28, 33) — and he explained that he "look[ed] at all of the nurses' increases in a year together" in making compensation decisions. (DMC's Motion, Ex. 10, Duggan Dep. at 52.) In DMC's view, then, Mr. Duggan had "rejected the premise" of the subsequent question by Plaintiffs' counsel that elicited his above-quoted testimony. (*See* DMC's Reply Br. at 14.)

[19] As Defendants point out in their reply brief, the information obtained on this latter occasion evidently led the compensation department to **[**46]** recommend a greater wage increase than it had recommended in an earlier draft of its Competitive Pay Analysis. (*See* Defendants' Reply, Ex. JJJ, Parkinson-Tripp Dep. at 192-94.)

[20] Although the cited testimony of Henry Ford employee Amy Lumetta appears to make reference to a memo that has been held to be protected by the attorney/client privilege, (*see* 2/24/2009 Order), the Court nonetheless may consider Ms. Lumetta's testimony as to the actions taken by Henry Ford's compensation department following the dissemination of this memo.

that Henry Ford's chief nursing officer, Ronnie Hall, planned to "send[] someone to Oakwood to find out" this competitor's contingent rate of pay for RNs).) [21]

[*619] Yet, despite this reminder, Henry Ford employees continued to provide wage-related information in response to direct inquiries from other hospitals. (*See, e.g.*, Plaintiffs' Response, Ex. 110 (Henry Ford providing St. John with information regarding nurse wages and practices in January of 2006); Ex. 111 (March 2006 e-mail in which St. John employee states that she "confirmed [pay increases] with HFH 2 weeks ago"); Ex. 113 (June 2006 e-mail from member of DMC compensation team reporting information received from "SUPER confidential" Henry Ford source regarding staff nurse pay range and recent change in pay scale).) Henry **[**48]** Ford also continued to both sponsor and participate in third-party surveys, with the results of these surveys occasionally reported to the hospital in a disaggregated format. (*See, e.g.*, Plaintiffs' Response, Ex. 71D (Henry Ford-sponsored survey conducted by Linda Budd in November 2003, reporting salary planning information in disaggregated form); Ex. 74 (results of 2004 "Nursing Pay Policy Survey" sponsored by Henry Ford, reported in disaggregated form); Ex. 196 (disaggregated results of November 2005 Oakwood-sponsored survey given to Henry Ford by Ms. Budd, who stated that she was "[a]lways happy to oblige [her] old 'alma mater'").)

Finally, in at least some years during the relevant period, Henry Ford sponsored third-party surveys of other Detroit-area hospitals' planned salary increases for the coming year. (*See* Plaintiffs' Response, Exs. 71D, 120 (survey conducted in late 2003 of projected increases for 2004); Ex. 121 (survey conducted in September of 2004 of projected increases for 2005).) Although Defendants claim that the "Competitive Pay Analysis" reports furnished by Henry Ford's compensation department to the executive-level Total Rewards Committee presented the survey data **[**49]** "in highly aggregated form," (Defendants' Motion, Br. in Support at 7), Plaintiffs correctly observe that the December 2003 and October 2004 reports incorporated the ***disaggregated*** results of the two above-referenced salary planning surveys, albeit with the participant hospitals identified by letter codes rather than by name. (*See* Plaintiffs' Response, Exs. 120, 121.)

3. Mount Clemens General Hospital

Mount Clemens is the only Defendant hospital with a unionized RN workforce. In preparation for its union negotiations, Mount Clemens commissioned third-party surveys of nurse wage-related information at other Detroit-area and Michigan hospitals. (*See, e.g.*, Plaintiffs' Response, Ex. 57B (February 2004 survey conducted by Linda Budd reporting detailed RN salary structure data in disaggregated form, but with hospitals identified by letter code rather than name); Ex. 122 (updated August 2004 survey conducted by Ms. Budd due to prolonged union negotiations, with data again in disaggregated form and reporting some data that was only a month old).) Mount Clemens states without contradiction, however, that the data from these surveys were shared with the nurses' bargaining team during negotiations, **[**50]** (*see* Defendants' Motion, Ex. BB, Klinger Dep. at 189; Ex. CC, Horde Dep. at 71, 92), and, on some occasions, were shared directly with the RNs themselves, (*see* Horde Dep. at 92-94). In addition, the compensation actually paid by Mount Clemens to its unionized RN workforce is disclosed in the

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[21] Beyond these examples of direct contacts, Plaintiffs point more generally to a March 2002 report generated by Henry Ford's "Market-Based Compensation Recalibration Team." (Plaintiffs' Response, Ex. 108.) As Plaintiffs observe, this report referenced such measures as "[f]requent audit of competitor pay rates and practices," "[a]ggressive collection of market compensation information from informal sources," and "[c]onstant monitoring of compensation competitiveness" by "keep[ing] in touch with other Compensation representatives from the various hospitals throughout the year as to future plans and any changes to current pay practices." (*Id.*) In a supplemental **[**47]** affidavit, however, Mr. Riney states that he was a co-leader of this team, and he asserts (i) that the March 2002 report included only "draft recommendations," (ii) that "Henry Ford did not take any action with regard to any specific recommendations" in the report, (iii) that the report "does not reflect compensation setting practices, processes, or philosophy at Henry Ford," and (iv) that "no department at Henry Ford, including the Compensation Department, ever implemented any of the [report's] recommendations." (Defendants' Reply, Ex. HHH, Riney Suppl. Decl. at ¶¶ 5-6.)

collective bargaining agreements ("CBAs") reached with the nurses' union, copies of which are distributed to each union member. [22]

[*620] Beyond this, Plaintiffs have identified an instance in March of 2006 when, in preparation for upcoming union negotiations, two of the hospital's representatives in the negotiations — David Klinger, Mount Clemens' then-vice president of human resources, and Priscilla Horde, a human resources consultant — obtained from an Oakwood employee a copy of an Oakwood-sponsored survey of RN pay. (*See* Plaintiffs' Response, Ex. 123 (January 2006 **[**51]** survey of RN wages paid by local hospitals, reported in an aggregated format).) When these 2006 negotiations again extended through the year, Mount Clemens employees obtained the results of a more recent Oakwood-sponsored survey, (*see* Plaintiffs' Response, Ex. 124 (August 2006 survey results provided to Mount Clemens)), and also initiated direct contact in November of 2006 with their counterparts at Beaumont, St. John, and Trinity to obtain the specific wage rates for these hospitals, with this disaggregated, unmasked data then included in a packet given to Mount Clemens' negotiating representatives, (*see* Plaintiffs' Response, Ex. 125; *see also* Ex. CC, Klinger Dep. at 58-60, 83-84). Finally, Plaintiffs note that on one occasion, a Mount Clemens human resources consultant, Gloria Stacey, obtained information from her counterparts at an HCRAMD meeting regarding the hiring bonuses paid to ICU nurses. (*See* Plaintiffs' Response, Ex. 24 (undated sheet disclosing this information for various local hospitals).) [23] As Defendants point out, however, there is no evidence that any of the information obtained by Mount Clemens through direct contacts with other hospitals had any impact on Mount **[**52]** Clemens' negotiations with the RN union.

4. William Beaumont Hospital

Defendant Beaumont's vice president of human resources, Ronald Lilek, has stated in an affidavit that Beaumont "established a minimum target for Inpatient RN base wage paygrade maximum at between the 60th and 80th percentile, with a target of the 75th percentile, of the highest actual rate paid in the market." (Defendants' Motion, Ex. S, Lilek Decl. at ¶ 25.) In determining its base hourly rate for RNs and endeavoring to meet this target, Beaumont relied in part on survey data. (*See id.* at ¶¶ 21, 26.) As discussed earlier, until October of 2003, Beaumont obtained this survey data through its own quarterly surveys conducted by one of its employees, Tom Dabrowski, who directly requested compensation information from other Detroit-area hospitals, and all of the Defendant hospitals other than Bon Secours participated in one or more of these surveys. Thereafter, Beaumont switched to surveys conducted by a third **[**53]** party, Sullivan Cotter & Associates. [24]

Even after Beaumont made this transition to third-party surveys, its employees continued to occasionally contact their counterparts at other hospital for compensation-related information. In July of 2006, for example, Mr. Dabrowski sought **[*621]** and received information from DMC regarding its student loan programs for nurses and other positions. (*See* Plaintiffs' Response, Ex. 101.) In September of 2004, Mr. Dabrowski compiled a list of information he had obtained from other local hospitals regarding their most recent pay increases for bedside nurses. (*See* Plaintiffs' Response, Ex. 102.) More generally, Beaumont's director of compensation, David Misner, testified that he would permit direct contacts on occasions where "we were maybe looking to survey a singular job, **[**54]** and to go out and get a custom survey through a third party would have been expensive [and] very time

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[22] Consequently, on those occasions when Mount Clemens employees responded to inquiries from other hospitals or third-party surveys regarding the hospital's wage rates for RNs or plans for future increases, such information was readily obtainable from the current CBA, which was widely available to all members of the Mount Clemens RN union.

[23] While Defendants claim that this information was gathered outside the class period, in 2001, the passage of Ms. Stacey's deposition cited in support of this contention is silent as to the date of this document.

[24] As Plaintiffs note, at around the time Beaumont began to use Sullivan Cotter to conduct wage surveys, this outside firm sent Beaumont a September 2003 letter stating that "[a]s a result of the Justice Department guidelines regarding survey data exchanges, you would like to 'outsource' the collection of competitive pay data from key healthcare organizations." (Plaintiffs' Response, Ex. 202.)

consuming," but he stated that, so far as he was aware, such contacts occurred only "on a sporadic basis." (Plaintiffs' Response, Ex. LL, Misner Dep. at 141, 183.)

In Plaintiffs' view, the record discloses several instances in which Beaumont used information from the local market to award smaller wage increases or to reduce planned or requested increases in other forms of compensation. In September of 2003 and again in May of 2005, Beaumont's chief operating officer, Kenneth Matzick, determined that budgeted 2.5 percent wage increases for the hospital's nurses should not be awarded, citing the recommendations of human resources personnel that "[b]ased upon a review of the recently completed nursing survey," a smaller 2.0 percent increase was appropriate. (Plaintiffs' Response, Exs. 104A, 104C.) Likewise, a pay increase that was "anticipated" for December of 2006 was cancelled, with Beaumont's director of human resources, Lucy Vail, explaining that "pay is market-based" and that "[w]e led the market when the increases were given in the summer, resulting in pay as much as $2.00 over top **[**55]** of the market," so that "there is no need to increase pay at this time." (Plaintiffs' Response, Ex. 99.) In addition, a length-of-service ("LOS") increase was reduced by one percent in 2005, based on a "survey of six area hospitals indicat[ing] that Beaumont[']s LOS increases ha[ve] been inconsistent with what is occurring in the wage market." (Plaintiffs' Response, Ex. 105.) Finally, the results of a June 2005 *ad hoc* survey of local hospitals were cited as a basis for rejecting a requested increase in the then-current $3.00/hour on-call rate for the acute hemodialysis staff. (*See* Plaintiffs' Response, Ex. 106; *see also* Ex. 103 (April 2003 recommendation, based on market data, that the on-call rate for cardiac cath lab staff be increased to $3.00/hour rather than the requested $4.00/hour, although the requested increase to $4.00/hour was later granted in September 2004).)

5. Trinity Health Corp.

There are three Trinity hospitals involved in this case: (i) St. Joseph Mercy Oakland in Pontiac, Michigan ("Trinity-Oakland"), (ii) St. Mary Mercy Hospital in Livonia ("Trinity-Livonia"), and (iii) the former St. Joseph Mercy Macomb in Clinton Township ("Trinity-Macomb"). [25] Although these hospitals **[**56]** are affiliated with Trinity, each of them operates independently, and each has a separate nurse compensation structure with distinct rates of pay and no effort to coordinate with the other Trinity facilities.

None of the three Defendant Trinity hospitals commissioned any third-party wage surveys during the class period. However, Trinity's corporate compensation group collected market wage data from a variety of sources, and used this information **[*622]** to prepare and disseminate market analyses to each of the three Trinity affiliates. Trinity's corporate recommendation to these affiliates was to target their base pay to the 50th percentile of the market, and all three affiliates adopted this target. In addition to the market analyses furnished by Trinity's corporate compensation group, each of the three Trinity affiliates participated in and received the results of third-party surveys, such as Linda Budd's surveys. (*See, e.g.*, Plaintiffs' Response, Ex. 128 (affiliates received disaggregated results of survey **[**57]** conducted by Ms. Budd in May 2003); Ex. 129 (affiliates received disaggregated results of survey conducted by Ms. Budd in November 2003).)

Plaintiffs also cite evidence of employees at the three Trinity affiliates initiating direct contacts with their counterparts at other Detroit-area hospitals to obtain wage- related information, although some of these contacts predate the June 2003 commencement of the class period applicable to Trinity. As to Trinity-Livonia, for example, Plaintiffs point to the testimony of Judy Seybert, an employee in the hospital's human resources department until February of 2003, who stated that she would request wage information from other Detroit-area hospitals when instructed by her supervisor to do so. (*See* Plaintiffs' Response, Ex. VV, Seybert Dep. at 82-83; *see also* Ex. 139 (December 2001 request for wage information from Oakwood); Ex. 140 (September 2002 request for wage information from a number of hospitals, with response from Oakwood).) Similarly, Christine Barcome, a compensation analyst at Trinity-Oakland, testified that prior to the arrival of a new supervisor, Martha Murphy, in 2002 or 2003, she would contact competitor hospitals at management's **[**58]** request to obtain market data for RN

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[25] In July of 2007, after the commencement of this suit, Trinity sold its interest in Trinity-Macomb to Defendant Henry Ford, and this hospital is now part of Henry Ford Macomb Hospital.

compensation. (*See* Plaintiffs' Response, Ex. D, Barcome Dep. at 15, 97-98, 108-09; *see also* Ex. 135 (September 2001 request to Oakwood); Ex. 136 (January 2003 request to Oakwood).) [26]

Next, Plaintiffs have produced evidence that Trinity-Macomb employees also made direct contacts with their counterparts at other Detroit-area hospitals to obtain compensation-related information. (*See* Plaintiffs' Response, Ex. 131 (May 2004 request for information with response from St. John); *see also* Ex. 130 (April 2005 e-mail from Trinity-Macomb's then-vice president of human resources stating that he "may possibly be able to validate/nullify . . . through some additional sources" the information obtained by his staff regarding cath-lab on-call rates paid at other hospitals).) The hospital's administrative director of human resources, Lynn Urban, has testified that she considered it part of her duties to obtain wage range information from hospitals outside of the Trinity network. **[**59]** (*See* Plaintiffs' Response, Ex. AAA, Urban Dep. at 38-39.) Ms. Urban further testified that she occasionally used the RN wage range information she received through these direct contacts in analyzing whether Trinity-Macomb's RN wages should be increased and the level to which they should be increased. (*See id.* at 38.) Finally, beyond the contacts she initiated, Ms. Urban responded to direct contacts from other hospitals seeking nurse wage information, (*see* Plaintiffs' Response, Ex. 133 (February 2002 e-mail reflecting that Ms. Urban provided information effective January 2002 to a counterpart at St. John)), and employees at the other two Trinity hospitals did likewise, (*see* Plaintiffs' Response, Ex. 137 (Ms. **[*623]** Barcome of Trinity-Oakland providing copy of documents from the hospital's policy and procedure manual); Ex. 14 (Ms. Barcome responding to Beaumont October 2003 survey with current information and indication of planned merit increase in November); Ex. 102 (Ms. Barcome responding to September 2004 Beaumont survey); Ex. 141 (Ms. Seybert of Trinity-Livonia responding to August 2002 Beaumont survey)).

III. ANALYSIS

A. The Standards Governing Defendants' Motions

Through the two motions **[**60]** addressed in the present opinion, each of the five remaining Defendants — Detroit Medical Center, Henry Ford Health System, Mount Clemens General Hospital, William Beaumont Hospital, and Trinity Health Corp. [27] — seeks summary judgment in its favor on each of Plaintiffs' two claims brought under § 1 of the Sherman Act. Under the pertinent Federal Rule, ***HN1***[] summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. [28] As the Supreme Court has explained, "the plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)*.

HN2[] In deciding a motion brought under *Rule 56*, the Court must view the evidence "in a light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences." *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854, 861 (6th Cir. 2007)*. Yet, the nonmoving party "may not rely merely on

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[26] Shortly after Ms. Murphy became her supervisor, however, Ms. Barcome was directed not to contact other hospitals to obtain compensation-related information. (*See* Barcome Dep. at 97-98.)

[27] As noted earlier, two of these Defendants, Mount Clemens General Hospital and William Beaumont Hospital, recently reached tentative settlement agreements **[**61]** with Plaintiffs, but these settlements have not yet been finalized.

[28] *Rule 56* has recently been revised in various respects, but the language quoted here (and immediately below) reflects the Rule as it read when Defendants filed their motions. Under the current Rule, the bulk of the quoted language from *subsection (c)* has been moved to *subsection (a)*, but the recent amendments do not appear to have altered the overarching standards for resolving a summary judgment motion.

allegations or denials in its own pleading," but "must — by affidavits or as otherwise provided in [Rule 56] — set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). Moreover, any supporting or opposing affidavits "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters **[**62]** stated." Fed. R. Civ. P. 56(e)(1). Finally, "[a] mere scintilla of evidence is insufficient" to withstand a summary judgment motion; rather, "there must be evidence on which the jury could reasonably find for the non-moving party." Smith Wholesale, 477 F.3d at 861 (internal quotation marks and citation omitted).

As Plaintiffs point out, the Sixth Circuit recently observed that **HN3**[] "[i]n this circuit, motions for summary judgment are disfavored in antitrust litigation." Smith Wholesale, 477 F.3d at 862. Yet, the court then emphasized:

> This general rule . . . does not preclude the use of summary judgment in an **[*624]** antitrust case in which there clearly are no genuine issues of fact to try —indeed, the very purpose of a motion for summary judgment, to eliminate a trial where it would be unnecessary and merely result in delay and expense, warrants summary disposition of such cases when appropriate. Accordingly, the absence of any relevant probative evidence in support of a litigant's antitrust claims will expose such claims to summary judgment disposition.

477 F.3d at 862 (internal quotation marks and citations omitted). Moreover, Defendants correctly note the willingness of both the Supreme Court **[**63]** and the Sixth Circuit to award or affirm summary judgment in antitrust cases, so long as "there is no genuine issue for trial." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (internal quotation marks and citation omitted); *see also* Smith Wholesale, 477 F.3d at 880-81; Wallace v. Bank of Bartlett, 55 F.3d 1166, 1170 (6th Cir. 1995); Nurse Midwifery Associates v. Hibbett, 918 F.2d 605, 617 (6th Cir. 1990). With these principles in mind, then, the Court turns to the challenges advanced in Defendants' motions.

B. Plaintiffs' *Per Se* Claim of a Conspiracy to Depress RN Compensation

1. The Law Governing *Per Se* Claims Under § 1 of the Sherman Act

HN4[] Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. The Sixth Circuit has stated:

> [T]o establish a claim under section 1, the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets, that the **[**64]** objects of and conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result of that conspiracy.

Expert Masonry, Inc. v. Boone County, Ky., 440 F.3d 336, 342 (6th Cir. 2006) (internal quotation marks and citations omitted). Yet, **HN5**[] if the challenged anticompetitive practice is deemed illegal *per se*, "further examination of the practice's impact on the market or the procompetitive justifications for the practice is unnecessary for finding a violation of **antitrust law**." Expert Masonry, 440 F.3d at 342 (internal quotation marks and citations omitted). Rather, in the case of practices that are "proscribed *per se*, the plaintiff need only prove that (1) two or more entities engaged in a conspiracy, combination, or contract, (2) to effect a restraint or combination prohibited *per se* (wherein the anticompetitive effects within a relevant geographic and product market are implied), (3) that was the proximate cause of the plaintiff's antitrust injury." 440 F.3d at 342 (citations omitted).

In Count I of their complaint, Plaintiffs allege that the Defendant hospitals "and their co-conspirators have engaged in a continuing conspiracy in restraint **[**65]** of trade to depress the compensation of RNs employed at hospitals in the Detroit [metropolitan area]." (Third Corrected Class Action Complaint at ¶ 51.) The parties agree that such **HN6**[] a conspiracy among competing hospitals to fix wages, like an analogous horizontal price-fixing conspiracy, would be subject to *per se* treatment. *See* Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001); Fleischman v.

Albany Medical Center, 728 F. Supp.2d 130, 157 (N.D.N.Y. 2010); *see also* DOJ/FTC Guidelines, Statement 6(B) at 64 ("If an exchange **[*625]** among competing providers of . . . cost information results in an agreement among competitors as to . . . the wages to be paid to health care employees, that agreement will be considered unlawful per se."). Absent direct evidence of an explicit agreement among the Defendant hospitals to fix RN wages — which Plaintiffs acknowledge they have not produced — the requisite conspiracy may be established through circumstantial evidence of "business behavior which evidences a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *Wallace, 55 F.3d at 1168* (internal quotation marks and citations omitted).

The Supreme Court **[**66]** has adopted what this Court previously characterized as a "fairly stringent" standard for assessing circumstantial evidence of an alleged conspiracy in violation of § 1. *In re Northwest Airlines Corp., 208 F.R.D. 174, 195 (E.D. Mich. 2002)*. In particular, the Supreme Court has emphasized:

> ***HN7***[] [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)*, we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id., at 764, 104 S.Ct., at 1470*. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. *465 U.S., at 764, 104 S.Ct., at 1471*. [The plaintiffs] in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiffs].

Matsushita, 475 U.S. at 588, 106 S. Ct. at 1356-57 **[**67]** (citations omitted). The Court further cautioned that "mistaken inferences" in assessing the evidence of a claimed antitrust conspiracy "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita, 475 U.S. at 594, 106 S. Ct. at 1360*.

In the wake of this Supreme Court precedent, ***HN8***[] the Sixth Circuit has adopted a "two-part inquiry for evaluating the propriety of summary judgment in an antitrust conspiracy case." *Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474, 483 (6th Cir. 1990)* (internal quotation marks and citation omitted); *see also In re Northwest Airlines, 208 F.R.D. at 195*. First, the Court must determine whether Plaintiffs' evidence of conspiracy is ambiguous — that is, whether it is "as consistent with the defendants' permissible independent interests as with an illegal conspiracy." *Riverview Investments, 899 F.2d at 483* (internal quotation marks and citation omitted). If so, the Court must inquire whether Plaintiffs have produced "evidence that tends to exclude the possibility that the defendants were pursuing these independent interests." *899 F.2d at 483* (internal quotation marks and citation **[**68]** omitted). "A plaintiff thus fails to demonstrate a conspiracy if, using ambiguous evidence, the inference of a conspiracy is less than or equal to an inference of independent action." *899 F.2d at 483*; *see also In re Northwest Airlines, 208 F.R.D. at 195-96*.

2. There Is No Inflexible Requirement that Plaintiffs Must Produce Evidence of Parallel Conduct in Order to Establish a Conspiracy Through Circumstantial Evidence.

As a threshold matter — and, indeed, as the principal argument Defendants **[*626]** have advanced against Plaintiffs' *per se* claim in the brief in support of their combined summary judgment motion — Defendants contend that Plaintiffs "cannot even get to first base" on their claim of a *per se* violation of § 1 without proof that the Defendant hospitals engaged in parallel conduct in their setting of RN wages. (Defendants' Motion, Br. in Support at 22.) In Defendants' view, the law is clear that "[w]here antitrust plaintiffs rely on circumstantial evidence to prove a Section 1 conspiracy claim, they must first demonstrate that the defendants' actions were parallel." (*Id.* at 21 (quoting *In re Beef Industry Antitrust Litigation, 907 F.2d 510, 514 (5th Cir. 1990)*).) Defendants suggest **[**69]** that Plaintiffs cannot make this threshold showing, citing a report and accompanying graph reflecting the opinion of their economic expert, Dr. Daniel Rubinfeld, that the RN wages paid by the Defendant hospitals "were not similar and did not change in a parallel way." (Defendants' Motion, Br. in Support at 22-23.) As discussed below, however, while parallel conduct can serve as one form of circumstantial evidence of a § 1 conspiracy to fix prices or wages — and while the absence of parallel conduct might serve to undercut an inference of conspiracy that might otherwise arise from the evidentiary record — the Court does not read the pertinent case law as mandating this particular form of proof in order to sustain a § 1 conspiracy claim.

There is no question that many (perhaps most) § 1 price-fixing claims rest in part upon allegations of parallel conduct. *See, e.g., Wallace, 55 F.3d at 1168* (plaintiffs attempted to establish § 1 claim by contending that the defendant banks "all charge essentially the same fee for NSF checks"); *In re Flat Glass Antitrust Litigation, 385 F.3d 350, 354-55 (3d Cir. 2004)* (plaintiffs alleged that "[s]everal times during the class period, [the defendant] flat **[**70]** glass producers raised their 'list prices' for flat glass by the same amount and within very close time frames"); *In re Baby Food Antitrust Litigation, 166 F.3d 112, 122 (3d Cir. 1999)* ("In an effort to reinforce their claim of collusive pricing, plaintiffs presented the testimony of an expert for the purpose of showing a pattern of parallel price increases in each of the five baby food product categories throughout the certified time period."); *In re Beef Industry, 907 F.2d at 512* (plaintiff cattlemen alleged that the defendant meat packers "violated § 1 of the Sherman Act by using an information exchange . . . and consciously parallel pricing to depress live cattle prices"). This stands to reason because, in the absence of direct evidence of an agreement to fix prices, the most likely way that such an arrangement would manifest itself to outsiders — and potential plaintiffs — would be through parallel action that gives rise to a suspicion of unlawful coordination in restraint of trade. *See In re Travel Agent Commission Antitrust Litigation, 583 F.3d 896, 903 (6th Cir. 2009)* (observing that "[a]llegations of concerted action by competitors are frequently based on a pattern of uniform **[**71]** business conduct").

Nonetheless, this Court is aware of no case law — nor have Defendants identified any — that mandates that a plaintiff's portfolio of circumstantial evidence in a § 1 case ***must*** include proof of parallel conduct. To the contrary, in *Re/Max International, Inc. v. Realty One, Inc., 173 F.3d 995, 1009 (6th Cir. 1999)*, the Sixth Circuit cited ***HN9***[] the defendants' "uniform[ity] in their actions" as merely one of several "[i]mportant factors" a court should evaluate in determining whether a plaintiff's circumstantial evidence of antitrust conspiracy is sufficient to withstand summary judgment. Similarly, Plaintiffs point to the decision in *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 163-65 (3d Cir. 2003)*, in which **[*627]** the court first addressed the plaintiff's attempt to establish a conspiracy "on the [b]asis of [c]ircumstantial [e]vidence," and then, upon finding that this effort failed to produce evidence that would support a "reasonable inference[] of concerted action," proceeded to ask as a separate matter whether the plaintiff had shown that the defendants "engaged in activity that approximates conscious parallelism." [29]

Indeed, in another RN wage-fixing case presently pending in the Northern **[**73]** District of New York, the court expressly rejected the very same argument advanced by Defendants here, holding that the ***HN10***[] plaintiffs in that case "need not prove parallel pricing in order to prevail on [a] per-se claim based on circumstantial evidence." *Fleischman v. Albany Medical Center, 728 F. Supp.2d 130, 158 (N.D.N.Y. 2010)*. As succinctly stated by the court in that case, "[p]arallel pricing is merely one such form of circumstantial evidence" upon which a plaintiff may permissibly rely to establish concerted action in violation of § 1. *Fleischman, 728 F. Supp.2d at 158* (internal quotation marks and citation omitted).

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[29] Defendants' effort to explain away the *InterVest* **[**72]** decision is unpersuasive. In Defendants' view, while the court in that case used separate headings in its opinion entitled "Conspiracy on the Basis of Circumstantial Evidence" and "Conspiracy on the Basis of Consciously Parallel Behavior," *InterVest, 340 F.3d at 163, 165*, this does not necessarily mean that the court viewed these as "distinct ways" of proving a § 1 agreement. (Defendants' Reply Br. at 20.) Yet, at the very beginning of the second of these two sections of its opinion, the court expressly stated that "[w]ithout any evidence of communication between the [defendants] or other reasonable inferences of concerted action," the plaintiff was obligated to proceed through a showing of conscious parallelism. *InterVest, 340 F.3d at 165*. The import of this language seems fairly clear — namely, that a showing of conscious parallelism is only one of the available avenues of proving a § 1 conspiracy by circumstantial means. Here, of course, there is substantial evidence of communications among the Defendant hospitals, which *InterVest* identifies as an alternative method for raising an inference of concerted action.

The cases cited by Defendants are not to the contrary. In the decision upon which they principally rely for their posited rigid requirement of parallel conduct, *In re Beef Industry*, Defendants quote only the language that aids their cause — *i.e.*, that a plaintiff in a § 1 conspiracy case "must first demonstrate that the defendants' actions were parallel" — while notably omitting the language that immediately precedes it — namely, that this standard applies to plaintiffs who "rel[y] on ***circumstantial evidence of conscious parallelism*** to prove a § 1 claim." *In re Beef Industry, 907 F.2d at 514* **[**74]** (emphasis added). As Plaintiffs aptly note, this "unsurprising statement" by the court is "frankly little more than a tautology — if your theory of the case is based upon parallel conduct then you must show parallel conduct!" (Plaintiffs' Response Br. at 92.) Likewise, Defendants' selective quotation from the decision in *City of Moundridge v. Exxon Mobil Corp., 429 F. Supp.2d 117, 132 (D.D.C. 2006)*, notably truncates the court's complete statement that a showing of parallel conduct is "the first element necessary in showing a conspiracy ***with conscious parallelism.***" (Emphasis added.)

In short, ***HN11***[] while evidence of parallel conduct provides one means by which a plaintiff in a § 1 case may make a circumstantial showing of concerted activity, the case law establishes no hierarchy of the sorts of circumstantial evidence a plaintiff must produce to withstand summary judgment. Rather, circumstantial evidence of any sort will do, provided that it demonstrates "business behavior which evidences a unity of purpose or a common design and understanding, **[*628]** or a meeting of the minds in an unlawful arrangement." *Wallace, 55 F.3d at 1168* (internal quotation marks and citations omitted). Accordingly, the **[**75]** Court rejects Defendants' contention that Plaintiffs' *per se* claim fails for lack of evidence of parallel conduct. [30]

3. Plaintiffs' Evidence in Support of Their *Per Se* Claim Fails to Give Rise to an Inference of Conspiracy Stronger Than the Inference of Independent Action.

Having disposed of Defendants' threshold challenge based on the absence of evidence of parallel conduct, the Court now returns to the more general evidentiary standards by which Plaintiffs' *per se* claim of conspiracy must be judged. As noted earlier, ***HN12***[] the analysis of this claim is governed by the overarching requirement that Plaintiffs' evidence must "reasonably tend[] to prove that [Defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective," and must further "tend[] to exclude the possibility that [Defendants] were acting independently." *Monsanto, 465 U.S. at 764, 104 S. Ct. at 1471*.

As discussed at length below, the Court believes that the record evidence and the inferences that may fairly be drawn from this record give rise to a **[**76]** very close question on Plaintiffs' *per se* claim, and that fair-minded jurists could reasonably disagree as to the resolution of this question. Certainly, Plaintiffs have produced a great deal of evidence which, if fully credited and granted generous inferences, could circumstantially support a finding of concerted, albeit sophisticated, interactions among the Defendant hospitals for the purpose of suppressing RN wages, at least over time. However, after thorough review and careful consideration of this substantial body of evidence — and given the fairly stringent and somewhat elevated standard Plaintiffs must meet to establish their *per se* claim of conspiracy to fix wages — the Court finds that the inference of independent action arising from the record is at least as strong as the inference of a conspiracy to depress RN wages. It follows that an award of summary judgment to Defendants is warranted on Plaintiffs' *per se* § 1 claim.

At the outset of this inquiry, the Court acknowledges Plaintiffs' well-taken point that ***HN13***[] they need not produce evidence of a formal agreement among the Defendant hospitals in order to prove that these health care institutions engaged in a conspiracy in violation **[**77]** of § 1. *See United States v. General Motors Corp., 384 U.S. 127, 142-43, 86 S. Ct. 1321, 1329, 16 L. Ed. 2d 415 (1966)*. As one appellate court has observed, the courts are not "so naive as to believe that a formal signed-and-sealed contract or written resolution would conceivably be adopted at a meeting of price-fixing conspirators in this day and age;" to the contrary, "the typical price-fixing agreement is usually accomplished" in a manner that "can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged." *Esco Corp. v. United States,*

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[30] In light of this conclusion, the Court need not address Plaintiffs' contention that they have, in fact, presented evidence of parallel conduct.

340 F.2d 1000, 1006-07 (9th Cir. 1965). Moreover, this antitrust suit, in its present summary judgment posture, is subject to the usual rule that Plaintiffs, as the non-moving parties, must be given "the benefit of all reasonable inferences" that may be drawn from the evidence, Smith Wholesale, 477 F.3d at 861, and "the question of what weight should be assigned to competing permissible inferences remains within **[*629]** the province of the fact-finder at trial," Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987).

HN14[] The Sixth Circuit has identified four factors that a court should consider **[**78]** in evaluating the circumstantial evidence offered in support of a § 1 conspiracy claim:

> (1) whether the defendants' actions, if taken independently, would be contrary to their economic self-interest; (2) whether the defendants have been uniform in their actions; (3) whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether the defendants have a common motive to conspire.

Re/Max International, 173 F.3d at 1009. Accordingly, the Court addresses each of these factors in turn, as well as other considerations identified by the parties, and then returns to the overarching inquiry whether the entire body of circumstantial evidence produced by Plaintiffs, considered as a whole, "tend[s] to exclude the possibility of independent conduct." Re/Max International, 173 F.3d at 1009.

T**(a) Evidence of Actions Taken by the Defendant Hospitals That Are Inconsistent with Their Independent Interests**

As the first category of circumstantial evidence offered in support of their *per se* § 1 claim, Plaintiffs contend that they have identified myriad instances and ways in which the Defendant hospitals have acted inconsistently with **[**79]** their independent pursuit of their respective self-interests. Upon reviewing the evidence offered by Plaintiffs in support of this proposition, the Court agrees that most (but not all) of it tends to give rise to an inference of conspiracy that has greater force than the opposing inference of independent action.

First and foremost, Plaintiffs naturally point to the substantial body of evidence revealing the Defendant hospitals' regular requests for and exchange of competitively sensitive information regarding the wages paid to their RN workforces, projected wage increases, and the pay philosophies underlying their RN wage determinations. As set forth above in the Court's recitation of the voluminous record, Plaintiffs have produced evidence of Defendants' repeated exchanges — through both direct contacts and third-party surveys — of (i) detailed, current information as to the wages paid to their RN workforces, (*see, e.g.*, Plaintiffs' Response, Exs. 46E, 46G, 157) ; (ii) their planned future pay increases, (*see, e.g.*, Plaintiffs' Response, Exs. 71, 120, 121), and (iii) their overall philosophies and targets in setting RN wages, (*see, e.g.*, Plaintiffs' Response, Ex. 74). A fair number **[**80]** of these exchanges violated one or more of the criteria set forth in the DOJ/FTC Guidelines, including the recommendations (i) that wage surveys should be managed by a third party, (ii) that survey participants provide information that is more than three months old, and (iii) that the survey data be reported in a "sufficiently aggregated" form "such that it would not allow recipients to identify the . . . compensation paid by any particular provider." DOJ/FTC Guidelines, Statement 6(A) at 63.

As Defendants correctly observe, ***HN15***[] the "exchange of price data" — or, here, wage data — "among competitors does not invariably have anticompetitive effects," but may to the contrary "increase economic efficiency and render markets more, rather than less, competitive." United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16, 98 S. Ct. 2864, 2875 n.16, 57 L. Ed. 2d 854 (1978); *see also* Wallace, 55 F.3d at 1169; In re Baby Food, 166 F.3d at 126. In Wallace, 55 F.3d at 1169 & n.5, for example, the court recognized that the **[*630]** defendant banks "naturally are interested in surveying the market to determine what other banks are charging in order to make strategic competitive decisions," and that the banks' publication **[**81]** of their fees also served "to advise customers of the charges they must pay." In addition, the DOJ/FTC Guidelines expressly emphasize that the "safety zones" described therein are not to be taken "as defining the limits of joint conduct that is permissible under the antitrust laws." DOJ/FTC Guidelines at 6.

Nonetheless, the brute fact remains that any pro-competitive objectives identified by the Defendant hospitals — and, as Plaintiffs observe, Defendants are long on generalities but short on specifics in this regard — could just as well have been achieved through exchanges that fell comfortably within the "safety zone" identified in the DOJ/FTC Guidelines. Plaintiffs state without contradiction that they do not seek to condemn the use of surveys in general, and they point to reputable, nationally recognized firms that "report the results of properly aged and highly aggregated data gathered from enormous numbers of participants." (Plaintiffs' Response Br. at 28 & n.28 (citing an example of a Watson Wyatt survey that "had hundreds of participants").) Yet, rather than relying on such third-party surveys that fully comported with the DOJ/FTC Guidelines, the Defendant hospitals time and **[**82]** again sought and obtained RN wage-related information through direct contacts and surveys that fell short of the DOJ/FTC "safety zone" criteria. Defendants are notably silent as to how it was necessary to their independent competitive interests to proceed in this fashion, rather than confining their exchanges to the "safety zone."

To the contrary, the manner in which the Defendant hospitals actually exchanged wage information, at least on many occasions, certainly appears to have been inconsistent with not only the DOJ/FTC Guidelines, but also each participating hospital's independent self-interest. There is no dispute that these hospitals compete with each other in the market for RNs. (*See* Defendants' Motion, Br. in Support at 12 (acknowledging that "Defendants compete for nurses with each other . . . .").) [31] Against this backdrop, while it is understandable that each Defendant hospital would like to know what its competitors are paying their RNs, it is far less clear why a hospital would respond to a competitor's request for this information regarding its own RN wages and pay practices. As the Supreme Court observed in the analogous context of information-sharing among sellers, ***HN16***[] "if **[**83]** one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and diffused." *United States Gypsum, 438 U.S. at 456, 98 S. Ct. at 2883*; *see also* *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 450 (9th Cir. 1990)* (noting that the disclosure of "sensitive price information might be considered contrary to a firm's self-interest," and thus could support a jury's finding of a "common understanding" among the companies sharing this information). Likewise, in **[*631]** this case, if one of the Defendant hospitals sought to recruit a competitor's RNs by raising its own wages, [32] it would surely run counter to this purpose to notify the competitor about the increased wage rate. Yet, there is nary an example in the record of a Defendant hospital refusing a request for wage-related information on the ground that it was unwilling to disclose this competitively sensitive data.

Still less clear is what pro-competitive **[**85]** justification exists for exchanging information regarding projected ***future*** wage increases, as the Defendant hospitals occasionally did in this case. The court in *In re Flat Glass, 385 F.3d at 369*, viewed an analogous disclosure of a planned future price increase as "qualitatively different" from the type of information exchange it had deemed insufficient to establish a conspiracy in an earlier case, *In re Baby Food.* Similarly, the Second Circuit opined in *Todd, 275 F.3d at 211*, that "exchanges of future price information are considered especially anticompetitive." *See also* DOJ/FTC Guidelines, Statement 6(B) at 64 ("Exchanges of . . . future compensation of employees are very likely to be considered anticompetitive."). Along the same lines, the Court is at a loss to identify — and Defendants do not suggest — a pro-competitive justification for the Defendant hospitals' willingness to disclose to each other information regarding their overarching pay philosophies and target

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[31] The parties do dispute, however, whether there is a shortage of hospital nurses in the Detroit area. (*Compare* **[**84]** Plaintiffs' Response Br. at 63-65 (citing evidence in support of the proposition that "during the class period, there was a shortage of bedside nurses in Detroit") *with* Defendants' Reply Br. at 25 (asserting that Plaintiffs' claim of a nurse shortage rests solely upon the "discredited utilization analysis" of its expert).) The Court finds it unnecessary to weigh in on this subject, in light of its disposition of Plaintiffs' *per se* § 1 claim on grounds independent from this question.

[32] As Plaintiffs observe, this scenario appears to be more hypothetical than real. In particular, the record fails to disclose any instance in which a Defendant hospital used wage data gathered from its competitors as part of an explicit attempt to "outbid" other hospitals for RNs. Such conduct, of course, would lend considerable support to the claim that Defendants' information exchanges served a pro-competitive purpose. By the same token, the absence of such conduct tends to suggest that the Defendant hospitals were acting inconsistently with their own interests by failing to exploit an advantage provided through their knowledge of their competitors' rates of RN compensation.

rates of RN pay within the local market, as occurred in at least one instance. (*See* Plaintiffs' Response, Ex. 74 (December 2004 nursing pay policy survey sponsored by Henry Ford and conducted by Linda Budd).) [33]

Certainly, it is telling that when Plaintiffs and their counsel invited various employees of the Defendant hospitals to suggest a pro-competitive justification for their exchange of information with their counterparts at other Detroit-area hospitals, none was able to do so. For example, Defendant Beaumont's director of compensation, David Misner, testified that he had "no idea why we would want to share" RN wage-related information with other hospitals. (Plaintiffs' Response, Ex. LL, Misner Dep. at 221.) Other employees testified that in their past experience working in other industries or parts of the country, they did not directly contact their competitors for wage information. (*See* Plaintiffs' Response, Ex. DD, Kontos Dep. at 27-28 (stating that he did not contact competitors when employed in the automotive industry "[b]ecause of the antitrust laws"); Ex. QQ, Perez Dep. at 16-17).) Still another employee testified that her employer, Defendant Trinity, shared its wage data in third-party surveys "in **[**87]** order to receive the results of the survey." (Plaintiffs' Response, Ex. D, Barcome Dep. at 81.) As Plaintiffs observe, this sort of *quid pro quo* understanding supports an inference of concerted action rather than independent conduct.

Moreover, even to the extent that the Defendant hospitals utilized third-party **[*632]** surveys rather than direct contacts to obtain market wage data — thereby employing a practice that was at least potentially more compliant with the DOJ/FTC Guidelines and less suggestive of collusive action — Plaintiffs properly point to the "pretextual" nature of at least some of these surveys. In particular, several such surveys were conducted by Linda Budd, a former human resources employee at Henry Ford, who carried out the surveys and reported the results in a manner that Defendants could not have believed consistent with the truly independent third-party surveys contemplated by the Guidelines. As noted earlier, Ms. Budd occasionally permitted sponsoring hospitals to design their own surveys, decide which institutions to survey, and determine how the results should be presented. In addition, she initially reported her survey results with the participating hospitals identified **[**88]** by name, and even when she switched to letter codes, she continued to provide disaggregated results to the sponsoring institution (and sometimes to participating hospitals as well), and her letter codes occasionally were easily deciphered (or she herself disclosed the key). Under this record, just as there seemingly was no pro-competitive justification for the Defendant hospitals to disclose their wage data directly to their competitors, it is difficult to see why these hospitals thought it was in their independent self-interest to disclose this data to Ms. Budd, where competitors could so readily determine its source.

Defendants' various efforts to downplay the significance of this substantial body of evidence of competitively suspect information exchanges are unavailing. First, although Defendants note that most of the direct hospital-to-hospital contacts involved lower-level employees, they do not seriously contend that these employees were acting on their own or against the wishes of their superiors. [34] To the contrary, the higher-level decisionmakers at each of the Defendant hospitals have acknowledged that they considered market wage data in making RN wage determinations, and **[**89]** the record shows that at least some of this data was acquired through direct contacts, particularly in the early portion of the class period. Similarly, to the extent Defendants contend that such contacts were only "sporadic," Plaintiffs have managed to compile quite a record of these "sporadic" contacts. In any event, many of these contacts merely filled the gaps between "numerous third party surveys," which occurred so frequently that they "in effect, constantly provided [the Defendant hospitals] with current information concerning each others['] pay rates." (Plaintiffs' Response Br. at 34-35 (recounting the number and frequency of surveys undertaken during the class period).)

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[33] Plaintiffs **[**86]** observe that during the class period, none of the Defendant hospitals has deviated from the market percentile targets disclosed in this survey.

[34] As Plaintiffs observe, given the time and effort involved in responding to some of the more detailed surveys, (*see* Plaintiffs' Response Br. at 12-13 n.16 (citing evidence of the time spent by employees of the Defendant hospitals to complete surveys), it is highly doubtful that a lower-level employee would have undertaken this task unless directed to do so, and it is also doubtful that a hospital's senior management would look the other way or remain ignorant as its compensation staff engaged in this task.

Defendants' **[**90]** remaining quibbles with Plaintiffs' characterization of their information exchanges warrant little discussion. While Defendants point to their occasional use of masked and/or aggregated survey results, there is ample evidence of survey results reported to the Defendant hospitals in unmasked and/or disaggregated form. Likewise, although one or more of the Defendant hospitals at times commissioned surveys conducted by truly independent third parties — *e.g.*, Defendant Beaumont's use of Sullivan Cotter after October of **[*633]** 2003 — this does not require that the Court (or the trier of fact) disregard the significant evidence of direct contacts or the use of "third parties" in name only, such as Ms. Budd. Finally, while Defendants fault Plaintiffs for their occasional citation to information exchanges that occurred prior to the class period, Plaintiffs correctly observe that ***HN17***[] these exchanges may form the basis for a recovery, so long as it can be shown that they affected wage determinations made during the class period. *See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 806, 28 L. Ed. 2d 77 (1971)*. In any event, the record plainly is not confined to information exchanges that **[**91]** occurred prior to the commencement of the class period in December of 2002.

In sum, the record of information sharing in this case provides considerable evidence of conduct by the Defendant hospitals that was inconsistent with the independent pursuit of their own interests. Both the nature and extent of these information exchanges and the manner in which they were undertaken serve to distinguish this case from the decisions cited by Defendants, in which the courts found that exchanges of information were at least as consistent with the defendants' individual interests as with a shared design or purpose. In *Wallace, 55 F.3d at 1169*, for example, the Sixth Circuit held that the defendant banks' publication of their NSF fees served "a legitimate interest in providing customers relevant information regarding the fees associated with their checking accounts," and nothing in that case suggests that the banks surveyed the fees charged by their competitors through methods that would have fallen outside the DOJ/FTC "safety zone" — or, for that matter, that they gathered anything beyond publicly available information.

The other case principally relied upon by Defendants, *In re Baby Food*, is also **[**92]** distinguishable. The court in that case found that much of the information sharing evidence produced by the plaintiffs amounted to nothing more than "sporadic exchanges of shop talk among field sales representatives who lack pricing authority." *In re Baby Food, 166 F.3d at 125*. Although Defendants here make a similar effort to downplay purportedly "sporadic" exchanges of wage-related information among "low-level" employees, the Court already has explained that the record of Defendants' sharing of this information was hardly "sporadic," but instead consisted of fairly regular surveys augmented by direct contacts. In addition, it is important to note that the "low-level" employees here generally worked in the Defendant hospitals' compensation departments, and were expressly charged with the tasks of gathering competitive compensation information and recommending wage increases. While these employees may have lacked ultimate wage-setting authority, the evidence shows that they were participants in the process leading up to the decisions made by those who possessed this authority, and that at least some of the data they gathered played a role in this process. Thus, it cannot be so readily **[**93]** said here, as in *In re Baby Food, 166 F.3d at 125*, that there is no "evidence that the exchange of information had an impact on pricing decisions." [35]

Next, while Plaintiffs' claims of conduct inconsistent with the Defendant hospitals' independent interests rest principally upon Defendants' willingness to share wage-related **[*634]** information, Plaintiffs further contend that Defendants acted contrary to their self-interests by purportedly agreeing to refrain from "active recruitment [of RNs] from other defendant hospitals, even when it [wa]s known that certain hospitals [we]re paying their nurses low wages." (Plaintiffs' Response Br. at 80.) Yet, the one isolated example of this conduct cited by Plaintiffs does not support an inference of conspiracy rather than independent conduct. Specifically, Plaintiffs point to an occasion in 2003 when Oakwood and St. John agreed, following complaints from DMC, to abandon recruitment efforts directly targeted at DMC nurses. At the time, DMC **[**94]** was experiencing a severe financial crisis, and it contemplated closing two of its facilities, Detroit Receiving Hospital and Hutzel Women's Hospital, which resulted in "a number of nurses leaving or considering leaving" DMC's employ. (DMC's Motion, Ex. 2, Natale Decl. at ¶ ¶16, 18.) The evidence produced by Plaintiffs indicates that St. John and Oakwood initially viewed these developments as an

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[35] The Court returns below to a more detailed assessment of the evidence produced by Plaintiffs that purports to establish the impact of the Defendant hospitals' information exchanges on their wage-setting decisions.

opportunity to recruit DMC nurses, but that they backed off these efforts following complaints from DMC officials. (*See* Plaintiffs' Response, Ex. 34.)

The Court does not view this isolated incident as evidencing any sort of broader agreement among the Defendant hospitals not to recruit each others' RNs. As revealed in one of the documents produced by Plaintiffs regarding this episode, two high-level St. John officials — the hospital's corporate director of workforce planning, Jim Flanegin, and its senior vice president of human resources, Dan Zuhlke — discussed DMC's complaints about St. John's recruiting effort and "came to the conclusion that at this time it is better for all of us in the long run that we support the DMC rather than attack them." (Plaintiffs' Response, Ex. 34A.) The undisputed **[**95]** record shows that DMC operates several "safety-net" hospitals in the City of Detroit, and that it provides "the majority of care to the indigent, uninsured, and underinsured citizens of Detroit," totaling "approximately $250 million of uncompensated care annually." (Defendants' Motion, Ex. K.1, Duggan Decl. at ¶¶ 5, 8.)

Under these circumstances, Plaintiffs' claim of conduct against a hospital's self-interest cannot be evaluated solely by reference to the willingness of a competitor to "raid" DMC's RN workforce. Rather, the record indicates that other factors played a role in Oakwood's and St. John's decisions to "stand down" from recruiting DMC nurses. The evidence suggests, in particular, that it would be consistent with the other Defendant hospitals' self-interests to ensure that DMC's safety-net facilities remained available to serve indigent and uninsured patients who would otherwise seek uncompensated care at their facilities. Indeed, it is clear from the evidence produced by Plaintiffs that the other Defendant hospitals did not altogether abandon their efforts to recruit DMC nurses, but instead continued to employ "other [recruitment] resources" in lieu of direct, targeted appeals **[**96]** to DMC's RN workforce. (*See* Plaintiffs' Response, Ex. 34B, 34D.) This incident, then, does not serve as an additional example of the Defendant hospitals acting contrary to their own self-interests.

(b) Evidence of Uniformity in Defendants' Actions

The next factor to consider in the Court's evaluation of Plaintiffs' circumstantial evidence of conspiracy is "whether the defendants have been uniform in their actions." *Re/Max International, 173 F.3d at 1009*. In one respect, it can readily be said that the Defendant hospitals were uniform in their actions — namely, in their willingness to provide competitively sensitive **[*635]** compensation-related information to other Detroit-area hospitals, whether through direct contacts or third-party surveys.

Yet, beyond this broad level of generality, the evidence of uniform conduct is far more mixed. As observed by Defendants — and as noted in the report of their expert, Daniel Rubinfeld — there was not "uniform circulation, participation in, or receipt of surveys" by the Defendant hospitals, and Defendants "used surveys in different ways and to different degrees in their compensation setting." (Defendants' Motion, Ex. G, Rubinfeld Report at ¶ 16.) As examples **[**97]** of these disparate practices, Defendants point out that Trinity did not commission any surveys during the class period, and that DMC commissioned only one during this time frame, while St. John asked Linda Budd to conduct annual surveys and Beaumont used semi-annual surveys conducted by Sullivan Cotter. [36] Given the expense of these surveys, (*see* Plaintiffs' Response Br. at 12 n.15 (citing evidence that the surveys cost "anywhere from a few hundred dollars to well over $1000 per survey")), it surely would have behooved Defendants to pool their resources in furtherance of any purported scheme to depress RN wages, yet they did not do so. In addition, Defendants differed in their use of direct contacts to obtain wage-related information from other Detroit-area hospitals — as observed earlier, Henry Ford largely ceased this practice in 2003, while Beaumont continued to permit such direct contacts as warranted by the particular circumstances (*e.g.*, when seeking information for only a single job).

Next, Defendants point out that **[**98]** Plaintiffs have not shown "that any two hospitals utilized the same set of surveys and information about the market to set their RN compensation." (Defendants' Motion, Br. in Support at 15.)

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[36] In addition, Mount Clemens operated on an altogether different schedule, seeking survey data in advance of its union negotiations approximately every three years.

For example, in the instances noted by Plaintiffs where Beaumont cited market data to reduce the magnitude of wage increases — or, on one occasion, to determine that a previously anticipated pay increase would not be given — the record indicates that Beaumont relied exclusively on the surveys it had sponsored or conducted. (*See* Plaintiffs' Response, Exs. 99, 104.) More generally, the record is bereft of evidence of any common pool of market data being used by two or more Defendant hospitals in making their RN compensation decisions. To be sure, and as this Court has previously recognized, "minor variances in the particular means . . . chosen" by each Defendant hospital to set its RN wages do not defeat an inference of conspiracy, because ***HN18***[] "an agreement need not dictate every conceivable aspect of each conspirator's behavior in order to violate § 1." *In re Northwest Airlines, 208 F.R.D at 199*. Yet, the inference of conspiracy Plaintiffs seek to draw here is certainly weakened by the evidence that **[**99]** each Defendant hospital gathered and used its own unique set of market information as it carried out its separate wage analysis and determined its own rates of RN compensation.

Finally, and most significantly, the record reflects a decided lack of uniformity in the end results of each Defendant hospital's wage-setting process. Defendants' expert, Dr. Rubinfeld, has concluded upon his analysis of the underlying wage data that "there are substantial differences in the rate of change, levels, and forms of compensation among the Defendant hospitals." (Defendants' Motion, Ex. G, Rubinfeld Report at ¶ 17.) To emphasize this point, Defendants cite two graphs prepared **[*636]** by Dr. Rubinfeld illustrating the different annual rates of change in the wages paid by the Defendant hospitals to their RN workforces. (*See* Defendants' Motion, Br. in Support at 23, 24.) The first of these graphs shows that in 2005-06, for example, the annual change in mean total hourly RN wages ranged from 1.2 percent (for Mount Clemens) to 10.0 percent (for Trinity's St. Joseph-Macomb Hospital). (*See* Rubinfeld Report, App. G at 5.) [37] The second graph, which maps the annual change in mean base wages for RNs, shows that in 2005-06, **[**100]** for example, the annual increases ranged from 2.05 percent (for Mount Clemens) to 10.23 percent (for Trinity's St. Mary-Livonia Hospital). (*See id.*, App. G at 39.) [38] In general, it is difficult to look at these graphs (or the underlying data from which they are derived) and discern a strong pattern or clear-cut uniformity in the wage-setting decisions made by the Defendant hospitals during the class period.

To be sure, Plaintiffs seek to refute this apparent evidence of disparate wage-setting decisions by pointing to a graph prepared by their expert, Orley Ashenfelter, that Plaintiffs view as "demonstrat[ing] parallel compensation behavior among the Defendants." (Plaintiffs' Response **[**101]** Br. at 93 (citing Defendants' Motion, Ex. C, Ashenfelter Report, Fig. 1).) In particular, this graph purports to show that the mean wage rates paid by the Defendant hospitals during the class period followed roughly similar trajectories. Yet, the underlying data reflected in this graph is the very same data relied upon by Defendants' expert, Dr. Rubinfeld, in the graphs reproduced in Defendants' brief. Dr. Rubinfeld's more specific year-by-year, hospital-by-hospital analysis of the underlying data reveals the key point obscured in Dr. Ashenfelter's much more general presentation of this data — namely, that while there might have been an overall, fairly modest upward trend in the wage rates paid by each of the Defendant hospitals during the class period, this overall trend was formed through individual, periodic wage determinations that varied significantly from one hospital to another (and from one year to the next within the same hospital system). Under analogous circumstances, the court in *In re Baby Food, 166 F.3d at 129*, discounted an expert's use of "trend lines" as "revealing nothing more than that the transaction prices tended to increase over time." Accordingly, the Court finds **[**102]** that the evidence of the Defendant hospitals' uniformity of action — or lack thereof — tends to favor an inference of independent rather than coordinated conduct.

(c) Evidence of Defendants' Exchange of Information Relative to Their Alleged Conspiracy

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[37] If one compares the underlying total hourly wage rates paid by the Defendant hospitals, rather than the annual rates of change, the rates for 2006 range from $30.64 (for one of the Henry Ford hospitals) to $38.66 (for one of the Oakwood facilities). (*See id.*, App. G at 16.)

[38] Again, looking at the underlying mean base wages paid by the Defendant hospitals, the hourly rates for 2006 range from $27.80 (at one of the Henry Ford facilities) to $35.00 (at one of the Oakwood locations). (*See id.*, App. G at 48.)

The next factor identified by the court in *Re/Max International, 173 F.3d at 1009*, as relevant to the evaluation of circumstantial evidence of a § 1 conspiracy is "whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy." As already discussed, there is ample evidence in this case of the exchange of compensation-related information that would have enabled the Defendant hospitals to monitor each others' wage determinations **[*637]** and thereby sustain the wage-fixing conspiracy alleged by Plaintiffs.

To be sure, Defendants correctly observe that ***HN19***[] "[t]he exchange of [wage] data and other information among competitors does not invariably have anticompetitive effects," but rather may "in certain circumstances increase economic efficiency and render markets more, rather than less, competitive," *United States Gypsum, 438 U.S. at 441 n.16, 98 S. Ct. at 2875 n.16*; *see also* *Continental Cablevision of Ohio, Inc. v. American Electric Power Co., 715 F.2d 1115, 1119 (6th Cir. 1983)* **[**103]** (***HN20***[] "[I]n the absence of a purpose or effect to restrain competition, or some other evidence of an actual agreement to restrain competition, we hold that the exchange of price data does not offend § 1 of the Sherman Act."). Yet, as previously noted, at least some of the information exchanges that occurred here trigger heightened concerns of anticompetitive impact. In particular, some of these exchanges involved disaggregated or unmasked (or both) competitor wage data, some occurred through direct contacts between competitors, and some involved current wage information or, in some cases, even future projected wage increases. Moreover, Defendants have failed to suggest why information exchanges that lacked these troublesome features, and that instead remained within the "safety zone" articulated in the DOJ/FTC Guidelines, would not have sufficed to achieve the business objectives they have identified as driving their compensation decisions. Under these circumstances, this factor tends to support the inference that the Defendant hospitals were engaged in an unlawful conspiracy, as opposed to pursuing their own independent interests.

(d) Evidence of Defendants' Common Motive to Conspire

The **[**104]** fourth and final factor identified by the Sixth Circuit in *Re/Max International, 173 F.3d at 1009*, is "whether the defendants have a common motive to conspire." As a general matter, such a common motive is clear in this case, where Plaintiffs state without contradiction that RN wages are the largest single item in the Defendant hospitals' budgets. More generally, Defendants acknowledge that "[a]ll companies have an incentive to lower input prices." (Defendants' Reply Br. at 32.) Yet, as Defendants point out, the evidence of common motive here is not especially compelling, given that "[p]rofit is always a motivating factor in the conduct of a business." *In re Baby Food, 166 F.3d at 134*. Thus, while this factor perhaps tilts slightly in favor of Plaintiffs' claim of conspiracy, it cannot be said that it has a particularly strong "tend[ency] to exclude the possibility of independent conduct." *Re/Max International, 173 F.3d at 1009*.

(e) Other Forms of Circumstantial Evidence Identified by the Courts as Indicative of an Unlawful Conspiracy

Beyond the four factors cited in *Re/Max International*, Plaintiffs address a number of other factors that the courts have considered in analyzing circumstantial **[**105]** evidence of a § 1 conspiracy. [39] First, Plaintiffs address the factor of plausibility, which can alter the evidentiary burden they must shoulder to give rise to a permissible inference of collusive action. As the Supreme Court has explained, ***HN21***[] "if the factual context renders [the plaintiffs'] claim implausible — if the claim is one that simply makes no economic sense — [the plaintiffs] must come forward with more **[*638]** persuasive evidence to support their claim than would otherwise be necessary." *Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356*; *see also* *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 661 (7th Cir. 2002)* ("More evidence is required the less plausible the charge of collusive conduct."). Here, however, where the motive to conspire is straightforward and fairly evident, and where Plaintiffs have alleged

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[39] As noted by Plaintiffs, **[**106]** the courts sometimes refer to these considerations as "plus factors" which, when considered along with evidence of parallel conduct, can give rise to an inference of conspiracy sufficient to withstand summary judgment. *See, e.g.,* *Wallace, 55 F.3d at 1168*.

a "garden-variety [wage]-fixing conspiracy" among a number of competitors who stand on relatively equal footing, Plaintiffs' *per se* claim "involves no implausibility," *In re High Fructose Corn Syrup, 295 F.3d at 661*, and they need not make the "more persuasive" showing that *Matsushita* demands when a claim "simply makes no economic sense."

Next, Plaintiffs point to certain structural characteristics of the relevant market which, in their view, would make a wage-fixing conspiracy feasible, including the high "switching costs" associated with a nurse changing jobs, the low elasticity of the supply of RNs, and the frequent sharing of wage information that would enable a quick response to any "cheating" by a co-conspirator. Defendants, in contrast, question the factual basis for the claims of Plaintiffs and their experts concerning high switching costs and low elasticity of supply. More importantly, Defendants contend that the characteristics of the relevant market tend to undercut rather than support an inference of conspiracy, where this market is not highly concentrated, the RN workforce is heterogenous, and the Defendant hospitals likewise are heterogenous purchasers of nursing services, with each hospital having different needs for these services that varied over time. **[**107]** Defendants further cite their different pay structures, their distinct timetables for wage decisions, and the disparate components of each Defendant hospital's RN compensation package as making it difficult to coordinate compensation decisions and depress the wages of RNs across-the-board, since information sharing and collusion as to one component of RN wages, such as the base wage rate, would not necessarily prevent effective competition as to other aspects of the overall nurse compensation package.

Plaintiffs next assert that the inference of conspiracy is strengthened by the evidence of opportunities to meet and collude, where the record discloses meetings attended by the chief executive officers of the four largest Defendant hospital systems —DMC, Henry Ford, St. John, and Oakwood ? and where other health care industry groups provided forums to meet and discuss compensation-related information and to identify contacts from whom to obtain this information. In response, however, Defendants note the absence of evidence that their chief executive officers actually discussed any issues concerning nurse pay at their face-to-face meetings — to the contrary, those who have testified have **[**108]** denied that any such discussions occurred. Similarly, there is no evidence that the discussions among lower-level employees at other health care industry meetings had any impact on any Defendant's subsequent wage determinations.

Finally, Plaintiffs argue that further support for an inference of conspiracy can be found in Defendants' apparently knowing transgressions of the "safety zone" criteria set forth in the DOJ/FTC Guidelines. As recounted earlier, the record discloses that during the course of the class period, nearly every Defendant hospital became aware, if it was not previously aware, that direct contacts to obtain a competitor's wage data did not comport with the Guidelines, and that some of the third-party surveys in which they participated also failed to comply with one or more of the Guidelines' "safety zone" criteria. This **[*639]** awareness, however, did not lead to full compliance; instead, employees in Defendants' compensation departments continued to exchange wage information, albeit perhaps on a more sporadic and *ad hoc* basis. As Plaintiffs observe, such willful disregard for the DOJ/FTC Guidelines lends at least some support to the inference that Defendants were engaged in **[**109]** a conspiracy to depress RN wages, since it evidences a willingness to engage in information-sharing activity that has been identified in the Guidelines as having potentially anticompetitive effects.

(f) Plaintiffs' Circumstantial Evidence Viewed in Its Totality

Having now addressed each of the several categories of circumstantial evidence offered by Plaintiffs in support of their *per se* § 1 claim, the Court now considers whether this body of evidence, viewed as a whole, meets the rather stringent standard governing § 1 claims. As noted, the Supreme Court has instructed that this evidence, viewed in a light most favorable to Plaintiffs, must "reasonably tend[] to prove that [Defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective," and must further "tend[] to exclude the possibility that [Defendants] were acting independently." *Monsanto, 465 U.S. at 764, 104 S. Ct. at 1471*. The record produced by Plaintiffs, in other words, must give rise to an inference of conspiracy that is stronger than the competing inference of independent action. *Riverview Investments, 899 F.2d at 483*.

As previously indicated, the record here makes this question indeed **[**110]** a close one, but the Court ultimately concludes that Plaintiffs have not met this standard. Out of the four factors identified by the Sixth Circuit as especially pertinent to this inquiry, *see* *Re/Max International, 173 F.3d at 1009*, the one that most strongly supports an inference of conspiracy is the evidence of actions taken by the Defendant hospitals that seemingly ran counter to their independent interests — most notably, their willingness to regularly share competitively sensitive wage data. On the other hand, the factor that most significantly undercuts this inference is the evidence of the lack of uniformity in the Defendant hospitals' wage-setting decisions. These two factors, in the Court's view, are largely determinative of the question whether Plaintiffs' *per se* § 1 claim can withstand summary judgment.

Upon juxtaposing the evidence concerning these two most critical factors, the Court cannot say that the inference of conspiracy is stronger than the inference of independent action. The record leaves no room for doubt that each Defendant hospital was highly interested in learning about the wage rates and pay practices of other Detroit-area hospitals as it went about the process **[**111]** of establishing its own RN compensation package. Indeed, it was necessary for Defendants to obtain information about the prevailing RN wage rates in the Detroit-area market, given each Defendant hospital's acknowledgment that it set a target rate of RN compensation by reference to this prevailing market rate — *e.g.*, Defendant Beaumont set a target at the 75th percentile of the highest rate paid in the market, while Defendant Henry Ford sought to pay its RNs at the 66th percentile of this market. All are agreed that Defendants would not run afoul of § 1 if they independently pursued these wage-setting objectives by resort to information obtained in accordance with the "safety zone" criteria set forth in the DOJ/FTC Guidelines. Yet, the record reveals numerous examples of wage-related information exchanges that failed to satisfy these criteria.

[*640] As discussed earlier, the Court readily agrees with Plaintiffs that these repeated exchanges of RN wage data outside the Guidelines' "safety zone" could permissibly be viewed by the trier of fact as running counter to the Defendant hospitals' independent interests. Nonetheless, under the totality of the record presented here, the Court finds that **[**112]** this evidence of conduct contrary to Defendants' self-interests gives rise to only a modest inference of conspiracy. The record discloses a number of explanations for Defendants' exchange of wage-related data outside the Guidelines' "safety zone," including: (i) the continued adherence to historical practice, such as Beaumont's quarterly survey of nurse compensation from 1989 until the fall of 2003; (ii) *quid pro quo* understandings that if a given request for information was honored, the recipient hospital was more likely to provide its own information if requested at a later date; (iii) expediency, with compensation personnel determining in particular cases that additional information would be desirable regarding a specific position or component of an overall compensation package in advance of an immediately forthcoming wage-setting decision; and (iv) individual *ad hoc* decisions to provide information, such as Linda Budd's provision of disaggregated survey data to her "alma mater," Henry Ford. What the record does ***not*** disclose, however, is any shared understanding or agreement that these exchanges of data were to be used to ensure uniformity among the Defendant hospitals in their **[**113]** RN wage-setting practices, rather than as part of each Defendant hospital's independent process of establishing its own RN compensation package.

To be sure, Plaintiffs point out that they need not produce "smoking gun" evidence of such a shared understanding or agreement, and that it is enough if the record gives rise to an inference that Defendants were operating under such a coordinated arrangement. Any such inference, however, must overcome the competing inference that arises from the evidence of the Defendant hospitals' actual use of the wage-related information they exchanged among themselves during the relevant period. As discussed earlier in the Court's survey of the evidence concerning uniformity (or non-uniformity) in Defendants' actions, this wage data was compiled and put to use in a series of discrete, individualized RN compensation decisions, with Defendants' decisionmaking processes varying in (i) their degree of sponsorship of and participation in surveys, (ii) their reliance on direct contacts to obtain wage-related information, and (iii) their selection of surveys and market information to consider in setting RN compensation. Moreover, the outcomes of these discrete **[**114]** decisionmaking processes do not reveal any discernible pattern of coordinated wage-setting, but instead reflect material differences in the rates at which each Defendant hospital's RN wages changed from year to year. In short, the record of each Defendant's RN wage-setting is sufficiently individualized and idiosyncratic to undermine any reasonable inference that the Defendant hospitals acted with a unity of purpose.

In this limited respect, then, the Court recognizes the force of Defendants' point that Plaintiffs' *per se* § 1 claim is seriously weakened, albeit not outright defeated, by the absence of evidence of parallel conduct. As discussed earlier, the Court does not read the relevant case law as mandating a showing of parallel conduct in order to sustain a § 1 conspiracy claim. Yet, under the record presented here, it surely is more difficult to arrive at a reasonable inference of collective wage-fixing if the Defendants hospitals did not, in fact, engage in parallel conduct or reach parallel results in their compensation decisions for **[*641]** their respective RN workforces. Although Defendants need not have marched in lock-step in their gathering and use of competitor wage data and in **[**115]** their setting of RN wages, the evidence here simply features too wide a disparity among the Defendant hospitals' processes for determining RN compensation and the outcomes of these processes to support a reasonable inference of a conspiracy in violation of § 1.

In the end, Plaintiffs' *per se* § 1 claim rests principally on an admittedly significant body of evidence of regular sharing of wage-related information that seemingly ran counter to the Defendant hospitals' independent self-interests, and arguably undermined their ability to compete against each other in their formulation of RN compensation packages. Under this record, it is fair to say that Defendants could have confined their information exchanges to the "safe harbor" of the DOJ/FTC Guidelines, and thereby achieved all of their legitimate, pro-competitive objectives without disclosing unmasked, competitively sensitive wage data to other local hospitals. Even accepting, however, that Defendants' information exchanges were sub-optimal from an economic and competitive standpoint, the courts have cautioned against "second-guessing" of business judgments, "even where the evidence concerning the rationality of the challenged activities **[**116]** might be subject to reasonable dispute." *In re Citric Acid Litigation, 191 F.3d 1090, 1101 (9th Cir. 1999)*. The record here fails to establish that Defendants traveled beyond the realm of independent (albeit economically questionable) business practices and into the impermissible territory of coordinated wage-fixing, such that the inference of conspiracy is stronger than the competing inference of independent action. It follows that Defendants are entitled to summary judgment in their favor on Plaintiffs' Count I claim of a *per se* § 1 violation.

C. Plaintiffs Have Produced Sufficient Evidence to Withstand Summary Judgment as to the Causal Element of Their "Rule of Reason" Claim.

The next challenge advanced in Defendants' joint summary judgment motion is directed at both of Plaintiffs' claims — *i.e.*, their Count I claim of a *per se* antitrust violation through an agreement to fix wages, and their Count II "rule of reason" claim that the Defendant hospitals conspired among themselves to exchange wage information in a manner that harmed competition by depressing RN wages. [40] Defendants point out — and Plaintiffs do not dispute — that ***HN22***[] under either of these theories, "Plaintiffs must prove **[**117]** *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick TCorp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*; *see also* *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341-45, 110 S. Ct. 1884, 1893-95, 109 L. Ed. 2d 333 (1990)* (confirming that a private plaintiff must make this same showing of antitrust injury — *i.e.*, that the plaintiff has been "adversely affected by an *anticompetitive* aspect of the defendant's conduct" — in order to recover damages under **[*642]** a *per se* theory). The Sixth Circuit has emphasized that this "causal link" between an antitrust violation and antitrust injury "must be proved as a matter of fact and with a fair degree of certainty." *Shreve Equipment, Inc. v. Clay Equipment Corp., 650 F.2d 101, 105 (6th Cir. 1981)*. Defendants maintain that Plaintiffs have failed as a matter of law to make this showing. Although the question again is a close one, here the Court disagrees.

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[40] In light of the Court's decision to grant summary judgment in Defendants' favor on Plaintiffs' *per se* claim, it is not necessary to address any additional challenges **[**118]** to this claim. Nonetheless, because Defendants' present challenge as to the element of causation applies equally to Plaintiffs' *per se* and "rule of reason" claims, and because (as will be seen) the analysis is precisely the same as to either of these theories of recovery, the discussion that follows need not be strictly confined to Plaintiffs' "rule of reason" claim.

It is clear, as a threshold matter, that Plaintiffs have not pursued one of the possible avenues for establishing a causal link between an antitrust violation and antitrust injury — *i.e.*, proof through expert testimony. One of Plaintiffs' experts, Dr. Ashenfelter, testified that he made no effort to draw any conclusions as to "whether a particular information exchange led to a suppression of wages or not," that he had not "actually used the [information] exchanges to study whether — what the effect of the exchange was on wages," and that he had not "made that connection." (Defendants' Motion, Ex. Z, Ashenfelder Dep. at 26.) Plaintiffs' other expert, Gregory Vistnes, similarly testified that he had not "attempted to make a direct causal link between the information exchange and the resulting conduct of the hospitals," that **[**119]** he "was not looking at whether or not there were actual effects from any of the communications," and that the "magnitude of the effect [of the information exchanges] and whether the effect left wages above or below what the competitive price or wage should have been, was not an issue that I was looking at." (Defendants' Motion, Ex. AA, Vistnes Dep. at 213, 240, 252.)

Next, it is equally clear that the requisite causal link cannot be inferred solely from the fact that Defendants exchanged wage data, even if — as the evidence indicates — a number of these exchanges fell outside the "safety zone" articulated in the DOJ/FTC Guidelines. As noted earlier, ***HN23***[] "[t]he exchange of [wage] data and other information among competitors does not invariably have anticompetitive effects." *United States Gypsum, 438 U.S. at 441 n.16, 98 S. Ct. at 2875 n.16*. The Guidelines themselves reiterate this point:

> Participation by competing providers in surveys of prices for health care services, or surveys of salaries, wages or benefits of personnel, does not necessarily raise antitrust concerns. In fact, such surveys can have significant benefits for health care consumers. Providers can use information derived from **[**120]** price and compensation surveys to price their services more competitively and to offer compensation that attracts highly qualified personnel.

DOJ/FTC Guidelines, Statement 6 at 61. Likewise, Plaintiffs' expert, Dr. Vistnes, testified that "as a general matter an information exchange in this type of a context could be pro[]competitive and lead to . . . either [an] increase or [a] reduction in wages," and he further recognized that "a fact-based investigation of any case could show that conditions falling outside those [DOJ/FTC] safety zones are unlikely to cause competitive harm." (Defendants' Motion, Ex. AA, Vistnes Dep. at 200; *see also* Ex. Z, Ashenfelter Dep. at 34-35 (agreeing that in the absence of collusion, information exchanges can be procompetitive).)

Nonetheless, Plaintiffs correctly note that they may forge the necessary link between Defendants' alleged antitrust violations and antitrust injury without expert testimony, and they contend that the record in this case is sufficient for the trier of fact to infer such a connection. As to the starting point of this causation analysis — the antitrust violations — Plaintiffs have, of course, alleged violations of two sorts: (i) a **[**121]** **[*643]** conspiracy to depress RN wages, and (ii) a conspiracy to exchange wage-related information in a manner that harmed competition by depressing RN wages. As is evident from the descriptions of these two alleged violations, these claims rest upon a common theory of antitrust injury — namely, that the wages paid by the Defendant hospitals to their RN workforces have been held below the competitive level that would prevail in the absence of Defendants' antitrust violations. [41] The question, then, is whether the evidentiary record would permit the trier of fact to infer a causal connection between the two sorts of antitrust violations alleged by Plaintiffs and the antitrust injury identified by their expert. As discussed below, while there are obstacles in the evidentiary paths by which Plaintiffs seek to traverse the gap between a claimed antitrust violation and antitrust injury, the Court nonetheless concludes that the record is sufficient to allow the trier of fact to hear Plaintiffs' evidence and decide the issue of causation.

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[41] This theory of antitrust injury, in turn, rests upon a "benchmark" analysis performed by Plaintiffs' expert, Dr. Ashenfelter, who has computed a true "competitive" **[**122]** wage for RNs by reference to the fees paid by the Defendant hospitals for agency nurses. As a separate basis for an award of summary judgment in their favor, Defendants challenge Dr. Ashenfelter's agency fee benchmark analysis on a number of grounds. The Court, however, views this subject as more amenable to resolution in the context of Defendants' separate motion to exclude the expert testimony of Dr. Ashenfelter, which raises the same arguments (among others). Accordingly, the Court declines to address Defendants' challenges to Dr. Ashenfelter's expert analysis in the present opinion, but instead will address these matters (as necessary) in a later ruling.

First, Plaintiffs contend that the record in this case discloses a practice among the Defendant hospitals of regular exchanges of wage data "on demand," exchanges of a nature and frequency that both the courts and Plaintiffs' expert, Dr. Vistnes, have deemed likely to result in depressed, sub-competitive wages. The Court already has recounted the substantial evidence of the Defendant hospitals' regular exchanges of unmasked and disaggregated compensation-related information, both through direct contacts and through third-party surveys **[**123]** that failed to comport with the DOJ/FTC Guidelines in one or more respects. What is more, Plaintiffs have produced evidence — also summarized earlier — that this wage data, while often gathered by lower-level employees, was routinely passed up to the hospitals' executive leadership for use in making wage determinations. Indeed, as Plaintiffs aptly observe, "[i]t could hardly be otherwise," where "[t]he hospitals would hardly have spent thousands of dollars a year to commission surveys and devote[d] extensive resources to completing these surveys if they never used them," and where "hospital executives would not have ordered employees to spend time contacting other hospitals to gather information that was not to be used." (Plaintiffs' Response Br. at 95 (citations omitted).) Thus, while Defendants take issue with Plaintiffs' characterization of the evidence as establishing a "policy of on-demand information exchanges," (*id.* at 99), the Court finds that the record would permit a trier of fact to reach this conclusion.

Against this evidentiary backdrop, Plaintiffs point to case law which, in their view, recognizes the reasonableness of an inference that such "on-demand" exchanges of wage **[**124]** information will result in depressed, sub-competitive wages. First, Plaintiffs note the Supreme Court's recognition in *United States Gypsum, 438 U.S. at 457, 98 S. Ct. at 2883*, that "[r]egardless of its putative purpose, the most likely consequence of any such agreement [among competitors] **[*644]** to exchange price information would be the stabilization of industry prices." The Court explained that this likely anticompetitive effect arises from the fact that "each seller would know that his price concession could not be kept from his competitors," so that "no seller participating in the information-exchange arrangement would . . . have any incentive for deviating from the prevailing price level in the industry." *United States Gypsum, 438 U.S. at 457, 98 S. Ct. at 2883*. Similarly, in a case where, as here, the plaintiffs alleged that the defendants participated in regular surveys of the compensation paid to hospital employees — in that case, medical residents — the court stated:

> [I]t is reasonable to infer that the annual nature of the survey provides the institutional defendant co-conspirators the information they need to keep compensation levels depressed; each institutional defendant is able **[**125]** to set compensation levels consistent with the previous year knowing that the levels will be checked against those of the coming year with the next Survey.

Jung v. Association of American Medical Colleges, 300 F. Supp.2d 119, 167 (D.D.C. 2004). Finally, beyond this recognition of their theory of causation in the case law, Plaintiffs point to the opinion of their expert, Dr. Vistnes, that information exchanges of the sort engaged in by the Defendant hospitals here "can facilitate coordination and soften competition," which in turn "can affect prices" (or, here, wages). (Defendants' Motion, Ex. L, Vistnes 3/20/2009 Expert Report at 45, 53.)

As Defendants point out, however, this case law and Dr. Vistnes's expert opinion share a common infirmity — each addresses Plaintiffs' proffered theory of causation in the abstract, without specifically identifying the sort of evidence that would establish that a particular exchange of wage or price information actually caused softened competition or wage (or price) stabilization in a given case. Most notably, in *United States Gypsum, 438 U.S. at 456, 98 S. Ct. at 2883*, the Court prefaced its above-cited discussion of the possible anticompetitive effects **[**126]** of information exchanges by stating that it was addressing this matter only "[a]s an abstract proposition," based on "economic theory and common human experience." Similarly, the decision in *Jung, 300 F. Supp.2d at 167*, arose in the context of a motion to dismiss, so the court had no occasion to address the sort of proof the plaintiffs would ultimately need to produce in support of their claim that the alleged information exchange in that case "facilitated the stabilization of medical resident compensation." Finally, and as noted earlier, Dr. Vistnes's theory of softened competition is just that, a theory — by his own admission, he did not "attempt[] to make a direct causal link between the information exchange and the resulting conduct of the hospitals," nor did he consider whether the effect of Defendants' information exchanges "left wages above or below what the competitive price or wage should have been." (Vistnes Dep. at 213, 252.)

Yet, while the discussions in *United States Gypsum* and *Jung* might have been limited to abstract principles, the procedural posture here enables the Court to consider these principles in light of a voluminous record which, as stated, could be viewed as **[**127]** evidencing a practice of on-demand exchanges of wage data. As thoroughly recounted earlier in this opinion, the Defendant hospitals regularly reached out to each other to obtain specific information about their local competitors' wage rates and practices, and Defendants have acknowledged that their compensation decisions were based, at least to some extent, on considerations of their relative standing or wage percentile in the local market. This record establishes, **[*645]** at a minimum, the necessary background conditions to trigger the concern that was recognized in *United States Gypsum* and *Jung* only as an abstract or hypothetical proposition — namely, that each Defendant could comfortably hold the various elements of its RN compensation package to the minimum level needed to meet its objectives, secure in the knowledge that it did not need to outbid local competitors whose wage rates and practices were unknown. In addition, the Court has accepted, for present purposes, the assertion of Plaintiffs and their expert, Dr. Ashenfelter, that RN wages at the Defendant hospitals have in fact been held below competitive levels. Under a comparable record, the court in another RN wage-suppression suit **[**128]** found that the plaintiffs' theory of causation in that case, resting largely upon Dr. Vistnes's expert opinion as to the competition-softening effect of information exchanges, was "persuasive for inferring causation" and sufficient for the plaintiffs to withstand summary judgment. *Fleischman, 728 F. Supp.2d at 164-65*.

Even assuming that more is needed to remove Plaintiffs' theory of causation from the realm of abstraction, the Court is satisfied that the record here gives rise to issues of fact as to causation that a trier of fact should be permitted to resolve. In particular, Plaintiffs have produced evidence suggesting that wage-related data exchanged among the Defendant hospitals — data which, as discussed, was sometimes shared through direct contacts or through surveys that did not satisfy the DOJ/FTC "safety zone" criteria —was actually relied upon and brought to bear in Defendants' decisions to reduce elements of their RN compensation packages below the levels that were contemplated before this data became available. Plaintiffs cite, for example, the instances (discussed earlier) in which Beaumont executives expressly referenced market surveys of RN wages in explaining decisions **[**129]** to award smaller-than-recommended pay increases. The record also includes the testimony of DMC's chief executive officer, Mike Duggan, explaining that a smaller than recommended merit increase for 2006 was motivated by a desire not to "raise [employee] wages unnecessarily," and stating more generally that DMC "tr[ies] to raise in every specialty what is necessary to keep us competitive and keep our positions filled," but "tr[ies] not to pay more than that." (Plaintiffs' Response, Ex. O, Duggan Dep. at 53.) Similarly, Plaintiffs point to a set of "speaker's notes" accompanying a St. John salary increase proposal for fiscal year 2003/04, indicating that disaggregated, unmasked wage range data that had been very recently obtained from other Defendant hospitals was used as a basis for recommending that the maximum rate for St. John's nurses be set just below the next lowest maximum range. (*See* Plaintiffs' Response, Ex. 91; *see also* Exs. 92, 93 (another set of speaker's notes showing that competitor RN wage rates were used in St. John's March 2004 process of setting its RN compensation, with the resulting increase set at the minimum level of the 3.5-to-5.0 percent increase under consideration).) **[**130]** [42]

To be sure, this body of evidence suffers from weaknesses that undercut the inferences Plaintiffs wish to draw from it. First, it is highly anecdotal, shedding light **[*646]** on only a handful of the many RN compensation decisions made by the Defendant hospitals during the class period. As discussed earlier, Defendants and their expert have produced graphs that summarize the net effect of these decisions on RN wages, and these graphs reveal a significant degree of variance among the Defendant hospitals in their rates of change and underlying wage rates during the class period. [43] Thus, even making the most of the examples cited by Plaintiffs, they still face a difficult challenge in persuading a trier of fact to infer that RN wages in the market as a whole were depressed as a result of the exchange of wage-related data among the Defendant hospitals. While it may be true, as Plaintiffs

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[42] In light of these and other examples cited by Plaintiffs, the Court fails to see how Defendants can tenably claim that Plaintiffs have not "present[ed] any evidence . . . that wages would have been higher in the absence of the information exchanges challenged in their brief." (Defendants' Reply Br. at 45.)

[43] Plaintiffs, of course, have submitted a graph prepared by their own expert, Dr. Ashenfelter, that purports to show greater uniformity in Defendants' wage-setting decisions and resulting wage rates over the class period. This "battle of the experts" must be left for the trier of fact to resolve.

[131]** assert, that the requisite causal connection need not be established through an exhaustive compilation of "specific example[s] of . . . particular wage cut[s] that can be linked to . . . specific exchanges of information," (Plaintiffs' Response Br. at 99), there surely are limits to how much a trier of fact will be willing, or even permitted, to extrapolate from a modest number of wage-limiting decisions to market-wide setting of wages at sub-competitive levels.

Next, and more generally, Plaintiffs face a challenge in ensuring that the requisite finding of causation rests upon conduct that violates ***antitrust law***, as opposed to conduct that does not. As explained, exchanges of wage data are not *per se* unlawful, and Plaintiffs' own expert, Dr. Vistnes, has acknowledged that an exchange of wage data may be pro-competitive, even if it results in a wage reduction. (*See* Vistnes Dep. at 200.) Moreover, **[**132]** the law is clear that ***HN24***[] a private plaintiff in an antitrust case may recover damages only for losses attributable to "a competition-*reducing* aspect or effect of the defendant's behavior." *Atlantic Richfield, 495 U.S. at 344, 110 S. Ct. at 1894*. Thus, Defendants correctly observe that Plaintiffs can recover only by showing that the sub-competitive wage levels identified by Dr. Ashenfelter were caused by a "competition-*reducing* aspect or effect" of the Defendant hospitals' exchange of wage data.

Nevertheless, while all of this may give rise to thorny issues of proof, the Court declines to adopt Defendants' proposed solution — *i.e.*, a ruling as a matter of law that Plaintiff cannot make this showing. Taking Defendants' argument to its logical conclusion, a plaintiff seemingly could never prevail in a wage-suppression (or parallel pricing) suit based on a theory of information sharing, because even if a group of competitors shared all of their confidential business data in making wage (or price) decisions — or, indeed, convened in the same conference room and reached their decisions at the same time — the plaintiff still would be left to somehow identify and separate out the particular aspects **[**133]** of this information-sharing arrangement that were unlawful, and then prove that these decisions would have been different if the competitors had engaged in only a "permissible" exchange of data. Even assuming one could arrive at a settled understanding of the lawful versus unlawful aspects of an exchange of wage (or price) data — *e.g.*, by adopting the DOJ/FTC Guidelines, with their preference for masked, aggregated, and aged data — there would still remain the difficulty of forging a specific causal link between an anti-competitive wage (or price) **[*647]** decision and an unlawful component of the data exchange that preceded it.

The Court does not read the pertinent case law as imposing such an insurmountable standard of proof. As revealed in the foregoing discussion of this law, the courts view certain types of information exchanges as triggering concerns of anticompetitive effects, and the DOJ/FTC Guidelines likewise speak to these concerns. The record in this case features ample evidence of exchanges of wage data that implicate these concerns and exceed the Guidelines' "safety zone," and Plaintiffs also have produced at least some evidence that the data gathered in these exchanges was used **[**134]** in reaching decisions that had an unfavorable (or less favorable) impact upon nurse compensation. Finally, Plaintiffs have proffered the opinion of their expert, Dr. Ashenfelter, that the RN workforces at the Defendant hospitals are being paid at sub-competitive levels. This record, viewed as a whole, serves to blunt Defendants' criticism that Plaintiffs seek to try their case in the abstract —*i.e.*, that Plaintiffs have argued only that "causation in an information exchange case is theoretically possible," but have failed to present facts that would support "a concrete theory of causation in this case." (Defendants' Reply Br. at 44.) Having reviewed the record here in light of the relevant case law and governing legal standards, the Court finds that Plaintiffs have produced sufficient evidence from which a trier of fact could infer the requisite causal link between an antitrust violation and antitrust injury.

D. Plaintiffs Need Not Offer a Detailed Analysis of the Relevant Market in Order to Pursue Their "Rule of Reason" Claim.

Finally, in a challenge directed solely at Plaintiffs' Count II "rule of reason" claim, Defendants argue that this claim is defeated by Plaintiffs' failure to **[**135]** establish the relevant market within which to evaluate their allegations of anticompetitive effects. In particular, Defendants challenge the assertion of Plaintiffs and their expert, Dr. Ashenfelter, that the relevant market in this case consists only of RNs employed at hospitals in the Detroit metropolitan area, and not RNs who work for non-hospital employers such as physicians' offices, ambulatory surgery centers, nursing homes, and public health agencies. In response, Plaintiffs contend that they need not produce a detailed or formal market analysis in this case, where they have produced direct proof of the anticompetitive effects of Defendants' exchange of wage data. As discussed below, the Court finds that Plaintiffs have the better of the argument on this issue.

HN25[] Under a "conventional rule-of-reason approach," a court must "engage in a thorough analysis of the relevant market and the effects of the restraint in that market." *Realcomp II, Ltd. v. Federal Trade Commission, 635 F.3d 815, 825 (6th Cir. 2011)*. As both sides agree, however, even in cases where a challenged practice is subject to scrutiny under the "rule of reason," rather than subject to condemnation as *per se* unlawful, **[**136]** the "practical difference" between these two analytical approaches "is sometimes negligible," *Re/Max International, 173 F.3d at 1013*, and the courts occasionally find that a "less searching Rule of Reason analysis" is sufficient under the facts of a particular case, *In re Northwest Airlines, 208 F.R.D. at 206*. The Supreme Court has acknowledged "[t]he truth . . . that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear." *California Dental Association v. Federal Trade Commission, 526 U.S. 756, 779,* ***[*648]*** *119 S. Ct. 1604, 1617, 143 L. Ed. 2d 935 (1999)*. Of particular pertinence here, the Supreme Court has explained that "[s]ince the purpose of the [rule of reason] inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." *Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 2019, 90 L. Ed. 2d 445 (1986)* (internal quotation **[**137]** marks and citation omitted).

In Plaintiffs' view, they have offered such proof of "actual detrimental effects" here, and thus need not propound a detailed market analysis. Specifically, they point to Dr. Ashenfelter's benchmark analysis of the fees paid by the Defendant hospitals for agency nurses. This analysis, if credited, [44] serves as direct proof of a detrimental impact upon the wages paid to RNs by the Defendant hospitals. Moreover, Plaintiffs have identified a sufficient basis for attributing this detrimental impact to Defendants' exchange of information regarding the compensation paid to their RN workforces, where the case law, *see, e.g. Todd, 275 F.3d at 211-13*, the DOJ/FTC Guidelines, and the opinion of Plaintiffs' expert, Dr. Vistnes, all lend support to the proposition that information exchanges of the sort engaged in here can be expected to soften competition and have an anticompetitive effect on the wages paid to RNs. [45] Accordingly, the Court finds that Plaintiffs' "rule of reason" claim is not defeated by the absence of a detailed analysis of the relevant market and Defendants' power within that market. *See Fleischman, 728 F. Supp.2d at 163-64* (concluding under a similar **[**138]** record that a detailed market analysis was unnecessary).

Next, to the extent Defendants argue that Plaintiffs must at least "show the rough contours of a relevant market," *Republic Tobacco Co. v. North Atlantic Trading Co., 381 F.3d 717, 737 (7th Cir. 2004)*, the Court is satisfied that Plaintiffs and their expert have met this more relaxed standard of "rule of reason" analysis. As Plaintiffs observe, to see that Dr. Ashenfelter's exclusion of non-hospital RNs was reasonable, one need look no further than the Defendant hospitals' own conduct in commissioning and conducting wage surveys and in their direct exchanges of compensation-related information. In particular, "Defendants have commissioned literally scores of surveys to assist them in setting the wages for their hospital nurses and engaged in hundreds of phone calls and emails to help with that process, and **[*649]** those surveys and contacts always seek information only on what other *hospitals* are

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[44] Again, Defendants argue separately that this benchmark analysis is subject to exclusion, but the Court leaves this argument for another day.

[45] To be sure, and as discussed above, the Court recognizes that Plaintiffs face difficulties of proof in showing that Defendants' exchanges of wage data actually did have an anticompetitive effect on RN wages, and that this effect was brought about by unlawful aspects of these exchanges. As explained, this evidentiary obstacle arises from the difficulty of isolating the impact of the unlawful, versus the lawful, aspects of these information exchanges. Yet, the detailed market analysis sought by Defendants would not aid Plaintiffs (or the trier of fact) in resolving this difficulty, but instead would address a different question ? namely, whether Defendants' exchanges of information perhaps might not raise concerns of anticompetitive effect because, for example, any tendency of these exchanges to depress RN wages would be offset or overcome by the ability of RNs to pursue employment in a non-hospital setting. As indicated below, the Court is satisfied that the more abbreviated market analysis **[**139]** offered by Plaintiffs sufficiently addresses this question.

paying their *hospital* nurses." (Plaintiffs' Response Br. at 126.) Although Defendants point to an exception or two that seem to prove the rule, and they further cite some evidence that they have competed with non-hospital employers in their **[**140]** recruitment of nurses, there is no basis in the record for believing that Plaintiffs' exclusion of non-hospital RNs and employers from the relevant market has significantly distorted the analysis of the anticompetitive effects of Defendants' exchange of wage data under the rule of reason.

IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that the motion for summary judgment brought by Defendants Henry Ford Health System, Mount Clemens General Hospital, Inc., William Beaumont Hospital, and Trinity Health Corp. (docket #376) is GRANTED IN PART, with the moving Defendants awarded summary judgment in their favor as to Count I of Plaintiffs' Third Corrected Class Action Complaint, and DENIED IN PART, as to the moving Defendants' challenge to Count II of Plaintiffs' Third Corrected Class Action Complaint. Likewise, IT IS FURTHER ORDERED that Defendant Detroit Medical Center's motion for summary judgment (docket #358) is GRANTED IN PART, with respect to Count I of the complaint, and DENIED IN PART, with respect to Count II of the complaint.

Finally, in light of the tentative settlement reached between Plaintiffs and Defendant Mount Clemens General Hospital, **[**141]** IT IS FURTHER ORDERED that Defendant Mount Clemens General Hospital's renewed motion for summary judgment (docket #355) is DENIED WITHOUT PREJUDICE.

/s/ Gerald E. Rosen

Chief Judge, United States District Court

Dated: March 22, 2012

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[In re Live Concert Antitrust Litig.]

United States District Court for the Central District of California

March 23, 2012, Decided; March 23, 2012, Filed

2:06-CV-04987 SVW (VBK); 2:05-CV-06704 SVW (VBK); Case No: 06-ML-1745-SVW (VBK)

Reporter

863 F. Supp. 2d 966 *; 2012 U.S. Dist. LEXIS 47768 **

IN RE LIVE CONCERT ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: LAUREN J. HAMMER v. CLEAR CHANNEL COMMUNICATIONS, INC. ET AL., 2:06-CV-04987 SVW (VBK). MARGARET A. THOMPSON v. CLEAR CHANNEL COMMUNICATIONS, INC. ET AL., 2:05-CV-06704 SVW (VBK).

Prior History: *Thompson v. Clear Channel Communs., Inc. (In re Live Concert Antitrust Litig.), 247 F.R.D. 98, 2007 U.S. Dist. LEXIS 82894 (C.D. Cal., 2007)*

Core Terms

concerts, rock, artists, Defendants', prices, music, ticket, expert report, methodology, promoted, Plaintiffs', relevant market, rock music, indicia, antitrust, reliable, markets, cross-elasticity, submarket, variables, expert testimony, purported, economist, damages, summary judgment motion, calculating, categorize, Before-and-After, monopolization, Sherman Act

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Judges: STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

Opinion by: STEPHEN V. WILSON

Opinion

[*968] ORDER RE:

DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF DR. OWEN R. PHILLIPS [403]

DEFENDANTS' MOTION FOR CLASS DECERTIFICATION [410]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DENVER ACTION) [438]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (LOS ANGELES ACTION) [441]

PLAINTIFFS' MOTION FOR APPROVAL OF PLAN FOR CLASS NOTICE, TO ORDER DEFENDANTS TO PRODUCE CLASS MEMBER INFORMATION, AND TO MODIFY THE CLASS DEFINITION [460]

PLAINTIFFS' MOTION TO EXCLUDE THE "AFFINITY ANALYSIS" OF DR. JANUSZ ORDOVER [469]

PLAINTIFFS' MOTION TO STRIKE DECLARATION OF JULIA VANDER PLOEG [516]

I. INTRODUCTION AND PROCEDURAL [*969] BACKGROUND[1]

On **[**6]** June 13, 2002, Malinda Heerwagen filed a putative class action in the United States District Court for the Southern District of New York, alleging claims of monopolization, attempted monopolization, and unjust enrichment against Clear Channel, Inc. and related entities. Heerwagen claimed that the defendants had engaged in anticompetitive conduct in connection with their nationwide promotion of live music concerts. On August 11, 2003, the district court denied Heerwagen's motion for class certification, concluding that the putative class's antitrust claims required a separate analysis for each relevant geographic market, and, therefore, certification of a *nationwide* class was unwarranted. The Second Circuit affirmed. *Heerwagen v. Clear Channel Commc'ns, Inc. et al., 435 F.3d 219 (2d. Cir. 2006)*. Heerwagen subsequently dismissed the case voluntarily.

Twenty-two regional putative class actions subsequently were filed against Clear Channel, Inc. and related entities, alleging substantively identical claims of: (1) Monopolization under *Section 2* of the Sherman Act, *15 U.S.C. § 2*; (2) Attempted Monopolization under *Section 2* of the Sherman Act, *15 U.S.C. § 2*; and (3) Unjust Enrichment. These **[**7]** actions ultimately were consolidated and assigned to this Court as part of this Multi-District Litigation ("MDL").

On November 1, 2006, this Court issued an order staying discovery in every action except those in the following five geographic markets: Los Angeles, Chicago, New Jersey/New York, Boston, and Denver. (Dkt. 36, 37). On October 22, 2007, this Court issued an order certifying classes in these five markets and denying Defendants' motion for judgment on the pleadings as to Plaintiffs' attempted monopolization claims. (Dkt. 160); *Thompson v. Clear Channel Communs., Inc. (In re Live Concert Antitrust Litig.), 247 F.R.D. 98 (C.D. Cal. 2007)*.

On November 16, 2009, the Court denied Plaintiffs' motion for approval of plan for class notice, and further ordered that the action be stayed pending the Ninth Circuit's *en banc* decision in Dukes v. Wal-Mart*, 509 F.3d 1168 (9th Cir. 2007)*. (Dkt. 215). On October 7, 2010, the Court granted Defendants' motion to lift the stay, denied Defendants' motion for reconsideration based on the Ninth Circuit's decision in *Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010)* (en banc), and ordered the parties to submit a joint stipulation as to **[**8]** how best to proceed with this action. (Dkt. 240).

Pursuant to the parties' stipulation, the Court entered an Order Regarding Scheduling of Action on December 10, 2010. (Dkt. 260) Under this stipulated order, the parties agreed to limit further discovery to the Denver and Los Angeles markets. "The remaining three certified template markets (Chicago, New York and Boston) shall be stayed until the Denver and Los Angeles markets are tried or otherwise resolved." (Id).

On February 7, 2011, Defendants filed a Motion for Partial Summary Judgment Regarding Statute of Limitations (with respect to the Denver and Los Angeles actions). (Dkt. 271). On April 7, 2011, the Court granted the motion. (Dkt. 310).

The following motions are currently pending before the Court:

[*970] • Defendants' Motion to Exclude the Testimony of Dr. Owen R. Phillips, (Dkt. 403);
• Defendants' Motion for Class Decertification, (Dkt. 410);
• Defendants' Motion for Summary Judgment (Denver Action), (Dkt. 438);
• Defendants' Motion for Summary Judgment (Los Angeles Action), (Dkt. 441);

• Plaintiffs' Motion for Approval of Plan for Class Notice, to Order Defendants to Produce Class Member Information, and to Modify the Class Definition, **[**9]** (Dkt. 460); and

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A more detailed factual and procedural history is set forth in this Court's October 22, 2007 Order Granting Plaintiffs' Motion for Class Certification. (Dkt. 160); *Thompson v. Clear Channel Communs., Inc. (In re Live Concert Antitrust Litig.), 247 F.R.D. 98 (C.D. Cal. 2007)*.

• Plaintiffs' Motion to Strike Declaration of Julia Vander Ploeg, (Dkt. 516).

For the reasons set forth below, Defendants' Motion to Exclude the Testimony of Dr. Owen R. Phillips, (Dkt. 403), is GRANTED IN PART. Defendants Motions for Summary Judgment, (Dkt. 438, 441), are GRANTED. The remaining motions are DISMISSED AS MOOT.

II. PRIOR CLASS CERTIFICATION ORDER

As noted above, on October 22, 2007, the Court issued an Order Granting Plaintiffs' Motion for Class Certification (in the Chicago, Boston, New York/New Jersey, Denver, and Los Angeles markets). *In re Live Concert Antitrust Litig., 247 F.R.D. 98 (C.D. Cal. 2007)*. At that time, however, the Court was bound by then-governing Ninth Circuit precedent, under which district courts were precluded from resolving factual disputes — and, in particular, weighing conflicting expert testimony — at the class certification stage. Thus, the Court concluded "*Dukes [v. Wal-Mart, Inc., 474 F.3d 1214, 1229 (9th Cir. 2007)]* clearly precludes the Court from conducting a Daubert analysis or weighing expert testimony," *id. at 116 n.7*, and effectively accepted as true, for purposes of that motion only, the representations of Plaintiffs' **[**10]** expert. "[T]his order views the allegations, expert testimony, and evidence through the very narrow prism permitted by Dukes. Accordingly, Plaintiffs have satisfied the requirements of *Rule 23*[.]" *Id. at 155*.

The original decision in Dukes, however, was subsequently withdrawn and replaced by *Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010)* (en banc), which was, in turn, reversed by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. In its decision, the Supreme Court enunciated a significantly different standard than that applied by this Court in its 2007 Class Certification Order. "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of *Rule 23(a)* have been satisfied . . . . Frequently that 'rigorous analysis' will entail some overlap with the merits of the Plaintiffs' underlying claim. That cannot be helped." *Dukes, 131 S.Ct. at 2551*. The Court went on to observe, "The District Court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so[.]" *Id. at 2553-54*.

In short, the Court's prior Order Granting Class Certification **[**11]** was based on a legal standard that is no longer in effect, which precluded the Court from undertaking a meaningful analysis of either the underlying facts of the case or the representations of the parties' respective experts. As such, that order has little to no precedential value at this point in the litigation. The Court is writing on a proverbial "clean slate."

III. PENDING MOTIONS (ORDER OF ANALYSIS)

There are several motions currently pending before the Court, including: (1) **[*971]** Defendants' motion to exclude the testimony of Plaintiff's expert Dr. Owen Phillips, pursuant to *Federal Rule of Evidence 702*; and (2) Defendants' motions for summary judgment as to the Denver and Los Angeles markets. These motions require two distinct inquiries. First, the Court must evaluate the admissibility of Dr. Phillips' proffered expert testimony in its role as "gatekeeper" under *Rule 702*. See *Claar v. Burlington N. R.R., 29 F.3d 499, 501 (9th Cir. 1994)* (prior to ruling on summary judgment motion, "[t]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The primary locus of this obligation is *Rule 702*.") (emphasis in original) (quoting **[**12]** *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469(1993))*.

Second, the Court will evaluate the merits of Defendants' motions for summary judgment, considering Dr. Phillips' testimony only to the extent that it is admissible under *Rule 702*. See generally *id. at 504-05* (affirming summary judgment based on the exclusion of testimony by plaintiffs' damages expert, holding: "To survive [defendant's] motion for summary judgment, plaintiffs were required to offer admissible expert testimony showing that exposure to chemicals in the workplace played some part in producing their injuries.").

IV. DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF DR. OWEN R. PHILLIPS

A. Legal Standard

Federal Rule of Evidence 702 governs the admissibility of expert testimony in federal courts. Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles **[**13]** and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. [2]

"[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." Fed. R. Evid. 702, Notes of Advisory Committee on 2000 amendments (citing Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)).

The admissibility of expert testimony is a question for the Court. Fed. R. Evid. 104(a); Bourjaily, 483 U.S. at 175-76. To that end, the Supreme Court has recognized the obligation of the trial court to fulfill a "gatekeeping role" in order to "ensure that any and all [expert] testimony **[**14]** ... is not only relevant, but reliable." Daubert v. Merrell Dow Pharms., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). "The objective of that [gatekeeping] requirement is . . . to make certain that an expert, whether basing **[*972]** testimony upon professional studies or personal experience, employs in the courtroom the same level of intelle;ctual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

With respect to the reliability of expert testimony, the Supreme Court in Daubert identified several factors that the court may consider when making its determination, including: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. Daubert, 509 U.S. at 594; accord Kumho, 526 U.S. at 151 (holding Daubert factors may be applied to non-scientific expert testimony, depending upon "the particular circumstances **[**15]** of the particular case at issue").

The Supreme Court has emphasized, however, that these factors are not exclusive, and that "the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." Kumho, 526 U.S. at 142 (emphasis in original). "[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." Id. at 152. Thus, the admissibility of expert testimony is "a subject peculiarly within the sound

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Effective December 1, 2011, "[t]he language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility." Fed. R. Evid. 702, Notes of Advisory Committee on 2011 amendments.

discretion of the trial judge, who alone must decide the qualifications of the expert on a given subject and the extent to which his opinions may be required.'" *United States v. Chang, 207 F.3d 1169, 1172 (9th Cir. 2000)* (quoting *Fineberg v. United States, 393 F.2d 417, 421 (9th Cir. 1968))*.

Since "[d]istrict courts are not required to hold a Daubert hearing before ruling on the admissibility of scientific evidence," this Court may rule on Defendant's Daubert motion on the basis of the parties' papers. *In re Hanford Nuclear Reservation Litigation, 292 F.3d 1124, 1138 (9th Cir. 2002)* (citing *United States v. Alatorre, 222 F.3d 1098, 1100 (9th Cir. 2000))*.

B. [16] Discussion**

Defendants argue that the testimony of Plaintiffs' expert economist, Dr. Owen Phillips, should be excluded on several grounds. In particular, Defendants seek to exclude Dr. Phillips' testimony regarding: (1) the fact and amount of damages; (2) causation of Plaintiffs' injury; (3) the definition of the relevant product market; (4) Defendants' share of the relevant market; and (5) Defendants' alleged anticompetitive conduct. The Court will address each of these issues in turn.

1. Damages and Causation

Dr. Phillips performed several statistical analyses in order to estimate the damages suffered by Plaintiffs as a result of Defendants' allegedly anticompetitive conduct. These analyses are of four basic types: (1) the "Yardstick" approach; (2) the "Before-and-After" approach; (3) the "pooled sample" analysis; and (4) damages attributable to ticket surcharges. Defendants do not dispute that Dr. Phillips is qualified as an expert economist, nor do they dispute that statistical analysis may, under appropriate circumstances, properly be admitted into evidence. Instead, Defendants contend that Dr. Phillips failed to "reliably appl[y] the principles and methods [of proper statistical **[**17]** analysis] to the facts of the case" in violation of *Rule 702(d)*.

[*973] a. Legal Requirements For Statistical Analysis

As a general matter, flaws in a proffered expert's analysis typically go to the weight, rather than the admissibility, of the expert's testimony. See, e.g., *Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1188 (9th Cir. 2002)* ("In most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility. Vigorous cross-examination of a study's inadequacies allows the jury to appropriately weigh the alleged defects and reduces the possibility of prejudice.") (internal citation omitted). "In some cases, however, the analysis may be 'so incomplete as to be inadmissable as irrelevant.'" Id. (quoting *Bazemore v. Friday, 478 U.S. 385, 400, n.10, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986))*.

A somewhat unique body of law has developed governing whether and under what circumstances statistical analysis proffered by an expert — and, in particular, regression analyses such as those conducted by Dr. Phillips — pass muster under *Rule 702*. In the seminal case *Bazemore v. Friday, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*, the Supreme Court held that the Court of **[**18]** Appeals for the Fourth Circuit erred in ignoring statistical evidence presented by plaintiffs in connection with their employment discrimination claim. *Id. at 386*. The Court reasoned:

> While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.

Id. at 400. The Court further reasoned that "[t]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant; but such was clearly not the case here." *Id. at 400, n. 10*.

"Bazemore, however, does not give blanket approval to the introduction of all evidence derived from multiple regression analyses." *Penk v. Or. State Bd. of Higher Educ., 816 F.2d 458, 464-65 (9th Cir. 1987)*. Instead, courts have recognized that by its own terms, the Supreme Court's reasoning in Bazemore applies only to a regression analysis "which accounts for the major factors." See *Bazemore, 478 U.S. at 400*. Thus, **[**19]** in *Bickerstaff v. Vassar College, 196 F.3d 435, 449 (2d Cir. 1999)*, the Second Circuit concluded that the district court properly gave plaintiff's expert report "no probative value," holding:

> the district court did not reject Gray's regression analysis because it included less than all the relevant variables; rather, it found the evidence not probative because it omitted the major variables. Thus . . . Gray's statistical analysis falls within the *Bazemore* exception - that "there may . . . be some regressions so incomplete as to be inadmissible as irrelevant."

Id. at 449 (quoting *Bazemore, 478 U.S. at 400 n.10*) (internal citations omitted).

The importance of accounting for the relevant "major variables" has been recognized as particularly important in the context of antitrust litigation.

> Damage estimates in antitrust cases hinge on careful statistical analysis, reasonable assumptions, reliable data, and the robustness of the results. If any of these areas are circumspect, then the analysis could provide faulty conclusions **[*974]** as to the existence or the amount of damages.

2A P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 399c, p. 447 (3d ed. 2006).

> The correct application of the before-and-after approach **[**20]** [in the context of an alleged conspiracy to monopolize] requires using the prices in the "before" period as an evidentiary foundation for inferring what the prices would have been in the conspiracy period but for the illegal activity. **The determination of the "but for" prices, however, must take into account nonconspiratorial factors that would have caused prices to be different in the conspiracy period even if there had been no conspiracy.**

Id. ¶ 399b, at 446 (emphasis added) (discussing potential problems with the application of the "before-and-after" and "yardstick" methodologies in antitrust cases).

> By not including any additional variables in the regression, the possibility of omitted variable bias is high. In other words, there are omitted factors that may influence market share growth. These omitted factors could confound the results of the statistical analysis by biasing the damage estimates. In this way, the regression results do not necessarily identify an effect of USTC's alleged behavior on Conwood's market-share growth by state. Rather, the results only suggest a relationship between initial market share and market-share growth. Because the possibility of omitted variable **[**21]** bias is high, we cannot, therefore, infer anything from these results as to whether there was any illegal behavior and, if so, whether that behavior had any anticompetitive effects.

Id. ¶ 399c2, at 455 (discussing flaws in plaintiff's statistical analysis in *Conwood Company, LP v. United States Tobacco Company, 290 F.3d 768 (6th Cir. 2002))*.

Accordingly, the key question regarding the admissibility of Dr. Phillips' statistical analyses is whether they account for the "major factors." In making this determination, the Court cannot simply assume that variables omitted from the analysis are, in fact, "major factors" which should have been included. There must be some indication that the excluded variables would have impacted the results. See *Sobel v. Yeshiva University, 839 F.2d 18, 34 (2d Cir. 1988)* ("We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken . . . the analysis."). The burden of proof, however, remains on the proponent of the expert testimony. See *Bourjaily, 483 U.S. at 175-76*.

b. "Yardstick" Approach

Dr. Phillips' "Yardstick" methodology of calculating **[**22]** damages is fairly straightforward. (See Dkt. 494, Exh. A, Economic Report of Owen R. Phillips. Ph.D. as it Relates to Denver and Los Angeles Markets ("Phillips Expert Report"), at ¶¶ 264-66). In each geographic market (Denver and Los Angeles), Dr. Phillips calculated the average ticket price for rock concerts promoted by Defendants, and compared this amount to the average ticket price for rock concerts promoted by other promoters (i.e., the "yardstick"). Dr. Phillips found that the average ticket price was higher for rock concerts promoted by Defendants, and concluded that this disparity in price was the result of Defendants' anticompetitive conduct. Dr. Phillips then calculated the difference between these average ticket prices in each market, and multiplied this amount by the total number of tickets sold by Defendants during the relevant time period, resulting in estimated damages of $21,700,599 (Denver market) and $70,596,699 (Los Angeles market). (Dkt. 494, Exh. B, Rebuttal Economic **[*975]** Report of Owen R. Phillips. Ph.D. as it Relates to Denver and Los Angeles Markets ("Phillips Rebuttal Report"), at 39 (revised damages calculations)).

Dr. Phillips' "Yardstick" comparison, however, simply **[**23]** assumes — without further examination — that the difference in average ticket prices observed by Dr. Phillips is due entirely to Defendants' allegedly anticompetitive conduct. The analysis does not account for *any* other possible explanation(s) for this disparity. Among other variables, Dr. Phillips' analysis fails to account for differences in artist quality/popularity. Common sense dictates that a more popular music artist typically will command higher ticket prices than a less popular artist. Thus, if Defendants consistently promoted concerts for highly popular acts, one would expect their average ticket prices to be higher than those of rival promoters.

Dr. Phillips himself has acknowledged that artist popularity affects ticket prices and that Defendants promoted many of the most popular artists during the relevant time period. During the June 4, 2007 hearing on class certification, for example, the following exchanges with Dr. Phillips took place:

> Q. And you realize that there are factors in addition to considering the competitive price versus the monopoly price that you would have to consider in this analysis, correct?
>
> A. Well, there's going to be complications, because as Clear **[**24]** Channel became larger, they also [began] attracting the very best talent. . . . But I think there needs to be a check done on the quality of the artists that Clear Channel promotes versus the rest of the market so that damages aren't. . . overestimated in effect.
> Q. Is there a way, as an economist, that you can do that check for quality in doing a damage analysis here?
> A. Yes.
> . . . .
> THE COURT. It seems to me that if Clear Channel was attracting the best talent, that, as you said, that talent would command a higher ticket price, correct?
> WITNESS. Correct.
> THE COURT. So the damage analysis would have to include some further analysis to account for that qualitative difference in talent, correct?
> WITNESS. Yes, to see if there is a difference.
> . . . .
> Q. Do you believe that using those average ticket prices will bias damages against Clear Channel?
> A. It's possible. And that is why we have to look at differences in qualities of the artists. . . . [W]e have to make some adjustments for quality in doing the damage analysis.

(Dkt. 405, Exh. 2, at 41:6 - 51:1; see also id. at 43:17-23 (artist popularity can be accounted for by using, e.g., CD sales)).

The only "check" that Dr. Phillips performed to account **[**25]** for artist popularity, however, was to compare Defendants' promoter share (measured in ticket sales) of the "Top 100" rock acts in each geographic market to Defendants' share of the overall market. Dr. Phillips concluded that "Clear Channel's market share for the Top 100 Acts is consistent with its market share in the remainder of the market." (Phillips' Expert Report, at ¶ 263). The glaring flaw in this purported analysis is that the Top 100 rock acts in each market account for virtually all of the relevant ticket sales. [3] In other words, the Top 100 **[*976]** acts in each geographic market effectively comprise the entire market. Thus, Dr. Phillips' "analysis" amounts to nothing more than a simple tautology: Defendants' share of the overall market is consistent with Defendants' share of the overall market. Dr. Phillips conceded as much in his deposition:

> Q. So your conclusion is that Clear Channel's share of all concerts is the same as Clear Channel's share of all concerts?
>
> A. In Los Angeles, yeah.

(Dkt. 405-3, Phillips Depo., at 102:11-14).

> Q. So the [Top 100] analysis is meaningless? [referring to the Denver market]
>
> A. The money is in the top 100 concerts.
>
> Q. The top 100 analysis is meaningless?
>
> A. **[**26]** Right. Yeah. The top 100 — the money is in the top 100 concerts.

(Phillips Depo., at 103:7-11).

In contrast, Defendants have submitted evidence that the artists promoted by Defendants during the relevant time period were, on average, more popular than the artists promoted by rival promoters. [4] This evidence is consistent with Dr. Phillips' observation that Defendants attracted "the very best talent."

Moreover, in order to demonstrate the impact of Dr. Phillips' failure to account for artist popularity, Defendants' expert economist, Dr. Janusz Ordover, conducted a comparison of ticket prices for concerts promoted by Defendants to concerts promoted by other promoters *for the same artists.* Dr. Ordover found **[**27]** that Defendants' ticket prices generally were comparable to, and in several instances lower than, those of competing promoters for concerts by the same artist. (Ordover Expert Report, ¶¶ 170-80).

In his Rebuttal Report, Dr. Phillips contends that Dr. Ordover's analysis fails to account for venue size and, therefore, "is meaningless because the venue size is an important determinant of how prices are set. . . . A popular artist in a small venue will command a higher price than the same performance at a large venue." (Phillips Rebuttal Report, at 34). This assertion by Dr. Phillips, however, simply provides another reason to exclude his "Yardstick" analysis, which similarly fails to account for venue size (or artist popularity, or any variable other than the identity of the concert promoter).

In any event, while Dr. Ordover's analysis may be flawed, artist popularity is undoubtedly a "major factor" in determining ticket prices, which should have been included in Dr. Phillips' "Yardstick" analysis. The failure to do so renders this analysis "so incomplete as to be inadmissible as irrelevant." See *Bazemore, 478 U.S. at 400, n.10*.

Plaintiffs have not met their burden of establishing that Dr. **[**28]** Phillips' "Yardstick" damages analysis satisfies the requirements of *Rule 702*. Accordingly, the Court GRANTS Defendants' Motion to Exclude this testimony.

c. "Before-and-After" Approach

Dr. Phillips' "Before-and-After" analysis is similarly flawed. In performing this analysis, Dr. Phillips first analyzed average ticket prices (for all live rock music **[*977]** concerts in the Denver and Los Angeles markets) from 1981

3

From 2000 to 2006, the Top 100 artists accounted for 95% of ticket revenue in Los Angeles and 94% of ticket revenue in Denver. (Dkt. 485-2, Expert Report of Janusz A. Ordover, Ph.D. ("Ordover Expert Report"), ¶ 167).

4

From 2001 to 2006, Defendants' share of the top 25 acts in Denver was 63%, compared with a 48% share of the rest of the market; Defendants' share of the top 25 acts in Los Angeles was 71%, compared with a 37% share of the rest of the market. (Ordover Expert Report, ¶ 169).

through 1998, a period that Dr. Phillips characterizes as "competitive." (See Phillips Expert Report, at ¶¶ 267-73). Dr. Phillips then uses this data to "predict" the expected average ticket prices from 2000 through 2006. [5] Next, Dr. Phillips compares these expected average ticket prices to the actual average ticket prices from 2000 to 2006. Because the actual ticket prices are higher than the "expected" values, Dr. Phillips concludes that Defendants' entry into the market in 2000 caused an increase in ticket prices. Based on the difference between the expected ticket prices and the actual prices, Dr. Phillips calculates damages as follows:

"Before-and-After" Damages Calculations[6]

	Convergence Model	**Linear Time Trend Model**
Denver	$36,005,988	$21,295,572
Los Angeles	$126,772,722	$69,725,212

With respect to Dr. Phillips' "Before-and-After" analysis, the court's holding in *In re Remec Inc. Sec. Litig., 702 F. Supp. 2d 1202 (S.D. Cal. 2010)* is instructive. There, the plaintiffs' expert performed a multivariate regression analysis (as part of an "event study") to analyze the impact of "corrective disclosures" [7] on the stock price of a public company. *Id. at 1271-72*. The plaintiffs' expert first created a "market index" and an "industry index" (the "independent variables") to account for the market and industry forces that one would expect to impact the company's stock price. Id. He then used these independent variables to calculate the daily predicted return on the company's stock (i.e., the "dependent variable"). Id. Finally, the plaintiffs' expert compared this predicted return with the actual return during **[**30]** the relevant time period and found that on the day following a corrective disclosure, the actual stock return "varie[d] markedly from the predicted return." Id. Based on his analysis, the plaintiffs' expert concluded that the corrective disclosures had caused these declines in stock price. Id.

The court granted defendants' motion to exclude the above-described analysis, holding that it did not meet *Rule 702*'s standards for admissibility as articulated in Daubert. *Id. at 1273-74*. The court reasoned:

> Dr. Nye predetermines the results of his analysis. Nye purports to test the hypothesis that REMEC's corrective disclosures exerted a material negative influence on the per-share price of REMEC stock during the class period. . . . **Nye's model assumes that the difference between actual return and predicted return is necessarily a result of company-specific information.**
>
> **Dr. Nye makes no attempt to account for other possible causes,** *i.e.*, industry-specific news (for example, **[**31]** if an increase in global sales of defense products due to an increase in U.S. presence in Iraq was announced during the class period), market-specific news (for example, if a 5% decline in stock prices occurred across the market due to an announcement of an expected drop in consumer sales in December), or other measurable **[*978]** macroeconomic variables (for example, the inflation rate and GDP).

Id. at 1273 (emphasis added).

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[5] Dr. Phillips performed two versions of the "Before-and-After" analysis, one using a "convergence" model to predict future ticket prices, and one **[**29]** using a "linear trend model" to predict future ticket prices. (See Phillips Expert Report, at ¶¶ 267-73). Both analyses are flawed for the reasons set forth below.

[6] See Phillips Rebuttal Report, at 39 (revised damages calculations).

[7] "A 'corrective disclosure' is a disclosure that reveals the fraud [allegedly perpetrated by defendants on a public company], or at least some aspect of the fraud, to the market." *In re Remec Inc., 702 F. Supp. 2d at 1266-67*.

Accordingly, the court held that Dr. Nye's expert opinion was not relevant and reliable as required under *Rule 702*. *Id. at 1275*.

> Where a study accounts for the "major factors" but not "all measurable variables," it is admissible. [*Bazemore v. Friday, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*.] However, where significant variables that are quantifiable are omitted from a regression analysis, the study may become so incomplete that it is inadmissible as irrelevant and unreliable. *Bickerstaff, 196 F.3d at 449*. Because the burden of proving helpfulness and relevance rests on the proponent of a regression analysis, it is the proponent who must establish that other major factors have been accounted for in a regression analysis. Dr. Nye makes no attempt to do so **[**32]** here, aside from his assertion/assumption that company-specific information is the only major factor.

Id. at 1273.

Notably, Dr. Phillips' "Before-and-After" analysis is significantly *less* robust than the analysis rejected by the Court in In re Remec Inc. Sec. Litig. There, the expert's analysis accounted for two independent variables (the "market index" and the "industry index"), in addition to the corrective disclosures that allegedly caused the declines in stock price. Here, Dr. Phillips' "Before-and-After" analysis accounts for no independent variables other than time. [8] Moreover, in In re Remec Inc. Sec. Litig., the expert observed stock declines after several corrective disclosures by the defendants, arguably supporting his hypothesis that the disclosures were, in fact, the cause of the declines. Here, only one "event" (i.e., the entry of Defendants into the market in 2000) was considered. Finally, as discussed in more detail below, Dr. Phillips improperly excluded data from the year 1999 from his analysis.

Thus, as in **[**33]** In re Remec Inc. Sec. Litig., Dr. Phillips impermissibly *assumes* that any observed increase in average ticket prices after 2000 is due entirely to Defendants' anticompetitive conduct, without meaningfully testing this assumption. In particular, Dr. Phillips' analysis impermissibly fails to account for at least two major variables, both of which he has conceded could impact ticket prices: (1) changes in artist quality over the relevant time period; and (2) the emergence of digital downloading of music (using, *e.g.*, Napster or iTunes) and its impact on the price of tickets for live concerts.

With respect to artist quality, Dr. Phillips testified in his deposition that he believes ticket prices have increased due to changes in the "quality" of rock concerts, and that this increase began *prior* to Defendants' entry into the market.

> I let the market self-adjust for quality. So when you look at the market, you can see prices even before the entry of Clear Channel going up. Even without any anticompetitive behavior in the market, I see prices going up, and I presume and I believe that's because of quality changes in rock and roll concerts. So I am saying that the self-adjustment took place in **[**34]** the market.

(Phillips Depo., at 88:11-18). (See also Phillips Expert Report, at ¶ 274 (referring to "the emergence of 'superstar' acts in the late 1990s that continued to exist throughout the class period here").

[*979] Nevertheless, Dr. Phillips' "Before-and-After" analyses fail to account for changes in concert quality during the relevant time period. In effect, Dr. Phillips simply assumes - without analysis - that to the extent concert quality changed from 1981 through 1998, concert quality continued to change from 2000 to 2006 at precisely the same rate. This is, of course, not necessarily true. For example, if the Rolling Stones and other highly popular acts began touring more heavily in 2000, one would expect average concert "quality" (and, consequently, average ticket prices) to increase. Moreover, given Dr. Phillips' stated belief that changes in concert quality affect ticket prices, such changes undoubtedly constitute a "major factor," which should have been accounted for under Bazemore and its progeny.

8

In his Rebuttal Report, Dr. Phillips incorporates the Consumer Price Index ("CPI") into his analysis. This minor modification does not affect the Court's reasoning.

With respect to the emergence of digital downloading, at least one industry observer has concluded that the increasing availability of music on the Internet is the "main reason" for **[**35]** the recent increase in concert ticket prices.

> I suspect the main reason [for rising ticket prices] is that the growing ability of fans to download music free from the Web - legally or illegally - has cut into artists' revenues. Millions of people have downloaded music from Napster, Morpheus and KaZaA - and bought fewer records as a result. Music sales are plummeting, putting downward pressure on artists' royalties.
>
> In this environment, concerts take on a different meaning for artists and their managers. In pre-Napster days, concert prices were kept below their market rate to help sell albums, a complementary good. Now concert prices are set with an eye toward maximizing concert revenue.
>
> Bands have always had cadres of fans, whose loyalty conferred monopoly power. Yet they were reluctant to exploit this power by charging higher prices because they wanted to sell more albums. When revenue from albums began to dry up, it was natural for bands to raise concert prices.
>
> . . . .
>
> It is not that bands have become greedier; it is that the technology changed to make it less profitable to charge below-market prices for concerts.

(Dkt. 405-12, Alan B. Krueger, Economic Scene; Music sales slump, concert **[**36]** ticket costs jump and rock fans pay the price, New York Times (October 17, 2002)).

In his deposition, Dr. Phillips conceded that digital downloading of music has, in fact, affected artists' approach to concert profitability.

> Q. What is Napster?
>
> A. Napster is a digital download music site back in the late '90s.
>
> Q. 1998, 1999, right?
>
> A. Yes.
>
> Q. Didn't that fundamentally change the pricing of concert tickets?
>
> MS. CONNOLLY: Objection to form.
>
> A. Possibly. You know, it's interesting. I don't—it's hard to sort out the impact of Napstar (sic) from iTunes, and in my mind, Napster really started the digital download movement, but I think iTunes really had more of an impact.
>
> Q. (BY MR. JACOBSON) So isn't it true before Napster and iTunes that artists performed in concerts to promote record sales, while after Napster and during iTunes, artists now release records to promote concert revenue?
>
> MS. CONNOLLY: Objection to form.
>
> Q. (BY MR. JACOBSON) Isn't that undeniably true?
>
> MS. CONNOLLY: Same objection.
>
> **[*980]** A. I don't know if it's true because here's what I think. I think that all along there's a relationship there where an artist will do a concert to promote their recordings and they will do recordings to promote **[**37]** their concerts. It's a complementary relationship, but I think, you know, over time, given the popularity of digital downloads that the complementary relationship has changed. I'm not quite sure how it has changed, but it has changed, and artists are doing more concerts now because they have the opportunity to make more profit from the concert, more revenue from the concert relative to their recordings than I think before.
>
> Q. All right. So how does your Before-and-After analysis capture that impact?
>
> A. It captures the trend. I mean the trend begins, and it just maps it out.

(Phillips Depo., at 211:24 - 213:10).

Notably, the emergence of digitally-available music on the Internet (in approximately 1998/1999 according to Dr. Phillips) occurred immediately prior to 2000, the year in which Dr. Phillips concluded Defendants' entry into the market caused ticket prices to increase. This fundamental change in marketplace dynamics clearly qualifies as a "major factor," which should have been accounted for -in some fashion - in Dr. Phillips' analysis.

Finally, and perhaps most troubling to the Court, Dr. Phillips' "Before-and-After" analyses completely ignore the dramatic increase in ticket prices **[**38]** that occurred in 1999, the year *before* Clear Channel entered the rock concert promotion market. To the Court's chagrin, Dr. Phillips simply excluded 1999 from his data set, and performed the "Before-and-After" analyses as though 1999 had never occurred.

Dr. Phillips explains that he excluded data from 1999 because "during this year SFX [whom Clear Channel ultimately acquired] was actively acquiring and consolidating concert promoters. In my opinion there was anticompetitive conduct taking place, and there were Department of Justice investigations in the company's conduct. Including 1999 would be using an anticompetitive year in the markets to predict future competitive prices beginning in 2001." (Phillips Rebuttal Report, at 36 (citing a September 3, 1998 Los Angeles Times article)).

This purported explanation for the exclusion of 1999 fails for several reasons. First, according to Dr. Phillips' own data, Defendants' market share in 1999 was 2.34% in the Denver market and 0.0% in the Los Angeles market. (See Phillips Rebuttal Report, Revised Exhs. 1, 2). [9] These *de minimis* market shares are insufficient as a matter of law to support monopolistic conduct. See 2 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 25.03 [3] [a], **[**39]** at 25-37 (Matthew Bender 2d ed.) (hereinafter "Antitrust Laws and Trade")("[C]ourts have held that a low market share (generally below 40 percent) either precludes a finding of monopoly power or requires a finding of no monopoly power.").

Second, this explanation is directly contrary to Dr. Phillips' previous representations to this Court, based upon which the Court granted Plaintiffs' Motion for Class Certification. See *In re Live Concert Antitrust Litig., 247 F.R.D. at 136 & n.32* ("At the hearing, Phillips testified that he could determine whether Clear Channel imposed a monopoly overcharge through a variety of methods. First, Phillips testified that he could use the relevant market **[*981]** in 1999 as a benchmark because Clear Channel possessed a small market presence in 1999 and its ticket prices were comparable with competitors' ticket prices in 1999. This approach is commonly referred to as the 'before-and-after' approach.") (citing Hearing Tr. at 39:25-40:19).

Finally, even if anticompetitive conduct was, in fact, occurring in 1999, this conduct would not justify the wholesale exclusion of 1999 from Dr. Phillips' analysis. **[**40]** The law is clear that Dr. Phillips must *account for* major factors (such as allegedly anticompetitive conduct in 1999); he cannot simply *ignore* them and perform the analysis as if they did not exist.

The exclusion of 1999 undoubtedly had a significant impact on the results of Dr. Phillips' analysis. (See generally Ordover Expert Report, ¶ 192). As demonstrated in the chart below, the average ticket prices (for all concerts) in both Denver and Los Angeles increased dramatically in 1999. In Los Angeles, the change in average ticket price from 1998 to 1999 represented the largest one-year increase (30.11%) in the twenty-five years studied by Dr. Phillips. In fact, average ticket prices in Los Angeles actually *decreased* in 2000, the year that Dr. Phillips concludes Defendants' entry into the market caused ticket prices to rise to supracompetitive levels. Moreover, by excluding the significant price increase that occurred in 1999 from the "before" period, Dr. Phillips' model effectively builds the full amount of this increase into his estimated damages - notwithstanding the fact that this increase occurred *before* **[**41]** Defendants' entry into the market. As such, the analysis is hopelessly flawed.

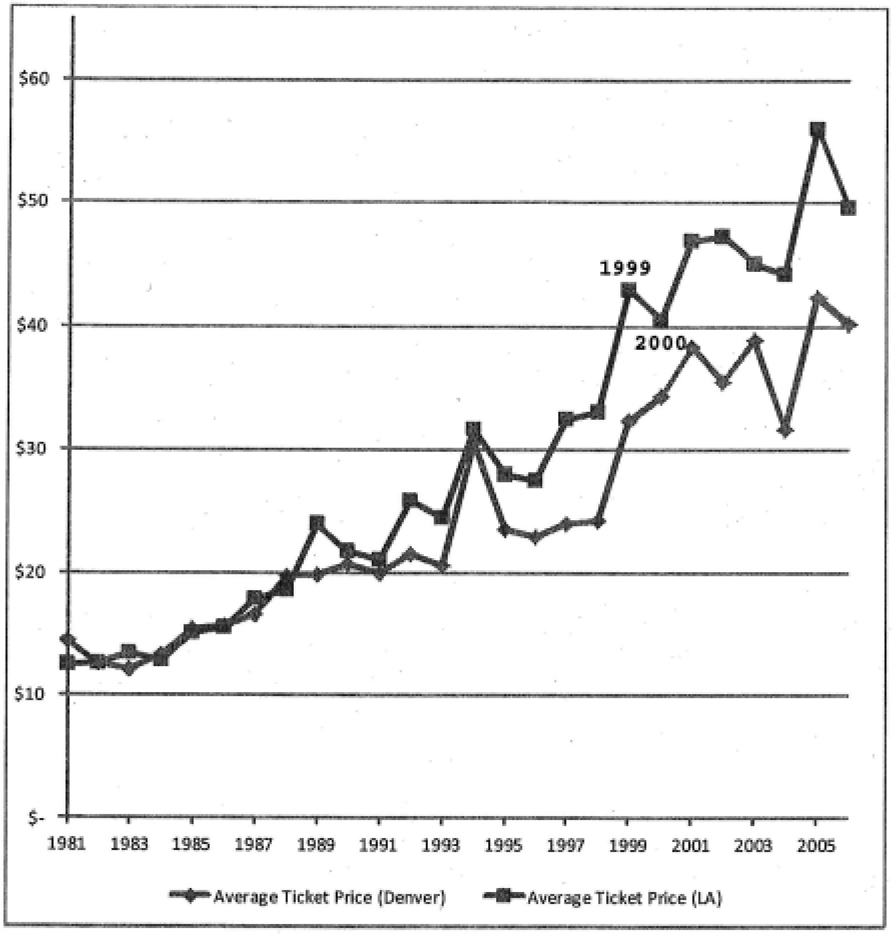
Average Ticket Prices (all concerts)[10]

9

Presumably, this data includes SFX, whom Defendants acquired in 2000.

10

Source: Phillips Rebuttal Report, Appendix 1: Revised Exhibit 5 (Denver Market), Revised Exhibit 7 (Los Angeles Market).



[*982]

Plaintiffs have not met their burden of establishing that Dr. Phillips' "Before-and-After" approach to calculating damages satisfies the requirements of *Rule 702*. Accordingly, the Court GRANTS Defendants' Motion to Exclude this testimony.

d. "Pooled Sample" Analysis

In his Rebuttal Report, Dr. Phillips performed an additional "pooled sample" analysis. For purposes of this analysis, Dr. Phillips combined all concerts from 1981-2006 (including concerts in both Los Angeles and Denver). (See Phillips Rebuttal Report, at 39, 64-67). He then analyzed this data in order to test his hypothesis that a "structural break" occurred in 2000. According to Dr. Phillips, this analysis "allows for a structural break in the market starting in 2000." (Id. at 64).

This "pooled sample" analysis is fatally flawed for the same basic reason discussed above; namely, it fails to account for any "major factors" (other than Defendants' entry into the market in 2000) that could have **[**42]** caused and/or contributed to an increase in ticket prices. Moreover, the "pooled sample" analysis fails even to consider whether a so-called "structural break" occurred in any year other than **[*983]** 2000. To the contrary, Dr. Phillips concedes that there may be "structural breaks" in other years; he simply did not test for them. (See Dkt. 405-4, Phillips Depo., at 450:8-452:8). Finally, the "pooled sample" analysis impermissibly combines two geographic markets (Denver and Los Angeles) in order to reach the desired result. While these MDL actions have been consolidated for the sake of judicial efficiency, this Court consistently has recognized that the antitrust analysis in each case must be done on a market-specific basis.

Plaintiffs have not met their burden of establishing that Dr. Phillips' "pooled sample" analysis satisfies the requirements of *Rule 702*. Accordingly, the Court GRANTS Defendants' Motion to Exclude this testimony.

e. Ticket Surcharges

In his Expert Report, Dr. Phillips opines that Defendants' monopoly power allowed them to add a variety of surcharges to the base price of tickets for the concerts they promoted. (See Phillips Expert Report, ¶¶ 276-82). "[W]hile Clear Channel **[**43]** assesses these charges, for the most part its competitors do not." (Id. at ¶ 279). In particular, Dr. Phillips contends that Defendants charged "monopoly rent" in the form of: (1) facility maintenance fees ("FMF"); and (2) parking fees in certain Los Angeles venues, which were charged regardless of whether the purchaser actually parked at the venue in question. According to Dr. Phillips, the total damages attributable to these surcharges is $2,753,709.12 (Denver) and $12,043,947.41 (Los Angeles). (Phillips Expert Report, at ¶ 282).

Defendants do not argue in their Daubert Motion that Dr. Phillips' testimony regarding these surcharges should be excluded; Defendants address these surcharges only in their Motions for Summary Judgment. Nor can the Court discern any obvious reason why this testimony should be excluded under *Rule 702*. The damage calculations appear to be straightforward, with no apparent methodological flaws that would render them unreliable. With respect to causation, Dr. Phillips' opinion that Defendants' monopoly power allowed them to assess the above-described surcharges generally appears to be within his area of expertise as an economist.

Accordingly, the Court will not **[**44]** exclude Dr. Phillips' damages calculations based on the ticket surcharges assessed by Defendants under *Rule 702*.

2. Definition of the Relevant Market

Dr. Phillips opines that for purposes of Plaintiffs' antitrust claims, the relevant product market is comprised of "live rock music concerts." (See Phillips Expert Report, ¶¶ 40-64). Defendants contend that this opinion should be excluded under *Rule 702*, because Dr. Phillips failed to utilize a reliable methodology in defining this purported market. As a result, Defendants contend that Dr. Phillips' proposed market definition is both under-inclusive and over-inclusive; under-inclusive in that it improperly excludes concerts that are reasonable substitutes for concerts included in Dr. Phillips' definition (e.g., concerts by certain "pop" artists); over-inclusive in that it improperly includes concerts that are not reasonable substitutes for one another (e.g., "classic rock" concerts, which are not reasonable substitutes for "heavy metal" concerts). (See Motion, at 16).

For the reasons set forth below, the Court agrees that Plaintiffs have failed to meet their burden of establishing that Dr. Phillips' proposed definition of the relevant product **[**45]** market is sufficiently reliable and helpful to the trier of fact to warrant inclusion under *Rule 702* and Daubert.

a. Applicable Substantive Law

"For antitrust purposes, a 'market is composed of products that have reasonable **[*984]** interchangeability for the purposes for which they are produced - price, use and qualities considered.'" *Paladin Assocs. v. Montana Power Co., 328 F.3d 1145, 1163 (9th Cir. 2003)* (quoting *Int'l Boxing Club, Inc. v. United States, 358 U.S. 242, 250, 79 S. Ct. 245, 3 L. Ed. 2d 270 (1959))*. "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)*.

> In standard antitrust analysis, the court considers both "demand elasticity" and "supply elasticity" in determining whether anticompetitive effects are likely. *Rebel Oil, 51 F.3d at 1436*. In other words, courts determine the degree to which price increases will cause marginal buyers to turn to other products or marginal suppliers to increase output of the product.

United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1118 (N.D. Cal. 2004).

As this Court observed in its previous Order Granting Class Certification, **[**46]** calculating the cross-elasticity of demand is often an economist's first step in defining the relevant product market. See *In re Live Concert Antitrust Litig., 247 F.R.D. at 123*. Nevertheless, while calculating the cross-elasticity of demand (and supply) is the preferred methodology, it is not an absolute requirement. In *Independent Ink, Inc. v. Trident, Inc., 210 F. Supp. 2d 1155 (C.D. Cal. 2002)*, for example, the court observed that in order to define the relevant product market:

> Plaintiff must proffer "market data, figures or other relevant material adequately describing the nature, cost, usage, or other features of competing products" to determine the bounds of the relevant market.

Id. at 1170-71 (quoting *Bhan v. NME Hosps., Inc., 669 F. Supp. 998, 1018 (E.D. Cal. 1987)*, aff'd, *929 F.2d 1404 (9th Cir. 1991))*.

> Reliable measures of supply and demand elasticities provide the most accurate estimates of relevant markets. However, it is ordinarily quite difficult to measure cross-elasticities of supply and demand accurately. Therefore, it is usually necessary to consider other factors that can serve as useful surrogates for cross-elasticity data.

U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 995 (11th Cir. 1993) **[**47]** (quoting *International Tel. & Tel. Corp., 104 F.T.C. 280, 409 (1984))*.

In the seminal Brown Shoe decision, the Supreme Court identified several "practical indicia," which it concluded could be relied upon to determine the boundaries of a product submarket for purposes of antitrust analysis.

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962).

Although Brown Shoe involved the challenge of a merger under *Section 7* of the **[*985]** Clayton Act, courts have recognized that its submarket analysis is equally applicable to claims brought under **[**48]** the Sherman Act.

> Although *Brown Shoe* involved a claim under Clayton Act *§ 7*, its submarket analysis is applicable in Sherman Act cases. *See* *Greyhound, 559 F.2d at 494 n. 7*. Such applicability follows because the same considerations essential to line of commerce analysis under the Clayton Act are essential to market analysis under the Sherman Act. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1270-71 (9th Cir. 1975)*.

Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1375 n.1 (9th Cir. 1989).

Moreover, while the Court in Brown Shoe was evaluating the definition of a product "submarket" (where the relevant product "market" already had been defined), the Ninth Circuit has observed: "Because every market that encompasses less than all products is, in a sense, a submarket, these [Brown Shoe] factors are relevant even in determining the primary market to be analyzed for antitrust purposes." *Olin Corp. v. FTC, 986 F.2d 1295, 1299 (9th Cir. 1993)* (citing *United States v. Continental Can Co., 378 U.S. 441, 449-55, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964))*.

> "[S]ubmarket indicia" are best viewed as "proxies for cross-elasticities [of supply and demand], and thus the identification of a submarket **[**49]** is in principle no different than the identification of a relevant market." This is to say that nothing would be lost by deleting the word "submarket" from the antitrust lexicon.

2A Areeda & Hovenkamp, ***Antitrust Law***, ¶ 533, at 257 (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218 n.4, 253 U.S. App. D.C. 142 (D.C. Cir. 1986))*.

While the Ninth Circuit has acknowledged that the practical indicia identified in Brown Shoe are "relevant" to the definition of the primary product market, see *Olin, 986 F.2d at 1299*, it has never expressly held that a plaintiff (and, more specifically, a plaintiff's expert economist) can define the relevant product market *exclusively by* reference to these "practical indicia." This case provides an additional wrinkle, in that Dr. Phillips effectively bases his proposed product market definition entirely upon his *qualitative* assessment of the market, without any supporting *quantitative* economic analysis. [11] Even where **[*986]** an economist is unable to calculate the cross-elasticity of demand (and/or supply), at least two of the practical indicia identified in Brown Shoe — "distinct prices" and "sensitivity to price changes" — would appear to lend themselves well to **[**50]** a quantitative approach.

The Court has had some difficulty in locating cases addressing the unique circumstances presented in this case. Nevertheless, for purposes of the instant motion, the Court assumes **[**52]** that an expert economist may, under appropriate circumstances, define the relevant product market through an entirely qualitative assessment of the "practical indicia" identified in Brown Shoe. See generally *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1082 (D. Colo. 2004)* (collecting cases in which courts held that a plaintiff may define the relevant product market without calculating the cross-elasticity of demand, so long as sufficient evidence of other indicia of reasonable interchangeability is introduced).

Under these circumstances, however, the Court will closely scrutinize Dr. Phillips' proposed product market definition in order to ensure that his analysis is sufficiently robust to warrant admission under *Rule 702* and Daubert. See generally *Grason Elec. Co. v. Sacramento Mun. Utility Dist., 571 F. Supp. 1504, 1521 (E.D. Cal. 1983)* ("As the defendant fairly observes, such a determination [of the relevant product market] generally requires a ***detailed examination*** of 'market data, figures or other relevant material adequately describing the nature, cost, usage or other features of competing products.'") (quoting *Morton Buildings, Inc. v. Morton Buildings, Inc., 531 F.2d 910, 919 (8th Cir. 1976))* **[**53]** (emphasis added).

b. Dr. Phillips' Definition of the Relevant Product Market

Here, the Court finds that Dr. Phillips' proffered definition of the relevant product market is inadmissible for two independent, albeit related, reasons. First, Dr. Phillips failed to satisfy *Rule 702*'s requirements in formulating his

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Dr. Phillips has, of course, performed a number of quantitative analyses, several of which are discussed earlier in this Order. Notably, however, none of these analyses address the fundamental question of what products should be included in the relevant market. Instead, they primarily relate to the calculation of Defendants' market share (presuming the product market is defined as Dr. Phillips proposes) and damages. (See generally Phillips Expert Report, Exhs. 1-10; cf. id. at ¶¶ 50-62 (defining the relevant product market without reference to quantitative economic analysis)).

During his deposition, Dr. Phillips conceded, "I didn't look at any particular cross-price elasticity analyses. I looked at the qualitative evidence in defining the market," but went on to state "I did look at the prices of Clear Channel and their sales and tracked their prices and sales as part of my definition of the market." (Phillips Depo., at 373:8-13). In support, Dr. Phillips cited Exhibits 1 and 2 of his Expert Report. (Id. at 376:14-15). These Exhibits are not, however, analyses of what products should be included in the relevant product market. Instead, they appear to be precisely **[**51]** what they are entitled, namely, analyses of "[Denver/Los Angeles] Rock Concert Ticket Prices and Sales, Clear Channel Market Shares and Damage Calculations." When analyzing and defining the relevant product market in his Expert and Rebuttal Reports, Dr. Phillips does not rely on either of these Exhibits. (See Expert Report, at ¶¶ 50-62; Rebuttal Report, at 1-3; 7-9). As one would expect, Dr. Phillips instead relies on these Exhibits to support his opinions regarding Defendants' market share, monopoly power, and damages calculations.

Accordingly, Dr. Phillips' unsupported statements at his deposition, indicating that Exhibits 1 and 2 support his proposed product market definition, do not transform his admittedly qualitative evaluation of the relevant product market into a quantitative analysis. See *Kumho, 526 U.S. at 157* ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.").

definition of the relevant product market; i.e., in determining that the relevant product market is comprised of "live rock music concerts." Second, Dr. Phillips failed to utilize a reliable methodology to populate this market as defined; *i.e.*, in determining which performers qualify as "rock" artists, and thus which concerts qualify as "rock" concerts, under his proposed definition.

(1) Definition of the Relevant Market

In formulating his proposed definition of the relevant product market ("live rock music concerts"), Dr. Phillips: (1) failed reliably to apply his chosen methodology to the facts of this case; (2) failed adequately to consider the "practical indicia" identified in Brown Shoe; and (3) failed to consider the cross-elasticity of supply. The Court will address each of these deficiencies in Dr. Phillips' analysis in turn.

(a) The SSNIP Test

In his Expert Report, Dr. Phillips **[**54]** states that in defining the relevant product market, he utilized the methodology set forth **[*987]** in the U.S. Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines, issued August 19, 2010 (the "Horizontal Merger Guidelines"). The Court will refer to this methodology as the "SSNIP" methodology. [12] As described by Dr. Phillips in his Expert Report, the SSNIP methodology requires an iterative approach. "In order to define a relevant market, economists begin with the *narrowest* definition of a product (or product group) and expand that definition until all reasonable substitutes are included." (Phillips Expert Report, at ¶ 41 (emphasis in original)); see also 2 Kalinowski, Antitrust Laws and Trade, § 24.04[2], at 24-69, 24-70 (describing methodology set forth in the 1992 Guidelines).

As a general matter, the Court assumes that the SSNIP methodology may, under appropriate circumstances, provide an acceptable framework with which to define a relevant product market for purposes of antitrust analysis under *Section 2* of the Sherman Act. See generally 2 Kalinowski, Antitrust Laws and Trade, § 24.02, at 24-34 ("The Department of Justice and Federal Trade Commission have issued a set of guidelines describing how those agencies will review transactions generally and define markets specifically when considering a proposed combination. The guidelines do not deviate from judicial precedent but attempt to provide a simplified approach. These guidelines are not binding on the courts."); see also *Thurman Industries, 875 F.2d at 1375 n.1* (noting Brown Shoe's analysis of the relevant market under *Section 7* of the Clayton Act (i.e., in a merger case) is applicable in Sherman Act cases).

After careful review of Dr. Phillips' Expert Report, however, it is apparent to the Court that Dr. Phillips did not reliably apply the SSNIP methodology to the facts of this case. Accordingly, Dr. Phillips' market definition must be excluded. **[**56]** See *Rule 702(d)* (expert testimony is admissible only where "the expert has reliably applied the principles and methods to the facts of the case.").

Here, Dr. Phillips did not employ the iterative approach called for under the SSNIP methodology. Instead, his market analysis both started and ended with the purported market for live "rock" music concerts. Dr. Phillips never meaningfully considered any *narrower* definition of the market, nor did he ever "expand that definition until all reasonable substitutes [were] included" as required under his own formulation of the SSNIP methodology. See id. In his deposition, for example, Dr. Phillips conceded that he never specifically evaluated any potential product markets *narrower* than his proposed market of live rock music concerts.

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See Horizontal Merger Guidelines, at 9 ("Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ('SSNIP') on at least one product in the market, including **[**55]** at least one product sold by one of the merging firms.").

Q. What did you do to apply the smallest market principle in this case?

A. . . .**[M]y smallest market principle stopped at the music genre rock.**
Q. You would agree, wouldn't you, that there are subgenres of rock?
A. There are.
. . . .

Q. What did you do to test whether applying the smallest market principle one could determine a market under your own methodology that is **[*988]** smaller than rock, such as a subgenre?

[Objection to **[**57]** form]
A. It's subjective in the sense that rock concerts generally substitute for one another. . . .

(Phillips Depo., at 123:17 - 124:17 (emphasis added)).

Thus, instead of starting with the "*narrowest* definition of a product (or product group)" - *e.g.*, an identifiable "subgenre" of rock - and expanding that definition until he was satisfied that all reasonable substitutes were included, Dr. Phillips simply started his analysis with the assumption that "rock" concerts constituted the relevant market, and looked for corroborating evidence without meaningfully testing this assumption. See *Claar v. Burlington N. R.R., 29 F.3d 499, 502-03 (9th Cir. 1994)* ("Coming to a firm conclusion first and then doing research to support it is the antithesis of [the proper application of the scientific method under Daubert].").

As a result, instead of answering the critical question: "What products comprise the relevant market?" Dr. Phillips, analysis devolved into a determination of: "Which performers qualify as 'rock' musicians?"

Q. To populate your relevant market and to exclude those outside of it, it was purely and simply a determination of, quote, whether an artist was, quote, rock or not, correct?
[Objection]

A. **[**58]** That was the main determinant, rock —
Q. What else was there?
A. —did they do rock music.
Q. What else was there?
A. That was the determination. It was rock, yeah.
Q. Okay.
A. Were they rock or not. If they were rock, they were in the market. If not, they were out of the market.

(Phillips Depo., at 116:24 - 117:14).

This approach impermissibly predetermined the results of Dr. Phillips' analysis; i.e., that the relevant product market is comprised of live music concerts by "rock" artists. See generally *In re Remec Inc. Sec. Litig., 702 F. Supp. 2d at 1273* (expert analysis inadmissible where expert's methodology "predetermines the results of his analysis.").

Dr. Phillips' failure even to consider the possibility of a narrower product market is also contrary to the approach outlined in the Horizontal Merger Guidelines, upon which Dr. Phillips purported to rely, which stresses the importance of defining the relevant market as narrowly as possible.

> Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. As a result, properly defined antitrust **[**59]** markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers.

(Horizontal Merger Guidelines, at 8).

In evaluating Dr. Phillips' market analysis, the Court's focus is exclusively on Dr. Phillips' methodology, not his results. See *GE v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)* ("[T]he 'focus, of course, must be solely on principles and methodology, not on the conclusions that they generate. . . . [But a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.") (citations omitted). Here, the Court finds that Dr. Phillips' failure to analyze, in a meaningful way, the possibility of a narrower or broader product market renders his purported application **[*989]** aof the SSNIP methodology unreliable under *Rule 702(d)*.

(b) Brown Shoe Analysis

In addition to the methodological deficiencies discussed above, the Court also finds that Dr. Phillips' analysis of the relevant product market does not adequately consider the "practical indicia" identified in Brown Shoe, and fails to satisfy *Rule 702*'s requirements on this basis as well.

As noted above, Dr. **[**60]** Phillips' failure to calculate the cross-elasticity of demand (or supply) is not necessarily fatal to his proposed market definition. Further, the Court has assumed that (under appropriate circumstances) an expert economist may define the relevant product market based entirely on a qualitative assessment of the "practical indicia" identified in Brown Shoe, *i.e.*: (1) industry or public recognition of the market as a separate economic entity; (2) the product's peculiar characteristics and uses; (3) unique production facilities; (4) distinct customers; (5) distinct prices; (6) sensitivity to price changes; and (7) specialized vendors. *Brown Shoe, 370 U.S. at 325*.

The existence of three or four of these indicia has been held "sufficient to delineate a submarket[.]" 2 Kalinowski, Antitrust Laws and Trade, § 24.02[2][a], at 24-86.

(i) Analysis Based on a Single Factor

Here, Dr. Phillips' analysis of the relevant market rests, for all intents and purposes, on a single Brown Shoe practical indicium: "industry or public recognition of the submarket as a separate economic entity." *Brown Shoe, 370 U.S. at 325*. As described by Dr. Phillips in his Expert Report:

> [T]he collective perceptions of buyers **[**61]** and sellers and other persons close to the industry must be relied upon to make a determination of the relevant market. Specifically, if participants in and agents close to the industry perceive goods to be close substitutes in the sense defined by the Merger Guidelines, economists are inclined to place the goods in the same market.

(Phillips Expert Report, ¶ 43 (emphasis in original omitted)).

Even assuming that this statement is correct (and the "collective perceptions of buyers and sellers and other persons close to the industry" support Dr. Phillips' proposed definition of the relevant product market), [13] the

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For purposes of this analysis, the Court accepts Dr. Phillips' conclusion that there is industry/public recognition of the purported market for "live rock music concerts" (*i.e.*, the first Brown Shoe practical indicium is satisfied). Nevertheless, the Court notes that the industry materials upon which **[**62]** Dr. Phillips purports to rely in reaching this conclusion are far from consistent.

For example, the website *www.allmusic.com*, upon which Dr. Phillips relied in order to classify various artists by music genre, (see Phillips Depo., at 140-41), does not identify "rock" as a stand-alone music category, but instead lists an umbrella category for "pop" and "rock" combined (*i.e.*, "pop/rock"). The website further identifies a number of different sub-genres of "pop/rock" music. (See *http://www.allmusic.com/explore/genre/pop-rock-d20*).

Similarly, Dr. Phillips cites a June 8, 2009 USA Music Preferences report for the proposition that "there is a well-defined market for the promotion of rock concerts" and "rock music appeals to very different audiences than [do other types of music.]"). (See Phillips Rebuttal Report, at 7 & n.17 (citing David McLaughlin, USA Music Preferences, Appendix 1: Music Preferences in the U.S. 1982-2002 (June 8, 2009), available at *http://www.scribd.com/doc/16203729/Usa-Music-*

fundamental flaw in Dr. **[*990]** Phillips' analysis is that he goes no further. In focusing on industry/public recognition of the purported market for live rock music concerts, Dr. Phillips either ignores, or addresses in cursory fashion, the remaining six Brown Shoe practical indicia.

The Court briefly addresses each of these additional Brown Shoe practical indicia below.

(a) Peculiar Characteristics and Uses

The closest that Dr. Phillips' Report comes to identifying a peculiar characteristic or use of "live rock music concerts" is quoting, without further discussion, **[**64]** the dictionary definition of "rock music." (See Phillips Expert Report, at ¶ 50 ("Webster's Ninth New Collegiate Dictionary (p. 1020) defines rock music as 'popular music played on electronically amplified instruments and characterized by a persistent heavily accented beat, [with] much repetition of simple phrases . . . .'")). The mere quotation of a dictionary definition - absent more - simply does not constitute meaningful expert *economic* analysis of this factor. Moreover, Dr. Phillips' Expert Report fails to consider whether the above-quoted definition applies exclusively to "rock" music, or whether it accurately characterizes a broader category of music (e.g., "rock/pop") or whether it would, in contrast, better characterize one or more sub-genres of "rock" (*e.g.*, "classic rock" or "heavy metal").

Dr. Phillips' failure adequately to consider this factor is noteworthy in that "'peculiar characteristics and uses,' although not necessary to the finding of a submarket, is the factor most often cited by courts in cases where product submarkets are demonstrated." 2 Kalinowski, Antitrust Laws and Trade, § 24.02[2][c], at 24-71.

(b) Unique Production Facilities

In the section of Dr. Phillips' **[**65]** Expert Report entitled "The Relevant Market," Dr. Phillips does not discuss the presence (or absence) of any purportedly "unique production facilities" for live rock music concerts. (see Phillips Expert Report, at ¶¶ 40-64). In the preceding section, entitled "Production Inputs for Live Concerts," Dr. Phillips opines that there are three "production inputs" for live music concerts in general: (1) music talent (i.e., the music artist(s) performing at the concert); (2) radio promotion (i.e., advertising and promotion for the concert on one or more radio stations); and (3) venue (i.e., the physical location at which the concert is held). (Id. at ¶¶ 28-39). Dr. Phillips, however, describes these production inputs as necessary components for the promotion of *all* live music concerts. (See id.). He does not argue that these production inputs are unique to the purported market for live *rock* music concerts, such that they support his proposed definition of the relevant product market under Brown Shoe. (See generally Phillips Expert Report, at ¶¶ 28-39 (discussing "production inputs"); ¶¶ 50-62 (discussing product market); ¶¶ 239-47 (discussing barriers to entry)).

The Court further addresses **[**66]** the three "production inputs" identified by Dr. Phillips below.

[*991] (i) Venue

Preferences)). This Report, however, does not analyze "rock" as a stand-alone category. Instead, it divides "rock" into two categories — "Classic Rock/Oldies" and "Rock/Heavy Metal" — each of which **[**63]** the Report analyzes independently.

To reiterate, the Court does not cite these inconsistent industry definitions of various music genres in an attempt to refute Dr. Phillips' conclusion that there is industry/public recognition of the purported market for "live rock music concerts." Instead, the Court notes these inconsistencies because they underscore the importance of performing a *thorough* analysis of the practical indicia identified in Brown Shoe, which (as discussed below) Dr. Phillips failed to do. See generally *Grason, 571 F. Supp. at 1521* (determination of the relevant product market requires a "detailed examination" of the relevant materials). In other words, the Court could envision a scenario in which the evidence supporting a single Brown Shoe indicium was so overwhelming that it (at least arguably) would obviate the need for meaningful analysis of the remaining indicia. This is not such a case.

With respect to venue, Dr. Phillips expressly conceded in his deposition that this "production input" is not unique to live rock music concerts.

> Q. Isn't it true that all promoters use the same facilities to promote rock concerts as they do country and jazz concerts?
>
> A. I would say so. There's music venues, and it doesn't really depend on the music.

(Phillips Depo., at 151:20-24).

(ii) Radio Promotion

With respect to the radio "production input," Dr. Phillips notes in his Expert Report that radio stations often play a "mix" of different types of music, (see, e.g., Phillips Expert Report, at ¶ 53 ("there are formats like contemporary Hit Radio (CHR) which play a mix of rock and popular music")), [14] and that there is "cross-promotion" among radio stations, meaning that "rock" concerts may be promoted on radio stations that play non-"rock" music. (See Phillips Expert Report, at ¶ 81 ("A fifth Clear Channel station, KFMD (KHIH) is a top 40, contemporary hits station, and cross-promotes with rock music concerts, and could be added to the above list [of radio stations relevant to the purported 'rock' market]")).

While Dr. Phillips expressly excludes "pop" music concerts from his definition of the relevant product market, (See Dkt. 405, Yen Decl., Exh. 17 (defining concerts as either "rock", "pop", or "other")), Dr. Phillips expressly includes "pop" radio stations (i.e., "contemporary hits" stations) in his analysis of the "radio" production input. (See, e.g., Phillips Expert Report at ¶ 88 ("This list [of "rock" radio stations] specifically includes CHR formats."); id. at ¶¶ 81, 89-90).

(iii) Music Talent

Similarly, when evaluating Clear Channel's allegedly anticompetitive conduct in his Expert Report, Dr. Phillips treats "rock" and "pop" artists as functionally interchangeable. When discussing Clear Channel's alleged control of the relevant "production inputs", for example, Dr. Phillips states:

> When promoting concerts, [Clear Channel] owns or controls radio inputs, venues, and much of its music talent through long-term exclusive contracts with artists such as the Rolling Stones, Madonna, U2, Jay-Z, Shakira, Nickelback and the Jonas Brothers.

(Id. at ¶ 27). While Dr. Phillips categorizes **[**68]** The Rolling Stones, Madonna, U2 and Nickelback as "rock" artists, he classifies both Shakira and the Jonas Brothers as "pop" artists, and Jay-Z as "other". (See Dkt. 405, Yen Decl., Exh. 17). Nevertheless, Dr. Phillips refers to these non-"rock" artists as "production inputs" in precisely the same manner as he refers to "rock" artists. (See also, e.g., Phillips Expert Report, at ¶ 126 (discussing allegedly anticompetitive behavior in connection with "Wango Tango[,] an annual day-long concert festival promoted by Clear Channel's KIIS FM radio. The festival invites a collection of pop and rock artists to perform free of charge at large venues in Southern California")).

* * *

Dr. Phillips does not base his definition of the relevant product market on any purported uniqueness of production facilities. (See Phillips Expert Report, at ¶¶ 40-62). Moreover, to the extent that **[*992]** Dr. Phillips' Expert Report can be said to address this issue, it does so in a manner contrary to his ultimate conclusion that the relevant market is comprised only of live *rock* music concerts. Cf. 2 Kalinowski, Antitrust Laws and Trade, § 24.02[2][f], at 24-76, 24-

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See also **[**67]** Phillips Expert Report, at ¶ 76 (discussing various radio stations "that often play high percentages of rock music").

77 ("Evidence that a product . . . requires facilities **[**69]** or technology ***markedly different*** from that used to produce its alleged substitutes supports the existence of a submarket.") (emphasis added).

(c) Distinct Prices and Specialized Vendors

With respect to "distinct prices" and "specialized vendors," Dr. Phillips does not address these indicia as they relate to his proposed product market definition of live *rock* music concerts. He addresses them only as to live music concerts generally.

> It is also my opinion live music concerts are separate products from other live events or other types of entertainment. They have several features distinct from performances that are filmed or purely audio . . . . [C]oncerts are distinct from movies, videos, and audio recordings. ... In addition, there are distinct prices for concert tickets. . . . And there are specialized vendors. The major promoters — Clear Channel and Anschutz Entertainment Group (AEG) — do not sell or rent video or audio recordings except as an adjunct to specific concerts.

(Phillips Expert Report, at ¶¶ 60-61).

(d) Sensitivity to price changes

Dr. Phillips does not address this factor.

(e) Distinct Customers

The only portion of Dr. Phillips' market analysis that arguably addresses the issue **[**70]** of distinct customers for "live rock music concerts" states: "[According to a survey by the U.S. Census Bureau,] '[s]even in ten young adults (age 18 to 24) say they like rock, compared with only 7 percent of adults aged 75 and older.'" (Phillips Expert Report, at ¶ 52). [15]

The mere observation that younger people are more likely to listen to rock music, however, is insufficient — on its own — to constitute meaningful expert analysis of this factor. As a preliminary matter, the cited survey appears to address general music listening patterns (e.g., when listening to music on the radio); it says nothing about *live concert* attendance, which is the relevant issue in this case. Moreover, as with all Brown Shoe indicia, the purpose of the "distinct customers" inquiry is to *distinguish* the products in the proposed market (or submarket) from potential substitutes. Here, however, Dr. **[**71]** Phillips does not purport to identify any "distinct" customer base for live rock music concerts, nor does he make any attempt to differentiate any such customer base from that of potentially larger markets (e.g., the market for live "rock/pop" music concerts), or smaller markets (e.g., the market for live "classic rock" or "heavy metal" concerts). [16]

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The Report similarly states: "A survey conducted for the National Endowment for the Arts by the U.S. Census Bureau found that, for example, 'Country audiences have a distinct demographic profile, and they tend not to cross over into other types of music.'" (Id.; see also Phillips Rebuttal Report, at 7 & n.17).

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In his Rebuttal Report, Dr. Phillips purports to bolster his analysis based on discussions with his students regarding their music listening patterns. (See Phillips Rebuttal Report, at 8). The definition of the relevant product market cannnot, however, properly be based on such "limited anecdotal evidence." *Metro Indus. v. Sammi Corp., 82 F.3d 839, 848 (9th Cir. 1996)* (quoting *Vollrath Co. v. Sammi Corp., 9 F.3d 1455, 1462 (9th Cir. 1993))*.

(f) Brown Shoe Practical Indicia: Conclusion

The Court has found minimal case law addressing the application of *Rule 702*'s **[*993]** requirements to an expert economist's proposed product market definition based on an analysis of the practical indicia identified in Brown Shoe. In related contexts, however, several courts have held that, in the absence of additional economic analysis, the relevant product market **[**72]** cannot be defined solely by reference to a single Brown Shoe factor. See 2 Kalinowsi, Antitrust Laws and Trade, § 24.02[2][b], at 24-70 ("Industry recognition of a separate market, alone, does not suffice to establish a submarket."); id. at § 24.02[2][a], at 24-67 (the presence of three or four Brown Shoe factors is sufficient to define a market); see also *IT&T v. General Tel. & Elecs. Corp., 518 F.2d 913, 932 (9th Cir. 1975)* (holding district court clearly erred in finding a valid submarket based on only two Brown Shoe indicia: industry recognition (including statements by the defendant itself) and distinct customers).

While not directly on point, the Court finds these cases helpful by analogy. In particular, the Court finds that Dr. Phillips' purported analysis of the relevant product market — which focuses almost entirely on a single Brown Shoe factor (industry/public recognition), with little relevant analysis of the remaining six factors [17] — is neither sufficiently reliable nor sufficiently helpful to the trier of fact to satisfy *Rule 702*'s requirements.

(ii) Economic Significance

Moreover, an indispensable component of any market analysis based on the practical indicia identified in Brown Shoe is an evaluation of the *economic significance* of these indicia.

> Whether or not a court is justified in carving out a submarket depends ultimately on whether the factors which distinguish one purported submarket from another are "economically significant" in terms of the alleged anticompetitive effect.

IT&T, 518 F.2d at 932. Here, Dr. Phillips not only failed meaningfully to consider any Brown Shoe indicia other than industry/public recognition, but he also failed to provide any meaningful discussion as to whether and how any such indicia are "economically significant" in this particular case. Instead, Dr. Phillips' analysis of the relevant product market essentially boils down to: plenty **[**74]** of people (including consumers and industry participants) recognize "rock" as a type of music; therefore, the relevant market in this case is comprised of "live rock music concerts." A key ingredient missing from Dr. Phillips' Expert Report, however, is *economic analysis* (be it quantitative or qualitative) tying these statements by industry observers to Dr. Phillips' ultimate conclusion that the relevant market is comprised of "live rock music concerts."

(c) Cross-Elasticity of Supply

When defining the relevant product market, Dr. Phillips admittedly failed to consider cross-elasticity of supply.

> Q. How did you apply the principle of cross-elasticity of supply in your analysis? It's not mentioned in your report, is it?
> A. No, it's not.
> Q. So how did you apply that principle in this case?
> A. Yeah, I didn't give it much thought.

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As discussed above, to the extent that Dr. Phillips addressed the remaining six Brown Shoe factors, he did so primarily by **[**73]** reference to product markets (i.e., the market for all live music concerts, or "rock/pop" music concerts) other than what he contends is the relevant product market in this case (i.e., live rock music concerts). Thus, to the extent that this mismatched analysis is relevant to Dr. Phillips' proposed product market definition, it undermines his ultimate conclusion.

[*994] (Phillips Depo, at 150:21-151:3). "But defining a market on the basis of demand considerations alone is erroneous. A reasonable market definition must also be based on 'supply elasticity.'" *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995)* (internal citations omitted).

In some respects, the "unique production facilities" indicium identified **[**75]** in Brown Shoe can be viewed as a proxy for the cross-elasticity of supply.

> [I]f two products can be manufactured with the same or similar equipment, i.e., a manufacturer of one can shift with little expense to production of the other, this is evidence of "cross-elasticity of supply.' Evidence of cross-elasticity of supply or production flexibility may be adduced to support a broad market definition.

2 Kalinowski, Antitrust Laws and Trade, § 24.02[2][f], at 24-77.

As discussed above, however, to the extent that Dr. Phillips considered "unique production facilities," he did so in a manner that undermined his proposed market definition (by focusing on "production inputs" common to *all* live music concerts — or in some cases common to "rock" and "pop" concerts — as opposed to production inputs unique to live *rock* music concerts).

(d) Definition of the Relevant Market: Conclusion

Dr. Phillips' analysis of the relevant product market: (1) fails to comport with Dr. Phillips' chosen methodology (*i.e.*, the "SSNIP" methodology); (2) is effectively predicated on the analysis of a single Brown Shoe factor; and (3) fails to consider the cross-elasticity of supply. Accordingly, the Court finds that this **[**76]** purported definition of the relevant product market is neither sufficiently reliable nor sufficiently helpful to the trier of fact to warrant admission under *Rule 702*.

(2) Populating the Relevant Market

The Court's discussion in the preceding section focused on Dr. Phillips' opinion that the relevant product market is comprised of "live rock music concerts." This section addresses the means by which Dr. Phillips populated this purported market; *i.e.*, his determination of which artists qualify as "rock" artists and, therefore, which concerts qualify as "rock" concerts, such that they should be included in the market as defined by Dr. Phillips.

As set forth in more detail below, to the extent that Dr. Phillips relied on his own subjective opinion in order to determine which performers qualify as "rock" artists, he is not qualified to make this determination. Further, to the extent that Dr. Phillips purported to rely on "industry information" in order to categorize the artists at issue, he did not utilize a reliable methodology for interpreting and applying this information. Under either view, this testimony is inadmissible under *Rule 702* and Daubert.

(a) Opinions Outside of Dr. Phillips" [77] Area of Expertise**

In connection with his analysis of the relevant product market, Dr. Phillips made a concert-by-concert determination of whether the performer(s) at issue qualified as "rock" artists. Dr. Phillips, however, has no expertise in this area. Nor can the Court discern any meaningful application of Dr. Phillips' expertise as an economist to these determinations.

When discussing his methodology for defining the relevant market, Dr. Phillips noted, "Indeed, some of what I did was similar to what Live Nation **Music Analyst** Dan Condon testified he did when his work called for him to categorize a particular artist by genre: namely, when a particular artist was not already categorized by the company, he looked to industry **[*995]** sources like Pollstar." [18] (Phillips Expert Report, at ¶ 62, n.85 (emphasis added)). Similarly, when asked in his deposition, "Isn't a juror perfectly capable of determining whether Paul McCartney is rock?" Dr. Phillips replied: "Yes, and in fact, the juror may be part of the fan base that has preferences for Paul McCartney or The Rolling Stones or someone else." [19] (Phillips Depo., at 128:22 - 129:2).

Thus, in determining whether each performer qualified as a "rock" artist, Dr. Phillips was, in his own words, doing the work of a "music analyst" (or perhaps a lay juror). He was not relying on his experience and expertise as an economist. See 4 J. **[**79]** McLaughlin, Weinstein's Federal Evidence § 702.04[6], at 702-68.9 (Matthew Bender 2d ed. 2011) ("[E]ven though a proposed witness might possess credentials to render some expert opinions, the trial court may, and perhaps must, exclude on grounds of disqualification any testimony that extends beyond the witness's demonstrated expertise.").

(b) Unreliable Methodology

Plaintiffs argue that in categorizing the music artists at issue, Dr. Phillips simply relied on the types of materials typically used by experts in his field (consumer surveys, trade publications, etc.). The Court recognizes, as a general matter, that economists are entitled to rely on relevant trade publications and comparable industry materials when conducting an economic analysis of a particular industry. Here, however, the manner in which Dr. Phillips utilized the industry publications upon which he relied - and the corresponding lack of any discernable economic analysis of these materials - render his categorization of music artists unreliable under *Rule 702(c)* (expert testimony is admissible only where it "is the product of reliable principles and methods").

More specifically, Dr. Phillips categorized each concert that **[**80]** took place during the relevant time period as "rock", "pop" or "other." (See Dkt. 405, Yen Decl., Exh. 17; Phillips Depo., at 134:3-25). With respect to this categorization, Dr. Phillips listed a "source" for each artist. (See id.). Dr. Phillips' primary source was Billboard. (Id. at 139:4-6). Billboard, however, does not categorize artists by genre (e.g., as a "rock" artist). [20] (Id. at 139:7-21; 141:16-18). Consequently, Dr. Phillips read the Billboard "bio" for each artist, and made a "subjective determination based upon [his] opinion" as to whether that artist qualifies as a "rock" musician. (Id. at 141:19-23). In some cases, additional sources were consulted (e.g., *www.allmusic.com*), but Dr. Phillips recorded only the "primary" source for each artist in his Report. (Id. at 135:5-8). Dr. Phillips decided for himself which source(s) to rely on when categorizing each artist. (Id. at 135:2-3). He **[*996]** did not consult a music expert when making this determination.

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Under certain circumstances, it would be appropriate for an **[**78]** economist to rely on work performed by a music analyst as a basis for further *economic* analysis. Here, however, Dr. Phillips does not purport to rely on work done by Dan Condon (or any other music analyst). Instead, he categorized artists — *i.e.*, performed the work of a "music analyst" — himself.

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When asked, "What evidence can you point to supporting your market definition that a member of the jury couldn't do on their own?" Dr. Phillips responded, "Well, if a member of a jury had a Ph.D. in economics and wanted to immerse themselves in this case for nine or ten years, they'd have a go at it, they'd have a possibility of reaching the same opinions I did." (Phillips Depo., at 128:14-21). With respect to the specific task of categorizing artists as "rock" versus non-"rock", however, Plaintiffs do not argue that a Ph.D. in economics is required (or that Dr. Phillips' background in any way qualifies him to make this determination on his own).

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From the record before the Court, there **[**81]** does not appear to be any "definitive" industry resource that categorizes artists in this manner.

[21] (Id. at 143:4-6). See generally 4 J. McLaughlin, Weinstein's Federal Evidence § 703.04 [3] & n.26, at 703-19 (under *Rule 703*, expert may reasonably rely on opinions of other experts).

By way of example, in Dr. Phillips' Expert Report, the "source" listed for Simon & Garfunkel is "Billboard." (See Phillips Depo., at 167:7-25). Simon & Garfunkel's Billboard bio refers to the group as "[t]he most successful folk-rock duo of the '60s." (Phillips Depo., at 167:7-9). Dr. Phillips, however, categorized Simon & Garfunkel as "pop," not "rock." (Id. at 167:22-25). When asked why, Dr. Phillips responded: "Because considering all of the industry information, they were considered to be more folk than rock." (Id. at 168:2-4). Dr. Phillips was unable to specifically identify any such "industry information," nor was it listed in his Report. (Id. at 169:4-13).

In effect, Dr. Phillips' explanation for this classification is: I am an economist, I reviewed a large amount of "industry information" — which does not explicitly categorize artists as "rock" versus non-"rock", which is not specifically **[**82]** identified in my Report, and which I am unable specifically to recall — and this industry information supports my conclusion. [22] This "methodology" does not satisfy the requirements of *Rule 702* or *Rule 703*. See *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 157, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* ("Of course, [the expert] himself claimed that his method was accurate, but, as we pointed out in *Joiner*, 'nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.") (quoting *General Elec. Co. v. Joiner, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997))*.

The Court's conclusion may have been different if Billboard, or any other resource identified by Dr. Phillips, provided a comprehensive, objectively-verifiable categorization of music artists. Courts consistently have allowed **[**83]** economists to rely on such data. See, e.g., *Clinchfield R. Co. v. Lynch, 784 F.2d 545, 553-54 (4th Cir. 1986)* (expert entitled to rely on reports of the United States Census Bureau); see also 2 Kalinowski, Antitrust Laws and Trade § 24.02[2][b] & n.170, at 24-70 (Industrial classification codes of the U.S. Census Bureau may be used as evidence of "industry or consumer recognition" under Brown Shoe). Here, however, the "industry information" upon which Dr. Phillips purports to rely failed to provide the specific information that he needed, forcing Dr. Phillips to engage in further *non-economic* analysis in order to categorize the artists at issue.

As noted in the Court's prior Class Certification Order, the definition of any product market necessarily will entail some "gray area" around the edges. Here, however, Dr. Phillips applied an unreliable methodology in determining whether every concert at issue in this litigation qualified as a "rock" concert, which should be included in the relevant product market. This unreliable methodology does not merely implicate the "gray area" **[**84]** at the fringes; it fatally undermines Dr. Phillips' **[*997]** definition of the relevant product market in its entirety.

c. NIPP Litigation

In *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1082 (D. Colo. 2004)* ("NIPP"), a Denver-based concert promoter brought an antitrust action against Clear Channel Communications, Inc., Clear Channel Broadcasting, Inc. (Defendants in this litigation) and other entities. In that case, Dr. Phillips offered expert testimony regarding several potentially relevant product markets, including the

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In contrast, Dr. Phillips relied on the assistance of a music expert when performing his market analysis in the NIPP litigation, which is discussed further below. (See Phillips Depo., at 143:4-144:21).

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Dr. Phillips also contends that Defendants' internal classifications of certain artists support his conclusions. These internal classifications, however, are similarly ambiguous. (See, e.g., Phillips Depo., at 162:13-63:3 (arguing that Defendants' classification of Madonna as "rock/pop" supports his categorization of Madonna as "rock" instead of "pop")).

purported market for rock music concerts. See *id. at 1083*. In response to Defendants' motion to exclude Dr. Phillips' testimony, the court held:

> Although Dr. Phillips did not calculate cross-elasticity of demand, he did rely on other economic data, including industry materials, pricing data, and public recognition of the market, all of which have been held relevant to determining the scope of a market. Additionally, Dr. Phillips does not base his opinion on his subjective beliefs but on his research of industry materials regarding the industry's categorization of rock music. Because Dr. Phillips relies on sufficient data and applies **[**85]** that data to define the market, his opinion is sufficiently reliable for admission on the issue of market definition under *Daubert.* The court elects to refrain from ruling on defendants' motion as to the admissibility of Dr. Phillips' opinion on damages at this time, since [that] decision is not relevant to the summary judgment motion. [23]

Id. at 1120. Both Plaintiffs and Dr. Phillips cite the NIPP decision in support of their proposed product market definition. The court's decision in NIPP, however, is not binding on this Court. Moreover, the *NIPP* case is distinguishable from the instant action in several key-respects.

As a preliminary matter, the court in NIPP undertook an extensive analysis of Dr. Phillips' proposed market definitions in connection with defendants' motion for summary judgment, followed by a very brief discussion (quoted above) of defendants' motion to exclude Dr. Phillips' testimony under *Rule 702*. As noted earlier, this Court's analysis proceeds in the reverse order: first, a thorough examination of Dr. Phillips' proffered expert testimony in the Court's role as "gatekeeper" under *Rule 702*; second, an analysis of Defendants' motions for summary judgment, considering Dr. Phillips' testimony only to the extent that it is admissible under *Rule 702*. See *Claar v. Burlington N. R.R., 29 F.3d 499 (9th Cir. 1994)*.

Furthermore, in NIPP, Dr. Phillips relied on the assistance of a music expert in performing his market analysis. In this case, no music expert was retained. **[**87]** [24] (See **[*998]** Phillips Depo., at 143:4-144:21 (discussing the use of a music expert in NIPP, but not in this litigation)).

Moreover, in evaluating the plaintiff's proposed product market in NIPP, the court relied, in part, on a pricing comparison in which "Dr. Phillips set[] forth average ticket prices for both rock, rock-pop, and all music concerts." *NIPP, 311 F.Supp.2d at 1084*. Here, Dr. Phillips cites no such comparative-pricing analysis in support of his proposed product market definition (nor does Plaintiff argue that Dr. Phillips' proposed product market definition is based on any such analysis). [25] Instead, in defining the relevant product market, Dr. Phillips compared the average

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While the NIPP court declined to rule on the admissibility of Dr. Phillips' opinion on damages, its brief discussion of this issue in connection with defendants' motion for summary judgment supports this Court's analysis of Dr. Phillips' damages calculations (discussed above):

> To the extent that NIPP argues that Clear Channel's prices are above industry average based on a comparison between average ticket prices charged in a given year by Clear Channel versus average ticket prices charged by other promoters, Clear Channel is correct that NIPP's failure to consider the **[**86]** different costs born by Clear Channel is fatal to NIPP's argument. If Clear Channel promotes all of the most expensive, top artists, Clear Channel's ticket prices will be higher than tickets sold by other promoters, and this price difference does not indicate monopolistic pricing or conduct.

NIPP, 311 F. Supp. 2d at 1100-01.

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In connection with his Expert Report submitted in this case, Dr. Phillips lists "NIPP" as the source for his classification of certain music artists. (See Yen Decl., Exh. 17). Presumably, the music expert in NIPP assisted Dr. Phillips in classifying these artists. Given the relatively small number of artists for which Dr. Phillips lists "NIPP" as the source, however, his prior use of a music expert in NIPP does not materially affect the Court's analysis in this case.

price of live music concerts generally **[**88]** to entirely different forms of entertainment (e.g., movies). (See Phillips Expert Report, at ¶ 60).

Notably, the plaintiffs in NIPP argued in support of multiple relevant product markets, leading the court to conclude, "Alternatively, a reasonable jury could surely find that NIPP has set forth evidence of practical indicia showing a distinct market for all live music concerts." *NIPP, 311 F.Supp.2d at 1084*. Here, in contrast, the only relevant product market argued by Plaintiffs is the purported market for live rock music concerts.

The court in NIPP concluded that plaintiff raised a triable issue of fact with respect to cross-elasticity of supply. See *NIPP, 311 F.Supp.2d at 1085*. Here, Dr. Phillips conceded that he did not consider cross-elasticity of supply in his analysis.

Finally, **[**89]** the court's decision in NIPP did not address the *methodology* employed by Dr. Phillips, which is the focus of this Court's analysis under *Rule 702*. The methodology employed by Dr. Phillips in NIPP differed in at least one material respect from the methodology employed here, namely, the use of a music expert to categorize artists by music type. Because the court in NIPP did not further elaborate on its Daubert findings, this Court is unable to discern whether Dr. Phillips' methodology in that case differed in other material respects as well.

d. Definition of the Relevant Market: Conclusion

The Court finds that Dr. Phillips' Expert Report fails to satisfy *Rule 702*'s requirements in both: (1) defining the relevant product market; and (2) populating this market for purposes of his analysis. Accordingly, Plaintiffs have failed to meet their burden of demonstrating that Dr. Phillips' opinion regarding the definition of the relevant product market is admissible under *Rule 702*.

3. Defendants' Market Share & Exclusionary Conduct

Finally, Defendants argue that the Court should exclude Dr. Phillips' opinions regarding Defendants' share of the relevant market and Defendants' allegedly anticompetitive **[**90]** conduct. The gravamen of Defendants' arguments as to this testimony, however, is not that Dr. Phillips is unqualified to offer opinions on these matters (or that his methodology is so flawed as to warrant exclusion under *Rule 702*). Instead, Defendants argue that Dr. Phillips' **[*999]** opinions on these issues are insufficient, as a matter of law, to support Plaintiffs' antitrust claims. Accordingly, these arguments are not amenable to analysis under *Rule 702*, but instead should be analyzed under the summary judgment standard.

V. DEFENDANTS" MOTIONS FOR SUMMARY JUDGMENT

A. Legal Standard

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is

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Nor has the Court located any such analysis in the voluminous record. See generally *Carmen, 237 F.3d at 1029* ("A lawyer drafting an opposition to a summary judgment motion may easily show a judge, in the opposition, the evidence that the lawyer wants the judge to read. It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence.").

entitled to judgment as a matter of law. See *Fed. R. Civ. P. 56(c)*; *Tarin v. Cnty. of Los Angeles, 123 F.3d 1259, 1263 (9th Cir. 1997)*.

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. See *Celotex Corp v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The moving party may satisfy its *Rule 56(c)* burden by "'showing' — that is, pointing out to **[**91]** the district court — that there is an absence of evidence to support the nonmoving party's case." *Celotex, 477 U.S. at 325*. Once the moving party has met its initial burden, *Rule 56(e)* requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. See *id. at 323-24*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact. *Addisu v. Fred Meyer, 198 F.3d 1130, 1134 (9th Cir. 2000)*. Only genuine disputes over facts that might affect the outcome of the suit under the governing law, i.e., "where the evidence is such that a reasonable jury could return a verdict for the nonmoving party," will properly preclude the entry of summary judgment. See *Anderson, 477 U.S. at 248*.

Under *Local Rules 56-2* and *56-3*, these triable issues of fact must be identified in the non-moving party's "Statement of Genuine Issues" and supported by "declaration or other written evidence." See also *Sullivan v. Dollar Tree Stores, Inc., 623 F.3d 770, 779 (9th Cir. 2010)* ("*Federal Rule of Civil Procedure 56(e)(2)* requires **[**92]** a party to "set out specific facts showing a genuine issue for trial."). If the non-moving party fails to identify the triable issues of fact, the court may treat the moving party's evidence as uncontroverted, so long as the facts are "adequately supported" by the moving party. *Local Rule 56-3*; see also *International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 398 n.14, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986)* ("[I]t is not [the Court's] task *sua sponte* to search the record for evidence to support the [parties'] claim[s]."); *Carmen v. San Francisco United School District, 237 F.3d 1026, 1029 (9th Cir. 2001)* ("A lawyer drafting an opposition to a summary judgment motion may easily show a judge, in the opposition, the evidence that the lawyer wants the judge to read. It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence.").

B. Sherman Act Claims

Defendants argue that summary judgment is warranted based, *inter alia*, on Plaintiffs' failure to raise a triable issue of fact as to the relevant product market.

"As long held by the Supreme Court, proof of a relevant market is an essential element of a *Section 2* monopolization and attempted **[**93]** monopolization case." 2 Kalinowski, Antitrust Laws and Trade, § 24.01[3][a], at 24-5, 24-6 (citing *Spectrum **[*1000]** Sports v. McQuillan, 506 U.S. 447, 457, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* ("[I]t is beyond doubt that [a monopolization claim under *Sherman Act § 2*] requires proof of market power in a relevant market.); *Spectrum Sports, 506 U.S. at 459* ("[P]etitioners may not be liable for attempted monopolization under *§ 2* of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market[.]")).

For the reasons set forth above, Dr. Phillips' testimony regarding the relevant product market is inadmissible under *Rule 702*. Plaintiffs do not argue (nor does the Court conclude) that there is an adequate evidentiary basis in the record, absent Dr. Phillips' testimony, for a jury to find that Plaintiffs have defined an economically significant product market. See *IT&T, 518 F.2d at 932*. Accordingly, summary judgment is appropriate with respect to Plaintiffs' claims of monopolization and attempted monopolization in the Denver and Los Angeles markets. See *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1380 (9th Cir. 1989)* (affirming district court's order granting summary judgment, **[**94]** where plaintiff failed to raise a triable issue of fact as to its proposed product submarket definition); *Plush Lounge Las Vegas LLC v. Hotspur Resorts Nev., Inc., 371 Fed. Appx. 719, 721 (9th Cir. 2010)* (affirming summary judgment as to plaintiff's claim under Sherman Act *§ 2*, where the district court excluded under *Rule 702* significant portions of the declarations of plaintiff's proffered experts).

In rare instances, a claim under the Sherman Act may succeed absent a specifically-defined product market.

> [D]ispensing with market definition and relying on direct evidence [of anticompetitive behavior] might be appropriate in cases involving highly suspicious restraints, such as horizontal agreements examined under the "quick look" rule of reason. For all other restraints, however, a relevant market must be shown.

2B Areeda & Hovenkamp, ***Antitrust Law***, ¶ 531, at 241 (citing *Republic Tobacco Co. V. N. Atl. Trading Co., Inc., 381 F.3d 717, 736-39 (7th Cir. 2004))*.

Here, however, Plaintiffs do not argue that Defendants' conduct was so "highly suspicious" that it can support an antitrust claim absent a properly-defined product market. Nor do they argue that Defendants' alleged anticompetitive **[**95]** behavior may be evaluated under a "quick look" analysis. Instead, Plaintiffs contend that Defendants' activities, even if lawful when viewed in isolation, amount to a violation of the Sherman Act when considered in their entirety. (See generally MSJ Opposition (Denver), at 9-11 (arguing that Defendants' conduct must be evaluated as a whole)). Accordingly, this action does not involve the rare circumstances under which a Sherman Act claim may succeed absent a viable definition of the relevant product market.

Accordingly, Defendants' Motions for Summary Judgment are GRANTED with respect to Plaintiffs' claims for monopolization and attempted monopolization under *Section 2* of the Sherman Act (in the Denver and Los Angeles markets). Based on the Court's conclusion that summary judgment is warranted based on Plaintiffs' failure adequately to define the relevant product market, the Court need not address Defendants' remaining arguments as to the merits of Plaintiffs' antitrust claims.

C. Unjust Enrichment Claims

Plaintiffs' claims of unjust enrichment are predicated entirely on their *Section 2* claims. Accordingly, Defendants' Motions for Summary Judgment are GRANTED with respect to Plaintiffs' **[**96]** claims of unjust enrichment.

[*1001] VI. REMAINING MOTIONS

The Court hereby DISMISSES AS MOOT Defendants' Motion for Class Decertification (as to Case Nos. 2:05-CV-06704 (Los Angeles market) and 2:06-CV-04987 (Denver market)), (Dkt. 410); Plaintiffs' Motion for Approval of Plan for Class Notice, (Dkt. 460); Plaintiffs' Motion to Exclude the "Affinity Analysis" of Dr. Janusz Ordover, (Dkt. 469); and Plaintiffs' Motion to Strike Declaration of Julia Vander Ploeg, (Dkt. 516) .

VII. FURTHER BRIEFING

The parties are hereby ORDERED promptly to meet and confer and to submit a joint stipulation as to how best to proceed with the remaining MDL actions before this Court within twenty-one (21) days of the date of this Order.

IT IS SO ORDERED.

DATED: March 23, 2012

/s/ Stephen V. Wilson

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE

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Drivecam, Inc. v. Smartdrive Sys.

United States District Court for the Southern District of California

March 26, 2012, Decided; March 26, 2012, Filed

CASE NO. 11-CV-0997-H (RBB)

Reporter

2012 U.S. Dist. LEXIS 201198 *

DRIVECAM, INC., Plaintiff, vs. SMARTDRIVE SYSTEMS, INC., Defendant.

Core Terms

counterclaim, antitrust, alleges, motion to dismiss, patent, lawsuit, patent office, trade secret, deceive, judicial notice, sham, inequitable conduct, market power, relevant market, specific intent, misappropriation, reasonable inference, unfair competition, communications, customers, baseless, withheld, asserts, anti trust law, infringement, invalidating, bifurcate, pleads, video, specific individual

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

Opinion by: MARILYN L. HUFF

Opinion

ORDER GRANTING-IN-PART AND DENYING-IN-PART PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES

On February 3, 2012, Plaintiff DriveCam, Inc. ("DriveCam") filed a motion to dismiss, strike or alternatively bifurcate and stay Defendant SmartDrive Systems, Inc's. ("SmartDrive") counterclaims and affirmative defenses. (Doc. No. 66.) On March 5, 2012, SmartDrive filed its opposition. (Doc. No. 73.) On March 13, 2012, DriveCam filed its reply. (Doc. No. 77.) On March 19, 2012 the Court held a **[*2]** hearing on DriveCam's motion. Clement S. Roberts appeared for DriveCam, and Geoffrey D. Oliver and Nicola A. Pisano appeared for SmartDrive.

<u>Background</u>

On May 6, 2011, DriveCam filed a complaint alleging that SmartDrive infringed U.S. Patent Nos. 6,389,340 ("the '340 patent"), 7,804,426 ("the '426 patent") and 7,659,827 ("the '827 patent"). (Doc. No. 1.) On October 20, 2011, DriveCam filed an amended complaint adding allegations of trade secret misappropriation against SmartDrive. (Doc. No. 34.) On January 3, 2012, SmartDrive raised the affirmative defense of inequitable conduct, and counterclaims of Walker Process fraud, sham litigation, trade secret misappropriation, and unfair competition. (Doc. No. 55.) DriveCam seeks dismissal of SmartDrive's affirmative defense and counterclaims, or an order to bifurcate and stay SmartDrive's antitrust counterclaims until resolution of the patent suit. (Doc. No. 66.)

I. Legal Standard for a Motion to Dismiss

A motion to dismiss a complaint under *Federal Rule of Civil Procedure 12(b)(6)* tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. The pleading must contain a short and plain statement showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. This requirement functions to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "While **[*3]** a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. "All allegations of material fact are taken as true and construed in the light most favorable to Plaintiffs. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)*; see also *Twombly, 550 U.S. at 555*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

"Generally, a district court may not consider any material beyond the pleadings in ruling on a *Rule 12(b)(6)* motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990)*. The court may, however, consider the contents of documents specifically referred to and incorporated into the complaint. *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)* overruled on other grounds by *Galbraith v. County of Santa Clara, 307 F.3d 1119, 1127 (9th Cir. 2002)*. A court may also consider **[*4]** judicially noticed facts to show whether a complaint states a cause of action. *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd., 245 F.2d 67, 70 (9th Cir. 1956)*.

For claims alleging fraud, "a party must state with particularity the circumstances constituting fraud." *Fed. R. Civ. P 9(b)*. A plaintiff pleading a fraud claim must specify the "who, what, when, where, and how of the misconduct charged." *Kearns v. Ford Motor Co.,567 F.3d 1120, 1124 (9th Cir. 2009)*. The pleading requirements of *Rule 9(b)* apply to Walker Process claims. *MedImmune, Inc. v. Genentech, Inc., 427 F.3d 958, 967 (Fed. Cir. 2005)*, rev'd on other grounds, *549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*.

II. Legal Standard for Inequitable Conduct

To prove inequitable conduct, the accused infringer must show by clear and convincing evidence that the applicant (1) misrepresented or omitted material information from the patent office, and (2) intended to deceive the patent office. *Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1287 (Fed. Cir. 2011)*. "[A] court must weight the evidence of intent to deceive independent of its analysis of materiality." *Id. at 1290*. "A district court should not use a 'sliding scale,' where a weak showing of intent may be found sufficient based on a strong showing of materiality." Id. "Because direct evidence of deceptive intent is rare, a district court may infer intent from indirect and circumstantial evidence." Id. But intent to deceive the patent office cannot be inferred solely from materiality. Id. Furthermore, intent to deceive must be "the single **[*5]** most reasonable inference able to be drawn from the evidence." Id. (quoting *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co., 537 F.3d 1357, 1366 (Fed. Cir. 2008))*. "In a case involving nondisclosure of information, clear and convincing evidence must show that the applicant *made a deliberate decision* to withhold a *known* material reference." *Therasense, 649 F.3d at 1290* (quoting *Molins PLC v. Textron, Inc., 48 F.3d 1172, 1181 (Fed. Cir. 1995))* (emphasis in original). "Proving that the applicant knew of a reference, should have known of its materiality, and decided not to submit it to the PTO does not prove specific intent to deceive." *Therasense, 649 F.3d at 1290*. A charge of inequitable conduct will survive a motion to dismiss only if the pleading "recites facts from which the court may reasonably infer that a specific individual both knew of invalidating information that was withheld from the PTO and withheld that information with a specific intent to deceive the PTO." *Delano Farms Co. v. Cal. Table Grape Comm'n, 655 F.3d 1337, 1350 (Fed. Cir. 2011)*.

For the '827 patent, the first amended paragraph specifically names three of DriveCam's officers, Mr. Gunderson, Mr. Moeller and Mr. Lefluer, as individuals acting on behalf of DriveCam. (Id. at ¶ 37.) These individuals are inventors of the '827 patent. (Id. at ¶ 74.) Specifically, SmartDrive alleges that DriveCam failed to disclose to the PTO that it had offered for sale the subject matter of the '827 patent as embodied in the Hindsight 20/20 Version **[*6]** 4.0 vehicle event recorder, and related software and publications, more than a year before filing the application for the '827 patent. (Id. at ¶ 10a.) SmartDrive also alleges that DriveCam failed to disclose invalidating prior art, including the '340 patent during prosecution of the '827 patent. (Id. at ¶ 39.) SmartDrive further claims that DriveCam failed to disclose the User's Manual for the DriveCam system that was on sale and in public use more than two years before the '222 application that gave rise to the '827 patent. (Id. at ¶¶ 30-31, 35, 38.) SmartDrive alleges that "DriveCam and its alleged inventors deliberately withheld the User's Manual and the '340 patent from the Patent Examiner handling prosecution of the '222 application so as to fraudulently induce the Examiner to issue the '827 patent." (Id. at ¶ 44.) The first amended answer further provides that the patent application filings were motivated by a "desire to compete with substantially similar systems disclosed by SmartDrive. . . irrespective of the lack of inventiveness of the alleged inventions disclosed in the DriveCam applications." (Id. at ¶ 37.)

For the '426 patent, the first amended paragraph specifically names Mr. Etcheson as a Senior Software Engineer that acted on behalf of DriveCam. **[*7]** (Id. at ¶ 79.) Mr. Etcheson is the inventor of the '426 patent. (Id. at ¶ 77.) SmartDrive specifically alleges that DriveCam failed to disclose the Hindsight 20/20 prior art or the '340 patent. (Id. at ¶¶ 10c, 55.) SmartDrive alleges that DriveCam specifically intended to deceive the patent office because of its "desire to compete with substantially similar systems disclosed by SmartDrive. . . irrespective of the lack of inventiveness of the alleged inventions disclosed in the DriveCam applications." (Id. at ¶ 54.)

Based on these specific assertions, the Court determines that SmartDrive's first amended answer alleges a desire to compete with SmartDrive that provides a reasonable inference that specific inventors knowingly withheld invalidating information from the PTO with the specific intent to deceive the PTO. Accordingly, the Court denies DriveCam's motion to dismiss the inequitable conduct defense with respect to the '827 and '426 patents.[1] *Delano Farms, 655 F.3d at 1350* (a charge of inequitable conduct survives a motion to dismiss if the pleading "recites facts from which the court may reasonably infer that a specific individual both knew of invalidating information that was withheld from the PTO and withheld that information with a specific intent **[*8]** to deceive the PTO").

Turning to the '340 patent, the first amended answer does not provide any allegations that specific individuals knew of invalidating information and withheld that information with a specific intent to deceive the patent office. Therefore, the first amended answer lacks facts that would lead to a reasonable inference that a specific individual deliberately withheld information with the intent to deceive the patent office. Accordingly, the Court concludes that SmartDrive's inequitable conduct defense fails to allege facts supporting a specific intent to deceive the patent office and grants DriveCam's motion to dismiss or alternatively strike the inequitable conduct defense with respect to the '340 patent, with thirty days leave to amend if it can do so.

III. Legal Standard for Sham Litigation

Sham litigation is a private action brought without the genuine purpose of procuring favorable government action. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 59, 113 S. Ct. 1920, 123 L.*

[1] The Court recognizes the difficulty of proving inequitable conduct by the clear and convincing evidence standard after Therasense. Even though the court concludes that SmartDrive satisfies the pleading standard in Delano Farms, DriveCam may bring a motion for summary judgment on the inequitable conduct issue at an appropriate time.

Ed. 2d 611 (1993). To prove that a lawsuit is a sham, the movant must first show that the lawsuit is objectively baseless in that no reasonable litigant could realistically expect success on the merits. *Id. at 60*. Secondly, the movant must show that the litigant possesses the subjective motivation **[*9]** to interfere directly with the business relationships of a competitor through the use of governmental process. *Id. at 60-61*. Additionally, the movant must show a substantive antitrust violation. *Id. at 61*. Litigation is not considered a sham so long as at least one claim in the lawsuit has objective merit. *Id. at 60* (specifying that "the lawsuit must be objectively baseless").

SmartDrive alleges that this litigation is a sham because (i) "DriveCam's amendment to include trade secret misappropriation and other state law claims in this litigation is a sham, lacks any factual basis, and was brought solely because it became plain to DriveCam that it could not prevail on its meritless patent infringement claims," and (ii) "DriveCam knew when it filed the case that. . . the '340, '426, and '827 patents are invalid and/or unenforceable." (Doc. No. 55 at ¶ 66-67.) With respect to the trade secret claim, SmartDrive specifically alleges that DriveCam lacked "any good faith basis" and brought this claim "solely to perpetuate DriveCam's in terrorem campaign to interfere with SmartDrive's customers." (Id. at ¶ 10e.)

DriveCam pleads plausible facts that support its trade secret claim. (Doc. No. 34 at ¶¶ 45-46). For example, DriveCam identified several **[*10]** categories of trade secret information, including "materials relating to development of new products," "customer lists, sales pipelines, product roadmaps and confidential technical information," and "training materials." (Id.) DriveCam specifically alleges that Mr. Frietas and Mr. Mitchell, former employees of DriveCam, had access to confidential materials and disclosed trade secret information to SmartDrive. (Id. at ¶¶ 45-47.) SmartDrive does not show that DriveCam's trade secret claim is objectively baseless such that no litigant could expect success on the merits. Furthermore, SmartDrive's opposition to DriveCam's motion to dismiss does not directly address whether the trade secret claim is objectively baseless. Therefore, the Court concludes that the lawsuit does not constitute sham litigation and grants DriveCam's motion to dismiss SmartDrive's sham litigation counterclaim.

IV. Legal Standard for Walker Process Fraud

"Walker Process antitrust liability is based on the knowing assertion of a patent procured by fraud on the PTO." *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1071 (Fed. Cir. 1998)* (referring to *Walker Process Equipment, Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965))*. In Walker Process, the Supreme Court held that obtaining a "patent by knowingly and willfully misrepresenting facts to the Patent Office" **[*11]** is sufficient "to strip [a patentee] of its exemption from the antitrust laws." *Walker Process, 382 U.S. at 177*. The first barrier for a Walker Process claim is to show that the patent was obtained through actual fraud upon the patent office. *Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1346 (Fed. Cir. 2007)*. To demonstrate Walker Process fraud, the claimant must make showings of intent to deceive the patent office, and that the patent would not have issued but for the patentee's misrepresentation or omission. *Id. at 1347*.

Additionally, the movant must show a violation of all elements of *§ 2* of the Sherman Act to assert a Walker Process claim. *Walker Process, 382 U.S. at 174*. *Section 2* of the Sherman Act prohibits monopolization or attempts to monopolize trade or commerce among the states or with foreign nations. *15 U.S.C. § 2*. To establish monopolization or attempt to monopolize, it is necessary to appraise the market power of the litigant and the relevant market for the product at issue. *Walker Process, 382 U.S. at 177*. The movant must also show an antitrust injury. *Am. Ad Mgmt., Inc. v. General Telephone Co. of Cal., 190 F.3d 1051, 1054-55 (9th Cir. 1999)*.

DriveCam asserts that SmartDrive's Walker Process counterclaim fails because the complaint does not plead facts showing a specific intent to deceive the patent office. The Court concludes that SmartDrive's first amended answer and counterclaim allege a specific intent to deceive the patent office with respect **[*12]** to the '827 and '426 patents, but does not plead facts supporting an specific intent to deceive with respect to the '340 patent. Furthermore, DriveCam asserts that the counterclaim does not plead facts establishing the relevant market, does not plead facts establishing that DriveCam has market power, and does not plead facts establishing an antitrust injury. The Court turns to these issues.

A. Relevant Market

The relevant market "encompasses notions of geography as well as product use, quality, and description. . . [and] includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka v. Univ. S. Cal. 252 F.3d 1059, 1063 (9th Cir. 2001)*. Determining the relevant market is a fact intensive inquiry. *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Additionally, a relevant antitrust market does not need to be pled with specificity. *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)*. The complaint must allege specific facts to show a plausible legal antitrust claim. *Twombly, 550 U.S. at 556*. The relevant product market alleged in a complaint will survive a motion to dismiss "unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." *Newcal, 513 F.3d at 1045*.

SmartDrive's counterclaim asserts that the relevant market is for "SAAS in-vehicle video event recorder safe driving programs." (Doc. No. 55 at ¶ 8.) **[*13]** SmartDrive claims that the allegations show significant interchangeability and a high degree of cross-elasticity of demand for brands of SAAS in-vehicle video event recorder safe driving programs. Additionally, SmartDrive argues that there is little interchangeability and low levels of cross-elasticity of demand between SAAS in-vehicle video event recorder safe driving programs and drive programs with non-SAAS systems. Paragraphs 12-16 of SmartDrive's counterclaim describe the advantages of its system, define the relevant market, describe DriveCam's implementation of SmartDrive's concept, and distinguish the SAAS market from the non-SAS market.

DriveCam disagrees with SmartDrive's market definition, particularly with the limitation of the market to exclude a variety of in-vehicle event recorders other than video with a SAAS system. DriveCam argues that SmartDrive's market definition is too narrow. But the question of whether the market should include other products is better resolved at the summary judgment stage. See *Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1203 (9th Cir. 1997)* ("Ultimately what constitutes a relevant market is a factual determination for the jury."); *Twin City Sportservice, Inc. v. Charles O'Finley & Co., 676 F.2d 1291, 1299 (9th Cir. 1982)* ("The definition of the relevant market is basically a fact question dependent **[*14]** upon the special characteristics of the industry involved."). The Court concludes that SmartDrive's counterclaim pleads a plausible relevant product market in SAAS in-vehicle video event recorder safe driving programs that is sufficient to survive DriveCam's motion to dismiss.

B. Market Power

The essence of market power is the ability to "control prices or exclude competition." *Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997)*. Market power does not need to be pled with specificity. *Newcal, 513 F.3d at 1045*. SmartDrive's counterclaim alleges that DriveCam has had monopoly power since 2007 and continues to hold monopoly power today. (Doc. No. 55 at ¶¶ 19 & 22.) SmartDrive's counterclaim further states that "DriveCam currently holds about 65% market share." (Id. at ¶ 19.) Over two-thirds of the market may constitute a monopoly. See *Eastman Kodak, 504 U.S. at 481* (citing *Am. Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946))*.

DriveCam challenges the factual basis for the market power allegations, since DriveCam only entered the market in 2007. (Doc. No. 55 at ¶ 13.) But the 2007 entry into a video based product technology market does not defeat the plausibility of the allegations of current market power and anticompetitive activity.

DriveCam also points to inconsistencies in the allegations of market power. For example, the allegation of the **[*15]** growth of SmartDrive's market share (Id. at ¶ 21) is inconsistent with DriveCam's market power (Id. at ¶ 22). But the counterclaim also alleges that DriveCam is using unlawful anticompetitive conduct to restrict SmartDrive's ability to compete in the market and to maintain DriveCam's monopoly power. (Id. at ¶¶ 69-70, 76.)

In reviewing the allegations of market power, the Court concludes that DriveCam's challenges are better suited for a motion for summary judgment. The Court concludes that SmartDrive pleads facts sufficient to support the allegation that DriveCam has market power.

C. Antitrust Injury

A litigant must allege an "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the accused] acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. The four requirements for an antitrust injury are: "(1) unlawful conduct, (2) causing and injury to the [litigant], (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc., 190 F.3d at 1055*. An antitrust injury must allege more than that its business was damaged, it must also allege that the accused behavior stifled competition. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 115, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* ("[T]he antitrust **[*16]** laws. . . were enacted for 'the protection of *competition*, not *competitors*.'") (internal citations omitted) (emphasis in original).

SmartDrive alleges three forms of supposed antitrust injury: (i) DriveCam's lawsuit caused existing and potential customers to forgo purchases of SmartDrive's products; (ii) DriveCam interfered with SmartDrive's existing and potential customers by false and deceptive statements; and (iii) attorneys' fees incurred by SmartDrive in defending against DriveCam's lawsuit. (Doc. No. 55 at ¶¶ 70-73.)

1. Injury From DriveCam's Lawsuit

SmartDrive alleges that DriveCam's lawsuit caused existing and potential customers to forgo purchases of SmartDrive's products and that DriveCam filed this lawsuit to harm competition by pushing DriveCam out of the market. The fact that DriveCam is litigating its patents against SmartDrive does not constitute antitrust injury. See *Professional Real Estate Investors, 508 U.S. at 60-61* ("the court should focus on whether the baseless lawsuit conceals 'an attempt to interfered *directly* with the business relationships of a competitor,' through the 'use [of] the governmental *process*-as opposed to the *outcome* of that process—as an anticompetitive weapon) (internal citations omitted) (emphasis **[*17]** in original). SmartDrive has not adequately alleged that this lawsuit is a baseless attempt to use the process of litigation for improper purposes. SmartDrive cannot show an antitrust injury by simply alleging harm it might suffer based on the outcome of these proceedings. Therefore, the Court concludes that the filing of this lawsuit against SmartDrive does not constitute an antitrust injury.

2. Injury From SmartDrive's Statements

Both the Ninth and Federal Circuits have held that threats of suit and ancillary communications about the suit, like suits themselves, are protected under the Petition Clause. *Globetrotter Software, Inc. v. Elan Computer Grp., Inc., 362 F.3d 1367, 1376 (Fed. Cir. 2004)*; *Sosa v. DirecTV, Inc., 437 F.3d 923, 933* (9th Cir. 2006.) As the court explained in Sosa, although the communications about the suit are "not themselves petitions, the Petition Clause may nevertheless preclude burdening them so as to preserve the breathing space required for effective exercise of the rights it protects." *Sosa, 437 F.3d at 933*. A relevant exception exists if communications are themselves shams. *Globetrotter Software, 362 F.3d at 1376-77* (communications to customers are protected unless they are both objectively baseless and improperly motivated); *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp., 711 F. Supp. 2d 1074, 1082 (C.D. Cal. 2010)* ("Under Sosa, all communications between private parties related to litigation—including presuit demand letters and settlement offers—are **[*18]** entitled to immunity.").

SmartDrive alleges that DriveCam made statements to existing and potential customers that SmartDrive would be unable to satisfy its contractual obligations or act as a reliable source of supply as a result of this lawsuit. (Doc. No. 55 at ¶ 73.) These statements do not constitute an antitrust injury. Communications about this lawsuit are protected under the Petition Clause. *Sosa, 437 F.3d at 935* ("communications between private parties are sufficiently within the protection of the Petition Clause. . . so long as they are sufficiently related to petitioning activity"). SmartDrive has not adequately alleged that this lawsuit is a sham, nor that the communications are a sham. SmartDrive cannot show an antitrust injury by alleging harm it might suffer based on the outcome (as opposed to the process) of this proceeding. See*Professional Real Estate Investors, 508 U.S. at 60-61* ("the court should focus on whether the baseless lawsuit conceals 'an attempt to interfered *directly* with the business relationships of a competitor,' through the 'use [of] the governmental *process*-as opposed to the *outcome* of that process—as an anticompetitive weapon) (internal citations omitted) (emphasis in original). Therefore, the Court concludes that DriveCam's statements **[*19]** to customers do not constitute an antitrust injury.

3. Injury from Attorneys' Fees

"[T]he costs incurred in the defense of a suit filed in violation of the antitrust laws constitute antitrust injury." *Rickards v. Canine Eye Registration Found., Inc.,783 F.2d 1329, 1334-35 (9th Cir. 1986)*; see also *Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 997 (9th Cir. 1979)* ("In a suit alleging antitrust injury based upon a bad faith prosecution theory it is obvious that the costs incurred in defense of the prior patent infringement suit are an injury which 'flows' from the antitrust wrong."). SmartDrive asserts that it suffers an antitrust injury by incurring attorneys' fees in defending this lawsuit. (Doc. No. 55 at ¶¶ 70-74.) SmartDrive further asserts that this lawsuit violates antitrust laws because DriveCam is knowingly asserting patents that it procured by fraud on the PTO. (Id. at ¶¶ 10(a)-10(c).) Therefore, the Court concludes that SmartDrive has adequately pled an antitrust injury based on its attorneys' fees under Ninth Circuit precedent.

In summary, the Court concludes that SmartDrive has pled a cognizable Walker Process counterclaim. Accordingly, the Court denies DriveCam's motion to dismiss SmartDrive's Walker Process counterclaim.

V. Legal Standard for Unfair Competition

Violation of ***antitrust law*** also violates California's unfair competition **[*20]** laws. See *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. SmartDrive alleges that "DriveCam's business practices detailed above," by which SmartDrive references DriveCam's supposed violations of the Sherman Act, violate California's unfair competition laws. (Doc. No. 55 at ¶ 100.) Therefore, SmartDrive's counterclaim for unfair competition is derivative of its Sherman Act counterclaims. Because the Court declines to dismiss SmartDrive's Walker Process counterclaim, the Court declines to dismiss SmartDrive's derivative state unfair competition claim. Accordingly, the Court denies DriveCam's motion to dismiss SmartDrive's unfair competition counterclaim.

VI. Legal Standard for Trade Secret

Under California law, a trade secret must both: (1) derive "independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use;" and (2) be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Cal. Civ. Code § 3426.1(d)*.

DriveCam challenges the sufficiency of SmartDrive's trade secret pleadings. Specifically, DriveCam asserts that SmartDrive failed to allege facts supporting a reasonable inference that DriveCam misappropriated trade **[*21]** secrets. SmartDrive identifies Sam Kim as a former SmartDrive employee with obligations of confidentiality to SmartDrive. (Doc. No. 55 at ¶ 106.) But SmartDrive does not allege that Sam Kim misappropriated any trade secrets. The mere fact that Mr. Kim worked for both parties does not create an inference that he misappropriated trade secrets. SmartDrive merely alleges in a conclusory fashion that unnamed former employees improperly disclosed trade secrets. (Id. at ¶ 109.) But SmartDrive does not allege factual content allowing a reasonable inference that a specific individual acting for DriveCam misappropriated trade secrets. Therefore, the Court grants

DriveCam's motion to dismiss SmartDrive's trade secret misappropriation counterclaim, with thirty days leave to amend if SmartDrive can do so.

VII. Legal Standard for Bifurcation of Antitrust Counterclaims

Bifurcation is a frequently employed case management decision that allows the parties to initially focus their litigation on the patent claims because the "[c]onvenience of all is served in trying the less complex patent issues first." *In re Innotron Diagnostics, 800 F.2d 1077, 1084-1085 (Fed. Cir. 1986)*; accord *Hydranautics v. FilmTec Corp. 70 F.3d 533, 536* ("In many cases. . . the court would sever the [antitrust] issues and resolve the infringement **[*22]** case first."). SmartDrive's Walker Process counterclaim depends upon its contention that the patents-in-suit are invalid, unenforceable and not infringed. Resolution of these issues will eliminate or reduce some of the proof necessary to ultimately decide the antitrust counterclaims. Therefore, the Court concludes that the interest of judicial economy is best served by bifurcating SmartDrive's Walker Process antitrust counterclaim. Accordingly, the Court grants DriveCam's motion to bifurcate SmartDrive's remaining Walker Process counterclaim pending resolution of the patent infringement claims.

VIII. Request for Judicial Notice

Federal Rule of Evidence 201 permits judicial notice of adjudicative facts, which are defined as facts "not subject to reasonable dispute." *Fed. R. Evid. 201(b)*. A judicially noticed fact must be one that is not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Id. A court may take judicial notice of "[r]ecords and reports of administrative bodies." *Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994)*; see also *Interstate Natural Gas Co. v. S. Cal. Gas Co., 209 F.2d 380, 385 (9th Cir. 1953)* ("We may take judicial notice of records and reports **[*23]** of administrative bodies.").

DriveCam requests that this Court take judicial notice of Exhibit A, an office action from the patent office relating to U.S. Patent Application No. 95/001,779. (Doc. No. 66-3.) The document requested by DriveCam is published by the patent office and is therefore ascertainable and verifiable. Accordingly, the Court takes judicial notice of DriveCam's Exhibit A.

SmartDrive requests that this Court take judicial notice of (1) Exhibit A, DriveCam's response to the ex parte reexamination initial office action filed with the patent office regarding the '340 patent; and (2) Exhibit B, an office action summary from the patent office relating to U.S. Patent Application No. 11/382,239. (Doc. No. 73-2.) The documents requested by SmartDrive are published by the patent office and are therefore ascertainable and verifiable. Accordingly, the Court takes judicial notice of SmartDrive's Exhibit A and B.

DriveCam requests that this Court take judicial notice of (1) Exhibit A, SmartDrive's response to DriveCam's third set of interrogatories; (2) Exhibit B, SmartDrive's responses and objections to DriveCam's first set of requests for admission; (3) Exhibit 1 to the Roberts declaration **[*24]** containing sealed documents from SmartDrive's production; and (4) Exhibit 2 to the Roberts declaration containing sealed documents from SmartDrive's production. (Doc. Nos. 78 & 81-3.) On a motion to dismiss, the Court generally does not consider any material beyond the pleadings. *Hal Roach Studios, 896 F.2d at 1555 n. 19*. The Court declines to convert the motion to dismiss into a motion for summary judgment. Discovery responses are not the type of information "not subject to reasonable dispute" under *Federal Rule of Evidence 201*. Accordingly, the Court declines to take judicial notice of the parties' discovery responses.

IX. Conclusion

Based on the foregoing, the Court denies DriveCam's motion to dismiss SmartDrive's inequitable conduct defense with respect to the '827 and '426 patents, but grants DriveCam's motion to dismiss or alternatively strike

SmartDrive's inequitable conduct defense with respect to the '340 patent with 30 days leave to amend; grants DriveCam's motion to dismiss SmartDrive's sham litigation counterclaim; denies DriveCam's motion to dismiss SmartDrive's Walker Process and unfair competition counterclaims; grants DriveCam's motion to dismiss SmartDrive's trade secret misappropriation counterclaim with 30 days leave to amend; grants DriveCam's motion to bifurcate **[*25]** SmartDrive's Walker Process antitrust counterclaim; and grants DriveCam's and SmartDrive's request for judicial notice except as noted.

IT IS SO ORDERED.

DATED: March 26, 2012

/s/ Marilyn L. Huff

MARILYN L. HUFF, District Judge

UNITED STATES DISTRICT COURT

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McNeary-Calloway v. JP Morgan Chase Bank, N.A.

United States District Court for the Northern District of California

March 26, 2012, Decided; March 26, 2012, Filed

Case No. C-11-03058 JCS

Reporter
863 F. Supp. 2d 928 *; 2012 U.S. Dist. LEXIS 40989 **; 2012 WL 1029502

PATRICIA MCNEARY-CALLOWAY, COLIN MACKINNON, TERRIE MACKINNON, ANDREA NORTH and SHEILA M. MAYKO, individually and on behalf of all others situated, Plaintiffs, v. JP MORGAN CHASE BANK, N.A. and CHASE BANK USA, N.A., Defendants.

Prior History: *Wahl v. Am. Sec. Ins. Co., 2011 U.S. Dist. LEXIS 59559 (N.D. Cal., June 2, 2011)*

Core Terms

settlement, force-placed, coverage, hazard, lender, borrowers, unfair, policies, allegations, backdated, prong, premiums, insurance policy, motion to dismiss, implied covenant, cause of action, kickbacks, consumer, parties, plaintiff's claim, fraudulent, notice, fails, mortgage contract, fair dealing, good faith, courts, express terms, matter of law, class action

LexisNexis® Headnotes

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

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

The court may consider documents of which judicial notice is taken, along with the allegations in the plaintiffs' complaint, on a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*.

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

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

On a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the court assumes the facts alleged in the complaint are true.

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

Evidence > Burdens of Proof > Allocation

HN3[] **Motions to Dismiss, Failure to State Claim**

A complaint may be dismissed for failure to state a claim for which relief can be granted under *Fed. R. Civ. P. 12(b)(6)*. The purpose of a motion to dismiss under *Rule 12(b)(6)* is to test the legal sufficiency of the complaint. Generally, a plaintiff's burden at the pleading stage is relatively light.

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

HN4[] **Complaints, Requirements for Complaint**

See *Fed. R. Civ. P. 8(a)*.

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

HN5[] **Motions to Dismiss, Failure to State Claim**

In ruling on a motion to dismiss under *Fed. R. Civ. P. 12*, the court analyzes the complaint and takes all allegations of material fact as true and construes them in the lights most favorable to the nonmoving party. Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. A complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory. The factual allegations must be definite enough to raise a right to relief above the speculative level. However, a complaint does not need detailed factual allegations to survive dismissal. Rather, a complaint need only include enough facts to state a claim that is plausible on its face. That is, the pleadings must contain factual allegations plausibly suggesting (not merely consistent with) a right to relief.

Civil Procedure > Settlements > Effect of Agreements

HN6[] **Settlements, Effect of Agreements**

In California, interpretation of a settlement agreement is governed by contract principles. However, a settlement agreement's bare assertion that a party will not be liable for a broad swath of potential claims does not necessarily make it so. At the same time, a settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action. A class settlement may also release factually related claims against parties not named as defendants.

Banking Law > Consumer Protection > Real Estate Settlement Procedures > Kickbacks & Prohibited Fees

HN7[] **Real Estate Settlement Procedures, Kickbacks & Prohibited Fees**

See *12 U.S.C.S. § 2607(a)*.

Banking Law > Consumer Protection > Real Estate Settlement Procedures > Kickbacks & Prohibited Fees

HN8[] **Real Estate Settlement Procedures, Kickbacks & Prohibited Fees**

See *12 U.S.C.S. § 2607(b)*.

Banking Law > Consumer Protection > Real Estate Settlement Procedures > Kickbacks & Prohibited Fees

HN9[] **Real Estate Settlement Procedures, Kickbacks & Prohibited Fees**

Under the Real Estate Settlement Procedures Act, the term settlement service includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement. *12 U.S.C.S. § 2602(3)*.

Banking Law > Consumer Protection > Real Estate Settlement Procedures > Kickbacks & Prohibited Fees

HN10[] **Real Estate Settlement Procedures, Kickbacks & Prohibited Fees**

The Code of Federal Regulations defines settlement services as any service provided in connection with a prospective or actual settlement, including the provision of services involving hazard, flood, or other casualty insurance or homeowner's warranties. *24 C.F.R. § 3500.2*. A settlement is the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan, i.e. the closing or escrow. *24 C.F.R. § 3500.2(b)*.

Banking Law > Consumer Protection > Real Estate Settlement Procedures > Kickbacks & Prohibited Fees

Governments > Legislation > Statute of Limitations > Time Limitations

HN11[] **Real Estate Settlement Procedures, Kickbacks & Prohibited Fees**

12 U.S.C.S. § 2607 has a statute of limitations of one year from the date of the occurrence of the violation. *12 U.S.C.S. § 2614*.

Banking Law > Consumer Protection > Real Estate Settlement Procedures > Kickbacks & Prohibited Fees

HN12[] **Real Estate Settlement Procedures, Kickbacks & Prohibited Fees**

Settlement service is defined as any service provided in connection with a real estate settlement. *12 U.S.C.S. § 2602(3)*. This language indicates that the Real Estate Settlement Procedures Act covers only those services provided, not necessarily required, in connection with a closing.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN13[] **Breach of Contract Actions, Elements of Contract Claims**

The elements of a cause of action for breach of contract are: (1) the existence of the contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach by the defendant; and (4) damages.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN14[] Contract Interpretation, Good Faith & Fair Dealing

There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN15[] Breach of Contract Actions, Elements of Contract Claims

A breach of contract may be established on the basis of either an express provision of the contract or on the implied covenant of good faith and fair dealing. An implied covenant of good faith and fair dealing cannot contradict the express terms of a contract. Further, because the implied covenant operates to protect the express covenants or promises of a contract, it cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of the parties' agreement.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

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

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN16[] Breach of Contract Actions, Elements of Contract Claims

Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity. Thus, to state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must identify the specific contractual provision that was frustrated.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN17[] Contract Interpretation, Good Faith & Fair Dealing

In New Jersey, a covenant of good faith and fair dealing is implied in every contract. Implied covenants are as effective components of an agreement as those covenants that are express. Although the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term. Because the breach of the implied covenant arises only when the other party has acted consistent with the contract's literal terms, if a party is found to have breached an express term of the contract, there can be no separate breach of the implied covenant.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN18[] Contract Interpretation, Good Faith & Fair Dealing

Even a defendant who does not breach a contract may still be liable for breach of the covenant of good faith and fair dealing if they fail to perform the contract in good faith.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN19[] **Contract Interpretation, Good Faith & Fair Dealing**

The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith. The exercise of discretionary powers is evaluated under the implied covenant to assure that the promises of the contract are effective and in accordance with the parties' legitimate expectations. However, the covenant cannot be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN20[] **Contract Interpretation, Good Faith & Fair Dealing**

Under New Jersey law, even when a party has acted consistent with the contract's literal terms, the implied covenant of good faith and fair dealing allows a court to judge whether a party has exercised bad faith or ill motive in carrying out discretionary activities to which it has been granted unilateral authority by the contract. Thus, in exercising discretionary authority as expressly authorized by an agreement, if a party does so arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits of the contract, the party taking the action may breach the covenant. A breach of the good faith obligation must include a finding of improper motive: Without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance.

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

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

A claim for unfair competition under the California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, may be brought by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition. *Cal. Bus. & Prof. Code § 17204*. Therefore, to establish standing under the UCL a plaintiff must (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice that is the gravamen of the claim.

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

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

A plaintiff proceeding on a claim of misrepresentation as the basis of his or her California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions. Consequently, a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct. However, a plaintiff is not required to allege that the challenged misrepresentations were the sole or even the decisive cause of the injury-producing conduct. Reliance as used in the ordinary fraud context has always been understood to mean reliance on a statement for its truth and accuracy. It follows that a UCL fraud plaintiff must allege he or she was motivated to act or refrain from action based on the truth or falsity of a defendant's statement, not merely on the fact it was made.

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

HN23[] **Deceptive & Unfair Trade Practices, State Regulation**

Case law holds that, under any prong, a California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, claim that is based in fraud must be supported by allegations of reliance in order to properly be pled.

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

HN24[] **Deceptive & Unfair Trade Practices, State Regulation**

The California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, prohibits unfair competition, which is defined as any unlawful, unfair, or fraudulent business act or practice. *Cal. Bus. & Prof. Code § 17200*. To establish a violation of the UCL, a plaintiff may establish a violation under any one of these prongs. To state a cause of action based on an unlawful business act or practice under the UCL, a plaintiff must allege facts sufficient to show a violation of some underlying law.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN25[] **Deceptive & Unfair Trade Practices, State Regulation**

Fraudulent, as used in the California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, does not refer to the common law tort of fraud but only requires a showing that members of the public are likely to be deceived. Although fraud is not a necessary element of a claim under the UCL, where a plaintiff alleges a unified course of fraudulent conduct and relies entirely on that course of conduct as the basis of that claim, the claim is said to be grounded in fraud or to sound in fraud, and the pleading as a whole must satisfy the particularity requirement of *Fed. R. Civ. P. 9(b)*. To satisfy *Rule 9(b)*, the plaintiff must include the who, what, when, where, and how of the fraud. The plaintiff must set forth what is false or misleading about a statement, and why it is false. A claim for fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.

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

HN26[] **Deceptive & Unfair Trade Practices, State Regulation**

In consumer cases, the California Supreme Court has not established a definitive test to determine whether a business practice is unfair under the California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.* A split of authority has developed among the California Courts of Appeal, which have applied three tests for unfairness in consumer cases. The test applied in one line of cases requires that the public policy which is a predicate to a consumer unfair competition action under the unfair prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions. A second line of cases applies a test to determine whether the alleged business practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. The test applied in a third line of cases draws on the definition of "unfair" in Section 5 of the Federal Trade Commission Act, *15 U.S.C.S. § 45(n)*, and requires that (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.

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

HN27[] **Deceptive & Unfair Trade Practices, State Regulation**

The Consumer Fraud Act, *N.J. Stat. Ann. § 56:8-1 et seq.*, provides a private cause of action to consumers who are victimized by fraudulent practices in the marketplace. A consumer who can prove (1) an unlawful practice, (2) an ascertainable loss, and (3) a causal relationship between the unlawful conduct and the ascertainable loss, is entitled to legal and/or equitable relief, treble damages, and reasonable attorneys' fees.

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

HN28[] **Deceptive & Unfair Trade Practices, State Regulation**

An unlawful practice under the Consumer Fraud Act, *N.J. Stat. Ann. § 56:8-1 et seq.*, is the use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby. *N.J. Stat. Ann. § 56:8-2*.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN29[] **Deceptive & Unfair Trade Practices, State Regulation**

Consumer Fraud Act, *N.J. Stat. Ann. § 56:8-1 et seq.*, claims sounding in fraud are subject to the particularity requirements of *Fed. R. Civ. P. 9(b)*.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN30[] **Types of Contracts, Quasi Contracts**

Although there is some disagreement among California courts as to whether unjust enrichment may be asserted as a standalone claim under California law, the United States District Court for the Northern District of California has recognized that the confusion is largely semantic. The court explained that even though California law may not recognize unjust enrichment as an independent claim, such a claim may be understood as one for restitution, which is recognized under California law.

Contracts Law > Remedies > Restitution

HN31[] Remedies, Restitution

To state a claim for restitution, a plaintiff must plead receipt of a benefit and the unjust retention of the benefit at the expense of another. Even when a person has received a benefit from another, he is required to make restitution only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. Case law explains that restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. To prevail on a claim for restitution, a plaintiff need not establish bad faith on the part of the defendant, so long as the recipient of the funds was not entitled to the funds.

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Scope of Declaratory Judgments

HN32[] Remedies, Injunctions

Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted. Additionally, a claim for declaratory relief is duplicative and unnecessary when it is commensurate with the relief sought through other causes of action.

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN33[] Preliminary Considerations, Venue

Generally, venue must be established as to each cause of action. However, if venue is proper on one claim, the court may find pendent venue for claims that are closely related. The decision to apply pendent venue to closely related claims is a discretionary decision. A court may consider the principles of judicial economy, convenience, avoidance of piecemeal litigation, and fairness to the litigants in making its decision.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN34[] Federal Venue Transfers, Convenience Transfers

28 U.S.C.S. § 1404(a) allows the court to transfer an action for the convenience of parties and witnesses and in the interest of justice to any other district or division where it might have been brought. *Section 1404(a)* displaces the common law doctrine of forum non conveniens and differs from forum non conveniens in that it allows courts to transfer actions in the interest of justice rather than having to dismiss them. However, courts draw on forum non conveniens considerations when deciding whether a *28 U.S.C.S. § 1404* transfer is appropriate. In particular, courts considering this issue balance the preference that is traditionally accorded the plaintiff's choice of forum against the burden to the defendant of litigating in an inconvenient forum. The defendant must make a strong showing of inconvenience to upset the plaintiff's choice of forum.

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For Colin MacKinnon, Terrie MacKinnon, Andrea North, Sheila M Mayko, Plaintiffs: Edward W. Ciolko, LEAD ATTORNEY, Kessler Topaz Meltzer & Check, LLP, Radnor, PA; Amanda R Trask, Kessler Topaz Meltzer Check, LLP, Radnor, PA.

For JPMorgan Chase Bank, N.A., Chase Bank USA, N.A., Defendants: Peter Obstler, **[**2]** LEAD ATTORNEY, Zachary J. Alinder, Bingham McCutchen, LLP, San Francisco, CA.

Judges: JOSEPH C. SPERO, United States Magistrate Judge.

Opinion by: JOSEPH C. SPERO

Opinion

[*934] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS [Docket No. 48]

I. INTRODUCTION

Plaintiffs Patricia McNeary-Calloway, Colin MacKinnon, Terrie McKinnon, Andrea North, and Sheila M. Mayko (collectively "Plaintiffs") initiated this putative class action on June 20, 2011, challenging Defendants JPMorgan Chase, N.A. and Chase Bank USA, N.A.'s (together "Defendants," or "Chase") practice of purchasing "force-placed" hazard insurance policies for home mortgage borrowers who fail to maintain adequate insurance. Defendants now bring a Motion to Dismiss Plaintiffs' First Amended Complaint ("the Motion"). Plaintiffs oppose the Motion. The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to *28 U.S.C. § 636(c)*. For the reasons stated below, the Motion to Dismiss is GRANTED in part and DENIED in part.

II. REQUESTS FOR JUDICIAL NOTICE

Defendants request that the Court take judicial notice of three documents that are matters of public record. Request for Judicial Notice in Support of Defendants' Motion **[**3]** to Dismiss Plaintiffs' First Amended Complaint ("Defs.' RJN"), 1-2. Plaintiff has not objected to Defendant's request or challenged the authenticity of any of the attached documents. Accordingly, the Court takes judicial notice of these records pursuant to *Rule 201 of the Federal Rules of Evidence.* Further, ***HN1***[] the Court may consider these documents, along with the allegations in Plaintiffs' complaint, on a motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure.* *See* *Catholic League for Religious and Civil Rights v. City and County of San Francisco, 464 F. Supp. 2d 938, 941 (N.D. Cal. 2006)*.

Plaintiffs also request that the Court take judicial notice of three documents that are matters of public record. Plaintiffs' Request for Judicial Notice ("Pls.' RJN"). Defendants have not objected to Plaintiffs' request or challenged the authenticity of any of the attached documents. Accordingly, the Court takes judicial notice of these records pursuant to *Rule 201 of the Federal Rules of Evidence.*

III. BACKGROUND

A. Factual Background[1]

Defendants JPMorgan Chase and Chase Bank originate mortgage loans and acquire loans from other lenders. Plaintiffs' First Amended Complaint ("FAC"), ¶ 58. Prior to its merger into JPMorgan, Chase Home Finance acted as the servicer to these loans. *Id.* Each loan is secured by a deed of trust on the underlying property. *Id.* In order to protect its interest in the secured property, mortgage loan contracts typically allow the lender or third party servicer to "force-place" hazard insurance when the homeowner fails to maintain such insurance. *Id.* at ¶ 60. Plaintiffs allege that Defendants have purchased force-placed insurance ("FPI") "from insurers that provide a financial benefit to Defendants and/or their affiliates and at rates that far exceed borrower-purchased hazard insurance (while providing substantially **[*935]** less coverage)." *Id.* at ¶ 4. Additionally, Plaintiffs maintain that FPI policies are often improperly backdated to collect premiums for periods that have already passed. *Id.* at ¶ 2. Such policies can also be duplicative, where FPI coverage **[**5]** becomes effective immediately following the termination of the borrower's policy, because the lender is temporarily protected under the Lender's Loss Payable Endorsement (LLPE) in the borrower's policy. *Id.* at ¶ 86.

Plaintiffs bring this action on behalf of a purported nationwide class consisting of all persons whose hazard insurance was force-placed by Defendants beginning June 16, 2007. *Id.* at ¶ 123. Plaintiffs' action also includes two purported subclasses, a California subclass and a New Jersey subclass. *Id.*

The specific allegations concerning the Plaintiffs' FPI policies are as follows:

(1) **Patricia McNeary-Calloway**

On or about September 13, 2007, Ms. McNeary-Calloway and her husband, James B. Calloway, Jr., obtained a $540,000 refinance mortgage loan from Chase Bank, secured by their primary residency in Oakland, California. *Id.* at ¶ 18. In connection with their mortgage loan, Ms. McNeary-Calloway and her husband purchased a hazard insurance policy from California Casualty with an annual premium of $1,640. *Id.* at ¶ 19.

On July 4, 2009, Mr. Calloway passed away due to complications from a serious illness. *Id.* at ¶ 20. During Mr. Calloway's illness and following his death, Ms. McNeary-Calloway **[**6]** faced financial difficulties and was unable to make her hazard insurance payments. *Id.* Her policy lapsed effective August 26, 2009. *Id.* On or about January 8, 2010, Chase Home Finance purchased a one-year insurance policy with American Security Insurance Company ("ASIC"), backdated to August 26, 2009, with an annual premium of $4,233, charged to Ms. McNeary-Calloway's escrow account. *Id.* at ¶ 21. The policy was backdated, despite the fact that there was no damage to the property or claims arising out of the property for the lapse period. *Id.* The ASIC policy provided substantially less coverage than Ms. McNeary-Calloway's previous policy. *Id.* at ¶ 22.

In September 2010, Ms. McNeary-Calloway received a letter from Chase Home Finance, stating that, effective August 26, 2010, Chase Home Finance had renewed the FPI policy for another year at the same rate. *Id.* at ¶ 24. Following the receipt of this letter, Ms. McNeary-Calloway obtained her own insurance policy from Farmers Insurance Group with an annual premium of $1,103 and an effective date of September 1, 2010. *Id.* at ¶ 25. After receiving notice of this policy, Chase Home Finance sent Ms. McNeary-Calloway a letter stating that it canceled **[**7]** the FPI policy, but charged her escrow account for retroactive coverage for the period extending from August 26, 2010 to September 1, 2010. *Id.* at ¶ 26.

(2) **Colin and Terrie MacKinnon**

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[1] The Court assumes the allegations in the complaint to be true for the purposes of this motion. *See* *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996)* **[**4]** (***HN2***[]) on motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, the court assumes the facts alleged in the complaint are true).

Plaintiffs Colin and Terrie MacKinnon ("the MacKinnons") reside in San Diego, California, having purchased their home in 1994 with a loan from Royal Bank of Canada. *Id.* at ¶ 27. In July 2005, the MacKinnons refinanced through an online mortgage broker and Chase Home Finance purchased the loan very shortly after closing. *Id.* The MacKinnons had hazard insurance through AAA with an annual premium of $440. *Id.* Unbeknownst to them, the MacKinnons' homeowners' insurance policy lapsed on July 20, 2008. *Id.* at ¶ 28. The MacKinnons believe that the lapse was due to a computer error on the part of AAA. *Id.*

[*936] On November 5, 2010, Chase Home Finance sent the MacKinnons a notice stating that an FPI policy had been purchased from ASIC with an annual premium of $1,782, and backdated to cover the period between August 18, 2009 and August 18, 2010. *Id.* at ¶ 29. The MacKinnons do not recall seeing the notice at the time. *Id.* at ¶ 30. They later became aware of the lapse in coverage in December 2010 and immediately reinstated **[**8]** their AAA policy, effective December 10, 2010. *Id.*

In January 2011, the MacKinnons noticed two charges to their escrow account for FPI. *Id.* at ¶ 31. Specifically, on October 27, 2010, Chase Home Finance charged the MacKinnons a premium of $1,782 for a FPI policy backdated to cover the period from August 18, 2009 to August 18, 2010. *Id.* Three days later, on October 30, 2010, Chase Home Finance charged the MacKinnons a premium of $1,782 for an FPI policy backdated to cover the period from August 18, 2010 to August 18, 2011. *Id.* Once Chase Home Finance received proof of the MacKinnons' insurance policy reinstated as of December 10, 2010, it provided a pro-rated refund of $1,226 for the period of December 10, 2010 through August 18, 2011. *Id.* at ¶ 32. Accordingly, the MacKinnons were charged a total of at least $2,338 for FPI policies. *Id.* There was no damage to the property or claims arising out of the property for the lapse period. *Id.* at ¶ 33.

(3) **Andrea North**

Plaintiff Andrea North resides in Yorba Linda, California. *Id.* at ¶ 35. On or about April 3, 2008, Ms. North obtained a loan from JPMorgan for the purchase of her home. [2] *Id.* Ms. North obtained a homeowner's insurance policy from **[**9]** State National Insurance Co. with an annual premium of $1,084. *Id.* However, after Ms. North became seriously ill in 2009, her homeowner's insurance policy was canceled effective April 23, 2009, for non-payment of the premium. *Id.*

On December 8, 2009, Chase Home Finance charged Ms. Woo and Ms. North $5,377 for a FPI policy from ASIC, backdated to April 23, 2009. *Id.* at ¶ 36. Ms. North's FPI policy was backdated, despite the fact that there was no damage to the property or claims arising out of the property for the lapse period. *Id.* On May 2, 2010, Chase Home Finance sent Ms. Woo and Ms. North a letter stating that it had renewed the policy for another $5,377, effective April 23, 2010. *Id.* at ¶ 37. Subsequently, Ms. Woo and Ms. North obtained their own insurance policy from Towers Select Insurance Co., effective June 8, 2010, for an annual premium of $1,134. *Id.* at ¶ 38.

Chase Home Finance canceled the second FPI policy effective June 8, 2010, but did not refund the initial $5,377 for the first FPI policy or the amount charged for the second FPI policy in effect from April 23, 2010 **[**10]** until June 8, 2010. *Id.* at ¶ 39.

(4) **Sheila M. Mayko**

Plaintiff Sheila M. Mayko resides in Riverside, New Jersey. *Id.* at ¶ 40. On or about January 11, 2002, Ms. Mayko purchased a residence at 200 Heulings Avenue, Riverside, NJ with a loan obtained from Chase Bank. *Id.* On or about June 30, 2003, Ms. Mayko obtained a $135,209 refinance loan with Chase Bank secured by the property at 200 Heulings Avenue. *Id.*

In January 2010, Ms. Mayko missed the 2010 hazard insurance premium payment of $1,064. *Id.* at ¶ 42. On January 19, **[*937]** 2010, Ms. Mayko's hazard insurance company, Preferred Mutual Insurance Company, sent a notice of cancellation stating the policy would be cancelled effective February 23, 2010 if payment was not made.

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[2] Ms. North's mother, Helen Woo, was a co-signer on the note, but was not a party to the mortgage contract.

Id. at ¶ 43. On January 26, 2010, Chase paid Ms. Mayko's annual premium of $1,064 to Preferred Mutual from Ms. Mayko's escrow account, leaving that account with a negative balance. *Id.* at ¶ 44.

Chase subsequently canceled Ms. Mayko's existing policy and force-placed coverage with another carrier. *Id.* at ¶ 46. On July 23, 2010, Chase Home Finance sent Ms. Mayko a letter informing her that it had force-placed a one-year homeowner's insurance policy on her property with ASIC at **[**11]** a cost of $3,177.34. *Id.* at ¶ 47. The insurance was backdated to May 13, 2010. *Id.* at ¶ 50. The insurance premium payment was charged against Ms. Mayko's escrow account. *Id.* at ¶ 47. The FPI policy supplied substantially less coverage than Ms. Mayko's previous policy in that it protected only Chase Home Finance and covered only the structure of the home. *Id.* at ¶ 48. Additionally, Mayko's dwelling was insured for the same amount under the FPI policy as it was under Ms. Mayko's existing policy ($328,000). *Id.* at ¶ 49.

Plaintiffs assert the following seven claims in their FAC:

(1) **Real Estate Settlement Procedures Act ("RESPA"), *12 U.S.C. § 2607***: Plaintiffs claim that Defendants violated RESPA's prohibition on accepting fees, kickbacks, or things of value in two ways. First, pursuant to "captive reinsurance arrangements," [3] Defendants' subsidiary received an "unlawfully excessive" split of borrowers' FPI premiums. *Id.* at ¶¶ 65, 140. Second, Defendants unlawfully received commissions from FPI providers in return for agreeing to exclusively force-place insurance with those providers. *Id.* at ¶¶ 66, 141. Under the commission arrangement, "the provider of the force-placed insurance policy pays **[**12]** a commission either directly to the servicer or to a subsidiary posing as an insurance 'agent.' Typically, under such an arrangement, commissions are paid to a 'licensed insurance **[*938]** agency' that is simply an affiliate or subsidiary of the servicer and exists only to collect the kickbacks or commissions collected from the force-placed insurance provider." *Id.* at ¶ 66. These reinsurance and commission arrangements, totaling as much as forty percent of the premiums paid by homeowners, were not for services actually furnished or performed, and/or exceeded the value of such services. *Id.* at ¶¶ 65, 142.

Plaintiffs claim they were harmed by the unlawful kickback scheme because the "kickbacks and unearned fees unnecessarily and artificially inflate settlement service charges," and thus Plaintiffs have been overcharged. *Id.* at ¶ 146. Even if Plaintiffs weren't overcharged, "RESPA *section 8(d)(2)* indicates that damages are based on the settlement service amount with no requirement [of an] overcharge." *Id.* at ¶ 145.

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[3] Under a "captive reinsurance arrangement," according to Plaintiffs, the provider of the FPI policy agrees to reinsure the FPI policy with a subsidiary, or "captive reinsurer," of the referring servicer. FAC, at ¶ 67. In exchange for receiving a portion of the borrowers' premiums, the subsidiary is supposed to assume a portion of the insurer's risk of loss. *Id.* Defendants purportedly agreed to take on this risk under an "excess of loss" captive reinsurance arrangement. *Id.* at ¶ 102. Plaintiffs, however, allege that the excess of loss arrangement "does not necessarily result in any actual 'losses' **[**13]** being shifted to the reinsurer." *Id.* at ¶ 99. Plaintiffs explain why this is so as follows:

> [I]n an excess of loss reinsurance arrangement, the reinsurer is liable only for a specified corridor or "band" of loss, with the losses below and above the band being covered by the force-placed insurance provider. In other words, the reinsurer is liable only for claims, or a percentage thereof, above a particular point, commonly known as an attachment or entry point, and subject to a ceiling, commonly known as a detachment or exit point. Under this structure, then, the reinsurer's liability begins, if ever, only when the force-placed insurance provider's incurred losses and expenses reach the attachment point and ends when such losses reach the detachment point.
>
> The likelihood of the reinsurer experiencing any real losses under this arrangement depends not only on the amount of losses paid by the force-placed insurer (i.e. whether the amount of claims paid by the insurer ever reaches the band where the reinsurer's responsibility to pay claims attaches) but also on whether the reinsurance agreement between the reinsurer and the force-placed insurance provider exposes the reinsurer to any real **[**14]** possibility that it may be required to contribute its own money when called upon by the force-placed insurance provider to pay for its share of losses.

Id. at ¶¶ 100-101.

(2) **Breach of the Implied Covenant of Good Faith and Fair Dealing**: Plaintiffs claim that the mortgage contracts between Plaintiffs and Defendants, to the extent those contracts allow Defendants to force-place insurance, forbid Defendants from force-placing insurance "capriciously" or in "bad faith." *Id.* at ¶ 152. Plaintiffs claim Defendants breached this duty of good faith in at least the following respects:

- "Failing to make any effort whatsoever to maintain borrowers' existing insurance policies and, instead . . . [,] forcing borrowers to pay for insurance from providers of Defendants' choice;"
- Entering into **[**15]** arrangements with FPI providers whereby Defendants received unlawful kickbacks and commissions, resulting in Defendants overcharging Plaintiffs for the cost of insurance;
- "Failing to seek competitive bids [for FPI policies] on the open market or otherwise making good faith efforts to reasonably exercise their discretion;"
- "Assessing excessive, unreasonable, and unnecessary insurance policy premiums against Plaintiffs and Class and misrepresenting the reason for the cost of the policies;"
- "Backdating force-placed insurance policies to cover time periods which have already passed and for which there was already absolutely no risk of loss . . . due to the passing of time and/or the lender's coverage under a Lender's Loss Payable Endorsement;"
- Misrepresenting borrowers' obligation to pay for such backdated coverage;
- "Failing to provide borrowers with any opportunity whatsoever to opt out of having their force-placed insurance policies provided by an insurer with whom Defendants had a commission and/or captive reinsurance arrangement."

Id. at ¶ 153. Plaintiffs claim they have suffered damages as a result of the above breaches. *Id.* at ¶ 154.

(3) **Breach of Contract**: Plaintiffs claim that **[**16]** Defendants have breached their obligation in the mortgage contracts to exercise their discretion to force-place insurance "in a reasonable manner." *Id.* at ¶ 158. Specifically, Defendants engaged in three practices that constitute such a breach of the contract: (1) "requiring borrowers to pay amounts for insurance coverage that exceed the amounts necessary to protect the mortgagee's interest in the secured property;" (2) backdating FPI policies to cover periods of time where no loss occurred; and (3) "requiring borrowers to pay for FPI policies despite the existence of a Lender's Loss Payable Endorsement . . . ." *Id.* at ¶ 159. Plaintiffs claim they **[*939]** were damaged as a result of Defendants' breach. *Id.* at ¶ 161.

(4) **Unlawful Business Practices Under *Cal. Bus. & Prof. Code §§ 17200 et seq.***: Plaintiffs allege that Defendants' actions and business practices are unfair, unlawful, and/or fraudulent under *Section 17200*. Plaintiffs base their UCL claim on Defendants' actions and practices as described in their RESPA, breach of the implied covenant, and breach of contract claims. *Id.* at ¶ 166. Plaintiffs claim they have lost money or property as the result of Defendants' conduct. *Id.* at ¶ 167. Plaintiffs **[**17]** seek damages, disgorgement of profits, restitution, and an injunction preventing Defendants' conduct. *Id.* at ¶ 168.

(5) **Violation of the New Jersey Consumer Fraud Act ("NJCFA"), *N.J. Stat. Ann. § 56:8-2***: Plaintiffs claim that Defendants have engaged in "unconscionable acts and practices," as described in the preceding claims, in violation of the NJCFA. *Id.* at ¶ 172. Plaintiffs claim that such practices are unconscionable because "they are unethical, immoral, oppressive, and harmful and depart from the standard of good faith, honesty . . . and fair dealing established under the NJCFA." *Id.* at ¶ 171. Further, "Defendants' conduct was deceptive and fraudulent, concealing numerous material facts and misrepresenting others." *Id.* Plaintiffs have suffered damages as a result of this conduct. *Id.* Plaintiffs seek damages, treble damages, restitution, injunctive relief, and attorney's fees, among other forms of relief. *Id.* at ¶ 177.

(6) **Unjust Enrichment/Disgorgement**: Plaintiffs assert a claim for unjust enrichment, alleging that Defendants wrongfully obtained "millions of dollars in purported commission payments and reinsurance premiums," all derived from borrowers' FPI premium payments. *Id.* **[**18]** at ¶ 179. Plaintiffs seek restitution and disgorgement of these funds. *Id.* at ¶ 182.

(7) **Declaratory and Injunctive Relief**: Finally, Plaintiffs claim that they, and the class they purport to represent, will be irreparably injured in the future by Defendants' conduct. *Id.* at ¶ 184. Accordingly, Plaintiffs seek declaratory and injunctive relief asserting:

> that Defendants: (a) are prohibited from force-placing insurance when the servicer knows or has reason to know that the borrower has a policy in effect that meets the minimum requirement of the loan documents; (b) cannot force-place insurance that is in excess of the replacement cost of the improvements on the mortgaged property; (c) are prohibited from purchasing the force-placed insurance from a subsidiary, affiliate, or any entity in which they have an ownership interest; (d) are prohibited from splitting fees, giving or accepting kickbacks or referral fees, or accepting anything of value in relation to the purchase or placement of the force-placed insurance; (e) must make reasonable efforts to continue or reestablish the borrower's existing insurance policy if there is a lapse in payment; [] (f) must purchase any force-placed insurance **[**19]** for a commercially reasonable price; and (g) are prohibited from backdating force-placed insurance policies absent evidence of damage to the property or claims arising out of the property during any lapse periods.

Id. at ¶ 185.

B. The *Wahl* Settlement

On June 2, 2011, after nearly three and a half years of litigation, a court in this district certified a class for settlement purposes which comprised the following:

> [A]ll current and former California homeowner/borrowers who during the period from January 28, 2004 through [June 2, 2011] were additional insureds under a lender and/or servicer placed **[*940]** residential fire or hazard insurance policy issued by American Security Insurance Company ("ASIC") insuring improvements to the homeowner/borrowers' real property (an "LPI policy"), who paid some or all of the first year premiums for an ASIC LPI policy.

*Wahl v. Am. Sec. Ins. Co., C08-00555-RS, Dckt. No. 176, 2011 U.S. Dist. LEXIS 59559 at *8*, Findings and Order Certifying Class for Settlement Purposes, Directing the Issuance of Class Notice, and Scheduling a Fairness Hearing (N.D. Cal.). The claims in the case were based on ASIC's alleged practice of force-placing hazard insurance for periods during which prior hazard insurance **[**20]** would have been in effect for the mortgage lender pursuant to the homeowners' LLPE had it not been cancelled by ASIC's placement of FPI.

That class was finally certified and a settlement entered into judgment on September 30, 2011. The settlement includes a Release that "forever discharge[s]" the Releasees "from any claims or liabilities arising from or related to the Released Claims." *Wahl*, Dckt. No. 190, Final Order and Judgment, at *4. For purposes of the Release, the term "Realeasees" means:

> American Security Insurance Company, doing business in its own name, and its predecessors, successors and assigns, and all of its respective past and present divisions, subsidiaries, parent companies, and affiliated companies (which shall include any person or entity which Controls, is Controlled by, or is under Common Control with any such party), including but not limited to any direct or indirect subsidiary of Assurant, Inc., and all of the officers, directors, employees, agents, brokers, distributors, representatives and attorneys of all such entities. **Releasees shall also specifically include all lenders, servicers, agents or any of their affiliated entities purchasing or originating the [**21] issuance of a Policy or Policies by American Security Insurance Company, and all of their respective past and present divisions, subsidiaries, parent companies, and affiliated companies** (which shall include any person or entity which Controls, is Controlled by, or is under Common Control with any such party). The term "Control" (including without limitation, with correlative meaning, the terms "Controlled by" and "under Common Control with"), as used with respect to any entity, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such entity, whether through ownership of voting securities or otherwise.

Id. at *5 (emphasis added).

The term "Released Claims" means "all claims and causes of action **arising out of the facts alleged in the Action** which have been, or could have been, may be, or could be alleged or asserted in the Action by Plaintiff or the Class Members against Releasees." *Id.* (emphasis added).

Plaintiff Andrea North is the only member of the class who opted-out of the settlement that is a plaintiff in the present case. *Wahl*, Dckt. No. 180, Declaration of Tore Hodne in Support of Reply to Motion for Final **[**22]** Approval of Class Action Settlement.

C. The Motion

Defendants filed their Motion to Dismiss on November 21, 2011, arguing that each cause of action fails to state a claim for relief under *Fed. R. Civ. P. 12(b)(6)*.

Defendants first assert that the *Wahl* settlement precludes all of the claims brought by the individual California Plaintiffs—with the exception of Plaintiff Ms. North, who opted-out of the settlement—and the purported California subclass. Defendants' Motion to Dismiss Plaintiffs' **[*941]** First Amended Complaint ("Motion"), 9. Defendants contend that the "General Release in *Wahl* covered any and all past, present, or future claims that the California named-Plaintiffs or the putative California subclass had, may have had or could have had against Chase as the lender or servicer of the loans under which the American Security lender-placed fire and hazard insurance policies at issue in this Action arose." Motion at 9 (citing RJN, Ex. A ("*Wahl* Final Order and Judgment"), 29). Defendants further assert that the scope of the Release in *Wahl* "'specifically include[s] all **[**23]** lenders, servicers, . . . purchasing or originating the issuance of a Policy or Policies by American Security Insurance Company.'" *Id.* at 10 (citing citing RJN, Ex. A ("*Wahl* Final Order and Judgment"), 29). Because Defendants are lenders and/or servicers purchasing or originating insurance policies by ASIC, Defendants argue they are deemed Releasees and therefore all claims released in *Wahl* now brought by any member of the *Wahl* settlement class fail as a matter of law. *Id.* Defendants add that, to the extent that Plaintiff Ms. North or any of the other seven Chase-related California opt-outs want to assert claims under California law, they must do so by way of individual actions, not as class actions under *Rule 23*, because the putative class is so small and easily identifiable as to make joinder of all members practicable as a matter of law. *Id.* at 11 (citing *Fed. R. Civ. P. 23(a)(1)*).

Even if the *Wahl* opt-out Plaintiff, Ms. North, and the New Jersey Plaintiff, Ms. Mayko, pursue their individual claims, Defendants assert that each claim in the FAC fails as a matter of law for the reasons stated below.

Real Estate Settlement Procedures Act, *12 U.S.C. § 2607 et seq.*: Defendants argue that **[**24]** Plaintiffs' RESPA claim fails for two reasons. First, the conduct Plaintiffs allege falls outside the scope of RESPA. *Id.* at 11-12. Specifically, RESPA prohibits kickbacks, unearned fees, and fee-splitting only in connection with "a real estate settlement service." *Id.* (citing *12 U.S.C. §§ 2607(a)* & *(b)*). Because "real estate settlement" under RESPA is synonymous with "closing" of the loan, Defendants argue, RESPA governs only conduct directly related to the closing of the loan. *Id.* at 12 (citing *Fitch v. Wells Fargo Bank, N.A., 709 F. Supp. 2d 510, 514 (E.D. La. 2010)*; *Ford v. New Century Mortgage Corp., 797 F. Supp. 2d 862, 2011 WL 2490720, at *4 (N.D. Ohio 2011)*; *Gens v. Wachovia Mortgage Corp., 2011 U.S. Dist. LEXIS 49709, 2011 WL 1791601, at *6 (N.D. Cal. May 10, 2011)*; *24 C.F.R. § 3500.2(b)*). Defendants contend that federal courts, including the Ninth Circuit, have drawn a "temporal distinction" whereby RESPA's prohibition on kickbacks, fees, and fee-splitting applies only "to fees or costs 'payable at or before settlement' of the loan, not to 'post-settlement fees paid by mortgagors after they have purchased their houses' and after the loan has closed." *Id.* (quoting *Bloom v. Martin, 77 F.3d 318, 321 (9th Cir. 1996)*; **[**25]** citing *Greenwald v. First Fed. Sav. & Loan Ass'n of Boston, 446 F. Supp. 620, 625 (D. Mass. 1978)*, *aff'd*, *591 F.2d 417 (1st Cir. 1979))*. Defendants argue that Plaintiffs' RESPA claim falls outside of RESPA's scope for one additional reason: RESPA "'does not extend to overcharges,'" at least to the extent that the overcharge was for services actually rendered. *Id.* (quoting *Martinez v. Wells Fargo Home Mortgage, Inc., 598 F.3d 549, 554 (9th Cir. 2010))*. Accordingly, Defendants contend that the claim fails as a matter of law since the alleged kickbacks and fees for FPI incurred after the closing of the loan, and because the alleged overcharge is not covered by RESPA.

Second, Defendants argue that because Plaintiffs' loans closed between 2002 and 2008, Plaintiffs' RESPA claim, brought in **[*942]** 2011, is time-barred under RESPA's one-year statute of limitations. *Id.* at 12-13 (citing *12 U.S.C. § 2614*; *Parmer v. Wachovia, 2011 U.S. Dist. LEXIS 43866, 2011 WL 1807218, at *2 (N.D. Cal. Apr. 22, 2011)*; *Gens, 2011 U.S. Dist. LEXIS 49709, 2011 WL 1791601, at *6)*. Defendants contend that equitable tolling does not apply here because Plaintiffs' mortgage contracts "expressly warn" that if the borrower failed to maintain appropriate insurance, Defendants may force-place **[**26]** such insurance at a significant increase in cost and altered coverage. *Id.* at 13. Defendants reject any attempt by Plaintiffs to justify the delay based on lack of expertise or the need to obtain counsel. *Id.* at 13-14 (citing *Santos v. U.S. Bank N.A., 716 F. Supp. 2d 970, 977 (E.D. Cal. 2010)*; *Garcia v. Brockway, 526 F.3d 456, 466 (9th Cir. 2008))*.

Breach of the Implied Covenant of Good Faith and Fair Dealing & Breach of Contract:

Defendants assert that both Plaintiffs' contract claims fail as a matter of law for the same reason: Plaintiffs' mortgage contracts are unambiguous in establishing Defendants' prerogative to force-place insurance "in the amount and for the periods that Chase required." *Id.* at 14-15 (citing FAC, Exs. 1, 7, 17 at ¶ 5, 18 at ¶ 4). Additionally, the contracts show that the parties "agreed that this amount would be sufficient to protect Chase's interest in the Property, not that of Plaintiffs." *Id.* at 15. Defendants assert that the "unambiguous language in the Plaintiffs' contracts trumps the allegations in their complaint" and the Court should therefore grant Defendants' motion to dismiss as to both contract claims. *Id.* at 14-15 (citing *Barrous v. BP P.L.C., 2010 U.S. Dist. LEXIS 108933, 2010 WL 4024774, *4 (N.D. Cal. Oct. 13, 2010)*; **[**27]** *Thompson v. Ill. Dep't of Prof'l Regulation, 300 F.3d 750, 754 (7th Cir. 2002)*; *Hayes v. Wells Fargo Home Mortgage, 2006 U.S. Dist. LEXIS 79769, 2006 WL 3193743, at *4 (E.D. La. Oct. 31, 2006)*; *Rodriguez v. Wells Fargo Bank, N.A., 2011 U.S. Dist. LEXIS 79632, 2011 WL 2946381, *3 (E.D. Cal. July 21, 2011)*; *Lass v. Bank of Am., N.A., 2011 U.S. Dist. LEXIS 89519 (D. Mass. Aug. 10, 2011))*.

Unlawful Business Practices Under *Cal. Bus. & Prof. Code §§ 17200 et seq.*: Defendants argue that Plaintiffs fail to state a claim under any of the UCL's three prongs, and contend that Plaintiffs' seek remedies—damages and disgorgement of profits—not allowed under the UCL. *Id.* at 18 (citing *In re Napster Inc. Copyright Litig., 354 F. Supp. 2d 1113, 1126 (N.D. Cal. 2005))*.

Defendants assert that Plaintiffs' claim under the "unlawful" prong of the UCL rises and falls with their RESPA claim. *Id.* at 16. Because Plaintiffs' RESPA claim fails, Plaintiffs' cannot maintain their UCL claim based on Defendants' alleged unlawful conduct. *Id.* Plaintiffs' claim based on the "unfair" prong also fails since Plaintiffs "cannot satisfy any of the tests that California courts use" to evaluate whether conduct is unfair. *Id.* at 16-17. Pursuant to those tests, Defendants contend that **[**28]** Plaintiffs "have not pled any facts showing that Chase's alleged conduct 'threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" *Id.* at 17 (quoting *Byars v. SCME Mortgage Bankers, Inc., 109 Cal. App. 4th 1134, 1147, 135 Cal. Rptr. 2d 796 (2003))*. Nor have Plaintiffs pled facts sufficient to establish any of the three factors under the balancing test: "'(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.'" *Id.* (quoting *Davis v. Ford Motor Credit Co.,* ***[*943]*** *179 Cal. App. 4th 581, 597, 101 Cal. Rptr. 3d 697 (2009))*. Finally, under the "fraudulent" prong, Defendants argue that Plaintiffs' claim fails because Plaintiffs have not pled the alleged fraud with any particularity, *Id.* (citing *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009))*, nor can Plaintiffs demonstrate that members of the public are likely to be deceived by Defendants' conduct in light of the unambiguous **[**29]** language in the mortgage contracts. *Id.* (citing *Buller v. Sutter Health, 160 Cal. App. 4th 981, 986, 74 Cal. Rptr. 3d 47 (2008))*.

Violation of the New Jersey Consumer Fraud Act ("NJCFA"), *N.J. Stat. Ann. § 56:8-2*:

Defendants assert that Plaintiff's claim under the NJCFA fails for at least three reasons. First, Plaintiffs fail to establish any unlawful conduct as required by the NJCFA. *Id.* at 18 (citing *N.J. Citizens Action v. Schering-Plough Corp., 367 N.J. Super. 8, 842 A.2d 174, 176 (N.J. 2003))*. Second, Plaintiff Mayko makes no allegation, and cannot make any allegation, that she was induced or lured into making any purchase. *Id.* (citing *Joe Hand Promotions, Inc. v. Mills, 567 F. Supp.2d 719, 724 (D.N.J. 2008))*. Third, Plaintiffs fail to allege any specific fraud under *Fed. R. Civ. P. 9(b)* as they must to state a NJCFA claim. *Id.* (citing *Capogrosso v. State Farm Ins. Co., 2009 U.S. Dist. LEXIS 97544, 2009 WL 3447068, at *3 (D.N.J. 2009))*.

Alternatively, Defendants contend that, if the Court declines to dismiss Plaintiffs' NJCFA claim on the merits, the claim should be dismissed or transferred for improper venue and/or forum non-conveniens. *Id.* at 19. Applying the principles of judicial economy, convenience, and fairness to the litigants, Defendants **[**30]** argue that the Court should dismiss or transfer the case to New Jersey because all of the events related to the NJCFA claim occurred there. *Id.* at 19-20 (citing *Remley v. Lockheed Martin Corp., 2001 U.S. Dist. LEXIS 7990, 2001 WL 681257, at *3 (N.D. Cal. June 4, 2001)*; *C.H. James & Co. v. Fed. Food Marketers Co., 927 F. Supp. 187, 190 (S.D. W.Va. 1996))*.

Unjust Enrichment/Disgorgement & Injunctive and Declaratory Relief: Defendants argue that there is no independent cause of action for unjust enrichment. *Id.* at 19 (citing *Bosinger v. Belden CDT, Inc., 358 Fed. Appx. 812, 815 (9th Cir. 2009)*; *Romero v. Mortgage Co., 2011 U.S. Dist. LEXIS 69673, at *8 (N.D. Cal. June 28, 2011))*. Likewise, injunctive relief is a remedy and not, in itself, a cause of action. *Id.* (citing *Gomez v. Wachovia Mortgage Corp., 2010 U.S. Dist. LEXIS 3799, 2010 WL 291817, at *8 (N.D. Cal. Jan. 19, 2010)*; *Peterson v. Wash. Mut. Bank, et al.*, 10-cv-01462-JCS, slip op. at *16-17 (N.D. Cal. July 29, 2010)). Declaratory relief is similarly not a cause action. *Id.* (citing *Weiner v. Klais & Co., 108 F.3d 86, 92 (6th Cir. 1997)*; *Gomez, 2010 U.S. Dist. LEXIS 3799, 2010 WL 291817, at *2)*. Accordingly, Defendants ask this Court to dismiss these claims with prejudice. *Id.*

D. The Opposition

In response to Defendants' **[**31]** Motion, Plaintiffs reject Defendants' argument that the *Wahl* settlement precludes the claims of the non-opt-out California Plaintiffs and the California subclass. Plaintiffs contend that, despite the language in the Release, Defendants cannot be considered Releasees because Defendants were non-parties to the *Wahl* case, listed nowhere in the *Wahl* settlement documents, did not bargain for any benefit in, nor contribute to, the settlement, and were not even aware of the settlement until well after final approval. Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Opposition"), 5. Plaintiffs also contend that the Release should reflect the settlement notice, which states that only ASIC will be released. Opposition **[*944]** at 5-6 (citing RJN, Ex. 3 (*Wahl* Notice of Class Action Settlement)).

Additionally, Plaintiffs apply the doctrine of *res judicata* and argue that their claims are not precluded by *Wahl* because that case involved different claims. *Id.* at 5. According to Plaintiffs, *Wahl* "focused **exclusively** on the insurer-defendant's provision of coverage backdated to the end of the expired policy thus overlapping with the extended coverage provided by the LLPE . . . ." *Id.* (citing RJN, Ex. **[**32]** 1 (*Wahl*, FAC)). Plaintiffs contend that the first amended complaint in *Wahl*, unlike Plaintiffs' FAC, "contain[s] no allegations of lender misconduct, of collusion between any lender (much less [JPMorgan Chase]) and insurers to circumvent federal law, of unlawfully inflated excessive premiums for the force-placed insurance, of inappropriately limited coverage, of backdated policies beyond the timeframe of the LLPE, of RESPA prohibited kickbacks, or of any claims against the lender like those presented in this case." *Id.* Plaintiffs assert that the "interests" and "rights" sought to be protected by Plaintiffs were not addressed in *Wahl* and their claims are therefore not precluded. *Id.* at 6-7 (citing *Daniels v. Anaconda Minerals Co., 2011 US. Dist. LEXIS 23920, at *31 (D. Mont. Mar. 9, 2011))*.

Plaintiffs further contend that Defendants cannot "categorically limit Plaintiffs' claims to those asserted in *Wahl* simply because they relate to force-placed insurance." *Id.* at 7. Rather, because the claims brought in *Wahl* do not arise from the "same factual predicate" as the "much broader" claims asserted against Defendants here, the settlement does not preclude the claims. *Id.* (citing RJN, Ex. **[**33]** 2 (Wahl, Plaintiff's Motion for Preliminary Approval of Class Action Settlement); *Hesse v. Sprint Corp., 598 F.3d 581, 590 (9th Cir. 2010)*; *E. & J. Gallo Winery v. Encana Energy Servs., Inc., 388 F. Supp. 2d 1148, 1157 (E.D. Cal. 2005))*. Plaintiffs do state that "[t]he sole common factor between the two cases is the existence of allegations surrounding the overlap between the LLPE and force-placed insurance." *Id.* at 8.

In addition to different claims, Plaintiffs argue that their case is not precluded because the injuries alleged by Plaintiffs "are plainly distinct from those alleged in *Wahl.*" *Id.* at 7 (citing *Negrete v. Allianz Life Ins. Co. of N. Am., 2010 U.S. Dist. LEXIS 113815, at *35 (C.D. Cal. Aug. 13, 2010))*. "In *Wahl*, there were no damages sought from the lender[;] rescission of the force-place insurance contract was sought[.] [T]here was no relief sought with respect to the mortgage, and there were certainly no RESPA claims." *Id.*

Plaintiffs respond to Defendants' arguments regarding the specific claims asserted in Plaintiffs' FAC as follows.

Real Estate Settlement Procedures Act, *12 U.S.C. § 2607 et seq.*: Plaintiffs reject Defendants' assertions that Plaintiffs' claim falls outside **[**34]** RESPA's scope and that Plaintiffs' claim is time-barred.

First, Plaintiffs argue that the statutory language, a Department of Housing and Urban Development ("HUD") regulation, and case law support their conclusion that FPI is a "settlement service" under *12 U.S.C. § 2607(b)*. Regarding the HUD regulation, Plaintiffs cite to the following language in "Regulation X":

> Settlement service means any service provided in connection with a prospective or actual settlement, including, but not limited to, any one or more of the following:
>
> * * *
>
> (10) Provision of services involving mortgage insurance;
>
> **[*945]** (11) Provision of services involving hazard, flood, or other casualty insurance or homeowner's warranties;
>
> (12) Provision of services involving mortgage life, disability, or similar insurance designed to pay a mortgage loan upon disability or death of a borrower, but only if such insurance is required by the lender as a condition of the loan;

Id. at 9 (citing *24 C.F.R. § 3500.2(b) (2011)*). Plaintiffs contend that this language "clearly" establishes that "settlement services include hazard insurance and other insurance 'required by the lender as a condition of the loan.'" *Id.*

Second, in further support of **[**35]** their proposition that FPI is a settlement service, Plaintiffs analogize to cases holding that mortgage insurance qualifies as a settlement service. *Id.* at 9-10 (citing *Munoz v. PHH Corp., 659 F. Supp. 2d 1094, 1099 (E.D. Cal. 2009)*; *Kay v. Wells Fargo & Co., 247 F.R.D. 572, 576 (N.D. Cal. 2007)*; *Alston v. Countrywide Fin. Corp., 585 F.3d 753, 756 n.2 (3d Cir. 2009))*. Plaintiffs argue that the *Munoz* decision, in particular, "recognizes that the determinative factor with regard to whether a particular service qualifies as a '[s]ettlement service' for purposes of *Section 8* is not when the payment is tendered but rather, whether the purchase of the service, and the corresponding obligation to pay, are required by the lender in order for the transaction to close." *Id.* at 10. Because FPI, like mortgage insurance, is required in order for the transaction to close, FPI should be considered a settlement service. *Id.*

Plaintiffs next attempt to distinguish cases cited by Defendants, including a case in this district directly on point. Plaintiffs argue that this Court should not follow *Gens v. Wachovia Mortgage Corp., 2011 U.S. Dist. LEXIS 49709 (N.D. Cal. May 10, 2011)*, because there the *pro* ***[**36]*** *se* plaintiff was overly litigious, creating a tortured procedural history and leaving the court with little patience to conduct a "thoughtful analysis" into whether FPI qualifies as a settlement service. *Id.* at 11. Moreover, Plaintiffs argue, the court's holding that FPI is not a settlement service is dicta: the "primary reason the *pro se* plaintiff's RESPA claims were dismissed was because the claims were time-barred." *Id.* (citing *Gens, 2011 U.S. Dist. LEXIS 49709, at *16-17)*.

Plaintiffs also reject Defendants' argument that RESPA "does not extend to overcharges." *Id.* at 11-12 (citing Motion at 12). Defendants' assertion that an "overcharge" does not fall under RESPA if the payment was for services that were actually performed is inapplicable here, Plaintiffs argue, because Defendants and their affiliates overcharged, but "did not provide any *bona fide* services." *Id.* at 12.

Finally, Plaintiffs argue that their RESPA claim is not barred by the one-year statute of limitations for two reasons. First, Plaintiff McNeary-Calloway filed her original complaint on June 20, 2011, which was less than a year after Defendants force-placed her hazard insurance "in or around September 5, 2010." *Id.* **[**37]** (citing FAC at ¶ 24; FAC, Ex. 4 (McNeary-Calloway FPI Policy Notice)). Second, even if the claim falls outside the statute of limitations, Plaintiffs argue the statute should be equitably tolled. *Id.* Plaintiffs reject Defendants' contentions that the mortgage contracts disclosed all information relevant to Plaintiffs' claims, arguing instead that Defendants concealed the basis for such claims and it wasn't until, at the earliest, news reports in November 2010 revealed the true nature of the FPI industry that the statute should begin to run. *Id.* at 13-14. Plaintiffs contend that Defendants never disclosed that Defendants would receive a financial **[*946]** benefit, that their reinsurance arrangements did not actually provide for a real transfer of risk, and that Plaintiffs would be required to pay for redundant or unnecessary backdated coverage. *Id.* at 13.

Breach of the Implied Covenant of Good Faith and Fair Dealing & Breach of Contract:

Plaintiffs contend that their contract claims are viable because, while the mortgage contracts afforded Defendants the discretion to force-place insurance that is "required," the manner in which Defendants exercised this discretion breached the contract's express **[**38]** terms and its implied covenant. *Id.* at 15. The contract "does not entitle Defendants to force-place backdated, unnecessary hazard insurance with unreasonably high premiums for which Defendants received an improper kickback." *Id.* Plaintiffs cite to two cases where courts found allegations of bad faith force-placement of insurance sufficient to defeat a motion to dismiss mortgage contract-based claims. *Id.* at 17 (citing *Abels v. JPMC Bank, N.A., 678 F. Supp. 2d 1273 (S.D. Fla. 2009)*; *Williams v. Wells Fargo Bank, N.A., 2011 U.S. Dist. LEXIS 119136 (S.D. Fla. Oct. 14, 2011))*. Plaintiffs conclude that whether Defendants properly exercised their discretion under the contract is a question of material fact not to be decided on a motion to dismiss. *Id.* at 16 (citing *Low v. SDI Vendome S.A., 2003 U.S. Dist. LEXIS 27603, at *17 (C.D. Cal. Jan. 7, 2003))*.

Unlawful Business Practices Under *Cal. Bus. & Prof. Code §§ 17200 et seq.*: Plaintiffs reject Defendants' arguments that their UCL claim fails. Plaintiffs maintain that their claim is viable under the "unlawful" prong because they assert a valid RESPA claim. *Id.* at 18. Regarding the "unfair" prong, Plaintiffs assert that this district has adopted **[**39]** a three-part test with the following elements for determining unfairness in a consumer class action: "'(1) a substantial consumer injury; (2) the injury outweighs any countervailing benefits to consumers or competition; and (3) the injury could reasonably been avoided.'" *Id.* at 19 (citing *Kilgore v. KeyBank, N.A., 712 F. Supp. 2d 939, 951-52 (N.D. Cal. 2010))*. Plaintiffs argue they were injured because they were required to "pay exorbitant prices for [FPI]" and forced to "pay for duplicative and unnecessary coverage." *Id.* Plaintiffs argue that this injury is not outweighed by any countervailing interest, and could not have reasonably been avoided. *Id.* at 19-20.

Plaintiffs also contend that they adequately state a claim under the "fraudulent" prong, having satisfied *Rule 9(b)* by identifying the who, what, where, when, and how of the alleged fraudulent conduct. *Id.* at 20. The scheme Plaintiffs lay out in their FAC is sufficiently particular, they assert. *Id.* (citing *Linear Tech. v Applied Materials, Inc., 152 Cal. App. 4th 115, 134-5, 61 Cal. Rptr. 3d 221 (2007))*. Plaintiffs reject Defendants' contention that Plaintiffs are unable to show that, given the language in the mortgage contracts, members of the general **[**40]** public are likely to be deceived by Defendants' conduct. *Id.* Rather, Defendants' scheme is composed of "secret arrangements" undisclosed in the mortgage contracts, therefore making Defendants' reliance on the mortgage contracts unavailing. *Id.*

Finally, Plaintiffs make clear that they are seeking "disgorgement and/or restitution, not damages, from JPMC for its violations of the UCL." *Id.* at 21.

Violation of the New Jersey Consumer Fraud Act ("NJCFA"), *N.J. Stat. Ann. § 56:8-2*:

Plaintiffs argue that they have stated a cause of action under the NJCFA, despite Defendants' contentions to the contrary. First, Plaintiffs reject Defendants' assertion **[*947]** that Plaintiffs must establish an underlying unlawful act in order to state a NJCFA claim. *Id.* at 21-22. Instead, under the statute "an 'unlawful practice' is *any* 'unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact.'" *Id.* (quoting *N.J. S.A. §56:8-2*; *Cox v. Sears*

Roebuck & Co., 138 N.J. 2, 19, 647 A.2d 454, 463 (1994)). Plaintiffs maintain that, under the statute, "unconscionable" means a lack of "good faith and honesty." *Id.* **[**41]** Defendants' FPI practices departed from this standard of good faith and honesty in several ways; specifically, Plaintiffs contend "that Defendants never told Plaintiffs that when force-placing insurance they would make no effort to shop for a reasonably priced policy, that Defendants did not disclose that they would receive a kickback for each policy force-placed, did not advise that no effort would be made to renew the existing policies, and did not disclose that the policies Defendants purchased for Plaintiffs would be backdated to cover periods during which no risk existed." *Id.* at 22.

Second, Plaintiffs reject Defendants' "narrow" construction of the NJCFA, requiring that the alleged conduct induced or lured Plaintiffs. *Id.* at 22-23. Plaintiffs contend that the statute requires only that the unlawful practice at issue be "'in connection with' the sale or advertisement of a commercial product or service or the 'subsequent performance' related thereto." *Id.* at 23 (citing N.J. S.A. §56:8-2). Plaintiffs argue that Defendants' practices were "in connection with" "Plaintiffs' entry into the initial mortgages or refinances and the [] purchase of [FPI]." *Id.*

Third, Plaintiffs argue that **[**42]** they have pled their NJCFA claim with the particularity required by Rule 9(b). They contend that to satisfy Rule 9(b) in the context of a NJCFA claim in a class action complaint, "the complaint need only contain 'sufficient detail as to [a named plaintiff's] claims to apprise [a defendant] of that plaintiff's exact grounds for relief and the specific conduct that plaintiff charges.'" *Id.* at 24 (quoting Pacholec v. Home Depot USA, Inc., 2006 U.S. Dist. LEXIS 68976 (D.N.J. Sept. 25, 2006)).

Finally, because viable claims asserted under California law exist, Plaintiffs insist that transfer of the NJCFA claim to the District of New Jersey is not warranted. *Id.* at 25. Plaintiffs ask this Court to apply the pendant venue doctrine in order to honor Plaintiffs' chosen forum. *Id.* Plaintiffs further contend that the California and New Jersey consumer claims "address the *same* [FPI] scheme," and California courts regularly adjudicate NJCFA claims in conjunction with other California consumer claims, particularly where the claims have a common nucleus of operative facts. *Id.* (citing In re Sony VAIO Computer Notebook Trackpad Litig., 2010 U.S. Dist. LEXIS 115142, at *13-18 (S.D. Cal. Oct. 28, 2010); **[**43]** Lucent Techs., Inc. v. Dicon Fiberoptics, Inc., 2007 U.S. Dist. LEXIS 37646, at *3 (N.D. Cal. May 10, 2007)).

Unjust Enrichment/Disgorgement & Injunctive and Declaratory Relief: Plaintiffs argue that, contrary to Defendants' contentions, California courts and the Ninth Circuit recognize a cause of action for unjust enrichment. *Id.* (citing Lectrodryer v. Seoul Bank, 77 Cal. App. 4th 723, 91 Cal. Rptr. 2d 881, 883 (2000); Ben & Jerry's Franchising, Inc. v. Porghavami, 418 Fed. Appx. 607 (9th Cir. 2011)). Regarding the injunctive and declaratory relief claim, Plaintiffs assert that "dismissal would be premature" at this stage in the litigation, but even if the Court decides to dismiss this cause of action, injunctive or declaratory **[*948]** relief would still be available if warranted. *Id.* at 24-25 n.8 (citing Wagner v. Aurora Loan Servicing, 2011 U.S. Dist. LEXIS 148726, at *20 (D. Haw. Dec. 27, 2011)).

E. The Reply

In response to the Opposition, Defendants cite to specific language in the Wahl first amended complaint to argue that Plaintiffs here plead "factual allegations challenging the identical arrangements between lenders and [ASIC]" that were at issue in *Wahl*, and therefore Plaintiffs' claims **[**44]** are precluded. Defendants' Reply in Support of Motion to Dismiss ("Reply"), 5 (citing *Wahl* FAC at ¶ 14). Moreover, Defendants point out, Plaintiffs concede that their Complaint contains factual allegations that are "common" and "overlapping" with *Wahl.* Reply at 5.

IV. ANALYSIS

A. Legal Standard

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

HN3[] A complaint may be dismissed for failure to state a claim for which relief can be granted under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. *Fed. R. Civ. P. 12(b)(6)*. "The purpose of a motion to dismiss under *Rule 12(b)(6)* is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983)*. Generally, a plaintiff's burden at the pleading stage is relatively light. *Rule 8(a) of the Federal Rules of Civil Procedure* states that *HN4*[] "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*.

HN5[] In ruling on a motion to dismiss under *Rule 12*, the court analyzes the complaint and takes "all allegations of material fact as true and construe(s) them in the lights most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. **[**45]** Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. A complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*. The factual allegations must be definite enough to "raise a right to relief above the speculative level." *Id. at 1965*. However, a complaint does not need detailed factual allegations to survive dismissal. *Id. at 1964*. Rather, a complaint need only include enough facts to state a claim that is "plausible on its face." *Id. at 1974*. That is, the pleadings must contain factual allegations "plausibly suggesting (not merely consistent with)" a right to relief. *Id. at 1965* (noting that this requirement is consistent with *Fed. R. Civ. P. 8(a)(2)*, which requires that the pleadings demonstrate that "the pleader is entitled to relief").

B. Whether the *Wahl* Settlement Precludes the Claims

Defendants argue **[**46]** that the *Wahl* settlement released any and all of the claims brought by Plaintiffs McNeary-Calloway and the MacKinnons. Plaintiffs contend that the settlement has no effect on this action because they bring different claims that do not share any common factors with the claims in *Wahl*, except in regards to their allegations concerning the overlap of LLPE and FPI. The Court finds that the *Wahl* settlement limits the scope of the Plaintiffs' claims.

[*949] 1. Identical Factual Predicate

a. Background Law

HN6[] "In California, interpretation of a settlement agreement is governed by contract principles." *Howard v. Am. Online Inc., 208 F.3d 741, 747 (9th Cir. 2000)* (citing *General Motors Corp. v. Superior Court, 12 Cal. App. 4th 435, 15 Cal. Rptr. 2d 622 (1993)*. However, "a settlement agreement's bare assertion that a party will not be liable for a broad swath of potential claims does not necessarily make it so." *Hesse v. Sprint Corp., 598 F.3d 581, 590 (9th Cir. 2010)* (quoting *Williams v. Boeing Co., 517 F.3d 1120, 1134 (9th Cir. 2008)* ("While Boeing may have drafted the settlement agreement to include as broad a release as possible, the release would have only been enforceable as to subsequent claims . . . depending upon the **[**47]** same set of facts.")). At the same time, "[a] settlement agreement may preclude a party from bringing a related claim in the future 'even though the claim was not presented and might not have been presentable in the class action,' but only where the released claim is 'based on the identical factual predicate as that underlying the claims in the settled class action.'" *Id.* (citing *Williams, 517 F.3d at 1133*; *Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1287 (9th Cir. 1992))*; *see also* *Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 748 (9th Cir. 2006)* (holding that a settlement release encompasses a plaintiff's claims if they arise from an "identical factual predicate" as the claims asserted by the settling plaintiff in the previous litigation). "A class settlement may also release factually related claims against parties not named as defendants . . . ." Reyn's Pasta, 442 F.3d at 748 (citing Class Plaintiffs, 955 F.2d at 1287-89).

b. Application of Law to Facts

Plaintiffs argue that the claims of the non-opt-out members of the *Wahl* class are not precluded, relying primarily on the doctrine of *res judicata.* The Court, however, declines to apply *res judicata* in evaluating **[**48]** the preclusive effects of the settlement; rather, consistent with the Ninth Circuit precedent cited above, the Court will analyze the issue under the "identical factual predicate" doctrine. Similarly, to the extent Defendants argue that the Court need only apply California contract law, the Court rejects that argument. To be sure, California contract law does apply to the settlement's interpretation. But interpretation is only the first question. The Court must also decide which claims fall within, or outside, the Court's interpretation of the settlement. The Court applies the "identical factual predicate" doctrine for this latter purpose.

As an initial matter, the Court will first address Plaintiffs' argument that any preclusive effects of the settlement should not apply to Defendants because they should not be considered "Releasess." Plaintiffs argue that Defendants cannot be considered Releasees because Defendants were non-parties to the *Wahl* case, listed nowhere in the *Wahl* settlement documents, did not bargain for any benefit in, nor contribute to, the settlement, and were not even aware of the settlement until well after final approval. Opposition at 5. Plaintiffs are incorrect **[**49]** for several reasons.

First, Defendants are included in the Stipulation of Settlement provided by the *Wahl* parties beginning on May 12, 2011. *See Wahl*, Dckt. No.173, Declaration of Plaintiff's Counsel in Support of Motion for Settlement, Ex. 1 ("Stipulation of Settlement"). The Stipulation of Settlement was explicitly referenced in the Court's preliminary approval of the settlement, the notice to the class, and fully incorporated into the Court's final order approving the settlement on September 30, 2011. *See* Dckt No. 176, 2011 U.S. Dist. LEXIS 59559, Findings **[*950]** and Order Certifying Class for Settlement Purposes, Directing the Issuance of Class Notice, and Scheduling a Fairness Hearing, [slip op.] at *2, 3, 5; RJN, Ex. 3 (*Wahl* Notice of Class Action Settlement), ¶¶ 13, 25; *Wahl*, Dckt. No. 189, Final Order and Judgment, ¶ 1. The relevant portion of the definition of "Releasees" in the Stipulation of Settlement is identical to the definition of that term in the Court's final order approving the settlement. To the extent Plaintiffs argue that the Releasees must be listed by name, the Court rejects that argument. It is enough that the definition states that lenders and servicers purchasing or originating ASIC FPI policies **[**50]** are considered Releasees. [4]

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[4] Plaintiffs appear to suggest that this Court should collaterally review the adequacy of notice to the class because the notice fails to explicitly reveal the full scope of the Release. The Court, however, finds that the "Releasees" definition was disclosed to the class well before final approval of the settlement. Although it is true that the notice itself did not explicitly reveal that other parties besides ASIC would be released as a result of the settlement, the notice did state that, in addition to releasing ASIC, staying in the class

> means that all of the Court's orders concerning the Class will apply to you and legally bind you, **including the Release described in detail in the Stipulation of Settlement.** This Release provision describes exactly the legal **[**51]** claims you give up if this settlement is approved and you do not exclude yourself.

RJN, Ex. 3 (*Wahl* Notice of Class Action Settlement), ¶ 13 (emphasis added). The notice also informs members of the class that the Stipulation of Settlement includes more details and that a copy may be obtained by downloading it from the Internet or writing to class counsel. *Id.* at ¶ 25. Additionally, Plaintiffs give no indication that they were not otherwise apprised of the *Wahl* litigation or knew of the Releasees definition prior to final approval of the settlement; indeed, many of the changes in Plaintiffs' FAC, filed while final approval of the settlement was pending, suggest that Plaintiffs were attempting to salvage their case in light of the settlement's effects. Therefore, even if the adequacy of notice was subject to collateral review, the Court concludes that, at a minimum, these Plaintiffs were provided "an adequate basis for informed decision-making" since they knew, through the Stipulation of Settlement or otherwise, that Defendants were included as Releasees. *See* McCubbrey v. Boise Cascade Home & Land Corp., 71 F.R.D. 62, 68 (N.D. Cal. 1976) (Pekham, J.) (finding that plaintiffs bringing **[**52]** parallel litigation were not adequately informed of settlement's terms only where plaintiffs received insufficient informal and formal notice).

Second, because a class settlement may also release factually related claims against parties not named as defendants, it does not matter that Defendants were not parties in *Wahl. See* *Reyn's Pasta, 442 F.3d at 748*. Finally, Plaintiffs cite to no authority for the proposition that Defendants must contribute to the settlement in order for the settlement to release them, and the Court finds no such rule.

Next, the Court finds that the settlement released "all claims and causes of action **arising out of the facts alleged in the Action** which have been, or could have been, may be, or could be alleged or asserted in the Action by Plaintiff or the Class Members against Releasees." *Wahl*, Dckt. No. 189, Final Order and Judgment, at *5 (emphasis added). At the same time, the settlement did *not* release or "affect any claims not arising from, nor regarding, nor relating in any way to the Released Claims." *Id.* at *9. The Court interprets this language to be a general release of all claims against Releasees to the extent those claims "depend[] upon the same set of facts" as the claims in *Wahl*. *Williams, 517 F.3d at 1134*.

For purposes of determining the bases on which Plaintiffs McNeary-Calloway and the MacKinnions are precluded from asserting their claims, the allegations in Plaintiffs' FAC can be divided broadly into **[*951]** two independent categories: 1) allegations related to force-placing ASIC insurance policies that included coverage for periods of time where **[**53]** an LLPE was in place; and 2) allegations related to force-placing ASIC insurance policies that *did not* include coverage for periods of time where an LLPE was in place. Both categories are discussed below.

The Court finds that the first category of allegations is precluded by the *Wahl* settlement. Plaintiffs admit that the existence of allegations surrounding the placement of FPI despite the existence of an LLPE is a "common factor between the two cases." Opposition at 8. Plaintiffs' contention that, despite the shared set of facts, their claims based on backdating over LLPE periods should not be precluded because of the "different parties, claims and relief sought herein" fails as a matter of law. As discussed above, what matters is whether a claim shares an identical factual predicate with the released claims. The practice of force-placing ASIC hazard insurance polices that included coverage for periods of time where prior hazard insurance would have been in effect for the mortgage lender pursuant to the homeowners' LLPE had it not been cancelled by the FPI, was the central allegation in the *Wahl* action, used to support all of plaintiff's claims. Here, Plaintiffs admit to making the **[**54]** identical allegation in at least some of the claims. The Court therefore finds that all of the California non-opt-out Plaintiffs' claims arising out of FPI polices that were placed with ASIC (the only insurer at issue in *Wahl*) which overlapped, or cancelled, the LLPE period, are barred by the settlement.

The Court finds that the second category of allegations are not precluded by the *Wahl* settlement. The force-placing of insurance policies which did not include coverage for any LLPE period was not the basis for any of the claims asserted in *Wahl.* As stated by the *Wahl* Court, "Wahl's claims in this action all arise from her basic contention that when ASIC issues a 'force placed' policy upon the cancellation of a homeowner's policy, but *before* the lender's protections under an LLPE have expired, the ASIC policy 'overlaps' the prior coverage and therefore 'provides no actual coverage.'" *Wahl v. Am. Sec. Ins. Co., 2008 U.S. Dist. LEXIS 51033, 2008 WL 2444802, at *1 (N.D. Cal. June 16, 2008)* (emphasis original). Here, the non-opt-out Plaintiffs' complaint includes allegations that Defendants force-placed insurance policies that did not overlap with LLPE coverage. The allegations related to those policies depend on a **[**55]** different set of facts as the claims that gave rise to the settlement.

The Ninth Circuit's holding in *Hesse v. Sprint Corp.* is instructive in this case. In *Hesse*, the court considered whether a broad release of claims in a nationwide settlement agreement between Sprint and its customers, the *Benny* settlement, precluded a class action involving a Washington state tax that Sprint charged to its Washington customers. *Hesse, 598 F.3d at 584*. The court found that the Washington class action was not precluded because the claims did not share an identical factual predicate with the claims resolved in the *Benny* settlement. The court reasoned as follows:

> The claims underlying the *Benney* Settlement dealt exclusively with specific nationwide surcharges to recoup the costs of compliance with federal programs, whereas the claims at issue in the present case involve Sprint's statewide surcharge to recoup the cost of the Washington B & O Tax allegedly in violation of a Washington statute. The superficial similarity between the two class actions is insufficient to justify the release of the later claims by the settlement of the former. Both involve claims that Sprint improperly billed government **[*952]**

> taxes **[**56]** or fees to its customers, but they deal with different surcharges, imposed to recoup different costs, that were alleged to be improper for different reasons.

Id. at 591.

As in *Hesse*, the two actions here share a "superficial similarity" in that both deal with claims that FPI policies were imposed for periods of time where coverage was unnecessary. But the claims here involve different policies that did not overlap with, or cancel, LLPE coverage and that are alleged to be improper for different reasons. The Court concludes that claims raised in this case arising out of the force-placement of policies that did not overlap with, or cancel, LLPE coverage, are not predicated on the same set of facts as the claims of the *Wahl* plaintiff, and therefore were not released by the *Wahl* settlement. [5]

The Court declines to rule at this stage of the case on the issue of whether the California non-opt-out Plaintiffs' (Ms. McNeary-Calloway and the MacKinnons) claims are barred based on this interpretation of the settlement. That decision will depend on, *inter alia*, whether the policies purchased by Plaintiffs before FPI included LLPE coverage, and when that coverage lapsed. The parties did not brief these issues in any detail, and it is best left for summary judgment, where the Court will have before it a fully developed factual record.

C. Whether Plaintiffs State a Claim for Violation of RESPA

Defendants seek dismissal of Plaintiffs' RESPA claim on the grounds that the claim falls outside RESPA's scope and that the claim is time-barred. The Court finds that Plaintiffs do not state a claim under RESPA, and grants Defendants' Motion on that basis only.

1. Background Law

Plaintiffs' RESPA claim is based on *Section 2607(a)-(b)*, which reads:

> (a) Business referrals
>
> ***HN7***[] No person shall give and no person shall accept any fee, kickback, or thing **[**58]** of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a *real estate settlement service* involving a federally related mortgage loan shall be referred to any person.
>
> (b) Splitting charges
>
> ***HN8***[] No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a *real estate settlement service* in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607 (emphasis applied).

HN9[] Under RESPA, the term "settlement service" includes:

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[5] To the extent Defendants argue that the claims in this case and in *Wahl* overlap with respect to allegations of a scheme between Defendants and FPI providors, the Court finds that the *Wahl* plaintiff's claims were not based on such allegations. The *Wahl* plaintiff did allege a scheme between ASIC and mortgage lenders, similar to the scheme alleged here. *See Wahl*, Dckt. No. 14, Plaintiff's First Amended **[**57]** Complaint, ¶ 14. But that allegation in the *Wahl* complaint consists of a mere paragraph and is not the factual predicate for any of the *Wahl* plaintiff's claims.

> any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent **[*953]** or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), **[**59]** and the handling of the processing, and closing or settlement[.]

12 U.S.C. § 2602(3).

HN10[] The Code of Federal Regulations defines settlement services as "any service provided in connection with a prospective or actual settlement, including . . . [the] [p]rovision of services involving hazard, flood, or other casualty insurance or homeowner's warranties." *24 C.F.R. § 3500.2*. A "settlement" is "the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan," i.e. the "closing" or "escrow." *24 C.F.R. § 3500.2(b)*. Finally, ***HN11***[] *Section 2607* has a statute of limitations of one year "from the date of the occurrence of the violation." *12 U.S.C. § 2614*.

2. Application of Law to Facts

a. "Settlement Service" Under RESPA Section 2607

The parties dispute whether FPI constitutes a "settlement service" under RESPA. The plain language of the statute and its implementing regulations require the Court to conclude that, under these facts, FPI is not a "settlement service" under RESPA. Plaintiffs' claim under *Section 2607* fails as a matter of law and is accordingly dismissed with prejudice.

Plaintiffs argue that the "determinative factor" in deciding **[**60]** whether a particular service qualifies as a "settlement service" is whether the purchase of the service "is required by the lender in order for the transaction to close." This argument, however, is contrary to plain words of the statute. ***HN12***[] "Settlement service" is defined as "any service provided in connection with a real estate settlement." *12 U.S.C. § 2602(3)*. This language indicates that RESPA covers only those services provided—not necessarily required?in connection with a closing. It is undisputed here that Defendants did not provide, nor were any way involved in, the hazard insurance purchased in connection with the closing of the loans. Rather, Plaintiffs, without any involvement of the Defendants, first purchased the hazard insurance policies on the open market and only some two to eight years after the closing of their respective loans did Defendants "provide" hazard insurance. Moreover, the policies first purchased by Plaintiffs are not at issue in this case. The fact that hazard insurance was required in order to close the loan is irrelevant here in deciding whether the hazard insurance at issue is a "settlement service."

Plaintiffs cite to *Kay v. Wells Fargo & Co., 247 F.R.D. 572 (N.D. Cal. 2007)* **[**61]** and *Munoz v. PHH Corp., 659 F. Supp. 2d 1094 (E.D. Cal. 2009)*, in support of their proposition. Those cases held that mortgage insurance provided in connection with the settlement constitutes a settlement service, notwithstanding that the risk insured or the premiums made incur after the closing of the loan. *Kay, 247 F.R.D. at 576*; *Munoz, 659 F. Supp. 2d at 1098-99*. The courts there reasoned that since mortgage insurance was required in order to close the loan, the provision of mortgage insurance occurred at the closing of the loan, rather than at some point in time after settlement when the risk would arise or the premium would be paid. *Id.* While it is true that, like the mortgage insurance in *Kay* and *Munoz*, hazard insurance was required to close Plaintiffs' loans, Plaintiffs' argument ignores the basic requirement that the service about which Plaintiffs complain must be provided to the borrower in connection with the settlement. The allegations in Plaintiffs' FAC state that Defendants provided hazard insurance **[*954]** upon a lapse in the borrower's coverage only well after the closing of loans. Because RESPA covers only the provision of services "in connection with" the closing of the loan, **[**62]** the Court cannot conclude that providing hazard insurance years after settlement qualifies as a settlement service. *See* *Bloom v. Martin, 77 F.3d 318, 320-21 (9th Cir. 1996)* (finding that services provided, and fees assessed, at some indeterminate time after the settlement are not "settlement services" under RESPA); *see also* *Gens v. Wachovia Mortg. Corp., 2011 U.S. Dist. LEXIS 49709, at *17-18 (N.D. Cal. May 10, 2011)* (Koh, J.) (holding that defendant's purchase of hazard insurance some two to three years after the closing of the loan "does not fall within the ambit of RESPA because the alleged fees are not connected to the 'settlement' or closing of the loan"); *Lass v. Bank of Am., N.A., 2011 U.S. Dist. LEXIS 89519, 2011 WL 3567280, at *6 (D. Mass. Aug. 11, 2011)* (finding that 15-year period between closing of the loan and the force-placement of insurance too great in order to find that the service was "in connection with a real estate settlement"). [6]

D. Whether Plaintiffs State a Viable Contract Claim

Plaintiffs **[**63]** bring two contract-based claims: a breach of contract claim based on an express provision, and a breach of the implied covenant of good faith and fair dealing claim. The Court finds that all California Plaintiffs state a breach of contract claim based on a breach of an express term of the contracts, as well as a claim based on a breach of the implied covenant. The Court also finds that the New Jersey Plaintiff states a claim under New Jersey law as to either theory of breach.

1. Background Law

HN13[] The elements of a cause of action for breach of contract are: 1) the existence of the contract; 2) performance by the plaintiff or excuse for nonperformance; 3) breach by the defendant; and 4) damages. *First Commercial Mortgage Co. v. Reece, 89 Cal. App. 4th 731, 745, 108 Cal. Rptr. 2d 23 (2001)*. ***HN14***[] "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract." *Harm v. Frasher, 181 Cal. App. 2d 405, 417, 5 Cal. Rptr. 367 (1960)*. ***HN15***[] A breach of contract may be established on the basis of either an express provision of the contract or on the implied covenant of good faith and fair dealing. *See* *Storek & Storek, Inc. v. Citicorp Real Estate, Inc., 100 Cal. App. 4th 44, 55, 122 Cal. Rptr. 2d 267 (2002)* **[**64]** (recognizing that "every contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"). An implied covenant of good faith and fair dealing cannot contradict the express terms of a contract. *Id.* (citing *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc., 2 Cal. 4th 342, 374, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (1992))*. Further, because "the implied covenant operates to protect the express covenants or promises of [a] contract ... [it] cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of [the parties'] agreement." *McClain v. Octagon Plaza, LLC, 159 Cal. App. 4th 784, 805, 71 Cal. Rptr. 3d 885 (2008)*.

[*955] ***HN16***[] "Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity." *Levy v. State Farm Mut. Auto. Ins. Co., 150 Cal. App. 4th 1, 5, 58 Cal. Rptr. 3d 54 (2007)*. Thus, to state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must identify the specific contractual provision that was frustrated. **[**65]** *See* *Lingad v. Indymac Fed. Bank, 682 F. Supp. 2d 1142, 1154 (2010)*.

HN17[] In New Jersey, a covenant of good faith and fair dealing is implied in every contract. *Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420, 690 A.2d 575 (1997)*. Implied covenants are as effective components of an agreement as those covenants that are express. *Aronsohn v. Mandara, 98 N.J. 92, 100, 484 A.2d 675 (1984)*. Although the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term. *Sons of Thunder, Inc., 148 N.J. at 419*. Because the breach of the implied covenant arises only when the other party has acted consistent with the contract's literal terms, if a party is found to have breached an express term of the contract, there can be no separate breach of the implied covenant. *Wade v. Kessler Inst.,*

[6] Because the Court finds that Plaintiffs' FPI policies do not constitute a "settlement service" under RESPA, the Court need not decide whether any of Plaintiffs' claims are barred by the statute of limitations.

172 N.J. 327, 344-45, 798 A.2d 1251 (2002) (citing Wilson v. Amerada Hess Corp., 168 N.J. 236, 240, 773 A.2d 1121 (2001)).

2. Application of Law to Facts

a. Breach of an Express Provision

Plaintiffs maintain that Defendants breached the contracts' express term that supposedly limits Defendants' **[**66]** discretion to force-place insurance only to the extent such insurance "is required." Defendants contend that the mortgage contracts unambiguously gives Chase the discretion to force-place insurance in the amount and for the time periods it requires. The Court cannot conclude that Plaintiffs' contracts authorize all of Defendants' alleged wrongful actions in the complaint.

The mortgage contracts for the California Plaintiffs have identical language, reading as follows:

> Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term 'extended coverage,' and any other hazards . . . for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan.

. . .

> If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover **[**67]** Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained.

FAC, Exs. 1, 7, 17 at ¶ 5.

Pursuant to the contracts' terms, Defendants are afforded broad discretion to compel borrowers to insure against particular **[*956]** hazards, at particular amounts, and for certain periods of time. However, broad discretion is not unlimited discretion. Nothing in the contract necessarily authorizes charges regardless of amount and regardless of whether Defendants receive a portion of the premiums. Nor does anything in the contract authorize backdating FPI policies to cover periods of time where no loss occurred. Because the Court cannot say that the contracts' terms unambiguously authorize Defendants' alleged behavior, the Court denies Defendants' motion to dismiss the California Plaintiffs' breach of contract claim. [7] *See* Barrous v. BP P.L.C., 2010 U.S. Dist. LEXIS 108933, 2011 WL 4024774, at *4 (N.D. Cal. Oct. 13, 2010) **[**68]** (Koh, J.) ("A court may resolve contractual claims on a motion to dismiss if the terms of the contract are unambiguous.").

Plaintiff Mayko's mortgage contract contains slightly different language that could be interpreted as explicitly restricting the lender's discretion in force-placing insurance. Ms. Mayko's contract reads, in part:

> Borrower shall insure all improvements on the Property . . . against any hazards . . . for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires.
>
> . . .

[7] Defendants' reliance on Lass v. Bank of Am., N.A., 2011 U.S. Dist. LEXIS 89519, 2011 WL 3567280 (D. Mass. Aug. 10, 2011) is misplaced. In *Lass*, the court held that the plaintiff's mortgage contract authorized the lender to increase the amount of flood insurance required beyond the amount required at the time the mortgage was executed. 2011 U.S. Dist. LEXIS 89519, [WL] at *3. Because that aspect of Plaintiffs' mortgage contracts are not at issue in this case, the Court finds *Lass* unhelpful in evaluating Plaintiffs' claim.

> If Borrower . . . fails to perform any [] covenants and agreements contained in this Security Instrument . . . then Lender may do and pay **whatever is necessary to protect the value [**69] of the Property and Lender's rights in the Property**, including payment of taxes, hazard insurance and other items . . . .

FAC, Ex. 18 (Ms. Mayko's Mortgage Contract) at ¶¶ 4, 7 (emphasis added). This language provides a basis for the claim that Defendants may force-place insurance only to the extent such insurance "is necessary" to protect the property's value and Defendants' rights in the property. Moreover, like the California Plaintiffs' contracts, Ms. Mayko's contract does not provide Defendants with unlimited discretion to force-place insurance. Accordingly, Defendants' motion to dismiss is also denied as to Plaintiff Mayko's claim.

b. Breach of the Implied Covenant

HN18[] Even a defendant who does not breach a contract may still be liable for breach of the covenant of good faith and fair dealing if they fail to perform the contract in good faith. *See* *Carma, 2 Cal. 4th at 373*. Here, the California Plaintiffs argue that even though Defendants reserved the discretion to force-place insurance, they exercised that discretion in bad faith by force-placing "backdated, unnecessary hazard insurance with unreasonably high premiums for which Defendants received an improper kickback." Opposition at 15.

HN19[] "The **[**70]** covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." *Carma, 2 Cal. 4th at 372*; *see* *Perdue v. Crocker Nat'l Bank, 38 Cal. 3d 913, 923, 216 Cal. Rptr. 345, 702 P.2d 503 (1985)* ("[W]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion **[*957]** in good faith and in accordance with fair dealing.") (internal quotations omitted). The exercise of discretionary powers is evaluated under the implied covenant to assure that the promises of the contract are effective and in accordance with the parties' legitimate expectations. *See* *Carma, 2 Cal. 4th at 373-74*; *Gabana Gulf Distrib., Ltd. v. GAP Int'l Sales, Inc., 2008 U.S. Dist. LEXIS 1658, 2008 WL 111223, at *8 (N.D. Cal. Jan. 9, 2008)* (Breyer, J.); *Schwarzkopf v. Int'l Bus. Machs., Inc., 2010 U.S. Dist. LEXIS 46813, 2010 WL 1929625, at *13 (N.D. Cal. May 12, 2010)* (Fogel, J.). However, the covenant cannot "be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms." *Carma, 2 Cal. 4th at 374*.

Defendants **[**71]** contend that *Carma* forecloses Plaintiffs' claim that the implied covenant restricts Defendants' express contractual right because such a restriction would vary the express terms. The California Supreme Court's decision in Carma, however, is not so straightforward. In *Carma*, the parties had entered into a commercial lease agreement which stated that if the tenant procured a potential sublessee and asked the landlord for consent to sublease, the landlord had the right to terminate the lease, enter into negotiations with the prospective sublessee, and appropriate for itself all profits from the new arrangement. *Id. at 351-52*. In upholding the right of the landlord to exercise its discretion and realize a profit at the expense of the tenant, the Court held that the landlord's "termination of the lease in order to claim for itself [a profit] was expressly permitted by the lease and was clearly within the parties' reasonable expectations." *Id. at 376*.

Unlike in *Carma*, however, the actions at issue here—backdating FPI unnecessarily and force-placing insurance with unreasonably high premiums in order to facilitate kickbacks to Defendants—were not expressly bargained for in the contract. Rather, **[**72]** Defendants merely bargained for the right to exercise discretion over the scope and extent of coverage borrowers were required to maintain. Pursuant to *Carma*, that discretion, as to acts and conduct not expressly provided for in the contract, must comport with the implied covenant of good faith and fair dealing. Moreover, although the Court in *Carma* found the landlord's actions to be expressly agreed to in the contract, the Court still required that the landlord's actions come within the parties' "reasonable expectations." *Id. at 376*; *see* *Gutierrez v. Wells Fargo Bank, N.A., 730 F. Supp. 2d 1080, 1122 (N.D. Cal. 2010)* (Alsup, J.) (recognizing *Carma*'s holding that the implied covenant will not vary express terms of the contract, but finding that *Carma* also "emphasized that express grants of discretion were still subject to 'the reasonable expectations of the parties'").

Other courts applying *Carma*'s principles have come to similar conclusions as this Court. In *Locke v. Warner Bros., Inc., 57 Cal. App. 4th 354, 66 Cal. Rptr. 2d 921 (1997)*, the actress Sandra Locke entered into a contract with Warner whereby Warner was given a right of first refusal over developing Locke's movie projects. *Id. at 358*. After **[**73]** refusing to develop any of Locke's projects, Locke sued alleging breach of the implied covenant. *Id. at 359*. The court in *Locke* rejected Warner's contentions that the implied covenant did not apply to its actions because its right to refuse Locke's projects was expressly provided for in the contract. *Id. at 367*. The court found instead **[*958]** that the contract gave Warner merely the discretion with respect to developing Locke's projects. *Id.*

Applying *Carma* and *Locke, Gabana Gulf Distrib., Ltd. v. GAP Int'l Sales, Inc., 2008 U.S. Dist. LEXIS 1658, 2008 WL 111223 (N.D. Cal. Jan. 9, 2008)* (Breyer, J.), also held that the implied covenant governed a party's right to exercise discretion in performing the contract. *2008 U.S. Dist. LEXIS 1658, [WL] at *8*. *Gabana* involved a clothing distribution contract between Gap and Gabana, whereby Gabana could purchase first-line goods from Gap and then resell them in certain Middle Eastern countries. *2008 U.S. Dist. LEXIS 1658, [WL] at *2*. Gap, however, required Gabana to first seek its approval before it could resell the goods, with Gap reserving the right to disapprove, in its sole discretion, Gabana's request. *Id.* Gabana later filed suit, alleging that Gap was refusing its proposals in bad faith. Gap argued that the implied covenant was inapplicable **[**74]** since the contract expressly provided it the right to deny any proposals. After finding that there was no breach of the express terms of the contract because the agreement gave Gap sole discretion to approve or disapprove Gabana's proposals, the Court found that the implied covenant did govern Gap's use of its discretion. *2008 U.S. Dist. LEXIS 1658, [WL] at *8*. The Court reasoned that "Gap merely bargained for the right to exercise 'discretion' over proposals made by Gabana; Gap did not bargain for the right to refrain from approving all proposals altogether." *Id.*

Relying on the principles in *Carma*, *Locke*, and *Gabana*, the Court finds that the implied covenant governs Defendants' discretion in force-placing insurance. Although Defendants have the right to set the scope and extent of hazard insurance coverage—and explicitly warn that FPI may be "significantly" more expensive than coverage on the open market—the Plaintiffs here have stated a claim under the implied covenant that Defendants abused this discretion by acting in bad faith and outside the reasonable expectations of the parties. Whether Defendants' acts were done in bad faith and not within the reasonable expectations of the parties is a question of fact **[**75]** that cannot be decided at the pleading stage. *See Gabana, 2008 U.S. Dist. LEXIS 1658, 2008 WL 111223 at *8*; *Locke, 57 Cal. App. 4th at 367*. Accordingly, Defendants' motion to dismiss the California Plaintiffs' breach of the implied covenant claim is denied.

For the New Jersey Plaintiff, a similar outcome results. ***HN20***[] Under New Jersey law, even when a party has acted consistent with the contract's literal terms, the implied covenant allows a court to judge whether a party has exercised bad faith or ill motive in carrying out discretionary activities to which it has been granted "unilateral authority" by the contract. *See Wilson, 168 N.J. at 251*. Thus, in exercising discretionary authority as expressly authorized by an agreement, if a party does so "arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits of the contract," the party taking the action may breach the covenant. *Id. at 251*. A breach of the good faith obligation must include a finding of improper motive: "Without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance." *Id.*

The Court interprets **[**76]** the breach of the implied covenant claim, as it relates to the New Jersey Plaintiff, to be pled in the alternative to her breach of contract claim based on a breach of an express term of the contract. *See Wade, 172 N.J. at 344-45* (holding that there can be no separate breach of the implied covenant where there is a breach of the contract's express terms). Based **[*959]** on the allegations in the FAC, the Court cannot conclude, as a matter of law, that the Defendants did not breach the implied covenant with respect to the New Jersey Plaintiff.

E. Whether Plaintiffs State a Viable UCL claim

Defendants seek to dismiss Plaintiffs' *Cal. Bus. & Prof. Code § 17200* ("UCL") claim on three grounds: 1) Plaintiffs are unable to establish "unlawful" conduct since their RESPA claim fails as a matter of law; 2) Plaintiffs have not pled their claim under the "fraudulent" prong with particularity, nor can they demonstrate that members of the public are likely to be deceived by Defendants' conduct; and 3) Plaintiffs cannot satisfy any of the tests that California courts use to evaluate whether conduct is "unfair" under the UCL. The Court concludes that Plaintiffs' state a UCL claim under the unfair prong.

1. Background [77] Law**

a. Standing

HN21[] A claim for unfair competition under the UCL may be brought "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." *Cal. Bus. & Prof. Code § 17204*. Therefore, to establish standing under the UCL a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice . . . that is the gravamen of the claim." *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 337, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*.

HN22[] A plaintiff "proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions." *In re Tobacco II Cases, 46 Cal. 4th 298, 306, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)*. Consequently, "a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct . . . ." *Id. at 326*. However, a "plaintiff is not required to allege that [the challenged] misrepresentations were the sole or even **[**78]** the decisive cause of the injury-producing conduct." *Id.* "'Reliance' as used in the ordinary fraud context has always been understood to mean reliance on a statement for its truth and accuracy. It follows that a UCL fraud plaintiff must allege he or she was motivated to act or refrain from action based on the truth or falsity of a defendant's statement, not merely on the fact it was made." *Kwikset Corp.,51 Cal. 4th at 327 n. 10*.

Although *In Re Tobacco* concerned a claim only under the fraudulent prong, ***HN23***[] it has been held that, under any prong, a UCL claim that is based in fraud must be supported by allegations of reliance in order to properly be pled. *See* *Kwikset Corp., 51 Cal. 4th at 326* (finding *In Re Tobacco*'s reliance requirement apposite to plaintiff's claim under the unlawful prong alleging misrepresentation and deception); *Carney v. Verizon Wireless Telecomm., Inc., 2010 U.S. Dist. LEXIS 47161, 2010 WL 1947635, at *3 (S.D. Cal. May, 13, 2010)* ("[F]or UCL claims . . . the plaintiff must show actual reliance regardless of whether the claim arises under the 'unfair,' 'unlawful' or 'fraudulent' prong of the UCL."); *In re Actimmune Mktg. Litig., 2010 U.S. Dist. LEXIS 90480, 2010 WL 3463491, at *8 (N.D. Cal. Sep. 1, 2010)* (Patel, J.) ("Since **[**79]** *Tobacco II*, at least one California Court of Appeal and one federal district court have held that a plaintiff must plead 'actual reliance,' even if their claim arises under the unlawful or unfair prongs, so long as the pleadings assert a **[*960]** cause of action grounded in misrepresentation or deception.").

b. UCL Violation

HN24[] The UCL prohibits "unfair competition," which is defined as any "unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. To establish a violation of the UCL, a plaintiff may establish a violation under any one of these prongs. To state a cause of action based on an unlawful business act or practice under the UCL, a plaintiff must allege facts sufficient to show a violation of some underlying law. *People v. McKale, 25 Cal. 3d 626, 635, 159 Cal. Rptr. 811, 602 P.2d 731 (1979)*.

HN25[] "'Fraudulent,' as used in the statute, does not refer to the common law tort of fraud but only requires a showing that members of the public 'are likely to be deceived.'" *Olsen v. Breeze, 48 Cal. App. 4th 608, 618, 55 Cal. Rptr. 2d 818 (1996)*. Although fraud is not a necessary element of a claim under the UCL, where a plaintiff "allege[s] a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct **[**80]** as the basis of that claim[,] . . . the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading . . . as a whole must satisfy the particularity requirement of *Rule 9(b)*" of the Federal Rules of Civil Procedure. *Kearns v. Ford Motor, Co., 567 F.3d 1120, 1125 (9th Cir. 2009)* (citing *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003))*. To satisfy *Rule 9(b)*, the plaintiff must include "the who, what, when, where, and how" of the fraud. *Vess, 317 F.3d at 1106* (citations omitted). "The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Decker v. Glenfed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994)*. A claim for fraud must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*.

Finally, while there is disagreement among California courts regarding the definition of "unfair" business practices, three tests have been applied, as the court in *Phipps v. Wells Fargo* explains:

> ***HN26***[] In consumer cases, such **[**81]** as this, the California Supreme Court has not established a definitive test to determine whether a business practice is unfair. *Drum v. San Fernando Valley Bar Ass'n, 182 Cal. App. 4th 247, 256, 106 Cal. Rptr. 3d 46 (2010)*. A split of authority has developed among the California Courts of Appeal, which have applied three tests for unfairness in consumer cases. *Drum, 182 Cal.App.4th at 256, 106 Cal.Rptr.3d 46*.
>
> The test applied in one line of cases requires "that the public policy which is a predicate to a consumer unfair competition action under the 'unfair' prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions." *Drum, 182 Cal.App.4th at 256, 106 Cal.Rptr.3d 46* (citing *Bardin v. Daimlerchrysler Corp., 136 Cal.App.4th 1255, 1260-1261, 39 Cal.Rptr.3d 634 (2006)*; *Davis v. Ford Motor Credit Co., 179 Cal.App.4th at 581, 595-596, 101 Cal.Rptr.3d 697 (2009)*; *Gregory v. Albertson's Inc., 104 Cal.App.4th 845, 854, 128 Cal.Rptr.2d 389 (2002)*.
> . . .
>
> A second line of cases applies a test to determine whether the alleged business practice "is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the **[**82]** utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Drum, 182 Cal.App.4th at 257, 106 Cal.Rptr.3d 46* (citing *Bardin, 136 Cal.App.4th at 1260,* ***[*961]*** *39 Cal.Rptr.3d 634*; *Davis, 179 Cal.App.4th at 594-595, 101 Cal.Rptr.3d 697*)).
> . . .
>
> The test applied in a third line of cases draws on the definition of "unfair" in section 5 of the Federal Trade Commission Act (*15 U.S.C. § 45, subd. (n)*), and requires that "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Drum, 182 Cal.App.4th at 257, 106 Cal.Rptr.3d 46* (citing *Davis, 179 Cal.App.4th 597-598, 101 Cal.Rptr.3d 697*; *Camacho v. Automobile Club of S. Cal., 142 Cal.App.4th 1394, 1403, 48 Cal.Rptr.3d 770 (2006))*.

*2011 U.S. Dist. LEXIS 10550, 2011 WL 302803, at *16 (E.D. Cal. Jan. 27, 2011)*.

2. Application of Law to Facts

a. Unlawful Conduct

In order to maintain a claim under the UCL based on unlawful conduct, a plaintiff must allege facts sufficient to establish a violation of some law. In their complaint, Plaintiffs allege that Defendants' violation of RESPA serves **[**83]** as the basis for their UCL claim. As discussed above, Plaintiffs RESPA claim fails as a matter of law.

Because Plaintiffs are unable to establish any underlying unlawful conduct, their UCL claim based on unlawful conduct fails to state a claim and it is accordingly dismissed.

b. Fraudulent Conduct

As discussed above, a plaintiff bringing a UCL claim based in fraud must plead reliance on the misrepresentations or failures to disclose in order to establish standing. Plaintiffs fail to allege reliance and their claim under the fraudulent prong is dismissed on this basis.

The Court finds that Plaintiffs' UCL claim under the fraudulent prong is grounded, in part, in fraud. Plaintiffs allege that Defendants "[m]isrepresent[] in their force-placed insurance notices that borrowers were obligated to pay for backdated insurance coverage" despite the absence of any risk of loss. FAC at ¶ 165(l). Plaintiffs further allege a lucrative scheme consisting of pre-arranged exclusive agreements between Defendants and ASIC. This scheme was kept secret from borrowers and actively concealed through notices that misrepresent Defendants' business interest in its FPI practice. Moreover, Plaintiffs concede their **[**84]** claim under the fraudulent prong is based in fraud when they argue in the Opposition that their claim meets the heightened pleading standard for fraud claims under *Rule 9(b)*.

Although Plaintiffs must plead reliance in order to support their claim grounded in fraud, no Plaintiff alleges reliance based on any of the conduct that could support a claim under the fraudulent prong. Plaintiffs' claim based on fraudulent conduct is accordingly dismissed with leave to amend.

c. Unfair Conduct

As with the fraudulent prong, Plaintiffs must plead reliance if their claim under the unfair prong is grounded in fraud. As discussed above, Plaintiffs make no allegation of reliance in relation to any conduct based in fraud. Therefore to the extent Plaintiffs' claim under the unfair prong is based on allegations sounding in fraud, the claim must be dismissed.

Although Plaintiffs' FAC makes considerable reference to Defendants' alleged scheme to deceive and mislead Plaintiffs about its business arrangements, Plaintiffs also make allegations that are not based on fraud. The Court will therefore examine Plaintiffs' claim under the unfair prong with reference only to Defendants' non-fraudulent conduct.

[*962] Defendants **[**85]** contend that Plaintiffs are unable to state a claim under any of the tests developed by the California courts in evaluating a claim under the unfair prong. The Court declines to grant Defendants' Motion on the "unfair" prong of the UCL claim as to any Plaintiff because the Court cannot say, as a matter of law, that Defendants alleged conduct would not violate any of the three tests for unfair conduct. Plaintiffs allege that Defendants unfairly force-placed exorbitantly priced hazard insurance on their property and backdated the policy despite no damage to the property or claims arising out of the property during the backdated period. This practice was disadvantageous to Plaintiffs and unsupported by any apparent reason other than the fact that Defendants stood to benefit financially from the high-priced, backdated policy. Moreover, Defendants' arrangement with ASIC resulted in financial gains to Defendants, at Plaintiffs' expense, and created incentives for Defendants to seek policies with the highest premiums. The Court cannot say that this allegation fails as a matter of law.

Defendants' contention that Plaintiffs could have avoided the alleged unfair conduct ignores Plaintiffs' factual **[**86]** allegations. Ms. McNeary-Calloway faced financial difficulties in the wake of her husband's death and, apparently, concluded that she could no longer afford to make her hazard insurance payments. Ms. North faced similar financial hardship following a serious illness. The MacKinnons allege that their coverage lapsed due to a computer error. The Court cannot say, as a matter of law, that Plaintiffs could reasonably have avoided Defendants' alleged unfair practice.

F. Whether the New Jersey Plaintiff States a Claim under to the NJCFA

Defendants argue that Plaintiff Mayko's claim under the NJCFA fails for three reasons: 1) Plaintiff fails to satisfy Rule 9(b)'s pleading requirements; 2) because Plaintiff's RESPA claim fails, Plaintiff has not plead any viable underlying unlawful conduct; and 3) Plaintiff has not alleged that she was induced or lured into making any purchase. The Court denies Defendants' motion to dismiss Plaintiff Mayko's NJCFA claim.

1. Background Law

HN27[] The Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1, et seq., provides a private cause of action to consumers who are victimized by fraudulent practices in the marketplace. Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 576, 25 A.3d 1103 (2011). **[**87]** A consumer who can prove "(1) an unlawful practice, (2) an 'ascertainable loss,' and (3) 'a causal relationship between the unlawful conduct and the ascertainable loss,' is entitled to legal and/or equitable relief, treble damages, and reasonable attorneys' fees." *Id.* (citing N.J.S.A. 56:8-19).

HN28[] An unlawful practice under the CFA is the:

> use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby.

N.J.S.A. 56:8-2.

HN29[] CFA claims claims "'sounding in fraud' are subject to the particularity requirements of Federal Rule of Civil Procedure 9(b)." Capogrosso v. State Farm Ins. Co, 2009 U.S. Dist. LEXIS 97544, **[*963]** 2009 WL 3447068, at *3 (D.N.J. Oct. 21, 2009) (quoting Dewey v. Volkswagen, 558 F. Supp. 2d 505, 524 (D.N.J. 2008)).

2. Application of Law to Facts

Plaintiff does not deny **[**88]** her CFA claim "sounds in fraud" and she is therefore required to plead with particularity as required by Rule 9(b). Plaintiff argues that she has satisfied Rule 9(b), and the Court agrees. Plaintiff alleges that, in connection with the loan transaction, Defendants failed to disclose to Plaintiff that when force-placing insurance they would make no effort to shop for a reasonably priced policy, that they would receive a kickback for each policy force-placed, that no effort would be made to renew the existing policies, and that the policies Defendants purchased for Plaintiffs would be backdated to cover periods during which no risk existed. *See, e.g.*, FAC ¶¶ 2-3, 6, 65-79, 84-86, 172. Plaintiff further alleges a scheme consisting of pre-arranged exclusive agreements between Defendants and ASIC, whereby Defendants had a financial interest in force-placing policies and purchasing policies with the highest possible premiums. *See* FAC ¶ 172. Regarding Defendants' notice of FPI, Defendants misrepresent and fail to disclose the true nature of the reinsurance arrangement. *Id.* Defendants also misrepresent why FPI premiums are considerably higher than normal hazard insurance premiums, failing **[**89]** to disclose that the premiums are inflated in order to cover the kickbacks to Defendants. *Id.* The allegations of the scheme, and its profitability for Defendants, is sufficient to plead an intent by Defendants to conceal its FPI practice. The Court concludes that these allegations are sufficient to meet the pleading requirements of Rule 9(b) and adequately plead an "unlawful practice" under the CFA. [8]

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[8] Defendants cite to no authority for their argument that Plaintiff must plead an actual violation of a statute in order to satisfy the "unlawful practice" requirement. Indeed, the statute itself, quoted above, explicitly defines the term, and a violation of a statute is clearly not a prerequisite to a finding of an "unlawful practice."

The Court also finds that Plaintiff has adequately pled an "ascertainable loss" and a "causal relationship" between the loss and Defendants' conduct. Defendants' argument that Plaintiff must also plead that Defendants' conduct lured or induced Plaintiff to enter into the loan transaction is unconvincing. The case Defendants cite in support of their argument, *Joe Hand Promotions, Inc. v. Mills, 567 F. Supp. 2d 719 (D.N.J. 2008)*, dismissed a CFA claim based **[**90]** on a letter threatening litigation if the recipient, Taylor, did not pay a settlement related to a television licensing dispute. *Id. at 723*. The court in *Joe Hand* concluded that the alleged fraudulent conduct, embodied in the letter, "did not induce Taylor to purchase anything . . . . Thus, the fraudulent conduct alleged was not done 'in connection with' the sale or advertisement of merchandise[.]" *Id. at 723-24*. This Court, however, can find no court that has since followed *Joe Hand*'s reading of the CFA requirements. Rather, the decision appears contrary to the New Jersey Supreme Court's holdings that the CFA "does not require proof of reliance." *Lee v. Carter, 203 N.J. 496, 522, 4 A.3d 561 (2010)* (quoting *Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607, 691 A.2d 350 (1997))*. The Court denies Defendants' motion to dismiss the CFA claim.

G. Unjust Enrichment Claim

1. Background Law

HN30[] Although there is some disagreement among California courts as to whether unjust enrichment may be asserted as a stand-alone claim under California law, **[*964]** this Court has recognized that the confusion is largely semantic. *Nordberg v. Trilegiant Corp., 445 F. Supp. 2d 1082, 1100 (N.D. Cal. 2006)* (Patel, J.). The court in *Nordberg* explained **[**91]** that even though California law may not recognize unjust enrichment as an independent claim, such a claim may be understood as one for restitution, which is recognized under California law. *Id.* Therefore, the Court considers whether Plaintiff's sixth claim, styled as a claim for unjust enrichment, states a claim for restitution.

HN31[] To state a claim for restitution, a plaintiff "must plead 'receipt of a benefit and the unjust retention of the benefit at the expense of another.'" *Walters v. Fidelity Mortgage of Cal., 2010 U.S. Dist. LEXIS 36839, 2010 WL 1493131, at * 12 (E.D. Cal., Apr. 14, 2010)* (quoting *Lectrodryer v. Seoulbank, 77 Cal. App. 4th 723, 726, 91 Cal. Rptr. 2d 881 (2000))*. "Even when a person has received a benefit from another, he is required to make restitution 'only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.'" *Ghirardo v. Antonioli, 14 Cal. 4th 39, 51, 57 Cal. Rptr. 2d 687, 924 P.2d 996 (1996)* (quoting *Restatement of Restitution, § 1, cmt. c*). In *McBride v. Boughton*, the court explained that "restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason." **[**92]** *McBride, 123 Cal.App. 4th at 388*. To prevail on a claim for restitution, a plaintiff need not establish bad faith on the part of the defendant, so long as the recipient of the funds was not entitled to the funds. *See Lectrodryer, 77 Cal. App. 4th at 726*.

2. Application of Law to Facts

Plaintiffs' FAC states a valid claim for restitution. Plaintiffs allege that Defendants unjustly charged Plaintiffs for backdated policies and that Defendants wrongfully earned commissions and kickbacks at Plaintiffs' expense.

H. Whether Plaintiffs State a Claim for Injunctive and Declaratory Relief

The Defendants argue that Plaintiffs fail to state a claim for injunctive or declaratory relief because those are not causes of action.

HN32[] "I]njunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted." *Camp v. Bd. of Supervisors, 123 Cal. App. 3d 334, 356, 176 Cal. Rptr. 620 (1981)* (quoting *Shell Oil Co. v. Richter, 52 Cal. App. 2d 164, 168, 125 P.2d 930 (1942))*. Additionally, "[a] claim for declaratory relief is duplicative and unnecessary when it is commensurate with the relief sought through other causes of action." *Vogan v. Wells Fargo Bank, N.A., 2011 U.S. Dist. LEXIS 132944, 2011 WL 5826016, at *8 (E.D. Cal. Nov. 17, 2011)*. **[**93]** Plaintiffs' arguments for declaratory relief are entirely remedial in nature rather than pertinent to a stand-alone claim. If Plaintiffs satisfy the legal standard to obtain those forms of relief, then they will be granted as a remedy. *See* FAC at 45.

I. Whether the NJCFA Claim Should be Dismissed for Improper Venue or Transferred to a Proper Venue

Defendants ask that Plaintiff North's CFA claim be dismissed for improper venue or, in the alternative, transferred to a federal district court in New Jersey pursuant to *28 U.S.C. § 1404(a)*. The Court rejects this request.

HN33[] Generally, venue must be established as to each cause of action. *Legal Additions LLC v. Kowalski, 2009 U.S. Dist. LEXIS 41835, 2009 WL* ***[*965]*** *1226957, at *11 (N.D. Cal. Apr. 30, 2009)* (Chen, J.) (citing *Rothstein v. Carriere, 41 F. Supp. 2d 381, 386 (E.D.N.Y. 1999))*. However, if venue is proper on one claim, the court may find pendent venue for claims that are closely related. *Id.*; *see* *Beattie v. United States, 756 F.2d 91, 100-104, 244 U.S. App. D.C. 70 (D.C. Cir.1984)*, *overruled on other grounds in* *Smith v. United States, 507 U.S. 197, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993)*. The decision to apply pendent venue to closely related claims is a discretionary decision. *Beattie, 756 F.2d at 103*. A court may consider **[**94]** the principles of judicial economy, convenience, avoidance of piecemeal litigation, and fairness to the litigants in making its decision. *Id.*

HN34[] *Section 1404(a)* allows the court to transfer an action "[f]or the convenience of parties and witnesses [and] in the interest of justice . . . to any other district or division where it might have been brought." *Section 1404(a)* displaces the common law doctrine of forum non conveniens and differs from forum non conveniens in that it allows courts to transfer actions in the interest of justice rather than having to dismiss them. *Decker Coal v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986)*. However, courts draw on forum non conveniens considerations when deciding whether a *§ 1404* transfer is appropriate. *Id.* In particular, courts considering this issue balance the preference that is traditionally accorded the plaintiff's choice of forum against the burden to the defendant of litigating in an inconvenient forum. *Id.* The defendant must make a strong showing of inconvenience to upset the plaintiff's choice of forum.

Defendants argue that venue is improper only as to Plaintiff Mayko's CFA claim, and the Court should decline to exercise pendent **[**95]** venue over that claim. The Court finds that, even if there is improper venue as to the CFA claim, principles of pendent venue are satisfied here since the CFA claim is closely related to the California Plaintiffs' UCL claim and "it does not seem too inconvenient" to include the claim with the other claims in this action. *Id. at 104*. Although Defendants assert that the CFA claim involves activities and residents located exclusively in New Jersey, Defendants have not met their burden in showing that their preferred forum is more appropriate given the relatedness of the claims, the convenience of the parties and witnesses, and the interests of justice. Defendants' motion to dismiss the CFA claim based on improper venue, or transfer the claim based on *Section 1404(a)*, is accordingly denied.

V. CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss is GRANTED in part and DENIED in part. An amended complaint, if any, shall be filed within thirty (30) days of the date of this order. Plaintiffs are granted leave to amend only to plead facts showing reliance on any alleged misrepresentations.

IT IS SO ORDERED.

Dated: March 26, 2012

/s/ Joseph C. Spero

JOSEPH C. SPERO

United States **[**96]** Magistrate Judge

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Global Reins. Corp.-U.S. Branch v Equitas Ltd.

Court of Appeals of New York

February 15, 2012, Argued; March 27, 2012, Decided

No. 53

Reporter

18 N.Y.3d 722 *; 969 N.E.2d 187 **; 946 N.Y.S.2d 71 ***; 2012 N.Y. LEXIS 550 ****; 2012 NY Slip Op 2251; 2012-1 Trade Cas. (CCH) P77,838; 2012 WL 995268

[1] Global Reinsurance Corporation-U.S. Branch, Formerly Known as Gerling Global Reinsurance Corporation-U.S. Branch, Respondent, v Equitas Ltd. et al., Appellants.

Prior History: [**1]** Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered January 18, 2011. The Appellate Division (1) reversed, on the law, a judgment of the Supreme Court, New York County (Bernard J. Fried, J.), which had dismissed the second amended complaint upon an order of that court (op *24 Misc 3d 264, 876 NYS2d 325 [2009]*) granting defendants' motion to dismiss the second amended complaint; and (2) reinstated the complaint. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

Global Reins. Corp. - U.S. Branch v Equitas Ltd., 82 AD3d 26, 921 NYS2d 1, 2011 N.Y. App. Div. LEXIS 251 (N.Y. App. Div. 1st Dep't, 2011), reversed.

Disposition: Order reversed, with costs, judgment of Supreme Court, New York County, reinstated and certified question answered in the negative.

Core Terms

coverage, Donnelly Act, allegations, Sherman Act, reinsurance, antitrust, non-life, retrocessional, conspiracy, syndicates, marketplace, extraterritorial, handling, anti trust law, anticompetitive, retrocessionary, risks, worldwide, commerce, global, relevant market

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

HN1[] **Sherman Act, Claims**

An antitrust claim under the Donnelly Act, *General Business Law § 340 et seq.*, or under its essentially similar federal progenitor, *§ 1* of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market.

Antitrust & Trade Law > Sherman Act > Claims

HN2[] **Sherman Act, Claims**

Although there are situations in which a fully integrated entity that takes over and consolidates economic functions formerly performed competitively will be deemed sufficiently autonomous in its subsequent operations to preclude their characterization as conspiratorial within the meaning of the antitrust laws, the pertinent inquiry in determining whether there is concerted or unilateral activity is one of substance and not form; what is important is how the parties to the alleged anticompetitive conduct actually operate.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN3[] **Relevant Market, Product Market Definition**

Product markets are defined for antitrust purposes by the applying the rule of reasonable interchangeability.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN4[] **Sherman Act, Claims**

Ordinarily, a Donnelly Act, *General Business Law § 340 et seq.*, or Sherman Act, *15 U.S.C.S. § 1 et seq.*, plaintiff, to survive a motion to dismiss in a rule of reason case, must minimally allege that conspirators possessed power within the relevant market to produce a market-wide anticompetitive effect. Defined in the context of sales, market power is the ability to raise prices significantly without losing business, but more generally may be understood as the capacity to impose onerous economic terms without suffering competitive detriment.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

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

HN5[] **Relevant Market, Product Market Definition**

While on a *CPLR 3211* motion to dismiss, the allegations of the complaint must be accepted as true and construed liberally in the plaintiff's favor and in the antitrust context courts are hesitant to dismiss complaints on the pleadings based on the sufficiency of product market allegations, it is nonetheless the case that there is no per se rule barring dismissal where the complaint simply does not allege a conspirator's basic capacity to inflict market-wide anticompetitive injury.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN6[] **Sherman Act, Claims**

It is market-wide effect that is crucial to an antitrust claim under the Sherman Act, *15 U.S.C.S. § 1 et seq.*, or Donnelly Act, *General Business Law § 340 et seq.*, not the existence of otherwise compensable individual injury.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN7[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The extraterritorial reach of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, is limited under the Foreign Trade Antitrust Improvements Act of 1982, *15 U.S.C.S. § 6a*, which provides that the Sherman Act shall not apply to conduct involving non-import trade or commerce with foreign nations. The only ground for excepting to this general rule of inapplicability where imports are not involved is where the conduct has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and such effect gives rise to a Sherman Act claim. *§ 6a(1)(A)*, *(2)*.

Headnotes/Summary

Headnotes

Monopolies -- Donnelly Act -- Reinsurance Coverage -- Relevant Product Market

1. Plaintiff, a New York branch of a German reinsurance corporation, failed to state an antitrust claim under the Donnelly Act (*General Business Law § 340 et seq.*) against defendants, London, England based entities engaged in the business of providing retrocessionary reinsurance that were created so as to reinsure certain otherwise uninsurable pre-1993 non-life retrocessionary obligations of Lloyd's of London syndicates. An antitrust claim under the Donnelly Act, or under its essentially similar federal progenitor, section 1 of the Sherman Act (*15 USC § 1 et seq.*), must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market. Although a perhaps colorable claim of concerted action was discernable from the complaint, and there was a nominal allegation of a worldwide market, there was no allegation of any anticompetitive effect attributable to the posited conspiracy beyond the Lloyd's marketplace. The Lloyd's syndicates were capable of insulating themselves from each other's competitive behavior in the area of claims management and could by that device attempt to cap their liabilities under certain previously issued coverage, but there were no allegations in the complaint from which it was possible to gather that they were capable of avoiding the business consequences of this approach in the global market. Plaintiff was perhaps injured by an anticompetitive restraint in the Lloyd's market, but that was not a circumstance from which it was possible to conclude that there was some broader anticompetitive effect, or even a capacity to produce such an effect, in the relevant world market.

Monopolies -- Donnelly Act -- Reinsurance Coverage -- Foreign Conspiracy

2. Plaintiff, a New York branch of a German reinsurance corporation, failed to state an antitrust claim under the Donnelly Act (*General Business Law § 340 et seq.*) against defendants, London, England based entities engaged in the business of providing retrocessionary reinsurance that were created so as to reinsure certain otherwise uninsurable pre-1993 non-life retrocessionary obligations of Lloyd's of London syndicates. The complaint alleged, essentially, that a German reinsurer through its New York branch purchased retrocessional coverage in a London marketplace and consequently sustained economic injury when retrocessional claims management services were by agreement within that London marketplace consolidated so as to eliminate competition over their delivery. Injury so inflicted, attributable primarily to foreign, government approved transactions having no particular New York orientation and occasioning injury here only by reason of the circumstance that plaintiff's purchasing branch happens to be situated here, was not redressable under New York State's antitrust statute. Even assuming that the extraterritorial reach of the Donnelly Act is as extensive as that of its federal counterpart, the Sherman Act (*15 USC*

§ 1 et seq.), the Sherman Act would not reach a competitive restraint, imposed by participants in a British marketplace, that only incidently affected commerce in this country.

Counsel: *Simpson Thacher & Bartlett LLP*, New York City (*Kevin J. Arquit, Mary Kay Vyskocil* and *Summer Craig* of counsel), and *Simpson Thacher & Bartlett LLP*, Washington, D.C. (*Arman Y. Oruc* of counsel), for appellants. I. Equitas Ltd.'s, Equitas Reinsurance Ltd.'s, and Equitas **[****2]** Policyholders Trustee Ltd.'s unilateral claims handling conduct cannot be challenged as an antitrust conspiracy without challenging its formation. (*Texaco Inc. v Dagher, 547 US 1, 126 S Ct 1276, 164 L Ed 2d 1*; *Anheuser-Busch, Inc. v Abrams, 71 NY2d 327, 520 NE2d 535, 525 NYS2d 816*; *Copperweld Corp. v Independence Tube Corp., 467 US 752, 104 S Ct 2731, 81 L Ed 2d 628*; *United States v Sealy, Inc., 388 US 350, 87 S Ct 1847, 18 L Ed 2d 1238*; *United States v Topco Associates, Inc., 405 US 596, 92 S Ct 1126, 31 L Ed 2d 515*; *Arizona v Maricopa County Medical Soc., 457 US 332, 102 S Ct 2466, 73 L Ed 2d 48*; *Rothery Stor. & Van Co. v Atlas Van Lines, Inc., 792 F2d 210, 253 U.S. App. D.C. 142*; *USX Corp. v Adriatic Ins. Co., 64 F Supp 2d 469*.) II. Global Reinsurance Corporation-U.S. Branch improperly challenges the formation of Equitas Ltd., Equitas Reinsurance Ltd. and Equitas Policyholders Trustee Ltd. under the Donnelly Act. (*Padula v Lilarn Props. Corp., 84 NY2d 519, 644 NE2d 1001, 620 NYS2d 310*; *Goshen v Mutual Life Ins. Co. of N.Y., 286 AD2d 229, 730 NYS2d 46*; *Board of Trustees of Univ. of Ill. v United States, 289 US 48, 53 S Ct 509, 77 L Ed 1025, Treas. Dec. 46306*; *South-Central Timber Development, Inc. v Wunnicke, 467 US 82, 104 S Ct 2237, 81 L Ed 2d 71*; **[****3]** *Michelin Tire Corp. v Wages, 423 US 276, 96 S Ct 535, 46 L Ed 2d 495*.) III. The complaint should be dismissed as time-barred. (*Zenith Radio Corp. v Hazeltine Research, Inc., 401 US 321, 91 S Ct 795, 28 L Ed 2d 77*; *In re Buspirone Patent Litig., 185 F Supp 2d 363*; *In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F Supp 2d 188*; *Varner v Peterson Farms, 371 F3d 1011*; *Grand Rapids Plastics, Inc. v Lakian, 188 F3d 401*.) IV. Global Reinsurance Corporation-U.S. Branch fails to allege a submarket or restraint of trade in a worldwide market. (*Creative Trading Co. v Larkin-Pluznick-Larkin, Inc., 136 AD2d 461, 523 NYS2d 102*; *Capital Imaging Assoc., P.C. v Mohawk Val. Med. Assoc., Inc., 996 F2d 537*; *CDC Tech., Inc. v IDEXX Labs., Inc., 186 F3d 74*; *Brown Shoe Co. v United States, 370 US 294, 82 S Ct 1502, 8 L Ed 2d 510*; *Geneva Pharms. Tech. Corp. v Barr Labs. Inc., 386 F3d 485*; *Newcal Indus., Inc. v Ikon Off. Solution, 513 F3d 1038*.) V. The Appellate Division erred in finding subject matter jurisdiction over Equitas Ltd.'s, Equitas Reinsurance Ltd.'s, and Equitas Policyholders Trustee Ltd.'s conduct. (*South-Central Timber Development, Inc. v Wunnicke, 467 US 82, 104 S Ct 2237, 81 L Ed 2d 71*; **[****4]** *F. Hoffmann-La Roche Ltd v Empagran S. A., 542 US 155, 124 S Ct 2359, 159 L Ed 2d 226*; *Boyd v AWB Ltd., 544 F Supp 2d 236*; *Animal Science Prods., Inc. v China Natl. Metals &Mins. Import &Export Corp., 596 F Supp 2d 842*; *In re Intel Corp. Microprocessor Antitrust Litig., 452 F Supp 2d 555*; *Matter of Zurich Ins. Co. v New York State Tax Commn., 144 AD2d 202, 534 NYS2d 515*; *Matter of 67 Vestry Tenants Assn. v Raab, 172 Misc 2d 214, 658 NYS2d 804*.)

Cahill Gordon & Reindel LLP, New York City (*Edward P. Krugman, S. Penny Windle* and *Lawrence A. Reicher* of counsel), for respondent. I. Equitas Ltd.'s, Equitas Reinsurance Ltd.'s, and Equitas Policyholders Trustee Ltd.'s conduct is not unilateral but is the concerted action of the underwriting members of Lloyd's, London through their common agent. (*Texaco Inc. v Dagher, 547 US 1, 126 S Ct 1276, 164 L Ed 2d 1*; *United States v Masonite Corp., 316 US 265, 62 S Ct 1070, 86 L Ed 1461, 1942 Dec. Comm'r Pat. 777*; *New York ex rel. Spitzer v Saint Francis Hosp., 94 F Supp 2d 399*; *North Tex. Specialty Physicians v Federal Trade Commn., 528 F3d 346*; *North Jackson Pharm., Inc. v Express Scripts Inc., 345 F Supp 2d 1279*; *Life Partners, Inc. v Morrison, 484 F3d 284*; **[****5]** *Nestor v Britt, 270 AD2d 192, 707 NYS2d 11*; *General Elec. Co. v Inter-America Mktg. Sys., 220 AD2d 307, 632 NYS2d 554*; *National Collegiate Athletic Assn. v Board of Regents of Univ. of Okla., 468 US 85, 104 S Ct 2948, 82 L Ed 2d 70*; *United States v Sealy, Inc., 388 US 350, 87 S Ct 1847, 18 L Ed 2d 1238*.) II. The courts of New York have subject matter jurisdiction over this action. (*California v ARC America Corp., 490 US 93, 109 S Ct 1661, 104 L Ed 2d 86*; *CSR Ltd. v CIGNA Corp., 405 F Supp 2d 526*; *CSR Ltd. v Federal Ins. Co., 40 F Supp 2d 559*; *Pillar Corp. v Enercon Indus. Corp., 694 F Supp 1353*; *In re Chocolate Confectionary Antitrust Litig., 602 F Supp 2d 538*; *Allstate Ins. Co. v Hague, 449 US 302, 101 S Ct 633, 66 L Ed 2d 521*; *Sperry v Crompton Corp., 8 NY3d 204, 863 NE2d 1012, 831 NYS2d 760*; *Matter of Zurich Ins. Co. v New York State Tax Commn., 144 AD2d 202, 534 NYS2d 515*; *Matter of People [Norwegian Receiver of Norske Lloyd Ins. Co.], 242 NY 148, 151 NE 159*; *Moscow Fire Ins. Co. v Bank of N.Y. &Trust Co., 280 NY 286, 20 NE2d 758*.) III. Global Reinsurance Corporation-U.S. Branch's claim is timely. (*Hanover Shoe, Inc. v United Shoe Machinery Corp., 392 US 481, 88 S Ct 2224, 20 L Ed 2d 1231*;

[**6]** Klehr v A. O. Smith Corp., 521 US 179, 117 S Ct 1984, 138 L Ed 2d 373; Zenith Radio Corp. v Hazeltine Research, Inc., 401 US 321, 91 S Ct 795, 28 L Ed 2d 77; In re Nine W. Shoes Antitrust Litig., 80 F Supp 2d 181; In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F Supp 2d 188; Imperial Point Colonnades Condominium, Inc. v Mangurian, 549 F2d 1029; Toledo Mack Sales &Serv., Inc. v Mack Trucks, Inc., 530 F3d 204; Champagne Metals v Ken-Mac Metals, Inc., 458 F3d 1073; Poster Exch., Inc. v National Screen Serv. Corp., 517 F2d 117; Varner v Peterson Farms, 371 F3d 1011.) IV. The Appellate Division correctly upheld the pleading of a rule-of-reason violation. (Leon v Martinez, 84 NY2d 83, 638 NE2d 511, 614 NYS2d 972; Guggenheimer v Ginzburg, 43 NY2d 268, 372 NE2d 17, 401 NYS2d 182; Capitaland United Soccer Club v Capital Dist. Sports & Entertainment, 238 AD2d 777, 656 NYS2d 465; Board of Trade of Chicago v United States, 246 US 231, 38 S Ct 242, 62 L Ed 683; People v Rattenni, 81 NY2d 166, 613 NE2d 155, 597 NYS2d 280; Arizona v Maricopa County Medical Soc., 457 US 332, 102 S Ct 2466, 73 L Ed 2d 48; State Oil Co. v Khan, 522 US 3, 118 S Ct 275, 139 L Ed 2d 199; United States v Visa U.S.A. Inc., 163 F Supp 2d 322; **[****7]** National Soc. of Professional Engineers v United States, 435 US 679, 98 S Ct 1355, 55 L Ed 2d 637; California Dental Assn. v FTC, 526 US 756, 119 S Ct 1604, 143 L Ed 2d 935.)

Dewey & LeBoeuf LLP, New York City (*John M. Nonna, Larry P. Schiffer* and *Daniel T. Stabile* of counsel), for Society of Lloyd's, amicus curiae. The formation of Equitas Ltd., Equitas Reinsurance Ltd. and Equitas Policyholders Trustee Ltd. was procompetitive.

Judges: Opinion by Chief Judge Lippman. Judges Ciparick, Graffeo, Read and Jones concur. Judge Smith concurs in the opinion of Chief Judge Lippman, except insofar as it discusses whether the allegations of the complaint would state a claim under the federal antitrust laws, in an opinion in which Judge Pigott concurs.

Opinion by: LIPPMAN

Opinion

[*726] [*72] [**188]** Chief Judge Lippman.

At issue is the sufficiency and extraterritorial reach of plaintiff's claim under New York State's antitrust statute, commonly known as the Donnelly Act (General Business Law § 340 et seq).

[*73] [**189]** Plaintiff is a New York branch of a German reinsurance corporation. Defendants (hereinafter collectively referred to as Equitas) are London, England based entities engaged in the business of providing retrocessionary reinsurance. Retrocessionary **[****8]** reinsurers, or **[2]** retrocessionaires as they are known, write coverage for risks ceded to them by reinsurers, in this transactional context referred to as "cedents."

According to the complaint, this action arises from practices employed in connection with the handling of claims made under retrocessional reinsurance treaties providing what is known as "non-life" coverage. Among the risks insured under this heading are those of environmental, catastrophic and asbestos related origin. Liabilities under policies insuring such risks typically are of the "long tail" variety; they may surface long after the policy period and it is clear in retrospect that underwriters did not accurately appreciate the magnitude of "non-life" risks or the unusual persistence of the liability they would engender.

Over the years, Lloyd's of London, an insurance marketplace composed of numerous competing insurance syndicates, themselves composed of individual underwriting participants (natural persons referred to as Names), issued, through its syndicates substantial non-life retrocessional coverage. By the early 1990s, it became evident that the liabilities arising under this coverage were mounting at an alarming **[****9]** rate and would soon outstrip the syndicates' reserves.

The syndicates individually proved unable to respond to this impending crisis, in significant part because in competing with each other for prospective business it was their practice to pay retrocessionary claims without haggling and without imposing onerous administrative burdens on their cedents. It was thus proposed that, since individual action by the syndicates to limit **[*727]** liability by more closely scrutinizing claims would be commercially unviable, the Names should agree to repose decision making with respect to the handling of certain liabilities arising under pre-1993 Lloyd's non-life retrocessionary coverage, in a newly created entity--a reinsurer that would, because it would be in perpetual "run-off" (i.e., merely concluding obligations under existing coverage and not soliciting new business), be free to adopt a more aggressive approach to the handling of claims. This proposal, as set forth by the governing body of Lloyd's in a "Reconstruction and Renewal Plan" (R&R plan), was approved by the Names and subsequently reviewed and found unobjectionable by United Kingdom and European Union antitrust regulatory authorities, **[****10]** i.e., the United Kingdom Department of Trade and Industry and the European Commission. [1]

It was pursuant to the R&R plan that Equitas was created in 1996 to reinsure the otherwise uninsurable non-life retrocessionary obligations of the Lloyd's syndicates. And, in accordance with a Reinsurance and Runoff Contract (RROC), the Names reinsured with Equitas **[3]** their risks under the Lloyd's syndicates' pre-1993 non-life retrocessionary treaties. The consideration for this coverage was comprised of some £14.7 billion in assets (premiums paid for the subject coverage) held by the syndicates and significant additional contributions by the Names individually, and by Lloyd's and its functionaries. Although **[***74]** **[**190]** subsequent to these transfers and until 2009 [2] the Names remained severally liable under the coverage extended by the syndicates, pursuant to the RROC Equitas was given plenary power to manage claims arising under the subject pre-1993 coverage. [3] The Names were concomitantly barred from reaching the funds transferred in exchange **[****11]** for the reinsurance provided by Equitas.

Plaintiff reinsurer purchased coverage for some of its non-life risks from Lloyd's retrocessionaires. The risks ceded by it to **[*728]** Lloyd's syndicates underwritten by pre-1993 retrocessionary coverage were, subsequent to the adoption of the R&R plan, in turn ceded by the Lloyd's retrocessionaires to Equitas under the RROC. According to plaintiff, Equitas adopted a "hard-nosed" approach to the handling of its claims, involving among other practices, holding payments due hostage to concessions by plaintiff and imposing extraordinarily onerous documentation requirements. **[****12]** In addition to commencing arbitration proceedings against the underwriters in which it sought damages for these alleged abuses under the governing insurance treaties, plaintiff filed this action in March 2007, asserting in its original complaint a Donnelly Act claim as well as one sounding in tortious interference with contractual relations.

On a *CPLR 3211* motion preceding the one now before us, the tortious interference claim was dismissed, upon the ground then urged by Equitas that the wrongful conduct attributed by plaintiff to it had not been performed by it as a stranger to the contracts said to have been interfered with, but in its capacity as the claims handling agent of the contractually bound Names (*20 Misc 3d 1115[A], 867 NYS2d 16, 2008 NY Slip Op 51362[U], *8 [2008]*). The motion court, however, sustained plaintiff's Donnelly Act claim finding, as is here relevant, that plaintiff had **[4]** adequately alleged in the claim's support a geographical market for retrocessional non-life insurance limited to the Lloyd's marketplace. The court nonetheless granted plaintiff's request to amend its complaint to allege that the relevant market was global. [4]

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[1] The R&R plan was also submitted for comment to various US government agencies, among them the New York State Department of Insurance, which registered no objection.

[2] In 2009, Equitas, with the approval of the British High Court undertook finally to relieve the Names of their obligations under the retrocessional treaties at issue (*see Matter of Names at Lloyd's for the 1992 & Prior Years of Account, Represented by Equitas Ltd.*, [2009] EWHC 1595 [Ch], 2009 WL 1949482 [July 7, 2009]).

[3] Under section 9.2 (a) of the RROC, Equitas was authorized "to adjust, handle, agree, settle, pay, compromise or repudiate any Claim, return premium, reinsurance premium or any other insurance or reinsurance liability on behalf of the Syndicate or Closed Year Syndicate."

[4] This amendment, as the parties **[****13]** then understood, would be essential to the action's survival, since there was no factually plausible contention that the Lloyd's marketplace was the relevant market in assessing whether Equitas's claims handling practices had an anticompetitive effect upon the retrocessional non-life insurance market.

The resulting second amended complaint, the pleading now at issue, alleges in support of the Donnelly Act claim that prior to the R&R plan and the consequent creation of Equitas, retrocessional non-life claims handling with respect to pre-1993 Lloyd's coverage was performed by the individual Lloyd's syndicates which, because they competed with each other for new business and were thus anxious to curry favor with potential cedents, were disposed to settle claims expeditiously and fairly. Following the R&R plan and the centralizing of all decision making respecting the handling of the subject category of claims in Equitas pursuant to the RROC, there ceased to be any competitive **[*729] [***75] [**191]** disincentive to the adoption of sharp claims management practices--Equitas had no interest in attracting prospective business; its sole mission was to marshal its fund with the considerable amount of parsimony necessary **[****14]** to cover the avalanche of liabilities that had led to its existence. The complaint further alleged that Lloyd's concentration of claims management decision making power in Equitas would operate to suppress competition in the delivery of a crucial component of the retrocessional non-life coverage product, namely, claims management, and that it would do so not only within the Lloyd's marketplace, but in the world. [5]

After the filing of the second amended complaint, Equitas again moved to dismiss pursuant to *CPLR 3211*. In deciding this motion, Supreme Court focused upon the circumstance that the complaint, while nominally alleging that the pertinent geographical market for the particular species of coverage at issue was global, actually seemed to continue to rely upon the existence of a cognizable submarket confined to the Lloyd's marketplace. Given the new allegations that there was a worldwide market for retrocessional non-life coverage, and the absence of any allegation that the coverage available **[****16]** in the Lloyd's marketplace could not be acquired elsewhere on competitive terms, the court concluded that Lloyd's was not a viable **[*730]** submarket and on that ground dismissed the Donnelly Act claim, since an assertion of market power adequate to sustain a claim for restraint of trade may only be demonstrated within the context of an identified relevant market or submarket (*24 Misc 3d 264, 273-274, 876 NYS2d 325 [Sup Ct, NY County 2009]*).[6] **[5]**

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[5] The relevant allegations are contained in paragraph 36 of the complaint:

> "36. In 1993, in 1996, at the time this action was commenced, and currently, the Lloyd's syndicates collective1y had market power in the worldwide market for retrocessional coverage.
>
> "(a) In 1993, in 1996, at the time this action was commenced, and currently, the Lloyd's marketplace was the single most significant seller of most forms of non-life retrocessional coverage to reinsurers worldwide.
>
> "(b) In 1993, in 1996, at the time this action was commenced, and currently, the Lloyd's marketplace provides the benchmark for prices, terms, and conditions for most forms of non-life retrocessional coverage.
>
> "(c) In 1993, in 1996, at the time this action was commenced, and currently, any reinsurer, and any **[****15]** reinsurance broker, wishing to purchase retrocessional coverage would have to at least consider approaching Lloyd's for quotes and would have to take into account the terms and conditions offered by various Lloyd's syndicates in determining what to purchase, and on what terms.
>
> "(d) For many lines of retrocessional business, and in many years, competition *within* the Lloyd's marketplace is more significant to prospective purchasers of retrocessional coverage than is competition between Lloyd's as a whole and other sellers, because Lloyd's is expected to, and does, set the lead in establishing coverage."

[6] Although there are Appellate Division decisions recognizing this basic requirement of a Donnelly Act claim (*see e.g. Creative Trading Co. v Larkin-Pluznick-Larkin, Inc., 136 AD2d 461, 462, 523 NYS2d 102 [1st Dept 1988]*), there do not appear to be any cases from our Court. It does not seem, however, that there would be much room for doubt as to the requirement. It is logically necessary to a coherent allegation of a trade restraint and has been recognized by federal courts in assessing the adequacy of pleadings alleging violations under the Sherman Act (*15 USC § 1 et seq.*; *see e.g. Newcal Indus. v Ikon Office Solution, 513 F3d 1038, 1045 [9th Cir 2008] cert denied* ***557 US 903, 129 S Ct 2788, 174 L Ed 2d 290 [2009]***), after which the Donnelly Act is modeled **[****17]** (*see State of New York v Mobil Oil Corp., 38 NY2d 460, 463, 344 NE2d 357, 381 NYS2d 426 [1976]*).

On plaintiff's appeal from the subsequently entered judgment dismissing the **[***76] [**192]** complaint, [7] the Appellate Division, with one justice dissenting, reversed and reinstated the Donnelly Act claim. The Court found that the complaint adequately pleaded a worldwide market. And, while acknowledging that the crucial allegations contained in paragraph 36 of the amended pleading (n 5, *supra*), did not separately allege market power--i.e., that Lloyd's was capable of unilaterally raising prices for retrocessional non-life coverage in the relevant market significantly without losing any business (*see* *CDC Techs., Inc. v IDEXX Lab., Inc., 186 F3d 74, 81 [2d Cir 1999]*)--the allegations read together and liberally construed were, in the Court's view, adequate to that purpose *(82 AD3d 26, 35, 921 NYS2d 1 [1st Dept 2011])*. The Court rejected, either expressly or impliedly, defendants' remaining contentions, among them that there was no actionable conspiracy because Equitas had at all relevant times acted unilaterally and pursuant to agreements (the R&R plan and the RROC) approved by the United Kingdom and European **[****18]** regulatory authorities; and that, even if a London-based conspiracy to restrain trade was adequately alleged, it could not be reached under a New York State antitrust statute presumptively without extraterritorial effect.

The Appellate Division granted Equitas leave to appeal, certifying to this Court the question of whether its order reversing the order of Supreme Court was properly made. We now reverse.

[*731] ***HN1***[] An antitrust claim under the Donnelly Act, or under its essentially similar federal progenitor, *section 1* of the Sherman Act (*15 USC § 1 et seq.*; *see* *Anheuser-Busch, Inc. v Abrams, 71 NY2d 327, 335, 520 NE2d 535, 525 NYS2d 816 [1988]*; *Mobil Oil Corp., 38 NY2d at 463*), must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market (*see e.g.* *Home Town Muffler v Cole Muffler, 202 AD2d 764, 765, 608 NYS2d 735 [3d Dept 1994]*; *Creative Trading, 136 AD2d at 462*; *Capital Imaging Assoc., P.C. v Mohawk Val.* ***[6]*** *Med. Assoc., 996 F2d 537, 542-543 [2d Cir 1993]*, **[****19]** *cert denied 510 US 947, 114 S Ct 388, 126 L Ed 2d 337 [1993]*). Equitas argues that the second amended complaint fails sufficiently to allege either element.

For present purposes, we assume, without deciding, that a conspiracy is alleged. In favor of that assumption we note that, although the complaint contains allegations that Equitas acted independently of the syndicates in discharging its claims management function and was a legally and financially autonomous entity, it also alleges in substance that the collective assumption of the claims management function previously performed by the syndicates individually was Equitas's raison d'|frtre under the RROC and that Equitas from its inception and at all relevant subsequent times acted, if not as an agent in the traditional sense, at least as a preprogrammed instrumentality of the Names. Indeed, it will be recalled that in obtaining the dismissal of plaintiff's tortious interference claim Equitas itself represented that it was the claims agent of the Names, and, according to the complaint the allegations of which we must at this juncture accept as true, Equitas had no other purpose but that of fixing and capping the Names' liability **[****20]** under the subject pre-1993 coverage. ***HN2***[] Although there are situations in **[***77] [**193]** which a fully integrated entity that takes over and consolidates economic functions formerly performed competitively will be deemed sufficiently autonomous in its subsequent operations to preclude their characterization as conspiratorial within the meaning of the antitrust laws (*see e.g.* *Texaco Inc. v Dagher, 547 US 1, 126 S Ct 1276, 164 L Ed 2d 1 [2006]*), the pertinent inquiry in determining whether there is concerted or unilateral activity is one of substance and not form (*American Needle, Inc. v National Football League, 560 US --, --, 130 S Ct 2201, 2211-2212, 176 L Ed 2d 947 [2010]*); what is important is how the parties to the alleged anticompetitive conduct actually operate (560 US at --, 130 S Ct at 2209). Here, there is discernible from the pleading a perhaps colorable claim that Equitas was engaged in concerted activity when it exercised **[*732]** in place of and on behalf of the coexisting Lloyd's syndicates consolidated decision making authority over the management of the syndicates' pre-1993 retrocessional non-life liabilities.

[1] The substantive problem with this action is rather that although a worldwide market **[****21]** is nominally alleged, as is evidently essential since it is clear that the retrocessional non-life product is available globally and that

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[7] The Donnelly Act claim and the pendent claim for injunctive relief were all that remained of the complaint following the motion court's earlier dismissal of plaintiff's tortious interference claim.

there is no distinct legally cognizable submarket, [8] there **[7]** is no allegation of any anticompetitive effect attributable to the posited conspiracy beyond the Lloyd's marketplace.

HN4[] Ordinarily, a Donnelly or Sherman Act plaintiff, to survive a motion to dismiss in a rule of reason case, such **[****22]** as this one, [9] must minimally allege that conspirators possessed power within the relevant market to produce a market-wide anticompetitive effect (*see* *Capital Imaging, 996 F2d at 546*). Defined in the context of sales, market power is the ability to raise prices significantly without losing business (*see* *CDC Techs., 186 F3d at 81*), but more generally may be understood as the capacity to impose onerous economic terms without suffering competitive detriment. Here, there is no allegation of any such power in the relevant worldwide market. While the Lloyd's syndicates were capable of insulating themselves from each other's competitive behavior in the area of claims management and could by that device attempt to cap their liabilities under certain previously issued coverage, there are no allegations from which it is possible to gather that they were capable of avoiding the business consequences of this approach in the global market.

[*733] Recognizing that ***HN5***[] on a *CPLR 3211* motion to dismiss the allegations of the complaint must be accepted as true and **[***78]** **[**194]** construed liberally in the plaintiff's favor (*Cron v Hargro Fabrics, 91 NY2d 362, 366, 694 NE2d 56, 670 NYS2d 973 [1998]*), and that in the antitrust context courts are "hesitant" to dismiss complaints on the pleadings based on the sufficiency of product market allegations (*Todd, 275 F3d at 200*), it is nonetheless the case that there is no per se rule barring dismissal where the complaint simply does not allege a conspirator's basic capacity to inflict market-wide anticompetitive injury (*see id.*). Here, there is no dispute as to the relevant market and, accordingly, no need for factual development on that point. The pertinent analytic focus is instead upon whether the complaint alleges the requisite power within the relevant worldwide market on the part of the claimed conspirators. We cannot conclude that it does. **[8]**

The allegations in paragraph 36 of the complaint do not singly **[****24]** or in combination allege market power as that term of art is defined in the antitrust lexicon. Lloyd's may, as plaintiff alleges, be the single most significant vendor of retrocessional non-life coverage; it may set the benchmark for the terms of such coverage and its quotes may be viewed as essential by reinsurers and reinsurance brokers; there may in addition be lines of retrocessional coverage with respect to which price competition with Lloyd's is considered more significant than competition in the world market. None of this, however, would justify the inference that Lloyd's could at will generally engage in "run-off" type claims management behavior and retain its business in a global market. Plaintiff was perhaps injured by an anticompetitive restraint in the Lloyd's market, but that is not a circumstance from which it is possible to conclude that there was some broader anticompetitive effect, or even a capacity to produce such an effect, in the relevant world market. ***HN6***[] It is market-wide effect that is crucial to an antitrust claim under the Sherman Act or Donnelly Act (*see* *CDC Techs. Inc., 186 F3d at 80-81*), not the existence of otherwise compensable individual injury. Plaintiff **[****25]** is evidently pursuing contract claims against Lloyd's underwriters in arbitration based on the same claims handling practices presently alleged. The question here is whether plaintiff may, premised on such allegations of localized individual harm, seek an award of treble damages for an antitrust violation. Inasmuch as it is the market-wide nature of the harm that would justify any such award, the answer, we believe, must be no.

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[8] Although, as noted (*see* supra at 729), the second amended complaint, while alleging a worldwide product market, retained its claim of a distinct submarket confined to Lloyd's, the latter is not a legally viable allegation. ***HN3***[] Product markets are defined for antitrust purposes by applying the rule of "reasonable interchangeability" (*see* *Todd v Exxon Corp., 275 F3d 191, 201 [2d Cir 2001]*) and, particularly in light of the second amended complaint's allegation that the relevant market is global, i.e., that the subject Lloyd's product is interchangeable with retrocessional reinsurance products available worldwide, there is no plausible explanation for the persisting submarket allegation (*see* *id. at 200*). Global, accordingly, appears to have abandoned its submarket claim.

[9] There is no contention in this case of a per se violation; whether any restraint on trade for which defendants are shown to have been responsible was unreasonable is a bona fide issue in this litigation. There is no dispute that the purported conspiracy arose **[****23]** as a response to the impending ruin of the Lloyd's marketplace, an event that defendants contend would have significantly reduced competition in the world market for retrocessional non-life coverage.

[2] Even if this pleading deficiency could be cured--and we perceive no reason to suppose that the formidable hurdle of **[*734]** alleging market power could be surmounted by plaintiff--there would remain as an immovable obstacle to the action's maintenance, the circumstance that the Donnelly Act cannot be understood to extend to the foreign conspiracy plaintiff purports to describe.

The complaint alleges, essentially, that a German reinsurer through its New York branch purchased retrocessional coverage in a London marketplace and consequently sustained economic injury when retrocessional claims management services were by agreement within that London marketplace consolidated so as to eliminate competition over their delivery. Injury so inflicted, attributable primarily **[****26]** to foreign, government approved transactions having no particular New York orientation and occasioning injury here only by reason of the circumstance that plaintiff's purchasing branch happens to be situated here, is not redressable under New York State's antitrust statute. That this is so is demonstrable when the Donnelly Act is considered in the context of federal ***antitrust law***.

[*79]** **[**195]** Assuming that the extraterritorial reach of the Donnelly Act is as extensive as that of its federal counterpart, the Sherman Act--an assumption that we do not ultimately embrace--it seems fairly clear that the Sherman Act would not reach a competitive restraint, imposed by participants in a British marketplace, that only incidently affected commerce in this country.

HN7[] The Sherman Act's extraterritorial reach is limited under the Foreign Trade **[9]** Antitrust Improvements Act (FTAIA) of 1982 (*15 USC § 6a*), which provides that the Sherman Act "shall not apply to conduct involving [non-import] trade or commerce … with foreign nations." The only ground for excepting to this general rule of inapplicability where imports are not involved [10] is where the conduct has a "direct, substantial, and reasonably foreseeable effect" **[****27]** on domestic commerce, and "such effect gives rise to a [Sherman Act] claim" (*15 USC § 6a [1] [A]* ;*[2]*; *F. Hoffmann-La Roche Ltd v Empagran S.A., 542 US 155, 162, 124 S Ct 2359, 159 L Ed 2d 226 [2004]*). The London conspiracy here alleged was, according to the complaint, worldwide in its orientation; there is nothing in the pleadings to justify an inference that it targeted United States commerce specially or that its effect upon commerce in **[*735]** this country was substantial. Even if there were, however, the viability of a Sherman Act claim would still finally depend upon whether the domestic effect of the foreign conspiracy would itself "give rise" to a claim under the Sherman Act (*id.*). Plaintiff, although alleging individual injury in New York, has not alleged harm to competition in this country (*see E & L Consulting, Ltd. v Doman Indus., 472 F3d 23, 28 n 3 [2d Cir 2006]*, *cert denied 552 US 816, 128 S Ct 97, 169 L Ed 2d 22 [2007]* ["It should go without saying … that a party cannot establish antitrust injury without establishing a violation of the antitrust laws, which, under *Section 1* (of the Sherman Act), must involve an injury to competition"]). The only harm to competition alleged **[****28]** is within a particular London reinsurance marketplace. It seems clear that even if plaintiff had an otherwise viable Sherman Act claim based on harm to competition in the relevant global market, which it does not, it still would not, premised on its allegations of domestic harm, have a jurisdictional predicate for that claim. It is not necessary to know precisely the extent of the Donnelly Act's extraterritorial reach to understand that it cannot reach foreign conduct deliberately placed by Congress beyond the Sherman Act's jurisdiction. The federal limitation upon the reach of the Sherman Act, predicated upon and an expression of the essentially federal power to regulate foreign commerce, would be undone if states remained free to authorize "little Sherman Act" claims that went beyond it. The established presumption is, of course, against the extraterritorial operation of New York law (*see* McKinney's Consolidated Laws of NY, Book 1, Statutes § 149), and we do not see how it could be overcome in a situation where the analogue federal claim would be barred by congressional enactment.

It is not an answer to this analysis to observe, as plaintiff does, that under the McCarran-Ferguson Act (*15 USC § 1011 et seq.*) regulation of the "business of insurance" is **[10]** committed to the states (*15 USC § 1012 [b]*). What is at issue here is not in the main the regulation of the "business **[***80]** **[**196]** of insurance," a matter within the special competence and jurisdictional reach of domestic state regulators, but the address of a purported foreign

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[10] There is no contention that the reinsurance product purchased by plaintiff at the Lloyd's marketplace **[****29]** was an import. Nor are there allegations that the alleged conspiracy was directed at any defined import market in this country (*see Animal Science Prods., Inc. v China Minmetals Corp., 654 F3d 462, 471 n 11 [3d Cir 2011])*.

conspiracy to restrain trade, a matter to be dealt with, if at all, under the significantly distinct antitrust rubric (*see* *Group Life & Health Ins. Co. v Royal Drug Co., 440 US 205, 210-211, 99 S Ct 1067, 59 L Ed 2d 261 [1979]*). The question now before us--as to the extraterritorial reach of our state ***antitrust law***--is, then, not one as to which the McCarran-Ferguson Act commitment is relevant. What is **[*736]** instead highly relevant is that the Donnelly Act's reach must be understood as part of a jurisdictional continuum whose outermost extension **[****30]** is defined by federal ***antitrust law***. While it is true that the scope of federal subject matter jurisdiction under the Sherman Act, as limited by the FTAIA and federal decisions following *Empagran (542 US 155, 124 S Ct 2359, 159 L Ed 2d 226 [2004], supra)* is frequently far from obvious, we think it sufficiently evident that the Sherman Act would not reach the purely foreign conspiracy here claimed, the anticompetitive effect of which beyond the Lloyd's marketplace is not made out.

Nonetheless, we do not ultimately ground our determination that the Donnelly Act does not reach the presently claimed conspiracy upon the FTAIA. Even if the Sherman Act could reach the purported conspiracy, it would not follow that the Donnelly Act should be viewed as coextensive. For a Donnelly Act claim to reach a purely extraterritorial conspiracy, there would, we think, have to be a very close nexus between the conspiracy and injury to competition in this state. That additional element is not discernible from the pleadings before us. It would be a very great, and we think unwarranted, supposition that the authors of the Donnelly Act intended to allow, on a predicate such as the one here alleged, the sort **[****31]** of highly intrusive international projection of state regulatory power now proposed.

Having said this, it should be emphasized that our decision should not be understood as placing some new limitation on the reach of the Donnelly Act. This is simply a rare instance in which a state antitrust action has tested the outer jurisdictional limits not only of state but federal ***antitrust law***.

Accordingly, the order of the Appellate Division should be reversed, with costs, the judgment of Supreme Court reinstated and the certified question answered in the negative.

Concur by: SMITH

Concur

Smith, J. (concurring). I agree with the result reached by the majority, and with most of the reasoning in the majority opinion. My only reservation is about the majority's analysis (which, as it acknowledges, is not essential to its decision) of whether the allegations in the complaint would state a claim under the federal antitrust laws. The implications of the Foreign Trade Antitrust Improvements Act of 1982 (*15 USC § 6a*) for this case (and for many other cases) are, to me at least, far less than clear. I would prefer to express no opinion about them, and simply to rely on the state law grounds explained at page 736 of the **[****32]** majority opinion (and on the similar **[11]** reasoning contained in **[*737]** the Appellate Division dissent [*82 AD3d 26, 40-41 (2011)*]), which sufficiently support the conclusion that the extraterritorial reach of the Donnelly Act does not extend to the transactions at issue here.

Judges Ciparick, Graffeo, Read and Jones concur with Chief Judge Lippman; Judge Smith concurs in a separate opinion, except insofar as Chief Judge Lippman's opinion discusses whether the allegations of the complaint would state a claim under the federal antitrust laws, in which Judge Pigott concurs.

Order reversed, etc.

End of Document

In re Southeastern Milk Antitrust Litig.

United States District Court for the Eastern District of Tennessee, Greeneville Division

March 27, 2012, Filed

No. 2:07-CV-188; Master File No. 2:08-MD-1000

Reporter

2012 U.S. Dist. LEXIS 44221 *; 2014-1 Trade Cas. (CCH) P78,633; 2012 WL 1032797

IN RE: SOUTHEASTERN MILK ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: Food Lion, LLC, et al. v. Dean Foods Company, et al., No. 2:07-CV-188

Subsequent History: Class certification granted by, in part *In re Southeastern Milk Antitrust Litig., 2012 U.S. Dist. LEXIS 76817 (E.D. Tenn., June 1, 2012)*

Motion granted by *In re Southeastern Milk Antitrust Litig., 2013 U.S. Dist. LEXIS 205412 (E.D. Tenn., Apr. 10, 2013)*

Reversed by, Remanded by *Food Lion, LLC v. Dean Foods Co. (In re Southeastern Milk Antitrust Litig.), 739 F.3d 262, 2014 U.S. App. LEXIS 66 (6th Cir. Tenn., Jan. 3, 2014)*

Prior History: *Food Lion, LLC v. Dean Foods Co. (In re Southeastern Milk Antitrust Litig.), 730 F. Supp. 2d 804, 2010 U.S. Dist. LEXIS 94158 (E.D. Tenn., Aug. 4, 2010)*

Core Terms

rule of reason, conspiracy, antitrust, horizontal, Plaintiffs', prices, geographic, vertical, monopolize, anti-competitive, merger, anti trust law, Sherman Act, Defendants', conspiracy to monopolize, summary judgment, raw milk, competitors, cases, milk, summary judgment motion, appears, parties, restraint of trade, issue of material fact, reconsideration motion, alleged conspiracy, illegal conspiracy, per se rule, processed

LexisNexis® Headnotes

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

HN1[] **Conspiracy to Monopolize, Elements**

It is doubtful that the contours of the geographic market must be as precisely defined, if at all, in a conspiracy to monopolize claim as opposed to a monopolization or attempt to monopolize claim."

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

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN2[] Conspiracy to Monopolize, Elements

A plaintiff alleging a violation of *15 U.S.C.S. § 2* must define the relevant market within which the alleged anti-competitive effects occur.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN3[] Relief From Judgments, Altering & Amending Judgments

Parties generally waive issues in the district court when they are raised for the first time in motions for reconsideration or reply briefs.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN4[] Standing, Requirements

The antitrust laws generally afford a private right of action to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15*. The United States Court of Appeals for the Sixth Circuit has established a two part test to determine whether a plaintiff has adequately alleged antitrust standing: (1) Whether the plaintiff has asserted a cognizable "antitrust injury"; and (2) whether the plaintiff is a proper plaintiff to assert a violation of the antitrust laws. The plaintiffs must establish both parts of this test; otherwise, they lack antitrust standing.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN5[] Standing, Requirements

An antitrust claimant must show more than merely an "injury casually linked" to a competitive practice; it must prove an antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

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

HN6[] Sherman Act, Scope

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, provides in part: every contract, combination or conspiracy in restraint of trade or commerce among the several states is declared to be illegal. While *§ 1* appears to prohibit every restraint of trade, the United States Supreme Court has interpreted the statute as condemning only those combinations which constitute unreasonable restraints of trade. In order to establish their claim under *§ 1* of the Sherman Act, the plaintiffs must prove that the defendants (1) participated in an agreement that; (2) unreasonably unrestrained trade in the relevant market.

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

HN7[] Per Se Rule & Rule of Reason, Sherman Act

With regard to an antitrust claim, whether an agreement unreasonably restrains trade is determined under one of two approaches: the per se rule or the rule of reason. In per se cases, evidence of actual effect on competition is not required because these actions are conclusively presumed to be unreasonable. A restraint on trade is per se illegal when the practice facially appears to be one that would almost always tend to restrict competition and decrease output.

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

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

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

With regard to an antitrust claim, examples of practices which are per se illegal are horizontal price fixing, market allocation, group boycotts or tying arrangements, activities which are considered inherently anti-competitive. Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints. There is often no bright line separating per se from rule of reason analysis.

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

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

HN9[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

With regard to an antitrust claim, a per se rule is inappropriate where the effects of a particular restraint are unclear, even where aspects of the restraint may appear to be facially anti-competitive. Per se analysis should not be extended to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.

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

HN10[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

With regard to an antitrust claim, there is a presumption in favor of a rule-of-reason standard. Under the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of produces significant anticompetitive effects within the relevant product and geographic markets.

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

HN11[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

While applying any one of antitrust's modes of analysis might involve many fact questions, the selection of a mode is entirely a question of law. To be sure, the United States Supreme Court has stated that the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition. But that statement was not meant to indicate that the fact finder should determine whether the per se rule or the rule of reason applied to a particular set of facts. Rather, it meant that once the court decided that the rule of reason should apply, disputed factual questions about reasonableness should be left to the jury. In a footnote the court made clear that determining the rule of decision was a question of law.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN12[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

With regard to an antitrust claim, in the first instance, courts must distinguish between some types of unlawful anticompetitive restraints that are per se illegal under the antitrust laws, and the far-larger type of restraints that should be analyzed under the rule of reason approach. If a court determines that a practice is illegal per se, further examination of the practice's impact on the market or the pro-competitive justifications for the practice is unnecessary for finding a violation of ***antitrust law***, suggesting that the decision as to whether a practice is illegal per se is one committed to the court.

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

HN13[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

With regard to an antitrust claim, the United States Supreme Court has repeatedly noted that the per se rule should be applied to conduct only after courts have had considerable experience with certain business relationships. Since it seems quite clear that the per se rule should be applied to conduct only after it has been examined carefully by the courts, not juries, it also seems rather clear that the question of whether allegedly unlawful conduct is subject to per se analysis or rule of reason analysis is a legal question for the court, not a question for the jury. A court must first determine whether the conduct alleged to be unlawful is the type of conduct that has a pernicious effect on competition and lacks any redeeming virtue, to be considered illegal per se.

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

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

HN14[] **Conspiracy to Monopolize, Elements**

The United States Court of Appeals for the Sixth Circuit has succinctly defined the two major types of antitrust conspiracies as follows: Courts have identified two major types of antitrust conspiracies to restrain trade: horizontal and vertical. Horizontal conspiracies involve agreements among competitors at the same level of market structure to stifle trade, such as agreements among manufacturers or among distributors to fix prices for a given product, and therefore may constitute per se violations of ***antitrust law***. Vertical conspiracies, on the other hand, involve agreements among actors at different levels of market structure to restrain trade, such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market. Vertical restraints are analyzed under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

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

HN15[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

With regard to an antitrust claim, as an initial matter the court must determine whether or not the agreement alleged by the plaintiffs is horizontal in nature, which may constitute a per se violation of ***antitrust law***, or vertical in nature, which must be analyzed under the rule of reason. In making this determination the labels used by the plaintiffs are largely irrelevant and the decision will be made against a backdrop of several well established principles. First of all, there is an automatic presumption in favor of the rule of reason standard. Secondly, the category of agreements to be analyzed under a per se analysis has been shrinking over the last few years. Finally, the per se rule should be applied only in "clear cut cases" of trade restraints that are so unreasonably anticompetitive that they present straightforward questions for reviewing courts. The per se analysis should not be extended to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.

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Judges: J. RONNIE GREER, UNITED STATES DISTRICT JUDGE.

Opinion by: J. RONNIE GREER

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiffs are retail sellers of processed milk who purchase directly from defendants Dean Foods Company ("Dean") and/or Dairy Farmers of America, Inc. ("DFA") who bring this purported class action under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. § § 1-2* and *Section 3* of the Clayton Act, *15 U.S.C. § 14*. [1] Plaintiffs' complaint alleges causes of action for violation of *Section 1* of the Sherman Act against Dean, DFA, and National Dairy Holdings, LP ("NDH") (agreement not to compete) (Count I); violation of *Section 1* of the Sherman Act and *Section 3* of the Clayton Act against Dean, DFA, NDH, Southern Marketing Agency, Inc. ("SMA") and Dairy Marketing Services, LLC ("DMS") (conspiracy to unreasonably restrain trade) (Count II); violation of *Section 2* of the Sherman Act against Dean (unlawful monopolization) (Count III); violation of *Section 2* of the Sherman Act against Dean (attempt to monopolize) (Count IV); and violation of *Section 2* of the Sherman Act against Dean, DFA, and NDH (conspiracy to monopolize) (Count V).

On August 4, 2010, the Court granted Defendant's motion for summary judgment on Counts II, III and IV and denied the motion as to Counts I and V, [Doc. 863]. Currently pending before the Court are two related motions which this order will address: (1) Defendants' motion for reconsideration of the Court's August 4, 2010 order denying summary judgment as to Counts I and V, [Doc. 952], and (2) Defendants' supplemental motion for summary judgment as to Counts I and V, [Doc. 1026]. The parties have now exhaustively briefed the pending motions, the Court has heard oral argument and the motions are ripe for disposition. For the reasons which follow, defendants' motion for reconsideration will be GRANTED IN PART (as to Count V) and DENIED IN PART (as to Count I) and the supplemental motion for summary judgment will be GRANTED, Counts I and V of plaintiffs' complaint will be DISMISSED, and judgment will be entered on the Court's orders in favor of defendants.

I. The Motion For Reconsideration, [Doc. 952]

A. Count I

[1] Although there is a pending class certification motion, no class has been **[*5]** certified in this case.

Defendants argue that the Court erroneously held that disputed issues of material fact require trial of the conspiracy count (Count I) of the plaintiffs' complaint **[*6]** under *§ 1* of the Sherman Act. Defendants acknowledge that the Court recognized the correct standards but they say that the Court failed to properly apply them. They specifically argue that the Court clearly erred when it found that the parties' competing views of the evidence and the inferences to be drawn from that evidence create material issues of fact for trial without requiring plaintiffs to produce "evidence that tends to exclude the possibility" that the challenged conduct was the result of independent action. *See* *Monsanto Co. v. Spray Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Plaintiffs, of course, disagree.

Although the Court will grant Defendants' pending supplemental motion for summary judgment as to Count I, the Court believes that it both correctly stated and correctly applied the proper standards in its prior memorandum opinion. The motion for reconsideration as to Count I, therefore, will be DENIED. Because the Court may not have articulated its views as clearly as it could have in the prior order, the Court will briefly discuss two of the issues raised by the motion and response.

The first deals with the proper application of the summary judgment standard in antitrust **[*7]** cases. Although the parties appear to agree on the definition of the standard, they disagree strenuously on the manner in which it is applied. Defendants seem to argue that the standard is met when they respond to Plaintiffs' ambiguous evidence with evidence of their own unilateral, independent business decisions related to the conduct. In other words, they seem to argue that they meet the standard whenever they offer any argument from which the jury could draw from their conduct an inference of independent business decision, as well as an inference of action in furtherance of an antitrust conspiracy. They then appear to argue, not that Plaintiffs must show a jury question, but that Plaintiffs must prove that the action was not taken unilaterally, but in concert with others in an illegal conspiracy. Plaintiffs describe Defendants' efforts as an "upside down view" of the standard because Defendants urge the Court to require Plaintiffs to produce "overwhelming evidence" of joint illegal conduct. The Court agrees with Plaintiffs on this point and an example will illustrate the point.

Plaintiffs have offered evidence which, if believed by the jury, establishes that Defendants have acted **[*8]** contrary to their independent economic interest, for instance, that DFA/NDH acquired spin-off plants from the Dean/Suiza merger which were doomed to failure from the outset. Defendants respond that acquisition of the plants satisfied a legitimate business purpose, *i.e.*, satisfaction of the government's concern about the merger, and that DFA had an interest in supplying raw milk to these plants. From this circumstantial evidence the jury could draw one of two inferences - the one argued by plaintiffs or the one urged by defendants. Yet, one of these inferences, if accepted by the jury, "tends to exclude the possibility" that the conduct was the result of independent action. Defendants want the Court to decide this dispute in the summary judgment motion context, not at trial by a jury. That is not the proper standard. If it is, then no antitrust case would ever reach the jury as long as the defendant could merely suggest a plausible business reason for complained of conduct.

Secondly, Defendants argue that the Court erroneously considered the "cumulative effect" of the evidence, violating both Supreme Court and Sixth Circuit standards against aggregating such evidence. In the prior memorandum **[*9]** opinion, the Court observed:

> Defendants rather convincing respond to many of the individual allegations made by plaintiffs and the Court would be constrained to agree with defendants on many of the individual issues raised by the respective parties in their briefs, if the Court viewed each separate document or transcript of testimony in isolation. Defendants appear to invite the Court to do just that; however, the Court must view the record as a whole and, while testimony or documentary exhibits viewed in isolation might not create a genuine issue of material fact, the cumulative effect of such evidence does so. *See* *American Tobacco Co. v. United States, 147 F.2d 93, 107 (6th Cir. 1945)* ("Acts done to give effect to the conspiracy may be, in themselves, wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.").
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> That the parties have many disputes about the appropriate inferences which could be drawn by a reasonable jury with respect to such a large volume of evidence simply illustrates the existence of genuine issues of

> material fact with respect to the conspiracy **[*10]** claim. It is not the strength of the plaintiffs' case on the merits that is being tested by this motion; rather, the Court must determine only whether or not there are genuine issues of material fact without weighing the evidence, resolving issues of credibility of witnesses or resolving factual disputes. Simply put, that is a matter for a jury.

[Doc. 863, at 12-13]. The Court simply observed the established rule that separate acts legal in themselves may be part of the sum of the acts relied upon to effectuate the conspiracy. None of the cases cited by Defendants change that rule.

B. Count V

As noted above, the Court previously denied Defendants' motion for summary judgment as to Count V, the claim of conspiracy to monopolize against Dean, DFA and NDH. Relying on cases from other circuits, the Court held that "***HN1***[] [i]t is doubtful that the contours of the geographic market must be as precisely defined, if at all, in a conspiracy to monopolize claim as opposed to a monopolization or attempt to monopolize claim." [Doc. 863, at 36]. Defendants suggest in this motion that the cases relied upon by the Court predated the United States Supreme Court decision in *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* **[*11]** and are contrary to clear Sixth Circuit precedent. Plaintiffs respond that Defendants are "wrong about the law." First, they argue that the *Spectrum Sports* case did not hold, as Defendants argue, that a determination of the relevant geographic market is an element of a conspiracy to monopolize claim and, secondly, that none of the Sixth Circuit cases cited by Defendants so hold.

In *Spectrum Sports*, a jury verdict was returned finding that Spectrum Sports had, among other things, "monopolized, attempted to monopolize, and/or conspired to monopolize." *Id. at 448*. The Ninth Circuit, noting that the jury had found a violation of *§ 2* without specifying whether the basis of its verdict was monopolization, attempt to monopolize or conspiracy to monopolize, concluded that a case of attempted monopolization had been established and affirmed. *Id. at 452*. More specifically, the Ninth Circuit held that it was not necessary for a plaintiff to present evidence of a dangerous probability of monopolization in a relevant market, a holding in conflict with the holding of all other circuit courts of appeals. The Supreme Court reversed. *Id. at 453*. This Court agrees with Plaintiffs that *Spectrum Sports* **[*12]** cannot clearly be interpreted to hold that plaintiffs must prove a relevant geographic market to succeed on its conspiracy to monopolize claim.

The Sixth Circuit, however, appears to have been relatively clear about the rule in this circuit. The Sixth Circuit most recently addressed the issue in *Kentucky Speedway, LLC v. NASCAR, Inc., 588 F.3d 908 (6th Cir. 2009)*. In that case, Kentucky Speedway sued NASCAR alleging a violation of *§ 1* of the Sherman Act and made claims for monopolization, attempt to monopolize and conspiracy to monopolize under *§ 2*. The district court granted summary judgment on all claims and the Sixth Circuit affirmed, holding that ***HN2***[] a plaintiff alleging a violation of *§ 2* must define "the relevant market within which the alleged anti-competitive effects . . . occur," and that Kentucky Speedway's claim failed because it "lacks the ability to define the relevant markets." *Id. at 916, 919*. [2]

Likewise, in *Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999)*, the Sixth Circuit affirmed the dismissal of a conspiracy to monopolize claim for failure to establish the relevant geographic market. Plaintiffs acknowledge this but argue that the Sixth Circuit "appears to have merely assumed the answer without explicitly considering" the issue. Nevertheless, the result in *Re/Max* is clear. Counter-plaintiff's claim of conspiracy to monopolize was dismissed because counter-plaintiff could not establish the relevant market. [3]

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[2] Plaintiffs acknowledge the holding of the *Kentucky Speedway* case, as they must. They claim, however, that the Sixth Circuit "did not explicitly consider the question of whether market definition is a necessary element of a conspiracy-to-monopolize claim." The record here establishes, **[*13]** however, that plaintiffs in the *Kentucky Speedway* case expressly argued in their brief that their conspiracy to monopolize claim did not require proof of a relevant market, a position the Sixth Circuit rejected.

[3] Defendants also cite *Michigan Division-Monument Bldrs. of America v. Mich. Cemetery Ass'n., 524 F.3d 726 (6th Cir. 2008)* as a Sixth Circuit case affirming dismissal of a claim of conspiracy to monopolize for failure to establish a relevant geographic

It thus appears that this Court erred in failing to apply these controlling Sixth Circuit precedents. It seems rather clear that definition of the relevant geographic market by plaintiffs for all their *§ 2* claims is required. Under these circumstances, justice requires that the Court reconsider its prior ruling and grant the motion for summary judgment as to the conspiracy to monopolize claim to avoid "a manifest error of law," unless defendants have waived their argument as claimed by plaintiffs.

Plaintiffs argue that defendants have waived any argument that market definition is required for plaintiffs' *§ 2* conspiracy claims by not making the claim in their opening brief, citing *Rich v. Gobble, 2009 U.S. Dist. LEXIS 24641, 2009 WL 801774 at *22 (E.D. Tenn. Mar. 24, 2009)* ("***HN3***[] parties generally waive issues in the district court when they are raised for the first time in motions for reconsideration or reply briefs."). Plaintiffs, however, overlook that defendants did in fact raise the argument in their opening brief in connection with all of plaintiffs' *§ 2* claims and the Court specifically considered **[*15]** those claims. Defendants have not waived their argument.

II. The Supplemental Motion For Summary Judgment, [Doc. 1026].

In addition to the reasons advanced by Defendants in the motion for reconsideration, they urge additional grounds on which the Court should grant summary judgment as to Counts I and V: (1) Counts I and V fail because Plaintiffs cannot establish antitrust injury; (2) Count I fails because Plaintiffs cannot establish the relevant geographic and product market; and (3) Count V fails because Plaintiffs cannot establish specific intent to monopolize. As necessary, the Court will address these grounds one at a time.

A. Antitrust Injury

HN4[] The antitrust laws generally afford a private right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C § 15*. The Sixth Circuit has established a two part test to determine whether a plaintiff has adequately alleged antitrust standing: (1) Whether the plaintiff has asserted a cognizable "antitrust injury," and (2) whether the plaintiff is a proper plaintiff to assert a violation of the antitrust laws. *Indeck Energy Servs. v. Consumers Energy Co., 250 F.3d 972, 976 (6th Cir. 2000)*. **[*16]** Plaintiffs must establish both parts of this test; otherwise, they lack antitrust standing.

Here, Defendants argue that Plaintiffs have not established antitrust injury of the type antitrust laws were intended to prevent. ***HN5***[] "An antitrust claimant must show more than merely an 'injury casually linked' to a competitive practice; it 'must prove an antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" *NicSand, Inc. v. 3M Company, 507 F.3d 442, 450 (6th Cir. 2007)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. In other words, plaintiffs in antitrust cases must prove that the harm for which they seek recovery flows from that which makes defendants' conduct anti-competitive. *Brunswick, 429 U.S. at 489*.

Defendants focus primarily on the expert opinions of Professor Ronald Cotterill, upon whom plaintiffs rely for proof of injury and damages in this case. Professor Cotterill, they claim, "does not offer evidence of injury caused by the alleged anti-competitive conduct that is the focus of Plaintiffs' Complaint." Defendants argue that the damages model **[*17]** used by Professor Cotterill measures the impact of the Dean-Suiza merger rather than the alleged anti-competitive conduct. More specifically, they argue that Professor Cotterill's primary damages model compares actual prices during the relevant period to what he estimates prices would have been if the Dean-Suiza merger had not occurred. [4] Professor Cotterill's alternative damages models built on what defendants see as a flawed primary

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market. The Court agrees with Plaintiffs that it is not entirely clear that the case involved such claim. It is clear, however, that the complaint alleged a "conspiracy to restrain trade and/or **[*14]** to monopolize" in violation of *§ 2* of the Sherman Act but the Sixth Circuit does not further expand upon the matter.

model and also estimates the impact of individual plant closings, which defendants argue are not anti-competitive. Furthermore, Defendants argue that even if there were a conspiracy to lessen competition for sales of processed milk, Plaintiffs cannot show that such a conspiracy injured Food Lion because the prices Food Lion paid Dean for processed milk were determined pursuant to a negotiated formula, the components of which were based on objective factors having nothing to do with the alleged anti-competitive behavior. Thus, they argue that any increased prices to Food Lion occurred "by reason of" the negotiated formula, not any alleged anti-competitive behavior.

Plaintiffs' response is predictable. They generally argue that Professor Cotterill's opinions, using reliable and widely accepted methodology, properly establish both injury and damages. In response to Defendants' specific claim that Professor Cotterill is measuring damages caused by the Dean-Suiza merger, Plaintiffs respond that Professor Cotterill "is comparing the before period with the conspiracy period," and they define the "before" period as the period of time immediately before the merger. Plaintiffs spend a good part of their response on an argument that a methodology comparing the period before the alleged conspiracy with the conspiracy period is an accepted methodology. As the Court understands it, Defendants do not quarrel with the methodology itself. While acknowledging that customers like Breto and Food Lion purchase through negotiated list prices, they argue that everyone who purchases milk, whether through negotiated prices or otherwise, suffers harm when parties succeed in conspiring **[*19]** to fix prices and they point to Professor Cotterill's opinion that formula pricing did not insulate Food Lion and Breto from overcharges.

On the issue related to Professor Cotterill, this Court agrees with the Defendants. While Defendants insist that Professor Cotterill has not measured impact caused by the merger, Professor Cotterill himself acknowledged, as Defendants point out, that that is precisely what he did. Professor Cotterill testified in his deposition that his task was "to analyze whether in fact the creation of NDH [through the merger] and the assertion [to DOJ] that there would be economies of size and lower prices through efficiencies generated by that creation from January 1, 2002 going forward [*i.e.* from merger], whether that in fact was true or not . . ." [Doc. 1149, Ex. 12, Cotterill depo. April 12, 2010, p. 267 ll. 15-20]. Professor Cotterill's expert report is even clearer. He states in that report that "the model I estimate is similar to the approach employed by the Department of Justice in its analysis of potential anticompetitive effects from the 2001 Dean-Suiza ***merger.***" [Cotterill report, March 5, 2010, ¶ 114] (emphasis added). Further, he stated that "the DOJ **[*20]** used this model to estimate the price impact of the proposed merger between Dean and Suiza, finding a predicted average price increase of six cents per gallon, or 2.5%, for affected Suiza customers in the sixteen state region analyzed. The application in this litigation is largely the same . . ." [*Id.*].

Thus, in this Court's view, it is largely beyond question that Professor Cotterill has measured the price impact of the merger itself and it is inescapable that the price increases he identifies as injury to the Plaintiffs in this case are related, if not totally, then at least in part, to the merger itself, conduct which is not challenged in this case. Further, it appears to the Court that Professor Cotterill cannot, and did not, measure how prices would have increased in the absence of a conspiracy. He simply compared pre-merger prices to post-merger prices. In short, Professor Cotterill's analysis does not create a material issue of fact on the question of whether the price increases were "by reason of" an illegal conspiracy in violation of the antitrust laws and Plaintiffs do not allege an injury of the kind which the antitrust laws are designed to prevent. [5]

Because Plaintiffs cannot establish antitrust injury, i.e., there is not a genuine issue for trial on the issue, Counts I and V fail and defendants are entitled to summary judgment as to Counts I and V on this basis alone. [6]

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[4] The Dean-Suiza merger closed in December 2001. The instant lawsuit was filed in August, **[*18]** 2007. Plaintiffs have expressly disclaimed any legal challenge to the merger, clearly recognizing that such a challenge is time barred by the four year limitations period of *15 U.S.C. § 15b*.

[5] Professor Cotterill **[*21]** himself appears to admit that the required causal connection is not present in his analysis. *See* [Doc. 1149, Ex. 12, at p. 66, ll. 13-14].

[6] As a result of the Court's ruling with respect to Professor Cotterill's expert opinions and the absence of any genuine issue of fact related to antitrust injury, the Court will not consider the other argument made by defendants, that is, that the prices Food

B. Relevant Geographic Market

The Court has previously stated that "Plaintiffs allege a horizontal agreement among Dean, DFA and NDH to lessen competition for sales of processed milk to retailers in the southeast and, in fact, not to compete for such sales." [Doc. 863 at 8]. Plaintiffs describe the conspiracy as a *quid pro quo* agreement between Dean and DFA (they allege that NDH was a false competitor controlled **[*22]** by DFA) in which Dean agreed to buy raw milk only from DFA in exchange for DFA's agreement to lessen competition in the bottled milk market. They further claim that full supply agreements were the "means by which Dean paid off DFA for NDH's participation in the conspiracy." [Doc. 1128 at 2]. The Court has previously held that Plaintiffs lack standing to challenge these raw milk agreements and has dismissed Count II on that basis, [*see* Doc. 863], but plaintiffs continue to see these agreements as being at "the heart" of their Count I conspiracy claims. The Court has previously held and now reaffirms that the evidence as a whole creates genuine issues of material fact as to whether Defendants entered into the alleged agreement.

Defendants argue, however, in this motion that Plaintiffs' Count I claim, no matter how it is characterized or labeled by Plaintiffs, is in reality, not a claim of a horizontal, *per se* illegal conspiracy, but rather a claim of an illegal conspiracy involving contracts between firms at different levels of the distribution chain — i.e. between a bottler of processed milk and a supplier of raw milk (Dean and DFA) which is essentially vertical in nature and subject **[*23]** to the rule of reason analysis. Because Plaintiffs cannot prove a relevant geographic market, Defendants argue that the conspiracy claim — Count I — fails. Plaintiffs respond that the conspiracy, if proven, is *per se* unlawful and no proof of a geographic market is required. They claim, alternatively, that even if the case were judged under the rule of reason standard, there is evidence of the appropriate geographic market.

Given this Court's ruling with respect to Professor Froeb's testimony, Plaintiffs cannot prove the relevant antitrust geographic market. If, therefore, the case is judged by the *per se* standard, the case must be submitted to the jury for resolution of the fact question of whether Defendants engaged in the alleged conspiracy. If, on the other hand, the case is judged by the rule of reason standard, Defendants are entitled to summary judgment because there is no genuine issue of fact as to the relevant geographic market. The question of whether the alleged conspiracy is horizontal and *per se* illegal or essentially vertical and judged under the rule of reason standard is, therefore, a critical one for Plaintiffs. Many of the issues related to this question have been **[*24]** considered and decided in relation to summary judgment motions in the coordinated case of the dairy farmer plaintiffs and the Court's analysis in that case, much of which is incorporated herein, is set out in Doc. 1639.

HN6[] *Section 1* of the Sherman Act provides in pertinent part:

> [e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal.

15 U.S.C. § 1. While *§ 1* appears to prohibit every restraint of trade, the Supreme Court has interpreted the statute as condemning only those combinations which constitute unreasonable restraints of trade. *Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. In order to establish their claim under *§ 1* of the Sherman Act, the Plaintiffs must prove that the Defendants "(1) participated in an agreement that (2) unreasonably unrestrained trade in the relevant market." *Nat'l Hockey League Players' Assoc. v. Plymouth Whalers Hockey Club, 325 F.3d at 712, 718 (6th Cir. 2003)*.

HN7[] Whether an agreement unreasonably restrains trade is determined under one of two approaches: the *per se* rule or the rule of reason. *Worldwide Basketball and Sport Tours, Inc. v. National Collegiate Athletic Association, 388 F.3d 955, 959 (6th Cir. 2004)*. **[*25]** In *per se* cases, evidence of actual effect on competition is not required because these actions are conclusively presumed to be unreasonable. *Copperweld Corp. v Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*; *Northern Pacific Railway Company v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. A restraint on trade is *per se* illegal when "the practice facially appears to be one that would almost always tend to restrict competition and decrease output."

Lion paid Dean for processed milk were determined pursuant to a negotiated formula and thus Plaintiffs cannot show that a conspiracy, even if it existed, injured Plaintiffs.

National Collegiate Athletic Association v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (citations omitted).

HN8[] Examples of practices which are *per se* illegal are horizontal price fixing, market allocation, group boycotts or tying arrangements, activities which are considered inherently anti-competitive. *Copperweld Corp., 467 U.S. at 768*; *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*; *Northern Pacific Railway Company, 356 U.S. at 5-6*. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 1522-23, 99 L. Ed. 2d 808 (1988)*. **[*26]** There is often no bright line separating *per se* from rule of reason analysis. *NCAA, 468 U.S. at 104, n.26*.

HN9[] A *per se* rule is inappropriate where the effects of a particular restraint are unclear, even where aspects of the restraint may appear to be facially anti-competitive. *Meijer, Inc. v Barr Pharmaceuticals, Inc., 572 F. Supp.2d 38, 47 (D.D.C. 2008)*. *Per se* analysis should not be extended "to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious . . . ." *Balmoral Cinema, Inc. v Allied Artists Pictures Corp., 885 F.2d 313, 316 (6th Cir. 1989)* (quoting *FTC v Indiana Federation of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*.

Furthermore, ***HN10***[] "there is a presumption in favor of a rule-of-reason standard," *Business Electronics, 485 U.S. at 726*. *See also* *Care Heating & Cooling, Inc. v. American Std., Inc. 427 F.3d 1008, 1012 (6th Cir. 2005)* ("There is an automatic presumption in favor of the rule of reason standard."). Under the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of "produces significant anticompetitive effects within the relevant product and geographic markets." **[*27]** *NHL Players' Assoc., 325 F.3d at 718*; *Worldwide Basketball and Sport Tours, 388 F.3d at 959* (quoting *Nat'l Hockey League Players, 325 F.3d at 718*)).

At the hearing on the supplemental motion for summary judgment on December 16, 2010, the Court posed a question to the parties — i.e., whether the question of whether the alleged conspiracy is one subject to *per se* analysis or one subject to rule of reason analysis is a question for a jury or the Court. By letter brief filed on December 30, 2010, [Doc. 1222], plaintiffs argue that the Court cannot, as a matter of law, determine whether *pro se* or rule of reason analysis applies to the case, relying almost exclusively on *In re Sulfuric Acid Antitrust Litigation, 743 F.Supp.2d 827, (N.D. Ill. 2010)*, a case where defendants asked the court to hold that rule of reason analysis applied and the district court declined to do so, holding that "[it] is not the Court's task to determine whether Defendants' conduct would be subjected to the rule of reason if the facts are as they claim." *Id. at 866-67*. The court found that the evidence presented an issue of fact as to whether a *per se* violation had occurred, *e.g.* whether certain defendants "stood in **[*28]** a horizontal, vertical, or hybrid relationship with co-defendants." *Id. at 868*.

Defendants responded to Plaintiffs' letter brief, [Doc. 1244], arguing that *Sulfuric Acid* has no application because here, unlike that case, there are no disputed issues of fact to be decided. They argue, on the contrary, that the case presents a "classic rule of reason case" based on "Plaintiffs own allegations." [*Id.* at 2]. In other words, Defendants argue that Plaintiffs' own view of the case establishes that the case is subject to rule of reason analysis. They also argue that whether Plaintiffs "*quid pro quo*" agreement should be evaluated under the rule of reason analysis is a question of law for the Court.

The question of the appropriate rule of law to be applied to the conspiracy alleged by the Plaintiffs in their complaint is to be determined by the Court or is a question of fact for the jury has not been precisely answered in the Sixth Circuit. This Court concludes, however, the *Sulfuric Acid* decision notwithstanding, that the weight of authority supports Defendants' argument that determination of the appropriate rule of law to be applied is a question of law to be decided by the Court and that approach **[*29]** also appears to be consistent with the Sixth Circuit's application of the legal rules involved.

A leading antitrust treatise recognizes that the selection of the mode of analysis is a question of law for the court:

> ***HN11***[] While applying any one of antitrust's modes of analysis might involve many fact questions, the selection of a mode is entirely a question of law. To be sure, the Supreme Court stated in *Maricopa* that "the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." But that statement was not meant to indicate that the fact finder should determine whether the *per se* rule or the rule of reason applied to a particular set of facts. Rather, it meant that once the court decided that the rule of reason should apply, disputed factual questions about reasonableness should be left to the jury. In a footnote the court made clear that determining the rule of decision was a question of law.

*XI Herbert Hovencamp, **Antitrust Law*** ¶ 1909b at 279 (2d Ed. 2005) (citing *Perceptron, Inc. v. Sensor Adaptive Machs., Inc., 221 F.3d 913 (6th Cir. 2000))*. This statement is also consistent with **[*30]** decisions of the Sixth Circuit. For instance, in *Expert Masonry, Inc. v. Boone County, Kentucky, 440 F.3d 336 (2006)*, the Sixth Circuit said: ***HN12***[] "In the first instance, ***courts*** must distinguish between some types of unlawful anticompetitive restraints that [are] . . . *per se* illegal under the antitrust laws, and the far-larger type of restraints that should be analyzed under the rule of reason approach . . . ."). *Id. at 342* (emphasis added). Likewise, in *United States v. Cooperative Theatres of Ohio, Inc., 845 F.2d 1367 (6th Cir. 1988)*, although a criminal case, the district court held as a matter of law that the alleged conduct constituted a *per se* violation of the Sherman Act, a ruling affirmed by the Sixth Circuit. *See also Care Heating & Cooling, Inc. 427 F.3d at 1012* ("if a court determines that a practice is illegal *per se*, further examination of the practice's impact on the market or the procompetitive justifications for the practice is unnecessary for finding a violation of ***antitrust law***," suggesting that the decision as to whether a practice is illegal *per se* is one committed to the court).

The approach is likewise consistent with that taken by the United States Supreme Court and **[*31]** other circuit courts of appeals. ***HN13***[] The Supreme Court has repeatedly noted that the *per se* rule should be applied to conduct only after ***courts*** have had "considerable experience with certain business relationships." *United States v. Topco Associates, Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. Since it seems quite clear that the *per se* rule should be applied to conduct only after it has been examined carefully by the courts, not juries, it also seems rather clear that the question of whether allegedly unlawful conduct is subject to *per se* analysis or rule of reason analysis is a legal question for the court, not a question for the jury. *See also Northern Pacific Railway Company, 356 U.S. at 5* (suggesting that the court must first determine whether the conduct alleged to be unlawful is the type of conduct that has a "pernicious effect on competition and lacks any redeeming virtue . . .," to be considered illegal *per se*); *Copy-Data Systems, Inc. v. Toshiba America, Inc., 663 F.2d 405 (2d Cir. 1981)* (where the district judge had held, after hearing argument from both sides, that Toshiba had imposed a horizontal, illegal *per se* territorial restriction on Copy-Data, a holding reversed by the Second Circuit **[*32]** on appeal as a matter of law).

It is beyond question that Plaintiffs present their claim as a horizontal, *per se* illegal conspiracy to restrain trade and fix prices on the part of the Defendants, [*see* Complaint, Doc. 87, ¶ 162], arguing only alternatively that the agreements at issue violate *§ 1* of the Sherman Act under rule of reason analysis. In addition, Plaintiffs have repeatedly referred to their claim as a horizontal, *per se* claim in their pleadings and at oral argument. The labels attached to the conduct by the Plaintiffs are not determinative, however, i.e. that Plaintiffs repeatedly state that the conspiracy they allege is a horizontal, *per se* illegal conspiracy to fix prices and allocate markets does not make it so. In fact, the Supreme Court has recognized just that. *See California Dental Ass'n. v. Federal Trade Commission, 526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*.

HN14[] The Sixth Circuit has succinctly defined the two major types of antitrust conspiracies as follows:

> Courts have identified two major types of antitrust conspiracies to restrain trade: horizontal and vertical. *Crane & Shovel Sales Corp. v Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988)*. Horizontal conspiracies involve agreements among **[*33]** competitors at the same level of market structure to stifle trade, such as agreements among manufacturers or among distributors to fix prices for a given product, and therefore may constitute *per se* violations of ***antitrust law***. *Id.*; *see also Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978)*. Vertical conspiracies, on the other hand, involve agreements among actors at different levels of market

> structure to restrain trade, "such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market." *Crane & Shovel Sales Corp., 854 F.2d at 805*.

Care Heating & Cooling, 427 F.3d at 1013. Vertical restraints are analyzed under the rule of reason. *Id.* (citing *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57-58, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977))*. To the extent there was any lingering doubt about whether vertical restraints are subject to *per se* or rule of reason analysis, that suggestion was quashed by the United States Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (vertical restraints to be judged according to the rule of reason). *See also* *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield, 552 F.3d 430 (6th Cir. 2008)*.

HN15[] As **[*34]** an initial matter then, the Court must determine whether or not the agreement alleged by the plaintiffs is horizontal in nature, which may constitute a *per se* violation of ***antitrust law***, or vertical in nature, which must be analyzed under the rule of reason. In making this determination, as set forth above , the labels used by the plaintiffs are largely irrelevant and the decision will be made against a backdrop of several well established principles. First of all, "[t]here is an automatic presumption in favor of the rule of reason standard." *Care Heating & Cooling, 427 F.3d at 1012* (citing *Business Electronics Corp., 485 U.S. at 726*; *Continental T.V., Inc., 433 U.S. at 49*). Secondly, the category of agreements to be analyzed under a *per se* analysis has been shrinking over the last few years. *See* *Leegin.* Finally, the *per se* rule should be applied only in "clear cut cases" of trade restraints that are so unreasonably anticompetitive that they present straightforward questions for reviewing courts. *NHL Players Assoc., 325 F.3d at 718* (citing *Sylvania, 433 U.S. at 49-50*). *See also* *Balmoral Cinema, 885 F.2d at 316* ("*per se* analysis should not be extended 'to restraints imposed in the context **[*35]** of business relationships where the economic impact of certain practices is not immediately obvious . . . .'").

As noted above, the essence of Plaintiffs' conspiracy claim is a *quid pro quo* agreement between competitors at the same level of the distribution chain (Dean and NDH) almost totally carried out through the use of agreements involving the supply of raw milk among a group of firms at other levels of the distribution chain (Dean and DFA, NDH and DFA). At oral argument, Plaintiffs presented the Court with a chart illustrating their claim which showed a triangular relationship with Dean and NDH as horizontal competitors and DFA in a vertical relationship to both Dean and NDH. Plaintiffs suggest that two horizontal competitors, Dean and NDH, "are central to the argument" while at the same time arguing that it is the full supply agreements for raw milk between vertical actors that are "at the heart" of their claims.

Plaintiffs equate the arrangement among the firms sued here with those in *In re Pressure Sensitive Label Stock Antitrust Litigation, 2007 U.S. Dist. LEXIS 85466, 2007 WL 4150666 (M.D. Pa. 2007)* (not reported in F.Supp.2d) and argue that the court there rejected the "exact same arguments" Defendants **[*36]** make in this case. In a footnote in that opinion, deciding a class certification motion, the district judge noted that Defendants had argued at oral argument that the agreement in question was not a horizontal agreement. As the Court understands the parties in that case, the plaintiffs, in the business of processing and converting pressure sensitive label stock ("PSL"), sued defendants, PSL producers, for conspiring "to fix, raise, maintain or stabilize prices for self-adhesive label stock . . . and to allocate and restrict output in the market for self-adhesive label stock sold in the United States." *2007 U.S. Dist. LEXIS 85466, [WL] at *1*.

One of the defendants ("UPM") was a paper supplier as well as the owner of another defendant ("Raflatac"), a PSL producer. Avery, another PSL producer, competed with Raflatac, and also had a contract with Raflatac's parent, UPM, to supply paper to Avery. The gist of the alleged illegal agreement challenged was that Avery would purchase large quantities of paper stock from UPM in consideration of UPM agreeing to refrain from competing with Avery in the PSL market through Raflatac. Thus, the paper supply agreement was a critical element of plaintiffs' antitrust claims. Defendants **[*37]** claimed that the antitrust arrangement was a dual distribution arrangement, not a horizontal agreement. The district court rejected that position, finding that "the agreement was between competitors and, therefore, horizontal," *2007 U.S. Dist. LEXIS 85466, [WL] at *12*, FN7. The instant case, Plaintiffs argue, "mirrors *Pressure Sensitive*," and they characterize the arrangement as "3-way agreement trading vertical supply for horizontal non-competition."

Defendants here do not claim the arrangement among Dean, NDH and DFA is a dual distribution arrangement. They claim rather that the substantial vertical elements of the agreement challenged here make the case analogous to cases decided under the rule of reason. It is for this reason that the Court does not find *Pressure Sensitive* to be particularly helpful in resolving this question. The district judge in *Pressure Sensitive*, while noting that the paper supply agreement between UPM and Avery was a critical element of the alleged conspiracy, apparently never considered the nature of the agreement in the terms posed by Defendants here.

The issue presented here is a difficult one. On the one hand, Plaintiffs' argue that the essence of the agreement here is that two horizontal **[*38]** competitors, Dean and NDH, are central and that the agreement should therefore be subjected to *per se* analysis. On the other hand, Plaintiffs also allege that NDH is a false competitor, completely controlled by DFA, and that the full supply agreements for raw milk are at the heart of their claims. In reality, it appears to the Court that the essence of the agreement alleged by the Plaintiffs is one between Dean in its role as a processor of bottled milk and DFA in its role as a supplier of raw milk and that the milk supply agreements for raw milk are central to the completion of the alleged conspiracy. Under these circumstances, the Court agrees with Defendants that the agreement has substantial vertical elements such that the alleged agreements challenged by Plaintiffs ought to be subject to the rule of reason analysis, requiring that Plaintiffs establish the relevant geographic antitrust market, something they cannot do. For this reason, Defendants are entitled to summary judgment as to Count I of Plaintiffs' complaint.

So ordered:

ENTER:

/s/ J. RONNIE GREER

UNITED STATES DISTRICT JUDGE

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Rubloff Dev. Group, Inc. v. SuperValu, Inc.

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

March 27, 2012, Decided; March 27, 2012, Filed

Case No. 10 C 3917

Reporter

863 F. Supp. 2d 732 *; 2012 U.S. Dist. LEXIS 41304 **; 2012-1 Trade Cas. (CCH) P77,842

RUBLOFF DEVELOPMENT GROUP, INC., RUBLOFF MUNDELEIN LLC, McVICKERS DEVELOPMENT, LLC, McVICKERS NEW LENOX, LLC, McVICKERS COOPER, LLC, McVICKERS HICKORY CREEK, LLC, McVICKERS TONNELL, LLC, McVICKERS WILLIAMS, LLC, Plaintiffs, v. SUPERVALU, INC., d/b/a JEWEL-OSCO, and THE SAINT CONSULTING GROUP, INC., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *Rubloff Dev. Group, Inc. v. Supervalu, Inc., 2013 U.S. Dist. LEXIS 15239 (N.D. Ill., Feb. 5, 2013)*

Prior History: *Rubloff Dev. Group, Inc. v. St. Consulting Group, Inc., 2011 U.S. Dist. LEXIS 70929 (N.D. Ill., June 30, 2011)*

Core Terms

antitrust, documents, lawsuit, conversion, shopping center, misrepresentation, Plaintiffs', grocery store, landowners, motion to dismiss, Defendants', allegations, anti trust law, confidential, damages, induced, tortious interference, fiduciary duty, anticompetitive, sham, wire, immunity, cause of action, trade secret, competitor, customer, copies, counts, mail, dismissal without prejudice

LexisNexis® Headnotes

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

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

On a motion to dismiss, all of a plaintiff's and counter-plaintiff's allegations are treated as true. *Fed. R. Civ. P. 12(b)(6)*. Complaints and counter-complaints will survive a motion to dismiss if they contain sufficient factual matter to state a claim to relief that is plausible on its face. However, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN2[] **Heightened Pleading Requirements, Fraud Claims**

Claims of fraud are subject to a heightened pleading standard, requiring a pleader to state with particularity the circumstances of fraud. *Fed. R. Civ. P. 9(b)*.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN3[] **Standing, Requirements**

The statutory language allowing private prosecution of antitrust laws is construed to limit the bringing of such action to (1) those who have suffered the type of injury antitrust laws were intended to prevent and (2) those whose injuries are a result of the defendants' unlawful conduct. The former is commonly referred to as antitrust injury and the latter as antitrust standing. Judicial precedent outlines several factors to be considered in determining whether a plaintiff is the proper party to bring a private action under the antitrust laws: (1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the nature of the plaintiff's injury and the relationship between the plaintiff's injury and the type of activity sought to be redressed under the antitrust laws; and (3) the speculative nature of the plaintiff's claim for damages and the potential for duplicative recovery or complex apportionment of damages.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN4[] **Standing, Requirements**

Where a more directly injured class of potential antitrust plaintiffs exists, courts are left with very little leeway to address the likelihood of whether any members of that class would actually bring suit.

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

HN5[] **Regulated Practices, Private Actions**

The antitrust laws protect competition, not competitors.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Private Actions, Remedies**

Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. There is a proximate cause element. Plaintiffs must prove antitrust injury, which is to say one that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Private Actions, Remedies**

Antitrust actions require that the plaintiffs allege an injury to the public, not just themselves.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN8[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine extends absolute immunity from antitrust laws to businesses and other associations when they join together to petition legislative bodies, administrative agencies or courts for action that may have anticompetitive effect. This is particularly true when part of the petitioning is a publicity campaign directed at the general public and seeks legislative or executive action. These efforts enjoy antitrust immunity even when the campaign employs unethical and deceptive methods.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN9[] **Noerr-Pennington Doctrine, Sham Exception**

Where adjudicative petitioning is concerned fraudulent representations can destroy Noerr-Pennigton immunity.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN10[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

There are two branches of the exception to the Noerr-Pennigton doctrine in regards to litigation: (1) sham lawsuits; and (2) fraudulent misrepresentations.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN11[] **Noerr-Pennington Doctrine, Sham Exception**

A misrepresentation renders an adjudicative proceeding a sham for purposes of the Noerr-Pennington doctrine only if the misrepresentation (1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered the outcome of the proceeding. Although successful petitioning activity may not, as a general matter, be deemed a sham, the fraud exception can remove that immunity if success is achieved by means of intentional falsehoods. If the government's action was not dependent upon the misrepresented information, the misrepresented information was not material.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN12[] **Noerr-Pennington Doctrine, Sham Exception**

As to the sham lawsuit branch of the exception to the Noerr-Pennington doctrine, the lawsuits must first be objectively meritless before any exploration of subjective intent can be undertaken. A successful action, by definition, cannot be objectively meritless. Only if a court makes the determination that a lawsuit was objectively meritless may it then inquire into the plaintiff's subjective intent in an exploration of whether the intent was not to win, but to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN13[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine does not apply when conduct is not geared toward the petitioning of government.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN14[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Although the Noerr-Pennington doctrine originated in ***antitrust law***, its rationale is equally applicable to RICO suits.

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN15[] **Private Actions, Standing**

RICO standing is an easier standard to meet than antitrust standing. For instance, injury that is not necessarily anticompetitive injury is sufficient under RICO. But RICO standing is still a hurdle greater than mere U.S. Const. art. III standing, and requires a proximate cause analysis because the language of *18 U.S.C.S. § 1964(c)* provides treble damages. Every court that to address this issue holds that injuries proffered by plaintiffs in order to confer RICO standing must be concrete and actual, as opposed to speculative and amorphous.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Statute of Limitations

HN16[] **Racketeer Influenced & Corrupt Organizations, Statute of Limitations**

A cause of action does not accrue under RICO until the amount of damages becomes clear and definite.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN17[] **Racketeer Influenced & Corrupt Organizations, Claims**

While dismissal of a RICO claim is appropriate if the plaintiff fails to allege sufficient facts to state a claim that is plausible on its face, the adequate number of facts varies depending on the complexity of the case.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN18[] Claims, Fraud

Allegations of fraud in a civil RICO claim are subject to the heightened pleading standard set forth in *Fed. R. Civ. P. 9(b)*, which requires particularity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN19[] Private Actions, Racketeer Influenced & Corrupt Organizations

Under RICO, a plaintiff must prove four elements: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

HN20[] Wire Fraud, Elements

An act of wire fraud requires a showing that (1) the defendants participated in a scheme to defraud; (2) the defendants intended to defraud; and (3) the defendants used wires in furtherance of the fraudulent scheme.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN21[] Claims, Fraud

A scheme to defraud requires the making of a false statement or material misrepresentation, or the concealment of material fact. A plaintiff must allege a situation in which someone was misled or fraudulently induced to engage in activity to their detriment. Not all questionable conduct is a scheme or artifice to defraud as those terms are used in the mail and wire fraud statutes. A misrepresentation is material if it has the natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed. The United States Court of Appeals for the Seventh Circuit has repeatedly rejected RICO claims that rely so heavily on mail and wire fraud allegations to establish a pattern.

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN22[] Fraud Against the Government, Mail Fraud

The wire and mail fraud statutes are incredibly broad, and require only a willful act by the defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for oneself or causing financial loss to another.

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

HN23[] Intentional Interference, Elements

To state a claim for tortious interference with prospective economic advantage, a plaintiff must allege (1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from the defendant's interference.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > Intentional Torts > Abuse of Process > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN24[] Intentional Interference, Defenses

As with antitrust issues, the Noerr-Pennington doctrine provides immunity for economic advantage interference that comes as part of a petitioning of government. Illinois, for policy reasons, does not recognize the filing of a lawsuit, even a baseless one, as grounds for a tortious interference suit. The only proper cause of action based on the filing of a lawsuit is either malicious prosecution or abuse of process.

Torts > Intentional Torts > Abuse of Process > Elements

HN25[] Abuse of Process, Elements

The only elements necessary to plead a cause of action for abuse of process are: (1) the existence of an ulterior purpose or motive and (2) some act in the use of legal process not proper in the regular prosecution of the proceedings.

Torts > Intentional Torts > Abuse of Process > Elements

HN26[] Abuse of Process, Elements

In order to satisfy the first element of an abuse of process claim, a plaintiff must plead facts that show that the defendant instituted proceedings against him for an improper purpose, such as extortion, intimidation, or embarrassment. In order to satisfy the second element, the plaintiff must plead facts that show a misapplication of process, or, in other words, the plaintiff must show that the process was used to accomplish some result that is beyond the purview of the process. When process is used only for its intended purpose, there has been no misapplication of process.

Torts > Intentional Torts > Abuse of Process > General Overview

HN27[] Intentional Torts, Abuse of Process

Process is not used in the context of an abuse of process claim in the general sense, as in the legal process of suing someone, prosecuting the case, receiving judgment, etc. Rather it is used in the literal, legal sense of something issued by the court. Process is issued by the court, under its official seal and must be distinguished from pleadings, which are created and filed by the litigants.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN28[] Actual Fraud, Elements

Common law fraud requires (1) a false statement of material fact; (2) the party making the statement knew or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement; (4) the party to whom the statement was made did rely on the statement; (5) the statement was made for the purpose of inducing the other party to act; and (6) the reliance by the person to whom the statement was made led to that person's injury.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN29[] Heightened Pleading Requirements, Fraud Claims

Claims of common law fraud are also subject to the heightened pleading standards of *Fed. R. Civ. P. 9(b)*.

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

HN30[] Breach of Fiduciary Duty, Elements

A predicate to any liability based on a theory of an inducement of a breach of a fiduciary duty is the existence of a fiduciary duty in the first instance. If that duty exists, the elements of the inducement claim require alleging the third party (1) colluded with the fiduciary in committing a breach of duty; (2) induced or participated in such breach; and (3) obtained the benefits resulting from the breach of duty.

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN31[] Intentional Torts, Breach of Fiduciary Duty

Claims based on breach of fiduciary duty stand or fall with those based on contract.

Contracts Law > Defenses > Public Policy Violations

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN32[] Defenses, Public Policy Violations

Illinois views postemployment restrictive covenants that insist on absolute secrecy of any and all information as unreasonable and unenforceable because a person is allowed to make a living, and cannot possibly not utilize any information from his past job.

Contracts Law > Defenses > Public Policy Violations

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN33[] **Defenses, Public Policy Violations**

The Illinois Supreme Court clarified that the test of enforceability is more than an examination of time and geography restrictions or other rote lists. Instead, its reasonability is a totality-of-the-circumstances question, judged by whether the covenant (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public. Time and geography restrictions may also be examined.

Torts > ... > Contracts > Intentional Interference > Elements

HN34[] **Intentional Interference, Elements**

The tort of interference with a contract requires, as its first element, a valid contract.

Torts > Intentional Torts > Conversion > Elements

HN35[] **Conversion, Elements**

To prove conversion, a plaintiff must establish that (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property.

Torts > Intentional Torts > Conversion > General Overview

HN36[] **Intentional Torts, Conversion**

Parties may recover for conversion of intangible assets. Once confidential information is released to competitors, it hardly can be said that the data is still confidential. Thus, the original owner would be deprived of the benefit of the information.

Torts > Intentional Torts > Conversion > General Overview

HN37[] **Intentional Torts, Conversion**

Copies of documents, rather than the documents themselves, should not ordinarily give rise to a claim for conversion. The reason for this rule is that the possession of copies of documents, as opposed to the documents themselves, does not amount to an interference with the owner's property sufficient to constitute conversion.

Torts > Intentional Torts > Conversion > General Overview

HN38[] **Intentional Torts, Conversion**

The law is clear that intangible property can be converted. But the cases indicate that that intangible property must have some value in terms of confidentiality, trade secrets, proprietary business information or the like.

Civil Procedure > Remedies > Provisional Remedies > Replevin

HN39[] **Provisional Remedies, Replevin**

An action for replevin may be brought to recover wrongfully detained goods or chattels. A replevin action cannot be maintained until a counter-claimant has made a demand for the surrender of the property and the defendant has refused. At trial, a counter-claimant must prove the defendant is wrongfully detaining the property. The property must be described in sufficient detail to distinguish it from similar chattels and a counter-claimant must state that he is the owner of the property or is otherwise entitled to lawful possession of it.

Counsel: **[**1]** For Rubloff Development Group, Inc., Rubloff Mundelein LLC, McVickers Development LLC, McVickers New Lenox LLC, McVickers Cooper LLC, McVickers Hickory Creek LLC, McVickers Tonnell LLC, McVickers Williams LLC, Plaintiffs: Thomas James Frederick, LEAD ATTORNEY, Cornelius Moore Murphy, Dana E Schaffner, Joanna C. Wade, Renee Ourania Sotos, Winston & Strawn LLP, Chicago, IL.

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For The Saint Consulting Group, Inc., Defendant: Craig Allen Knot, LEAD ATTORNEY, Caroline Lee Schiff, David Max Layfer, Gregory H. Furda, Michelle Alyce Ramirez, Sidley Austin LLP, Chicago, IL.

For The Saint Consulting Group, Inc., ThirdParty Plaintiff: Craig Allen Knot, Sidley Austin LLP, Chicago, IL.

For Leigh Mayo, Third Party Defendant: James B. Zouras, Ryan F Stephan, LEAD ATTORNEYS, Andrew C. Ficzko, Stephan Zouras, LLP, Chicago, IL.

Judges: Hon. Harry D. Leinenweber, United States District Judge.

Opinion by: Harry D. Leinenweber

Opinion

[*737] **MEMORANDUM OPINION AND ORDER**

Before the Court are Defendants' Motions to Dismiss Plaintiffs' **[**2]** Consolidated Complaint, and the Consolidated Motion of the two Rubloff entities to dismiss the Counter-Complaint of Defendant The Saint Consulting Group (hereinafter, "Saint"). For the following reasons, the Defendants' Motions to Dismiss are granted and the Rubloff entities' Motion to Dismiss is denied in part and granted in part.

I. BACKGROUND

At the heart of this case is the battle for grocery shoppers' dollars in suburban Chicago. Plaintiffs develop shopping centers and say Defendants used sneaky and underhanded tactics to try to kill or delay their developments, which would have included grocery stores that compete with Defendant SuperValu, Inc. ("SuperValu").

Plaintiffs brought actions alleging federal and state antitrust violations, RICO violations, tortious interference with prospective economic advantage, common law fraud, abuse of process and conspiracy to commit overt tortious and unlawful acts.

Defendants do not really deny they were sneaky, but claim being sneaky is legal under the Constitution. Defendant Saint brings Counterclaims against the two Rubloff entities, contending these Plaintiffs paid a former Saint employee to hand over confidential information, which exposed **[**3]** their underhanded tactics. Saint alleges inducement of breach of fiduciary duty, conversion, replevin, tortious interference with contractual relations and misappropriation of trade secrets.

A. The Parties

Plaintiff Rubloff Development Group, Inc. ("Rubloff Development") is a Rockford, Illinois corporation. Plaintiff Rubloff Mundelein, LLC ("Rubloff Mundelein") is also in Rockford. (The Rubloff entities are referred to collectively as "Rubloff"). Rubloff develops commercial real estate, including shopping centers. All other Plaintiffs are collectively referred to as "McVickers," and have their primary place of business in Buffalo Grove, Illinois. They, too, develop commercial real estate.

Defendant SuperValu, Inc. ("SuperValu") is a Delaware corporation headquartered in Minnesota. It has interests in many grocery store chains, such as Albertson's, Jewel-Osco, Cub and others.

Defendant Saint is both incorporated in and has its principal place of business in Massachusetts. It is a consulting firm that advertises itself as "protect[ing] clients from unwanted competition" and touts its staff as "Walmart killers."

B. The Developments

Rubloff acquired a purchase option on a parcel near Mundelein, **[**4]** Illinois (the "Mundelein Development") that was annexed to the village in 2005. Rubloff planned to develop a shopping center, and signed an agreement with Menards to buy part of **[*738]** the parcel. It also reached an agreement "in principle" with Walmart for another portion of the parcel and signed lease agreements with several other big-name stores. Rubloff expected construction to start in 2007 and finish in 2008.

In December 2005, Rubloff began talking with landowners near the parcel as part of its development efforts. Rubloff contends these meetings were going along just swimmingly - that nearby landowners did not object to the development in principle - when it ran into a wall.

Several landowners retained the unfortunately named attorney William Graft ("Graft"), who began pressing certain objections to the development, both in hearings with the village and in court. Landowners objected to the loss of wetlands, possible grease and oil runoff from the parking lot, traffic congestion, landscaping plans, fencing, lighting and other concerns. Two groups of landowners (the "Acker" plaintiffs and the Ivanhoe Country Club "Ivanhoe") sued the Mundelein in the fall of 2007 in Lake County Circuit **[**5]** Court, alleging violations of due process rights in zoning approvals Mundelein had granted. These cases were consolidated. Ivanhoe also filed suit directly against Rubloff in January 2009, alleging nuisance and trespass against the not-yet-developed shopping center. The legal fight continued until January 2011, when Mundelein and Rubloff settled all three lawsuits, with Rubloff agreeing to certain redesigns and paying out a total of $200,000 to various plaintiffs.

The battles caused great delay and the Mundelein development is still not built, and may never be, according to Plaintiffs. Rubloff claims millions of dollars of expenses due to the delays and millions in lost profits.

Meanwhile, in New Lenox, Illinois, McVickers was also planning a shopping center (the "New Lenox Development"). It acquired 73 acres in 2005, and signed land sale contracts with Walmart and Menards. It also had lease or purchase agreements with Aldi Foods and many other big-name stores. Like Rubloff, it expected to break ground in 2007 and complete construction in 2008. It, too, ran into problems getting permits from New Lenox and the Illinois

Department of Transportation ("IDOT"). Its construction start was **[**6]** delayed until late 2009, forcing it to pay additional purchase option fees and suffer the loss of several stores. It also claims lost sales tax revenue due to the delays, and attributes Menards' indefinite delay in building on its parcel to the delays.

All of this bad fortune would likely have been attributed simply to the whim of NIMBY ("Not In My Backyard") residents had it not been for a man named Greg Olson ("Olson"). Or, more accurately, a man named Leigh Mayo ("Mayo"), which was Greg Olson's real name. Mayo contacted Rubloff co-founder Robert Brownson ("Brownson") in August 2009 and dropped a bombshell.

Mayo was an *agent provocateur* for Saint and used the pseudonym of Olson to organize local opposition to the Mundelein development. SuperValu had retained Saint in 2007 and Mayo, in turn, had engaged Graft to represent community landowners before the Mundelein Village board and in the state court proceedings. Plaintiffs allege community members were never told that Graft was actually being paid by SuperValu. Saint's practice was to have "project managers" like Mayo use pseudonyms, even employing e-mail accounts utilizing the pseudonyms.

Over the course of several meetings, Saint alleges, **[**7]** Brownson, a lawyer, learned that Mayo had signed a confidentiality agreement but nonetheless induced him (by paying Mayo) to turn over roughly 3,000 Saint documents. The documents **[*739]** revealed that Saint's avowed purpose was to delay or kill the development, and delays won at village hearings and in court were celebrated with glee. In one report to SuperValu, Saint boasted "the hearings under administrative review could take an enormous amount of time as court dockets are clogged and a Judge will allow us to present testimony for as long as we desire." Pl.'s Compl. 8. Attorney Graft celebrated delays as well, updating Saint on litigation progress and also reveling in delays. "Happy 1 year Anniversary, by the way. We cost these guys [Rubloff] a ton of money," he wrote to Saint. *Id.* at 14.

Other questionable tactics included the rewriting of expert reports for use in litigation, "backchannel" communications with a Lake County judge to try to get a read on how that litigation would turn out, and attorney Graft's failure to promptly forward settlement offers to his landowner clients, presumably as another delay tactic.

The exposure of these documents to public light in a *Wall Street Journal* **[**8]** article cost Saint at least one client, it alleges.

C. Procedural Background

Plaintiffs and Saint agreed to proceed to summary judgment on one count of Plaintiffs' First Amended Complaint, which sought a declaratory judgment that "no privilege, trade secret, or other protection exists" in the Saint documents Rubloff acquired. The Court reviewed the documents and ruled on June 30, 2011 on a declaratory judgment count that Saint's various contentions, including claims of confidential business information, were without merit. The one exception to this ruling was twelve pages dealing with an unrelated Hoffman Estates matter and attorney Graft. Saint claimed the same attorney-client privilege in regard to those twelve pages that it had in regard to Graft legal documents concerning the Mundelein development. The Court found no privilege as to the latter documents because Saint was not Graft's client (the landowners were), even if Graft had been paid by Saint or SuperValu. But because there was no evidence before the Court on whether a similar client arrangement existed in the Hoffman Estates matter, the Court presumed the documents were indeed privileged.

On September 15, 2011, the Court denied **[**9]** a motion to reconsider the summary judgment, despite Saint's contention that Rubloff was threatening further exposure of the documents to leverage a settlement.

II. LEGAL STANDARD

HN1[] On a motion to dismiss, all of a plaintiff's and counter-plaintiff's allegations are treated as true. *FED. R. CIV. P. 12(b)(6)*; *Wigod v. Wells Fargo Bank, N.A., No. 11-1423, 673 F.3d 547, 2012 U.S. App. LEXIS 4714, at *2 (7th Cir. March 7, 2012)*. Complaints and counter-complaints will survive a motion to dismiss if they contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. However, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id. at 1940*.

HN2[] Claims of fraud are subject to a heightened pleading standard, requiring a pleader to state with "particularity" the circumstances of fraud. *FED. R. CIV. P. 9(b)*.

III. DEFENDANTS' MOTIONS TO DISMISS

A. Antitrust Issues

1. Antitrust Standing and Injury

HN3[] The statutory language allowing private prosecution of antitrust laws has been construed to limit the bringing of such action to (1) those who have suffered the type of injury antitrust laws were **[**10]** intended to prevent **[*740]** and (2) those whose injuries are a result of defendants' unlawful conduct. *Serfecz v. Jewel Food Stores, 67 F.3d 591, 595 (7th Cir. 1997)* (hereinafter, *Serfecz II*). The former is commonly referred to as "antitrust injury" and the latter as "antitrust standing." *Kochert v. Greater Lafayette Health Servs., 463 F.3d 710, 716-719 (7th Cir. 2006)*. The Supreme Court has outlined "several factors to be considered in determining whether a plaintiff is the proper party to bring a private action under the antitrust laws: (1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the nature of the plaintiff's injury and the relationship between the plaintiff's injury and the type of activity sought to be redressed under the antitrust laws; and (3) the speculative nature of the plaintiff's claim for damages and the potential for duplicative recovery or complex apportionment of damages." *Serfecz II, 67 F.3d at 595-596* (*quoting* *Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 537-546, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*.

In *Serfecz II*, a shopping center owner (Serfecz) sued a grocery store chain, Jewel, and a shopping center under antitrust **[**11]** laws. Jewel had moved out of Serfecz's center to a nearby center, but refused to relinquish the empty store in Serfecz's center to prevent competition by a new tenant.

Because the alleged antitrust activity was monopolization of the grocery store market in the local area, the district court and appellate court found Serfecz had neither antitrust standing nor injury relative to the grocery store market. As neither a competitor nor customer of a grocery store, (Serfecz was deemed a supplier of lease space to grocery stores) Serfecz's injury (lost value to his shopping center) was too indirect to the antitrust activity alleged. *Serfecz II, 67 F.3d at 598*. He also had no antitrust standing because he was not the party who could most efficiently vindicate the purposes of the antitrust laws. *Id. at 598* (suggesting competing grocery stores or Jewel customers would have standing).

HN4[] "Where a more directly injured class of potential plaintiffs exists, we are left with very little leeway to address the likelihood of whether any members of that class would actually bring suit. While the result may be somewhat frustrating in this particular case, it does provide a straightforward rule of law." *Serfecz v. Jewel Food Stores, No. 92-C-4171, 1994 U.S. Dist. LEXIS 12239, at *27-28 (N.D. Ill. August 31, 1994)* **[**12]** (hereinafter, *Serfecz I*).

But when the antitrust activity was defined as an attempt to monopolize the retail shopping center market, the outcome was different. Serfecz had both antitrust standing and injury. In that instance, plaintiffs were "direct participants in this market." *Serfecz II, 67 F.3d at 599*; *Serfecz I, 1994 U.S. Dist. LEXIS 12239 at *33-34*.

Plaintiffs argue that, under *Serfecz II*, they too have standing when the market is framed as the retail shopping center market. This is true, and the Court finds Plaintiffs have the requisite antitrust standing in the shopping center market, but not the grocery store market.

However, *Serfecz II*, where one of the defendants was a shopping center, also shows why Plaintiffs in this case do not have anticompetitive injury in the shopping center market.

In *Serfecz II,* anticompetitive injury as a result of the antitrust activity was clear: One of the defendants was a participant in the shopping center market and was trying to foreclose competition in that market.

[*741] Here, Plaintiffs have clearly stated the anticompetitive injury to the grocery store market (SuperValu's retention of high market share allows it to raise grocery prices) but not to **[**13]** the shopping center market. Plaintiffs note they have incurred millions of dollars in damages, and that the Mundelein development may have been successfully scuttled. But ***HN5***[] the antitrust laws protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Plaintiffs have not alleged their injury was a result of any anticompetitive activity of Plaintiffs with respect to the shopping center market.

That is not surprising because SuperValu (a grocery store chain) and Saint (their consultant) logically would have an interest in the shopping center market only as incidental to the grocery store market. That is why Plaintiffs repeatedly refer to shopping center developments only in terms of Wal-Mart. (*E.g.*, "The objective of the conspiracy was to increase SuperValu's market power by preventing competition from Wal-Mart at the Mundelein Development." Pls.' Compl. 29.)

HN6[] "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Serfecz II, 67 F.3d at 595*. There is a proximate cause element. *Id.* "[P]laintiffs must prove antitrust injury, which is to say . . . **[**14]** [one] that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would be likely to cause." *Brunswick, 429 U.S. at 488, 489 (1977)* (citations omitted).

Here, there is no causal connection between the antitrust violation (restraining competing grocery stores in the Chicagoland area to raise grocery prices) and the Plaintiffs' injury (loss of a shopping center or its devaluation).

HN7[] Antitrust actions require that Plaintiffs allege an injury to the *public*, not just themselves. *Pelfresne v. Vill. Of Lindenhurst, 03-6905, 2004 U.S. Dist. LEXIS 14176 *44 (N.D.Ill. July 26, 2004)*. There is no allegation as to the anticompetitive effect upon the retail shopping center market, be it in increased prices or decreased output.

Thus, the Court finds that Plaintiffs' injuries are too remote from the anticompetitive behavior and effects alleged (restriction of trade of *grocery* stores, leading to higher grocery prices).

Both Defendants and Plaintiffs acknowledge in their briefs that, for the purposes **[**15]** of the actions alleged here, federal and Illinois antitrust acts are identical. Pls.' Opp'n. 26, n. 15. Therefore, the outcome is the same with respect to the state law antitrust claims.

2. Noerr-Pennington Doctrine

Even if Plaintiffs could adequately allege antitrust standing and injury, *Noerr-Pennington* would provide protection for almost all the alleged antitrust activities.

HN8[] The *Noerr-Pennington* doctrine extends "absolute immunity" from antitrust laws to "businesses and other associations when they join together to petition legislative bodies, administrative agencies or courts for action that may have anticompetitive effect." *Mercatus Group, LLC v. Lake Forest Hosp., 641 F.3d 834, 841 (7th Cir. 2011)*. This is particularly true when part of the petitioning is a publicity campaign directed at the general public and seeks legislative or executive action. These efforts enjoy "antitrust immunity even when the campaign employs unethical and deceptive methods." *Id. at 844* (citing *Allied Tube & Conduit Corp. v.* ***[*742]*** *Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988))*.

a. Misrepresentations to Municipalities, IDOT and the Public Regarding the Developments

Given the allowance for unethical and deceptive methods **[**16]** in the legislative and executive arena, and in any accompanying public relations campaign, the Court finds *Noerr-Pennington* is applicable to those allegations concerning Defendants' alleged misrepresentations to villages, IDOT and landowners about Plaintiffs' development. As will be seen, an exception to *Noerr-Pennington* is more readily had for adjudicative proceedings, but Plaintiffs do not allege that these misrepresentations to municipalities, IDOT and the public were in the context of adjudicative proceedings.

I. Sham Litigation and Fraudulent Litigation

HN9[] Where adjudicative petitioning is concerned, however, fraudulent representations can destroy *Noerr-Pennigton* immunity. *Mercatus, 641 F.3d at 842* ("[T]here is little doubt that fraudulent misrepresentations may render purported petitioning activity a sham not protected from antitrust liability.")

HN10[] There are two branches of the doctrine in regards to litigation: (1) sham lawsuits; and (2) fraudulent misrepresentations. *Id.* Plaintiff states allegations relevant to both.

HN11[] "[A] misrepresentation renders an adjudicative proceeding a sham only if the misrepresentation (1) was intentionally made, with knowledge of its falsity; and (2) was material, **[**17]** in the sense that it actually altered the outcome of the proceeding." *Id. at 843*. "[A]lthough successful petitioning activity may not, as a general matter, be deemed a sham, the fraud exception can remove that immunity if success is achieved by means of intentional falsehoods." *Id.* "If the *government's* action was not dependent upon the misrepresented information, the misrepresented information was not material." *Id.* (emphasis added) (quoting *Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056, 1060 (9th Cir. 1998)*.

Here, the alleged fraud was a misrepresentation of who was funding the state lawsuit, rewritten expert reports used in litigation (Plaintiff did not allege that the rewritten report was false), backdoor communications with the judge for a read on how a ruling may come out (which turned out to be inaccurate, because the judge ruled for Mundelein), and Graft's failure to promptly report settlement offers to his clients. None of these implicate materiality with respect to the *government's* (*i.e.*, the judge's) action; indeed there is no allegation of misrepresentation to the judge at all. Therefore, these are immaterial, and the misrepresentation exception cannot be found on these **[**18]** grounds.

HN12[] As to the sham lawsuit branch, the lawsuits must first be objectively meritless before any exploration of subjective intent can be undertaken. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (hereinafter, "*PREI*"). A successful action, by definition, cannot be objectively meritless. *Id. at 61*. Only if a court makes the determination that a lawsuit was objectively meritless may it then inquire into the plaintiff's subjective intent in an exploration of whether the intent was not to win, but to interfere directly with the business relationships of a competitor. *Id. at 60-61*.

Plaintiffs allege the Lake County suits were undertaken "without regard to merit" but do not allege they were objectively meritless. They point out that Saint founder P. Michael Williams has written a book referencing similar dilatory litigation, and allege on "information and belief" that **[*743]** Saint has initiated dozens or hundreds of such lawsuits against Walmart developments without regard to merit, and that most have been unsuccessful. Plaintiffs believe the sham lawsuit exception is wider (in terms of being looser as to the "objectively meritless" requirement) when multiple **[**19]** lawsuits are at stake.

But the Court does not so read the law concerning multiple lawsuits, particularly because in *PREI*, Justice Stevens' concurrence explicitly made that case and the seven-justice majority did not buy into it. *Id. at 73* ("Repetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused," Stevens wrote). This case seems to fit neatly into Justice Stevens' prediction, but it was decidedly not the view adopted by the majority.

Additionally, while Plaintiffs in this case allege "dozens" of such suits filed by Defendants across the nation to the detriment of Wal-Mart, only three lawsuits (two of which were consolidated) were filed against Plaintiffs or their interests. If there is a sham lawsuit exception to *Noerr-Pennington* here, it must come from these three state court suits.

In the consolidated zoning cases, at least thirteen counts were filed. Two counts were dismissed by the landowner plaintiffs and three counts were dismissed on summary judgment. The state court granted judgment for Mundelein on one count on the pleadings, and issued a directed finding on six counts after the plaintiffs rested their **[**20]** case in a bench trial. Only one count went all the way through trial, and the judge ruled for Mundelein on it. The zoning cases were pending in the state appellate court and the third lawsuit was pending in the state circuit court when all three were settled under the same agreement.

Rubloff paid $200,000 and made significant concessions regarding the design of the development to settle the suits. That settlement is fatal to the sham litigation argument. *See* *New West, L.P. v. City of Joliet, 491 F.3d 717, 722 (7th Cir. 2007)* (noting a lawsuit that was settled for a significant amount could not form the basis for the sham litigation exception).

ii. Private Conduct in Regards to the Menards Tenant

HN13[] *Noerr-Pennington* does not apply when conduct is not geared toward the petitioning of government. *Mercatus, 641 F.3d at 850-851*. Toward that end, Plaintiffs also allege that Saint contacted a shopping center owner who was landlord to a Menards store that was slated to move into Rubloff's Mundelein development. Saint encouraged the owner to lock Menards into a long-term lease in order prevent Menards from moving into the Rubloff development and thereby "kill . . . or . . . serious[ly] delay" Rubloff's **[**21]** development. Pls.' Compl. 15 (quoting Saint memo to SuperValu). While such conduct may not fall under *Noerr-Pennington*, it is not actionable antitrust conduct. "A territorial admonition to a competitor - like other speech made in the commercial context - does not violate the antitrust laws unless it leads to an agreement to restrain trade or is accompanied by some sort of 'enforcement mechanism' designed to somehow coerce or compel that competitor to heed the admonition." *Id.* Here, there was even less than an admonition to a competitor; it was a suggestion to Planitiffs' customer. Plaintiffs do not allege that there was any coercion or enforcement mechanism to this suggestion. As a result, it is not actionable.

The Court is uncertain as to whether Plaintiffs can plead additional facts to surmount the problems with these antitrust claims, but as this is the first substantive pleading as to these claims, it gives Plaintiffs **[*744]** the benefit of the doubt and dismisses them without prejudice.

B. RICO Counts

Plaintiffs claim violation of *18 U.S.C. 1962(c)* and *1962(d)*.

1. Noerr-Pennington Doctrine

HN14[] "Although the *Noerr-Pennington* doctrine originated in ***antitrust law***, its rationale is equally applicable **[**22]** to RICO suits." *Int'l Bhd. Of Teamsters, Local 734 Health & Welfare Trust Fund et al. v. Philip Morris, 196 F.3d 818, 826 (7th Cir. 1999)*. Therefore, it provides the same protection with regards to the RICO charges, eliminating the petitioning of the municipalities, IDOT and the courts (as well as the attendant public relations campaign) from liability. *See* Section A.2. above.

2. RICO Standing

Neither Defendant brings up RICO standing, and admittedly, ***HN15***[] it is an easier standard to meet than antitrust standing. For instance, injury that is not necessarily anticompetitive injury is sufficient under RICO. *Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983)*. But RICO standing is still a hurdle greater than mere Article III standing, and requires a proximate cause analysis because the language of *Section 1964(c)* provides treble damages. *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)* ("Proximate cause is . . . required."). "[E]very court that has addressed this issue has held that injuries proffered by plaintiffs in order to confer RICO standing must be 'concrete and actual,' as opposed to speculative and amorphous." *Evans v. City of Chicago, 434 F.3d 916, 932 (7th Cir. 2006)*. ***HN16***[] "[A] cause of **[**23]** action does not accrue under RICO until the amount of damages becomes clear and definite." *Id.* One of the factors weighing against standing is difficulty in ascertaining the amount of the Plaintiffs' damages that are attributable to Defendants' wrongful conduct. *Gregory P. Joseph*, CIVIL RICO: A DEFINITIVE GUIDE 53 (3d ed. 2010) (referencing *Hemi Group LLC v. City of N.Y., 130 S.Ct. 983, 175 L. Ed. 2d 943 (2010)* and other collected cases).

Here, Plaintiffs have alleged mail and wire fraud as the predicate acts, and the injury of lost value of their development and millions of dollars of expenses caused by Defendants' delay of the projects. Plaintiffs have made vague references to damages amounts, but essentially they remain speculative, to the extent that Defendants alone caused them. To be sure, they were instrumental, but Plaintiffs' allegation that negotiations would have gone flawlessly with nearby landowners had Defendants not stepped in is nothing more than supposition and conclusion.

Plaintiffs contend that, had they known the real scope of the battle (*i.e.*, that Defendants were stirring up landowners rather than the opposition being a true grass-roots uprising), they could have defeated the opposition **[**24]** much more quickly and effectively. This, too, is supposition and conclusion, and even if true, gives no measure of how much of Plaintiffs' damages were attributable to Defendants' predicate acts, and how much is the normal expenditure by suburban shopping mall developers in the age of NIMBY.

Because the damages alleged in this Complaint are speculative and amorphous, and therefore causation of them cannot be shown, there is no RICO standing.

3. RICO Elements

HN17[] "While dismissal of a RICO claim is appropriate if the plaintiff fails to allege sufficient facts to state a claim that is plausible on its face, the adequate number of facts varies depending on the complexity of the case." *Kaye v. D'Amato, 357 Fed.Appx. 706, 710 (7th Cir. 2009)*. ***HN18***[] **[*745]** "Allegations of fraud in a civil RICO claim are subject to the heightened pleading standard set forth in *Federal Rule of Civil Procedure 9(b)*, which requires . . . particularity." *Id.*

HN19[] Under RICO, a plaintiff must prove four elements: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. *Id.*

Here, Plaintiffs' pled the "pattern" using the predicate acts of wire and mail fraud. ***HN20***[] "An act of wire fraud requires a showing that (1) **[**25]** Defendants participated in a scheme to defraud; (2) Defendants intended to defraud; and (3) Defendants used wires in furtherance of the fraudulent scheme. ***HN21***[] A scheme to defraud requires 'the making of a false statement or material misrepresentation, or the concealment of material fact.'" *Id. at 714*. A plaintiff must allege "a situation in which [someone] was misled or fraudulently induced to engage in activity to their detriment. *Id.* Not all questionable conduct is a "'scheme or artifice to defraud' as those terms are used in the mail and wire fraud statutes." *Id.* A misrepresentation is material if it has the natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed. *United States v. Fernandez, 282 F.3d 500, 508 (7th Cir. 2002)*. The Seventh Circuit has "repeatedly rejected RICO claims that rely so heavily on mail and wire fraud allegations to establish a pattern." *Jennings v. Auto Meter Prods., 495 F.3d 466, 475 (7th Cir. 2007)*

Here, the alleged falsehoods were that Defendants misrepresented to the zoning litigation plaintiffs that SuperValu and Saint were not behind the opposition and litigation, and that conduct induced **[**26]** Plaintiffs into responding differently. The schemes to defraud, Plaintiffs say, included "back channel" communications with a judge to get a feel on what the ruling would be, the alteration of expert reports that were submitted in that litigation (but not that those reports were false as submitted), and the failure of the zoning attorney to promptly notify his clients of settlement offers that prolonged the litigation (the complaint does not say how long the notification delay was).

The question of whether this is a "scheme to defraud" is close. ***HN22***[] The wire and mail fraud statutes are incredibly broad, and require only "a willful act by the defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for oneself or causing financial loss to another." *United States v. O'Connor, 656 F.3d 630, 644 (7th Cir. 2011)*.

Saint and SuperValu unquestionably intended to cost Rubloff money, they did it to financially enrich SuperValu, and they went to great lengths of deception in trying to do it. At the motion to dismiss stage, this Court would allow this theory if it were not for the *Noerr-Pennington*, doctrine and, as shall be shown shortly, *Rule 9(b)*.

a. ***[**27]*** *Federal Rule of Civil Procedure 9(b)*

Accepting that this is a sufficient scheme to defraud under the wire and mail fraud statutes, plaintiffs have not even come close to the particularity required by *Federal Rule of Civil Procedure 9(b)* for fraud allegations.

How the misrepresentations were made or communicated to zoning litigation clients is never explained, nor are the dates or approximate time frames (the "when"), nor are the actors who made the communications and received them (the "who"). Plaintiffs do not even specify whether these were affirmative misrepresentations to the zoning litigation clients, or just omissions. Plaintiffs cite to a Northern District Court decision and some Seventh Circuit decisions where *Rule 9(b)* standards were relaxed, but all took place **[*746]** before the Supreme Court reinvigorated pleading standards with *Bell Atlantic Corporation v. Twombly (550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))* and *Ashcroft v. Iqbal (556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))*. In any event, those cases do not stand for the wholesale abandonment of at least as much specificity as possible, which has not been met here, and Plaintiffs' offer to amend seems to concede this. A concrete assertion of how the wires or mails were used **[**28]** in furtherance of the scheme is also needed, although this is likely easily remedied by repleading.

Because the claims of fraudulent conduct are not pled with specificity, they are dismissed without prejudice.

b. RICO Conspiracy

Since Plaintiffs have not adequately pled any violation of the predicate acts of wire and mail fraud, they have no standing to plead a conspiracy claim under *Section 1962(d)*). *See, generally, Beck v. Prupis, 529 U.S. 494, 496, 120 S. Ct. 1608, 146 L. Ed. 2d 561*. The conspiracy claims are dismissed without prejudice.

C. Tortious Interference with Prospective Economic Advantage

HN23[] To state a claim for tortious interference with prospective economic advantage, "a plaintiff must allege (1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from the defendant's interference." *Voyles v. Sandia Mortg. Corp., 196 Ill. 2d 288, 751 N.E.2d 1126, 1134, 256 Ill. Dec. 289 (Ill. 2001)*.

HN24[] As with antitrust issues, *Noerr-Pennington* provides immunity for economic advantage interference that comes as part of a petitioning **[**29]** of government. *King v. Levin, 184 Ill. App. 3d 557, 540 N.E.2d 492, 132 Ill. Dec. 752 (Ill. App. Ct. 1989)*. Illinois, for policy reasons, does not recognize the filing of a lawsuit, even a baseless one, as grounds for a tortious interference suit. The only proper cause of action based on the filing of a lawsuit is either malicious prosecution or abuse of process. *Havoco of Am., Ltd. V. Hollobow, 702 F.2d 643, 647 (7th Cir. 1983)* (citing *Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685, 14 Ill. Dec. 489 (Ill. Ap. Ct. 1978)*.

Plaintiffs correctly note that *Cacique, Inc. v. Gonzalez* runs counter to *Havoco*, ruling that a tortious interference action can be based on the filing of a lawsuit when that lawsuit is malicious. *Cacique, Inc. v. Gonzalez, No. 03-C-5430, 2004 U.S. Dist. LEXIS 4966 (N.D. Ill. March 26, 2004)*. *Cacique* cites as its authority *Stafford v. Puro (63 F.3d 1436 (7th Cir. 1995))* and *Prince v. Zazove, 959 F.2d 1395 (7th Cir. 1992)* (hereinafter, *Prince II*). In *Stafford*, the alleged tortious conduct was not the filing of a lawsuit, so it is inapposite to this case. In *Prince*, the alleged tortious conduct was, in part, the filing of an adversarial complaint in an existing bankruptcy proceeding. *Prince v. Zazove, No. 89-C-5256, 1991 U.S. Dist. LEXIS 2718 at *13 (N.D.Ill. March 7, 1991)* **[**30]** (hereinafter, *Prince I*). But *Prince I* and *Prince II* dealt with a different matter: a privilege of qualified immunity for submissions made to the court in *existing* lawsuits when those matters are relevant to the pending proceeding. *Prince I, 1991 U.S. Dist LEXIS 2718 at *13* (citing to *Bond v. Pecaut, 561 F.Supp. 1037, 1038 (N.D. Ill. 1983)* (dealing with qualified immunity for the contents of a letter sent to a judge in a custody proceeding). Therefore, *Prince II* is also inapposite to this case.

[*747] Accordingly, the Court is bound to follow the Seventh Circuit precedent, and so *Havoco* controls.

For the reasons stated in Section A, Defendants are entitled to *Noerr-Pennington* immunity for their actions petitioning the courts, municipalities and IDOT, and the accompanying public relations campaign, so no tortious interference claim can be had for those activities. Additionally, *Havoco* and *Lyddon* prevent a tortious interference action for the filing of those lawsuits.

Accordingly, all that is left is the non-petitioning activity of Saint's contact with the Menards' landlord (*See* Section A, *supra*) and its attempt to prevent Menards from moving to Plaintiffs' planned Mundelein development. However, **[**31]** Plaintiffs fail under this set of allegations too, because they did not plead that such efforts induced or caused a breach or termination of the expectancy with Menards. Therefore, the tortious interference counts are dismissed without prejudice.

D. Abuse of Process Claims

HN25[🡅] "The *only* elements necessary to plead a cause of action for abuse of process are: (1) the existence of an ulterior purpose or motive and (2) some act in the use of legal process not proper in the regular prosecution of the proceedings." *Kumar v. Bornstein, 354 Ill. App. 3d 159, 820 N.E.2d 1167, 1173, 290 Ill. Dec. 100 (Ill. App. Ct. 2004)* (emphasis in original).

HN26[🡅] "In order to satisfy the first element, a plaintiff must plead facts that show that the defendant instituted proceedings against him for an improper purpose, such as extortion, intimidation, or embarrassment. In order to satisfy the second element, the plaintiff must plead facts that show a misapplication of process, or, in other words, the plaintiff must show that the process was used to accomplish some result that is beyond the purview of the process. When process is used only for its intended purpose, there has been no misapplication of process." *Neurosurgery & Spine Surgery, S.C. v. Goldman, 339 Ill. App. 3d 177, 790 N.E.2d 925, 930, 274 Ill. Dec. 152 (Ill. App. Ct. 2003)* **[**32]** (internal citations omitted).

HN27[🡅] "Process" is not used here in the general sense - as in "the legal process" of suing someone, prosecuting the case, receiving judgment, etc. Rather it is used in the literal, legal sense of something issued by the court. "'Process' is issued by the court, under its official seal and must be distinguished from pleadings, which are created and filed by the litigants." *Commerce Bank, N.A. v. Plotkin, 255 Ill. App. 3d 870, 627 N.E.2d 746, 749, 194 Ill. Dec. 409 (Ill. App. Ct. 1994)*.

In *Plotkin*, plaintiff Commerce Bank had received all appropriate approvals from the city of Peoria to develop a piece of property into a shopping center. Plotkin then instituted a meritless suit against Commerce, plaintiff alleged, for the sole purpose of scaring off financing for the deal in order to extort a settlement out of Commerce. Commerce was damaged by having to sell, rather than lease, its land and lost millions. The court found that while the first element was satisfied, the second was not because there was "no allegation of any misuse of 'process' by the court." *Id.*

Likewise, here, Plaintiffs have adequately alleged the first element, the existence of an ulterior motive and an improper purpose. They charge Defendants **[**33]** pulled the strings on litigation that ostensibly sought to restore the landowner plaintiffs' Due Process rights, but in fact was geared to cost Rubloff money and institute endless delay of its development. Plaintiffs' pleadings are replete with communications from attorney Graft to Defendants celebrating his achievement of delay after delay and costing Rubloff "a ton of money" - **[*748]** purposes that are clearly improper to any litigation.

But Defendants allege nothing in terms of a process issued by the court. Although they adequately pled the first element, they missed the second. Should Defendants be able to surmount this difficulty, the Court does not believe Defendants' other objections to this cause of action have merit, and the action is dismissed without prejudice.

E. Common Law Fraud

HN28[] Common law fraud requires "(1) a false statement of material fact; (2) the party making the statement knew or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement; (4) the party to whom the statement was made did rely on the statement; (5) the statement was made for the purpose of inducing the other party to act; and (6) the reliance by the person to **[**34]** whom the statement was made led to that person's injury." *Cramer v. Ins. Exch. Agency, 174 Ill. 2d 513, 675 N.E.2d 897, 905, 221 Ill. Dec. 473 (Ill. 1996)*.

Plaintiffs essentially argue here that Saint and SuperValu actively misrepresented that they were the parties behind the opposition to the developments. For example, Saint's project manager used a pseudonym, the reasonable implication being that he did so in order to keep Plaintiffs from learning who was behind the effort to stymie the developments. Plaintiffs also allege Defendants misrepresented to the citizen litigants the funding source of the litigation.

Plaintiffs' theory is that these misrepresentations were intended to be communicated to Plaintiffs, and in fact were. Plaintiffs allege they relied on them, and fought the lawsuits and citizen opposition as if it were genuine grass-roots community opposition rather than a commercially motivated opposition. Had they known their true opponent, "the Rubloff Plaintiffs could have effectively addressed that opposition, obtained the necessary approvals for the Mundelein Development, and have proceeded . . . to build the development." Pls.' Compl. 35.

Undoubtedly, false statements (fake names and a lawyer's omission to **[**35]** his client as to who was actually footing the bill) were made here. And Plaintiffs make a colorable argument that these falsehoods were intended to reach the Defendants. (Otherwise, why not announce yourself and your opposition?) But the allegation that such reliance caused the injury here is shaky at best. Plaintiffs claim if they had known the real enemy, they would have prevailed much more quickly, and it was this reliance on the fact that SuperValu was not behind the opposition which caused the injury. As discussed in the standing section of the RICO count, this is too speculative to sustain allegations of reliance.

In any case, ***HN29***[] claims of common law fraud are also subject to the heightened pleading standards of *Federal rule of Civil Procedure 9(b)* and, as discussed in the RICO section, were not met by the complaint. The common law fraud claims are dismissed without prejudice.

F. Common Law Conspiracy

As Plaintiffs said themselves, "Plaintiffs conspiracy claims survive to the same extent as do their underlying substantive claims." *Pls.' Opp'n.*, 35. With all substantive claims dismissed, this claim must fail. It is dismissed without prejudice.

G. Declaratory Judgment Claim

Plaintiffs **[**36]** sought a declaratory judgment in regards to their use of Defendants' documents. This issue was dealt with in the Court's orders of June 30, 2011, and the parties did not argue it in their briefing. Accordingly, this count is dismissed as moot.

[*749] IV. RUBLOFF'S MOTION TO DISMISS CROSS-COMPLAINT

A. Inducement of Breach of Fiduciary Duty

HN30[] A predicate to any liability based on a theory of an inducement of a breach of a fiduciary duty is the existence of a fiduciary duty in the first instance. *Alpha Sch. Bus Co. v. Wagner, 391 Ill. App. 3d 722, 910 N.E.2d 1134, 1151, 331 Ill. Dec. 378 (Ill. App. Ct. 2009)*. If that duty exists, the elements of the inducement claim require alleging the third party (1) *colluded* with the fiduciary in committing a breach of duty; (2) induced or participated in such breach; and (3) obtained the benefits resulting from the breach of duty. *Id.; see also Regnery v. Meyers, 287 Ill. App. 3d 354, 679 N.E.2d 74, 80, 223 Ill. Dec. 130 (Ill. App. Ct. 1997)*.

Rubloff and Saint seem to agree that a fiduciary duty exists for an ex-employee who has signed a confidentiality agreement that is applicable after the termination of employment.

Rubloff maintains that if the agreement is not breached, or was invalid, no fiduciary duty has been breached. This is correct. **[**37]** ***HN31***[] "Claims based on . . . breach of fiduciary duty stand or fall with those based on contract." *Composite Marine Propellers, Inc. v. Van Der Woude, 962 F.2d 1263, 1265 (7th Cir. 1992)*. ***HN32***[] Illinois views post-employment restrictive covenants that insist on absolute secrecy of any and all information as unreasonable and unenforceable because a person is allowed to make a living, and cannot possibly not utilize *any* information from his past job. *See, e.g., Serv. Ctrs. of Chicago, Inc. v. Minogue, 180 Ill. App. 3d 447, 535 N.E.2d 1132, 1137, 129 Ill. Dec. 367 (Ill. App. Ct. 1989)*; *North American Paper Co. v. Unterberger, 172 Ill. App. 3d 410, 526 N.E.2d 621, 624, 122 Ill. Dec. 362 (Ill. App. Ct. 1988)*; *Sencon Sys., Inc. v. W.R. Bonsal Co., No. 85-C-8250, 1988 U.S. Dist. LEXIS 2833 (N.D. Ill. April 6, 1988)*.

After the parties briefed this case, the Illinois Supreme Court revised its understanding of post-employment restrictive covenants in the context of non-compete agreements. *Reliable Fire Equip. Co. v. Arredondo, No. 111871, 965 N.E.2d 393, 2011 Ill. LEXIS 1836, 358 Ill. Dec. 322, 2011 IL 111871 (Ill. December 1, 2011)*. ***HN33***[] It clarified that the test of enforceability is more than an examination of time and geography restrictions or other rote lists. Instead, its reasonability is a totality-of-the-circumstances question, judged by **[**38]** whether the covenant (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public. Time and geography restrictions may also be examined. *Id. at *7-8*.

In this case, Saint's broad demand that Mayo "treat as strictly confidential *any and all* information" (emphasis added) forever, was clearly greater than required. Illinois Courts in the past have declined to rewrite such overly broad restrictions to give them any effect. *See Minogue, Unterberger, and Sencon*, cited above. The employee here, if held to the literal words of the contract, would not be able to hold another job in the same field, which would clearly be an undue hardship. And as this amounts to a restraint of trade, as defined by the Illinois state law precedents, would also be injurious to the public. The Court also believes that allowing an agreement to stand that would essentially sanction the misleading of dozens of landowners as to how they were used as pawns by SuperValu and Saint in their commercial fight against Walmart would also be injurious to the public.

Therefore, **[**39]** the agreement is unenforceable, and void as a matter of Illinois law. **[*750]** Because the fiduciary duty rises and falls with the contract, this claim fails.

Because the entirety of the contract was before the Court for review, and is deemed unenforceable as a matter of law, this count cannot be replead to state a cause of action. Therefore, the action is dismissed with prejudice.

B. Tortious Interference with Contractual Relations

HN34[] The tort of interference with a contract requires, as its first element, a valid contract. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc., 131 Ill. 2d 145, 545 N.E.2d 672, 676, 137 Ill. Dec. 19 (Ill. 1989)*. Thus, the lack of a valid contract (See II.A., *supra*) is fatal to this claim, and it is likewise dismissed with prejudice.

C. Conversion

HN35[] "To prove conversion, a plaintiff must establish that (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property." *Cirrincione v. Johnson, 184 Ill. 2d 109, 703 N.E.2d 67, 70, 234 Ill. Dec. 455 (Ill. 1998)*.

The parties spar over whether the documents at issue in this case **[**40]** represent property recognized under this action. Rubloff cites *Conant v. Karris, 165 Ill. App. 3d 783, 520 N.E.2d 757, 763, 117 Ill. Dec. 406 (Ill. App. Ct. 1987)*.

There are two types of property here: the physical paper (if any) taken from Saint, and the intangible information contained within them. ***HN36***[] "[P]arties may recover for conversion of intangible assets." *Stathis v. Geldermann, Inc., 295 Ill. App. 3d 844, 692 N.E.2d 798, 807, 229 Ill. Dec. 809 (Ill. App. Ct. 1998)*. "Once confidential information is released to competitors, it hardly can be said that the data is still confidential. Thus, the original owner would be deprived of the benefit of the information." *Conant v. Karris, 165 Ill. App. 3d 783, 520 N.E.2d 757, 763, 117 Ill. Dec. 406 (Ill. App. Ct. 1987)* (ruling that even though plaintiff retained the information that was the subject of the conversion action, conversion could nonetheless still be alleged).

Rubloff argues that *Conant* stands for the proposition that non-confidential information is not property, and the only thing of value would be the actual paper (if any were taken, rather than electronic documents) upon which the information was written. Because the Court already issued summary judgment finding the documents contained no trade secrets, or privileged, confidential or proprietary business **[**41]** information (save a handful), Rubloff says, there is no property subject to conversion here, unless it is the actual physical paper.

Rubloff also cites *FMC Corp. v. Capital Cities/ABC, Inc. (915 F.2d 300, 305 (7th Cir. 1990))* for the proposition that proprietary value of documents must be present for conversion to lie. *FMC* referenced Supreme Court decisions approving of treating confidential information as a convertible property, and that such a ruling mirrors the trend several states have adopted. *Id.*

FMC also noted that ***HN37***[] "copies of documents, rather than the documents themselves, should not ordinarily give rise to a claim for conversion." *Id. at 303*. "[T]he reason for this rule is that the possession of copies of documents - as opposed to the documents themselves - does not amount to an interference with the owner's property sufficient to constitute conversion. *Id.* In that case, however, the court found a cause of conversion, because the plaintiff no longer had the originals or any copies of them.

Rubloff says Mayo took only copies from Saint, and thus a cause of action should not **[*751]** lie because Saint has originals (or at least equivalent copies).

Saint cites *Hecny Transportation, Inc. v.* ***[**42]*** *Chu, et al.* for the proposition that information, whether privileged, confidential or not, can be the subject of a conversion action. *Hecny Transportation, 430 F.3d 402, 405 (7th Cir. 2005)* ("An assertion of trade secret in a customer list does not wipe out claims of theft, fraud, and breach of the duty of loyalty that would be sound even if the customer list were a public record.")

First, as to whether Saint has adequately alleged that originals were taken, as opposed to merely copies, we take Saint's use of the word "document" at face value, as indicating an original. At this stage, all of a Saint's allegations are taken as true. If evidence later develops that Saint was misspeaking, and they meant copies, it can be resolved on summary judgment or at trial.

As to whether information that is non-confidential or not proprietary can be converted, the Court believes Saint is misreading *Hecny.* That ruling was in the context of a defendant who had a fiduciary duty to the owner of the documents. The conversion charge also involved physical equipment, such as the fax machine and computer.

The case stated:

> If Hecny had put its customer list on its web site for the world to ogle, that would not **[**43]** have permitted *its managers* to go into covert competition using Hecny's own depot and staff, or to walk off with computers and fax machines, as Hecny alleges Chu did. Trade secrets just have nothing to do with Hecny's principal claims.

Id. at 405 (emphasis added). As the Court has already noted, there was no fiduciary duty in this case. That, and the physical equipment are what distinguishes *Hecny.* To read the case the way Saint suggests would mean that someone, even a competitor, who was browsing the web and came across the above-mentioned hypothetical customer list, and then tried to sell directly to those customers, would be guilty of conversion or theft. That cannot be.

The court's language of "trade secrets just have nothing to do with Hecny's principal claims" indicates that the court was assailing the notion that just because one is not guilty of trade secret violations, he is not granted immunity for *unrelated* torts, which was essentially what the District Court had ruled.

HN38[] The law is clear that intangible property can be converted. But the cases indicate that that intangible property must have some value in terms of confidentiality, trade secrets, proprietary business information **[**44]** or the like. As the Court already ruled that the documents at issue had no such content, they cannot be converted (unless Saint has no originals or copies of those documents). However, the paper itself can be the subject of a conversion claim, and to the extent that twelve pages of documents were ruled to be privileged, an action of conversion will lie for the information in those documents as well.

Therefore, within that scope, the counter-plaintiff has properly alleged a cause of conversion, and the motion to dismiss is denied as to this count.

D. Replevin

HN39[] An action for replevin may be brought to recover wrongfully detained goods or chattels. A replevin action cannot be maintained until a counter-claimant has made a demand for the surrender of the property and the defendant has refused. At trial, a counter-claimant must prove the defendant is wrongfully detaining the property. *First Illini Bank v. Wittek Indus., 261 Ill. App. 3d 969, 634 N.E.2d 762, 763, 199 Ill. Dec. 709 (Ill. App. Ct. 1994)*. The property must be described in **[*752]** sufficient detail to distinguish it from similar chattels and a counter-claimant must state that he is the owner of the property or is otherwise entitled to lawful possession of it. Robert G. Markoff **[**45]** & Lawrence O. Taliana, *Replevin, Detinue, and Attachment* (available at *http://www.iicle.com/links/CredRts09-Ch5-Markoff.pdf* (2009) (originally published in CREDITORS RIGHTS IN ILLINOIS (Illinois Institute for Continuing Legal Education, 2009)).

Because of the above determination regarding the nature of the property at interest, Saint has adequately alleged the elements for a replevin action. To the extent that the documents were found to be property in the above conversion discussion, a replevin action will also lie. The motion to dismiss is denied.

E. Misappropriation of Trade Secrets

As Saint concedes in its response (Dkt. 126, 10), this cause of action is foreclosed by the June 30, 2011 summary judgment order, and Saint filed the count to make its record and preserve its appeal. It is so preserved, and the count is dismissed with prejudice.

IV. CONCLUSION

For the reasons stated herein, Defendants' Motions to Dismiss are granted in their entirety, and Plaintiffs' Complaint is dismissed without prejudice as to each count. Plaintiff Rubloff's Motion to Dismiss is granted in part and denied in part. Counts I, IV and V are dismissed with prejudice. Counts II and III state valid causes of **[**46]** action.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber

Harry D. Leinenweber, Judge

United States District Court

DATE: 3/27/2012

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SanDisk Corp. v. Kingston Tech. Co.

United States District Court for the Western District of Wisconsin

March 27, 2012, Decided; March 27, 2012, Filed

10-cv-243-bbc

Reporter

863 F. Supp. 2d 815 *; 2012 U.S. Dist. LEXIS 42032 **; 2012-1 Trade Cas. (CCH) P77,849; 87 Fed. R. Evid. Serv. (Callaghan) 1392

SANDISK CORP., Plaintiff, v. KINGSTON TECHNOLOGY CO., INC. and KINGSTON TECHNOLOGY CORP., Kingstons.

Subsequent History: Motion granted by *SanDisk Corp. v. Kingston Tech. Co., 2012 U.S. App. LEXIS 16540 (Fed. Cir., Aug. 6, 2012)*

Prior History: *SanDisk Corp. v. Kingston Tech. Co., 2011 U.S. Dist. LEXIS 153116 (W.D. Wis., Oct. 27, 2011)*

Core Terms

flash, aggregators, licenses, drives, royalties, memory, patents, prices, reseller, sales, chips, firms, manufacturers, technology, costs, output, worldwide, products, vertically, markets, switch, market share, deposition testimony, integrated, cards, terms, paying, Edge, cases, licensees

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Judges: BARBARA B. CRABB, District Judge.

Opinion by: BARBARA B. CRABB

Opinion

[*817] OPINION AND ORDER

Plaintiff SanDisk Corp. holds a number of patents covering flash memory technology that it licenses to companies under broad licensing agreements. Defendants Kingston Technology Co., Inc. and Kingston Technology Corp. (hereafter Kingston) refused to enter into the agreements and instead pursued this action against SanDisk, alleging that the required licenses restrain trade beyond the legal monopoly that patents extend to their holders. To prevail, Kingston had to show at trial both that SanDisk's licensing terms exceeded the scope of its patents and that the licenses have an anticompetitive effect upon the USB flash drive market in the United States. It failed to make the second showing, that SanDisk's licenses will have an anticompetitive effect. Accordingly, judgment will be entered for SanDisk on Kingston's counterclaims under **[**5]** *§ 1* of the Sherman Act and the California Unfair Competition Law.

EVIDENTIARY RULINGS

As an initial matter, the parties are at odds over the admission of certain designations of deposition testimony that they submitted in lieu of live testimony for some witnesses. When I have relied on deposition testimony in reaching my decision, I have done so after resolving the specific objections to that testimony in favor of the party propounding the testimony. It is not necessary to discuss those objections, most of which were grounded on relevance, prejudice, lack of foundation or lack of personal knowledge.

Three objections require more specific discussion. Both sides objected to the submission of deposition testimony from any individual who was not unavailable to testify in person within the meaning of *Fed. R. Civ. P. 32* or who testified live at trial. Dkt. #464-11; dkt. #468-2. Neither side made it clear which witnesses it had in mind. Several of the designations are from witnesses who also testified at trial, such as Douglas Hauck, Darwin Chen and E. Earle Thompson. However, these individuals were officers and designees under *Fed. R. Civ. P. 30(b)(6)*, which means that under *Rule 32(a)(3)* an **[**6]** adverse party may use their deposition testimony for any purpose, regardless of their availability. *Fey v. Walston & Co., Inc., 493 F.2d 1036, 1046 (7th Cir. 1974)*. I will overrule each **[*818]** side's attempt at a general objection, but I will use deposition testimony from these individuals only if it was submitted by the adverse party.

The final evidentiary dispute concerns SanDisk's objection to Kingston's post trial submission of deposition testimony from Brett Reed. This testimony is not admissible because it is hearsay. Reed was SanDisk's damages expert in two patent cases that SanDisk brought previously against Kingston and others, 07-cv-605 and 07-cv-607. In this case, SanDisk disclosed Reed initially as a damages expert but never provided Kingston any expert reports by him and did not list him as a trial witness. On July 26, 2011, Kingston filed supplemental disclosures in this case in which it identified Reed as a potential defense witness for the first time. SanDisk objected to Kingston's calling him, arguing among other things that Reed's deposition testimony would not be admissible under *Rules 402*, *403*, *801* or *802*. Dkt. #388. Although Kingston chose not to call Reed at trial, it **[**7]** has designated certain portions of the deposition he gave in the 2007 cases, which it wants the court to consider as substantive evidence.

Kingston says that SanDisk's objection is untimely because SanDisk failed to file a motion in limine to exclude Reed's testimony, but there is nothing to this argument. Kingston knew both that SanDisk objected to any testimony from Reed and why it did. Because Kingston never called Reed as a trial witness, the court had no occasion to address the issue during the trial.

The only ground that Kingston asserts for admitting Reed's prior deposition testimony is that it constitutes a party admission and is therefore an exception to the hearsay rule under *Fed R. Evid. 801(d)(2)*. None of the categories of statements deemed party admissions by *Rule 801(d)(2)* apply to Reed's testimony. Kingston has not shown that SanDisk manifested its belief that all of Reed's statements were true, *Fed. R. Evid. 801(d)(2)(B)*, that Reed is SanDisk's agent, *Fed. R. Evid. 801(d)(2)(C)*, or that SanDisk authorized Reed to speak on its behalf. *Fed. R. Evid. 801(d)(2)(D)*. The mere fact that SanDisk used Reed as an expert witness in a prior case does not mean that SanDisk believed **[**8]** all of Reed's deposition statements were true, that Reed was within SanDisk's control or that SanDisk authorized him to speak on its behalf in all matters. *Kirk v. Raymark Industries, Inc., 61 F.3d 147, 164 (3d Cir. 1995)* ("In theory, despite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise.").

Kingston cites two cases in which courts found that a party "authorized" its expert's previous deposition testimony within the meaning of *Rule 801(d)(2)(C)*, but neither case supports its position in this case. In *In re Hanford Nuclear Reservation Litigation, 534 F.3d 986, 1016 (9th Cir. 2008)*, the plaintiff submitted expert testimony about causation at a trial in which the jury was unable to reach a decision. When the case was retried, plaintiff's counsel sought to introduce the same expert's testimony on certain topics but exclude his prior causation testimony, which was damaging to the plaintiff's position. The district court denied the plaintiff's motion to exclude the prior adverse testimony and allowed the defendants to cross examine the expert. The Court of Appeals for the **[**9]** Ninth Circuit upheld the district court's ruling, holding that the expert's prior causation testimony was fair game for cross examination because his statements became party admissions when he testified at the first trial. In *Glendale Federal Bank, FSB v. United States, 39 Fed. Cl. 422 (Fed. Cl. 1997)*, the plaintiff sought to introduce deposition testimony from the defendant's expert witnesses as substantive evidence. **[*819]** The court held that the defendant had "authorized" the statements of the experts whom it listed as trial witnesses but not the expert who it withdrew after depositions but before trial. *Id. at 425*. The court reasoned that it was fair to tie a party to its expert's testimony if it retained the expert through trial but that a rule tying a party to its expert's deposition after it withdraws the expert would hinder its ability to control and develop its case.

Unlike the testimony under consideration in *Glendale* and *In re Hanford*, Reed's deposition testimony was given in a separate case. Because SanDisk never proffered Reed's testimony in this case, it is neither reasonable nor fair to find that SanDisk authorized Reed's deposition testimony so that it can be deemed a party **[**10]** admission and used against SanDisk. Reed's deposition testimony is inadmissible hearsay in this case and will be excluded.

From the evidence presented at the trial, the admissible portions of the designation depositions and facts stipulated by the parties, I find the following facts.

BACKGROUND

A. The Parties

Plaintiff SanDisk Corp. and defendants Kingston Technology Co. and Kingston Technology Corp. compete to be the largest sellers of USB flash memory drives, nationally and internationally. SanDisk is a vertically integrated manufacturer of flash memory products. It designs, manufactures and markets flash memory chips, controllers, systems and consumer products and sells the finished products worldwide.

Defendants are privately owned companies. They were founded in 1987 to produce memory for personal computers and began selling flash memory products in 2003.

B. Flash Memory and the Flash Memory Industry

Flash memory is a type of solid-state memory technology that stores information when not powered. Flash memory products are sold in different formats, including Compact Flash cards, Secure Digital cards, MultiMediaCard and USB flash drives. USB flash drives consist of one or more flash memory **[**11]** chips (also called devices) and a controller that are assembled on a circuit board into a flash memory system, which is covered in a casing and sold to consumers. The controller is crucial to the workings of the flash memory chips, because it communicates with the host system to enable the chips to store data.

The flash memory industry has seen rapid technological development. Between 2003 and 2009, the capacity of flash memory products increased from between 16 and 256 megabytes to 1 gigabyte (1,024 megabytes) and 4 gigabytes. Between 2000 and 2010, output of NAND flash memory devices (measured by shipments of one gigabyte units) increased by a compounded annual growth rate of more than 125%, while the average sales price fell by a compound annual rate of more than 56.5%.

The participants in the flash memory industry include chip, controller and systems manufacturers, system aggregators and resellers. Six chip manufacturers, SanDisk, Intel, Toshiba, Samsung, Micron Technology, Inc. and Hynix, earned 99% of worldwide revenue from the sales of flash memory chips in 2010. The number of chip manufacturers is limited by the high fixed costs of fabrication facilities, which can take takes **[**12]** several years to build and may cost up to $8 billion. Except for Hynix, all the major chip manufacturers are vertically integrated, which means in the context of this case that they manufacture **[*820]** chips, controllers and systems, although they may not place the systems in a casing and sell the final product to retailers or consumers.

Several firms manufacture and sell flash memory controllers, such as Hitachi, Ltd., Phison Electronics Corp., Silicon Motion Technology Corp., Skymedi and Solid State System Co., Ltd. Systems aggregators purchase components, such as flash memory chips, controllers and circuit boards on the open market, assemble them into flash memory systems, place them in a housing and sell the finished product to retailers or directly to consumers. Resellers purchase fully assembled flash memory systems, place them in housings labeled with their brand and resell the finished products.

C. Markets

USB flash drives have few if any adequate substitutes in the field of portable memory storage. Rewritable compact discs and digital versatile discs have much smaller capacity, are slower, are damaged more easily, require a separate drive and are not as portable. External hard drives **[**13]** serve a different purpose and follow different pricing patterns. They are larger, slower and require an external power supply. Even the smallest external hard drive is physically larger than most flash drives. Flash drives are much cheaper than comparable hard drives for up to 16 gigabytes of memory, but even when the per gigabyte price for flash drives exceeds that of external hard drives, consumers still do not use external hard drives as substitutes for flash drives. The pricing for USB flash drives is largely independent of the pricing of external hard drives or CDs and DVDs.

Other flash memory systems such as Secured Digital cards (SD cards) and Compact Flash cards offer the closest substitutes, but they serve different functions and have limitations that USB flash drives do not. SD, Micro-SD and Compact Flash cards are thin cards used in phones or cameras that serve primarily as digital film substitutes.

Unlike USB flash drives, they are not readily compatible with computers and often require a special adapter to interface with a computer's USB port. When both are necessary, the combination is almost twice the price of a USB flash drive. Changes in the price of SD or Compact Flash **[**14]** cards do not seem to have any correlative effect on the USB flash drive market or any influence on the pricing decisions of USB flash drive manufacturers. In the contemporary market, no close substitutes exist for USB flash drives.

A large number of firms sell USB flash drives in the United States. Market shares have fluctuated significantly over time, with no firm having a dominant market share. Impediments to entry are few: the percentage of the market held by small firms with less than a 1% market share increased from 16 to 35% between 2006 and 2010 and the percentage held by private labels sales doubled from 5 to 10%. In addition, between 2000 and 2010, output of USB flash drives increased by more than 125% annually while prices decreased by more than 56.5%, despite an increase in demand for flash memory devices.

The market for flash memory technology consists of the market for the technology to produce flash memory chips and assemble them into flash memory systems like USB flash drives. SanDisk enjoys market power in the market for flash memory technology. Not only does SanDisk have 1,700 United States patents relating to flash memory technology, it was unable to identify at trial **[**15]** a commercially viable flash memory product that does not practice its technology or any flash memory firm that does not use its technology in its flash memory systems. SanDisk takes **[*821]** the position that anyone selling flash memory systems in the United States needs a license from it and it enforces this position with litigation. SanDisk also licenses the manufacturers that sell 89% of the flash memory chips in the world. Only one flash memory chip manufacturer, Micron, has not accepted a license with SanDisk, but SanDisk requires manufacturers that use Micron chips in their own systems to pay SanDisk a royalty on the unlicensed chips.

D. <u>SanDisk's Market Activity</u>

Since 2007, SanDisk's annual expenditures on flash memory research and development have averaged around $400 million. Slightly more than half of this is spent on chip technology; the rest is spent on the technology to incorporate these chips into flash memory systems. In 1995, SanDisk held 30 United States patents relating to flash memory technology, 36 pending United States patents and several pending foreign patents. By 2011, SanDisk had more than 1,100 pending patent applications and more than 1,700 flash memory patents in the **[**16]** United States, along with more than 1,100 flash memory patents in foreign countries, including China, France, Germany, Italy, Japan, Korea, the Netherlands, Taiwan and the United Kingdom. SanDisk chooses to file for patent protection in these particular countries because most flash memory products are manufactured in or shipped through those countries. In Taiwan, SanDisk has about 240 flash memory patents and 700 pending applications; in China, it has 190 flash memory patents and 700 pending applications. SanDisk has no patents in Africa, Latin America or Eastern Europe.

SanDisk uses its patented technology to manufacture flash memory chips and flash memory systems in various formats, including Secure Digital cards and USB flash drives. SanDisk's largest share of the USB flash drives market was 34% of worldwide revenue in 2006 and 40% of United States revenue in 2009. By 2011, its market share had dropped to 18% worldwide and 34% in the United States.

In addition to manufacturing flash memory products, SanDisk licenses its patents to companies throughout the flash memory industry. Between 1995 and 2009, it earned $2.5 billion in royalty revenues from its flash memory licenses, an amount **[**17]** that corresponds roughly to its research and development expenditures. SanDisk and its licensees accounted for 89% of worldwide revenue from flash memory chips in 2010. The only large chip manufacturer that is not a licensee of SanDisk is Micron, which has a market share of between 8 and 10%. SanDisk also licenses flash memory aggregators, which include PNY Technologies, Inc., Riteck, Silicon Motion, TDK Corp., Trek and Welldone Technologies.

SanDisk's general licensing practice is to offer only worldwide and non-exclusive cross-licenses for its full portfolio within certain "fields of use." Each party to the license receives the right to use all of the other's existing flash memory patents and any new patents acquired during the term of the cross-license. The licensees and SanDisk remain free to license their existing and new patents to third parties. SanDisk does not license its patents individually or vary the royalty rate according to the number of patents the licensee uses. The licenses cover a "device-level" field of use, a "system-level" field of use or both. Device-level royalties are calculated as a percentage of the sales price or value of the flash memory chips, while system-level **[**18]** royalties are calculated as a percentage of the sales price of the flash memory product containing the system. If a licensee sells flash memory systems that contain an unlicensed chip, it pays an additional royalty on the value of the chip. SanDisk has **[*822]** an express policy of not licensing manufacturers to sell controllers separately.

In 1995, SanDisk entered into portfolio cross-licenses with Intel; in 1997, it entered into similar licenses with Toshiba and Samsung. These firms agreed to pay royalties on all worldwide sales of flash memory chips and products, whether or not they practiced SanDisk's patents. In 2002, Toshiba's cross-license became royalty free as part of its joint venture with SanDisk to manufacture flash memory wafers. Under SanDisk's latest agreement with Samsung, Samsung pays a 2.5% royalty on the sales price of flash memory chips or any finished product, regardless whether it uses licensed or unlicensed chips. These agreements also give SanDisk the right to purchase 20% of Toshiba's output and 10% of Samsung's output. In 2007, SanDisk entered a portfolio cross-license with Hynix.

E. <u>SanDisk's Lawsuits and Standard Card Licensing Offer</u>

In 2007, SanDisk filed a patent **[**19]** infringement suit before the International Trade Commission against numerous flash memory aggregators. In October 2007, SanDisk filed two actions in this court, 07-cv-605 and 07-cv-607, against many of the same aggregators, charging that they had infringed seven of SanDisk's flash memory patents. In December 2007, SanDisk sent a "standard card license" offer to each of the defendants in the cases, including Kingston. Exh. #1501. When SanDisk presented the licensing offer, it told the defendants that the offer was non-negotiable and that it would pursue them in litigation until they accepted the license.

The standard card license followed SanDisk's general licensing practices. The aggregator licensee would pay system-level royalties equal to 4% of the sales price from any flash memory product sold worldwide. If it used unlicensed flash memory chips, it would pay an additional royalty of 4% or 8% of the cost or fair value of the chip. The total royalty was capped at $4.00 a unit. The royalty would not vary by the percentage of the licensees' sales in the United States and would include sales in countries in which SanDisk holds no patents or has never filed patent infringement claims. **[**20]** The aggregators would not be required to use SanDisk's technology or purchase anything from SanDisk. The aggregators' licenses would last five years, although some of SanDisk's other licenses last seven years.

Several defendants in the ITC and the 2007 cases negotiated settlement agreements with cross-licenses. Many signed the standard licensing agreement with few changes. In June 2007, Ritek accepted a licensing agreement under which it would pay an initial $970,000 lump sum, a 4% royalty on the sales price of each licensed product up to $4.00 a unit (4.5% in the first year with no maximum) and an additional 4% on the price of unlicensed chips. In December 2007, Trek entered an agreement to pay a 3% royalty on sales price of any USB flash drives sales worldwide and an additional 4% royalty on the price or value of any unlicensed chips. Between January 2008 and October 2008, SanDisk entered licensing agreements with at least nine other companies, including Infotech Logistic, LLC and PNY. All of the licenses used a worldwide royalty base and required royalty payments at the chip and system level.

Buffalo Technology USA was one of the aggregators that SanDisk sued before the ITC in the **[**21]** 2007 cases. From 2004 to 2007, Buffalo's domestic sales of flash memory products doubled each year to more than $400,000. Buffalo did not believe it had violated any of SanDisk's patents, but it agreed to a consent judgment in March 2008, in which it agreed to stop selling any flash memory products in the United **[*823]** States that were not purchased from SanDisk or its licensees. In April 2010, SanDisk voluntarily dismissed Buffalo from the 2007 cases because Buffalo had substantially complied with the consent order.

F. <u>Kingston's Market Activity</u>

When Kingston began selling flash memory products in 2003, it acted as a reseller, purchasing completed flash memory systems from third parties, placing them in a casing and selling them under its brand. In 2005, Kingston became an aggregator. It assembled its own flash memory systems from chips purchased from large chip manufacturers licensed by SanDisk and controllers purchased from specialized manufacturers. The chips make up 77% of the average cost of Kingston's flash drive; the controller makes up the remaining 6.2%.

Between 2006 and 2008, Kingston's worldwide revenue from USB flash drives increased from $336 million to $814.8 million. During that **[**22]** period, a significant oversupply of flash memory chips enabled Kingston to purchase chips from manufacturers cheaply, sometimes below the manufacturer's cost. (Manufacturers sometimes find it financially advantageous to sell chips below cost rather than stockpile them.) Kingston's strategy was to increase its market share by underpricing competitors, even if doing so reduced its profit margin. In 2008, Kingston overtook SanDisk as the world's largest seller of USB flash drives and obtained its highest market share in the United States, at around 13%.

In 2009, Kingston changed its domestic manufacturing from an aggregator model back to a reseller model to limit its potential liability from SanDisk's lawsuits. Kingston now purchases pre-assembled USB flash drives cards from a single supplier, Toshiba; places them in the external casing; and sells them under its label. Kingston's market share in the United States began dropping after it adopted the reseller model. Its domestic expansion reversed and its market share fell from 13% in 2008 to 9% in 2009 and 2010. Kingston's foreign operations continue to use the aggregator model. Kingston's share of the worldwide revenue from USB flash drive **[**23]** sales increased from 28% in 2008 and 2009 to 31% in 2010.

G. <u>Proceedings in this Case</u>

On May 4, 2010, SanDisk filed this suit, alleging that Kingston had infringed six different patents held by SanDisk. Kingston filed counterclaims for injunctive relief, alleging that SanDisk had violated various antitrust and unfair competition laws. I granted Kingston's motion for summary judgment with respect to SanDisk's infringement claims, dkt. #312, and SanDisk's motion for summary judgment with respect to Kingston's monopolization and attempted monopolization counterclaims under *§ 2* of the Sherman Act and *Wis. Stat. § 133.03*. Dkt. #327. Kingston proceeded to trial before the court on one of its counterclaims under *§ 1* of the Sherman Act, *15 U.S.C. § 1*, alleging that SanDisk's license agreements unreasonably restrain trade in the United States USB flash drive market by requiring double royalties and a worldwide royalty base, and its counterclaim under the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200*, alleging that SanDisk's discriminatory licenses constitute unfair business acts or practices.

OPINION

<u>A. Section 1 of the Sherman Act</u>

1. <u>Legal background</u>

Section 1 of the Sherman **[**24]** Act prohibits acts of "conspiracy in restraint of trade or commerce." *15 U.S.C. § 1*. "[T]o establish liability under *Section 1* of the Sherman Act, a plaintiff must demonstrate **[*824]** that the defendants conspired to achieve an unlawful objective and that the resulting restraint of trade was unreasonable." *Bi-Rite Oil Co. v. Indiana Farm Bureau Cooperative Association, 908 F.2d 200, 202 (7th Cir. 1990)* (citations omitted).

Kingston argues that SanDisk's licensing terms exceed the scope of its patents and that these licenses will restrain trade in the USB flash drive market in the United States. Because Kingston is not alleging that SanDisk's licensing agreements are *per se* unreasonable restraints, the licensing agreements are evaluated under the "rule of reason," *Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*, which requires "an inquiry into market power and market structure designed to assess a [restraint's] actual effect." *Id. at 886* (quoting *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*.

Kingston must identify the relevant market and "show that the challenged restraint has an adverse impact on competition in the relevant market." *Bi-Rite Oil, 908 F.2d at 203*. **[**25]** Kingston does not have to prove that SanDisk has a monopoly or a dangerous probability of achieving a monopoly in the market, but in this circuit at least, it must meet a market power threshold. *Valley Liquors, Inc v. Renfield Importers, Ltd., 822 F.2d 656, 666-67 (7th Cir. 1987)*. Market power may be inferred from a substantial market share (generally around 50% but perhaps as low as 17% with additional evidence about the elasticity of demand and supply) or shown by direct evidence of anticompetitive effects on price or output. *Id.; Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928, 937 (7th Cir. 2000)*. After meeting this threshold, Kingston must demonstrate that SanDisk has or will use its market power to take actions that will likely reduce output or raise prices in the relevant market. Id.

In a case involving patents such as this one, it is not enough for a defendant to prove that a patentee's licensing of patents will raise prices or decrease output. As I explained in prior opinions in this case, Nov. 15, 2010 Order, dkt. #100, at 13-15; Oct. 13, 2011 Order, dkt. #327, at 27, the patentee's legal monopoly gives it the right to restrain competition within the scope of its patent. A patentee **[**26]** does not restrain trade unreasonably unless it uses its patent monopoly to restrain competition beyond the scope of its legal monopoly. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135-36, 139-41, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *Microsoft, 253 F.3d at 62*.

To succeed at this stage of its *§ 1* claim, Kingston had to prove that SanDisk uses its licenses to restrain trade beyond the scope of its patents. To that end, Kingston argued that SanDisk restrained trade beyond the scope of its patents by requiring its licensees to pay royalties on worldwide sales even in nations in which SanDisk has no patent rights and by using a system-level "field of use" that produced "double royalties" on the same patents for the same products. Even if Kingston could prove its contention that the license terms exceeded the scope of the patents, it would still have to prove that imposition and enforcement of these challenged terms will adversely affect the USB flash drive market in the United States.

In summary, to prove its claim under *§ 1*, Kingston needed to prove at trial both that (1) the worldwide royalty base or systems-level field of use terms in SanDisk's licenses exceed the scope of its patents and (2) imposing **[**27]** these invalid licensing terms on competitors was likely to increase price or decrease output in the USB flash drive market. Kingston was **[*825]** unable to prove the second of these prerequisites to its claim, that is, that the challenged license terms would have an adverse effect upon the market for USB flash drives in the United States. Therefore, it is not necessary to address the first prerequisite, which is that SanDisk uses licensing terms that are beyond the scope of its patents.

2. Relevant markets and market power

Kingston argues, and I agree, that two relevant markets can be used to evaluate the competitive effect of SanDisk's licensing practices. As described earlier, one is the market for USB flash drives, in which no close substitutes exist for USB flash drives; the other is the United States market for flash memory technology in which SanDisk enjoys market power through its large flash memory technology patent portfolio, for which no substitute exists.

3. Anticompetitive effects

Kingston has a straightforward theory about how SanDisk's licenses adversely affect competition. If SanDisk uses its power in the technology market to force aggregators to pay worldwide and double royalties, **[**28]** the aggregators' costs will rise and they will either pass their costs on to consumers, switch to a reseller model or exit the market. Prices will increase (or, at least, not fall as fast) because aggregators are more efficient and have used their cost advantage to drive down prices. SanDisk has two incentives to eliminate aggregators: the price of its USB flash drives would increase and its royalties would increase because they are calculated as a percentage of the price of each flash drive sold.

The core of Kingston's theory is that forcing aggregators to pay higher royalty costs will raise the market price for USB flash drives. Dr. Russell Mangum, Kingston's expert witness, testified that as a matter of general economic theory, when the costs for suppliers increase, the supply curve shifts inward and either price increases or the quantity supplied decreases.

Kingston's theory focuses on a single variable, an increase in cost for the entire market. It neglects the fact that even if paying SanDisk's royalties increases aggregators' costs, aggregators provide only part of the supply of USB flash drives. The relevant question is whether increased costs for aggregators will raise the overall **[**29]** market price. This is a matter of proof, not of mere assumption that aggregators can pass on higher costs with higher prices. It requires consideration of the nature of the market and possible responses of aggregators and other firms to the higher royalty costs. In addition, the theory does not take into account SanDisk's relevant patents on flash memory chips and systems. Kingston fails repeatedly to distinguish the effects of SanDisk's valid royalty demands from its allegedly improper ones. Instead, it assumes that the correct comparison is between a situation in which aggregators pay no royalties to SanDisk and a situation in which aggregators agree to SanDisk's standard licensing program. Obviously this is incorrect. The relevant question is whether the alleged extension of SanDisk's royalties beyond the scope allowed by its patents will adversely effect competition.

Once some of the complexity of the real counterfactual question comes into focus, several questions demand analysis:

> (1) if aggregators must pay SanDisk's putatively invalid royalty demands, will they pay the royalties to continue their current operations, switch to being resellers or leave the United States markets?
>
> (2) **[**30]** if aggregators pay the royalties or remain as resellers, what will happen to the price and quantity of USB flash drives in the United States?
>
> **[*826]** (3) if some aggregators leave the market, will other aggregators, resellers or vertically integrated manufacturers increase their production of USB flash drives and prevent a drop in quantity or increase in price?

Kingston failed to present sufficient evidence to allow the court to reach reliable conclusions about any of these three questions.

a. If aggregators must pay SanDisk's putatively invalid royalty demands, will they pay the royalties, switch to being resellers or leave the United States markets?

Kingston has adduced no persuasive evidence about what effect, if any, SanDisk's putatively invalid licensing terms have had or will have on aggregators generally or on Kingston in particular. It asserts that SanDisk's licensing program has already caused aggregators to reduce production and exit the market. In support of this assertion, Kingston compiled the following evidence about the performance of aggregators in the United States USB flash drive market:

> Since 2006, the number of aggregator and reseller firms has fallen and several large firms **[**31]** have reduced their sales. Memorex sold $86 million in USB flash drives in 2006 but its sales decreased by more than $21 million in 2007 and fell precipitously after 2008. Memorex signed a license with SanDisk in late 2007. Imation had more than $11 million in sales in 2006, but its sales fell to around $613,000 by 2010. Imation was sued by SanDisk in 2007 and signed a license in January 2011. Ritek and A-Data have also reduced their presence after 2006.
>
> Several aggregators reduced their USB flash drive sales after signing licenses with SanDisk in 2007. Buffalo sold $400,000 worth of USB flash drives in the United States in 2007, but stopped all sales after its consent judgment. Welldone, Add-on and Infotech have stopped sales in the United States since accepting licenses. Welldone paid $788,000 in royalties in 2009 but none in 2010 or 2011. Add-on paid approximately $20,000 in royalties in 2008 and 2009 but none in 2010 or 2011. Interactive Media, Kaser and TSR all agreed to licenses but paid no royalties. These three firms either stopped selling USB flash drives, switched to being resellers or stopped paying royalties, but Kingston submitted no evidence about which of these things **[**32]** occurred.

Kingston argues that this evidence shows that SanDisk's licensing program has hurt competition in the USB flash drive market. Although Dr. Mangum, Kingston's expert, introduced this evidence, he never made any such claim. In fact, Mangum clarified his testimony on cross examination, explaining that he was not saying that SanDisk's licensing program caused these aggregators to reduce their sales. Tr. Trans., dkt. #465, at 96-97, 105-06. This was a wise admission. He performed no analysis, quantitative or qualitative, to determine why the aggregators reduced their sales or to rule out potential causes other than the licenses. In fact, several of these firms reduced their sales for reasons unrelated to SanDisk's lawsuits or licenses. Memorex's sales fell by almost 25% in the year before it signed a license with SanDisk. Imation was planning to leave the market in 2007 and reduced its sales by more than 94% before entering a license with SanDisk. Kingston adduced no evidence to suggest that SanDisk's licensing program caused these aggregators to reduce their sales.

Mangum made a second clarification, which was that he was not offering an opinion about what effect SanDisk's licenses **[**33]** have had on prices or output in the flash **[*827]** drive market since 2007. Tr. Trans., dkt. #465, at 131. This admission is revealing because he was presented with a convenient natural experiment. SanDisk began its aggregator licensing program in 2007. Mangum could have used this event to analyze the effects of SanDisk's licenses on aggregators and market conditions, but he did not. The evidence that was presented suggests that the market has remained competitive despite SanDisk's aggregator licensing program. A large number of firms sell USB flash drives, none is dominant and their shares have fluctuated over time. Few impediments to entry are visible. Small firms sold more than a third of all USB flash drives, a percentage that has doubled in recent years. Such low concentration, high volatility and ease of entry are indicators of vibrant competition. The anecdotal evidence from Kingston's witnesses further confirms the competitive nature of the USB flash drive market. Sun Dep., dkt. # 464-6, at 77; Ciano testimony, Tr. Trans., dkt. #458, at 62; J. Thompson Dep., dkt. #453-2, at 99-100. Kingston adduced no evidence showing that SanDisk's aggregator licensing program has damaged competition **[**34]** in the USB flash drive market since 2007.

Kingston's primary argument is that SanDisk's licenses will harm competition in the future by forcing aggregators to leave the market. As evidence, Kingston offered testimony from officers of several aggregators that they cannot compete while paying SanDisk's royalties. It followed this with a series of arguments that it will likely leave the United States market rather than pay royalties under SanDisk's proposed terms.

The testimony that Kingston elicited from executives of other aggregator firms was largely conclusory. Kingston submitted deposition testimony from Jeff Thompson, the President, CEO and founder of Edge Tech, a company that sold approximately $7.5 million in USB flash drives in the United States in 2007. SanDisk sued Edge Tech in 2007 and sent it the standard card license. SanDisk told Thompson that no changes would be made to the license, but Thompson did not want changes. He wanted all the aggregators to sign similar agreements because Edge Tech might be unable to compete if it paid higher royalties than its competitors.

Edge Tech paid $190,871 in royalties in 2008 and $28,650 in 2009, but none in 2010 or 2011. From 2008 to 2009, **[**35]** Edge Tech's gross profit from USB flash drives decreased around 70%, and it was not profitable in 2010. If Edge Tech paid royalties in 2010 and 2011 similar to those that it paid in 2008, it would owe around $124,000 annually, bringing its annual losses to $200,000. Thompson stated that Edge Tech would not be competitive if it paid these royalties and would likely stop selling USB flash drives. *Id. at 63-64*.

Although Edge Tech's losses would increase if it paid SanDisk's royalties and Thompson may reasonably predict his company's response to such losses, his deposition testimony does not prove that SanDisk's allegedly improper licensing terms will cause Edge Tech to leave the USB flash drive market. Thompson never suggested that SanDisk's license caused Edge Tech's problems that began in 2009. In fact, Edge Tech suffered losses in 2010 or 2011 while paying no royalties. Moreover, Thompson did not testify that he believed SanDisk's royalty demands were outside the scope of its patents. In short, Kingston has not proven by a preponderance of the evidence that improper terms in SanDisk's license will cause Edge Tech to reduce its sales or leave the United States markets.

Kingston presented **[**36]** similar testimony from Mark Ciano, Vice President of Finance for PNY. PNY has sold flash memory **[*828]** products in the United States since 2000, averaging approximately $150 million in USB flash drives sales annually. Until 2009, PNY was a reseller and purchased 95% of its products as completed systems. Ciano oversees PNY's accounting, treasury and human resources departments and supervises the calculation of the royalties that PNY pays under its license with SanDisk.

SanDisk sued PNY in 2007 and sent it the standard card license offer. PNY asked for changes to the worldwide royalty base, but SanDisk's CEO responded that

> my offer to [PNY's representative] was based on the clear understanding that they were going to accept without any material changes to our standard contract. I specifically told [PNY's representative] for establishing a fair playing field to all licensees, we do not have the room to customize agreements for each license. He agrees that it's not to be a lawyer-to-lawyer negotiations but that we could keep it simple (i.e., virtually no changes—he raised none with me).

Exh. 655. Several days later, PNY signed a licensing agreement containing SanDisk's standard worldwide royalty **[**37]** base and field of use provisions. Exh. 1541.

PNY did not believe that these provisions would affect it, because it would not owe royalties on systems it purchased from SanDisk's licenses for resale. However, in 2009, PNY switched to an aggregator model. Now it purchases only 10 to 15% of its systems complete. To date, PNY has paid about $800,000 in royalties on more than $150 million in sales. SanDisk sued PNY after an audit concluded that it had withheld between $21 and $30 million in royalty payments, an amount equal to PNY's profit for the last two years. PNY contests the audit and denies that it owes these sums under their agreement. Ciano testified that if PNY paid the disputed royalties, it would be unable to compete.

However, Ciano admitted that PNY has never considered leaving the United States market. In fact, during the time in which PNY has had a license from SanDisk, PNY's prices fell 20% and its sales increased. Moreover, Ciano has substantially conflicting incentives for his testimony. In the lawsuit over the disputed royalties, PNY filed antitrust counterclaims alleging that the worldwide licenses and double royalties violate antitrust laws. PNY likely regrets accepting **[**38]** these license terms because it did not foresee that it would switch to an aggregator model. In light of PNY's past market performance and Ciano's conflict of interest, I am not persuaded by Ciano's conclusory testimony that SanDisk's license will cause PNY to reduce its USB flash drive sales or exit the United States market.

Finally, Kingston argues that SanDisk's licensing demands will likely cause Kingston to leave the USB flash drive market in the United States and that if it leaves, competition will be harmed. Kingston's argument rests on two premises: (1) it cannot afford to continue acting as a reseller and (2) it cannot afford to pay the royalties charged under SanDisk's standard licensing offer to be an aggregator.

To support the first premise, Kingston relies primarily on its sagging domestic performance. After it adopted the aggregator model, Kingston's market share in the United States increased from 8% in 2005 to 13% by 2008. The next year, it switched back to a reseller model in the United States and its domestic expansion underwent a reversal. Its market share declined to 9% in 2009 and 2010. Meanwhile, its worldwide market share remained stable in 2009 and increased from **[**39]** 28 to 31% in 2010.

[*829] Darwin Chen, Kingston's Vice President of Sales and Marketing, testified about how switching to a reseller model has affected Kingston. Chen has been responsible for strategy, business development and product management in Kingston's flash memory business since 2003. Chen does not believe the reseller model is sustainable, because Kingston can no longer search for the cheapest components from different manufacturers. This hinders its ability to expand its market by competing on price and maintain the perception that it is a price leader. Chen testified that if Kingston must continue operating as a reseller, it cannot be competitive and will eventually leave the market.

Mangum testified that, in his opinion, the reseller model caused Kingston's sales to stagnate in the United States, suggesting that it is not a viable long-term business model. I do not find his conclusion reliable. The bases for it were conversations with Kingston's executives and his theoretical analysis of the reseller and aggregator models. He performed no direct analysis of Kingston's performance. Mangum did not compare Kingston's costs or profits as a reseller to those of other manufactures, analyze **[**40]** Kingston's domestic costs before and after switching to the reseller model or compare Kingston's domestic costs as a reseller to its foreign costs in countries where it remained an aggregator. Kingston submitted spreadsheets that appear to contain the necessary data, Exhs. 197, 198, 200, and 468, but offered no testimony to explain them. Mangum also failed to consider alternative explanations for Kingston's decline in sales, an omission that undermines his opinion.

Kingston introduced no data to support a finding that it would have been more competitive domestically if it had remained an aggregator. The bare correlation between Kingston's declining market share and its switch to a reseller model is weak evidence that the reseller model is less advantageous, but not sufficient to prove that Kingston will leave the market rather than remain a reseller, even when Chen's testimony is taken into consideration. Kingston has not proven by a preponderance of the evidence that maintaining the reseller model in the United States is an unacceptable alternative to paying SanDisk's licensing fees and that it will be forced to leave the United States USB flash drive market to avoid the fees.

Instead **[**41]** of offering useful empirical analysis about the market conditions in the United States, Kingston insisted on comparing its profit margin when paying no royalties to its profit margin if it paid SanDisk's worldwide royalty on both fields of use. If Kingston pays worldwide royalties on both fields of use, it would owe approximately $40 million a year in royalties from sales in countries in which SanDisk has no patents and in which its competitors pay no royalties. Its average net profit on worldwide sales would drop from 3.2% to .9%. Kingston argues that this $40 million should be considered a royalty on United States sales, because SanDisk is using the United States license as leverage to extract foreign royalties to which it has no legal right. Under Kingston's theory, the effective royalty on its United States sales would average around 40% and its average profit margin on domestic sales would fall to -19.2%. According to Mangum and Chen, Kingston would exit the United States market rather than accept such a high loss on its United States sales.

This calculation is misleading because Kingston has specified the counterfactual situation incorrectly. The $40 million figure does not account **[**42]** for the portion of royalties within the scope of SanDisk's patents, such as royalties on flash memory chips in countries in which it has patents. **[*830]** Kingston manufactures all of its flash memory products in China, Taiwan and the United States, countries in which SanDisk has flash memory patents. Chen testified that SanDisk has never shown Kingston any of its Taiwanese or Chinese patents, but this testimony is not proof that those patents do not cover Kingston's products.

Kingston offered one calculation that would control for SanDisk's valid foreign royalties. If Kingston paid royalties only on sales in the United States, its average margin on domestic sales would fall from a 1.6% profit to -.7% loss. However, neither Mangum nor Chen testified about whether Kingston would leave the United States market to avoid such minimal losses. Moreover, even this -.7% figure is misleading. When Mangum calculated the -.7% average loss, he included the years after 2008 when Kingston's margins were allegedly lower because it was acting as a reseller and it would not owe any royalties. Even if I were to overlook that error, this calculation does not account for SanDisk's right to royalties for its flash **[**43]** memory chip patents. Kingston is still operating on the false assumption that the proper baseline for comparison is a situation in which it pays no royalties, failing to differentiate the effect of the valid from the allegedly invalid royalties.

b. If aggregators pay SanDisk's licenses or become resellers, will the quantity of USB flash drives supplied in the United States decrease or will the price of USB flash drives increase?

Even if Kingston had proven that SanDisk's licensing program would injure Kingston or other aggregators, Kingston must show more than injury to one or a few firms. A firm may unreasonably restrain trade by excluding competitors, but only if the exclusion raises prices above the competitive level or drives output below it. *Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 394 (7th Cir. 1984)*. The federal antitrust laws are concerned not with the welfare of competitors but the health of the competitive process, and healthy competition has winners and losers. *Id. at 393*. Kingston has adduced no convincing evidence that prices will increase or output will decrease in the USB flash drive market if aggregators face higher costs because they pay SanDisk's **[**44]** licenses or switch to a reseller model. The nature of the USB flash drive market and the evidence about firms' pricing behavior suggest that neither price nor output would be adversely affected.

Kingston had access to evidence about whether competition in USB flash drive market is affected when aggregators switch to the reseller model or pay SanDisk's royalties. Kingston became a reseller in 2009, but Mangum did not analyze the effects on the market price or output after such a large aggregator switched to the reseller model. Id. at 91-92, 95. Many aggregators accepted SanDisk's licenses in 2007, yet Mangum did not analyze the affect on the market when they began paying royalties.

The evidence that Kingston did present suggests that market prices are unlikely to change if aggregators begin paying royalties or switch to a reseller model. Edge Tech began paying royalties in 2008 but did not raise prices to offset this cost. PNY paid royalties in 2008 and switched from being a reseller to an aggregator in 2009, but its prices continued to fall and its sales continued to increase. Kingston did not raise its prices after switching to the reseller model in 2008.

The USB flash drive market is **[**45]** so competitive that firms cannot pass on their cost increases by raising the price of their USB flash drives, as Kingston's own witnesses testified. Mangum, Tr. Trans., dkt. #465, 91-95; Chen, Tr. Trans., dkt. #455, **[*831]** 125-27. The USB flash drive market is largely commodified because drives from different firms are not readily distinguishable from one another. Because consumer's primary concern is storage capacity and price, firms set their prices according to the market price rather than on their costs. Tr. Trans., dkt. #465, at 89-90; Ciano, Tr. Trans., dkt. #458, 57-58. Mangum testified that in the 2007 cases, he had concluded that even if Kingston had been required to a pay a 4% royalty on United States sales, it would have been unable to raise its prices because of the competitive market. Tr. Trans., dkt. #465, at 81. Aggregators' profit margins will diminish if they begin paying SanDisk's royalties or switch to a reseller model, but Kingston did not prove by a preponderance of the evidence that the market prices or quantity supplied would be adversely affected.

c. If aggregators leave the market, will the price of USB flash drives increase or output decrease?

Even if Kingston had **[**46]** proven that SanDisk's licenses would force aggregators to leave the market, it did not prove that the loss of aggregators would affect competition in the United States flash drive market. Kingston's argument is that aggregators play a special role in fostering price competition in the USB flash drive markets. Kingston has two arguments to support this proposition: (1) aggregators are more efficient than vertically integrated manufacturers and use their cost advantage to foster price competition; and (2) prices are already higher in the United States than in foreign markets because more aggregators compete in foreign markets.

Kingston's argument that aggregators are more efficient relies on its theoretical analysis of the USB flash drive market and on statements by SanDisk's executives about the competitive situation in 2006 and 2007. Kingston's theoretical analysis ignores the benefits of vertical integration and overstates aggregators' advantages.

According to Kingston's theory, fabricators have high fixed costs and low marginal costs, which gives them an incentive to continue full production of chips. When demand weakens, this causes periods of oversupply that permit aggregators to **[**47]** purchase chips at low cost. When one such period of oversupply occurred in 2006, aggregators gained a competitive edge. In particular, Kingston used its cost advantage to compete on price and expand its United States market share. In response, SanDisk devised its licensing program to target the aggregators who posed a competitive threat.

Kingston's analysis of the importance of aggregators ignores the efficiency advantages of vertical integration. By receiving components through internal channels, vertically integrated firms spend fewer resources locating components in the merchant market (they must still spend some resources to track and price inputs correctly). In addition, by participating in the upstream (manufacturing) and downstream (retail) market, a vertically integrated firm increases downstream competition and reduces the profit margin taken by intermediate firms in the supply chain.

Moreover, Kingston's analysis overstates aggregators' advantage in times of oversupply. When market prices fall, the cost of components falls for everyone. The "cost" of chips falls for a vertically integrated firm because it should value chips that it uses internally at their opportunity cost, **[**48]** which is the price it could obtain by selling them to a third party. Many vertically integrated firms also sell flash memory chips and benefit when aggregators purchase chips and prop up prices. Furthermore, when supply is limited and prices rise, aggregators will lose **[*832]** any purported cost advantage they had. A complete analysis would have compared the respective costs and benefits of each method of production. Neither Mangum nor Kingston undertook such an analysis.

Kingston's internal documents confirm my conclusion that the facts are more complicated than the theoretical picture Kingston presented at trial. Kingston argued that vertically integrated firms have higher costs because of their investments in facilities and patents. However, in an internal presentation entitled "Competitive Analysis," Kingston concluded that SanDisk had higher net margins because its fabrication facility and intellectual property lowered its costs. Exh. 20. The internal documents suggest that even Kingston recognizes that vertical integration may have efficiency advantages.

Dr. Mangum, Kingston' expert, testified at trial that aggregators have lower costs, but his opinions on this subject relied entirely **[**49]** on statements from employees and executives of SanDisk and Kingston. Tr. Trans., dkt. #458, at 136-44; dkt. #465, at 10-12, 132. When Kingston identified specific statements on which Mangum relied, the statements were limited to certain time periods and speculative conclusions lacking any apparent foundation. E.g. Tr. Trans., dkt. #458, at 143-44; Tr. Trans., dkt. #465, at 38-40. The only objective evidence on which Mangum relied to conclude that aggregators had lower component costs was a market report from 2007, in which Gartner reported that Kingston, along with Transcend and A-Data, gained market share by purchasing large quantities of chips at low cost. Kingston produced no evidence that aggregators enjoyed similar purchasing advantages at other times or that this advantage in times of oversupply outweighed the disadvantages when supply and demand were aligned. More important, as I explained above, vertically integrated firms and aggregators should value their components similarly. If aggregators are more efficient, it must be because their incremental costs are lower, but Kingston produced no data about the cost of assembling, marketing or distributing USB flash drives. Therefore, **[**50]** I conclude that Kingston has failed to show that aggregators are more efficient, on balance, than vertically integrated firms.

Kingston also argued that it is a particularly efficient firm and would represent a special loss to the USB flash drive market. It maintained that as a large aggregator, it can purchase chips opportunistically at prices lower than the spot market and even lower than SanDisk can produce them. It failed to substantiate these claims. The only data it offered about its component costs was specific to the first quarter of 2008. It produced no evidence that it enjoyed similar advantages at other times or that its costs for assembling, marketing or distributing USB flash drives are lower than the costs of SanDisk, other vertically integrated firms or other aggregators.

Kingston has also not proven that the loss of aggregators would lead to price increases. Kingston offered no data to support its theory that aggregators' prices are lower than the prices charged by SanDisk or other vertically integrated manufacturers. To predict the effect of increasing the costs for aggregators or forcing aggregators to exit the market, Kingston would have had to analyze the potential **[**51]** reactions by firms unaffected by SanDisk's challenged licenses. The likelihood that a reduction in output by a large aggregator would increase market prices depends on the capacity and incentive of other firms to increase production or to enter the market. Kingston's expert did not undertake this analysis. Moreover, he ignored available evidence to test the theory that the **[*833]** loss of a large aggregator would raise prices. Two large aggregators, Memorex and Imation, stopped selling USB flash drives between 2006 and 2010. Mangum did not analyze whether their exit increased prices or whether other firms responded with increased output.

Several features of the USB flash drive market suggest that it could absorb the loss of Kingston or other aggregators with little effect because other firms would increase output. Small firms have demonstrated their capacity to expand output, more than doubling their share to 35% between 2007 and 2010. Private label USB flash drives also doubled their market share to 10%. In addition, flash memory chip manufacturers would have strong incentives to replace any reduction in output by aggregators. These firms have a strong incentive to maintain high levels of **[**52]** production and to insure that there are uses for their chips. The cost to expand downstream is low because it is comparatively simple and cheap to assemble chips and controllers into flash drives. Chip manufacturers like Samsung and Toshiba already have a large retail presence. If Kingston or other aggregators were to reduce their output, these manufacturers will likely expand into the downstream market or sponsor an aggregator to use its chips.

Kingston's expert did not give adequate attention to these potential market effects. Mangum argued that his market share analysis showed that other firms are not waiting to take over Kingston's output, but he did not provide a comprehensive survey of market participants or analyze the capacity of particular firms or types of firms to increase output. The fact that some firms have left the market does not suggest that other firms are not able to expand output. On the contrary, Memorex and Imation left the market with no apparent effect on price or output. Mangum did note that SanDisk had concluded in an internal presentation that Samsung was unlikely to expand downstream into SD cards because of a conflict among its internal divisions. However, **[**53]** he did not discuss Samsung's incentive to insure downstream demand or the fact that Samsung has partnerships with downstream firms. Even if Mangum's view of the presentation were correct, that still leaves four other large chip manufacturers.

In the absence of reliable empirical data to support its theoretical analysis of the USB flash drive market and aggregators' competitive advantage, Kingston rested its case primarily on statements by SanDisk's executives supposedly acknowledging that aggregators play a crucial role in maintaining competition. Kingston relies heavily on two comments by SanDisk's founder and former CEO, Dr. Harari. In a 2007 quarterly earnings call, Harari told investors in 2007 that SanDisk's profit margins were low because of the "crazy competitive" situation. Exh. 289. In testimony before the International Trade Commission in 2007, he said that SanDisk "has many capable competitors such as Kingston, Imation and Transcend and these competitors put enormous pricing pressures on the market for our products." Harari Dep., dkt. #468-10, at 26. These isolated comments are not very probative. In the first, Harari is describing a specific time period and does not even **[**54]** mention aggregators. In the second, he acknowledges that competition from these firms decreases prices, but he never suggests that their aggregator model makes them more efficient or gives them a competitive edge.

Kingston also cites deposition testimony by SanDisk's Vice President of Retail Sales, Douglas Hauck. Hauck stated that, historically, aggregators' prices have been lower than SanDisk's prices in the United **[*834]** States and that SanDisk tried raising its prices in 2009 but competition from aggregators forced it to bring them back down. Hauck Dep., dkt. #468-5, at 87. Hauck also testified that SanDisk does not use cost reductions to reduce prices "proactively." Id. at 281. Hauck's testimony offers some support for Kingston's claim that aggregators have lower prices and compete on price more readily, but his general statements are not enough to corroborate Kingston's theory about the role aggregators play in the USB flash drive market. His testimony does not prove that aggregators are more efficient, that SanDisk used its licenses to exclude aggregators and raise prices or that such a strategy has any likelihood of success. More important, SanDisk's beliefs were not relevant to the **[**55]** issues at trial. As to those, Kingston needed reliable evidence about efficiency and market price.

Kingston's final argument is that prices for USB flash drives in the United States are higher than prices in foreign markets because more aggregators compete in foreign markets. Kingston submitted a chart listing prices charged for USB flash drives on April 1, 2011 by Kingston, Transcend, A-Data and PNY in the United States and various foreign regions. Exh. 672. Mangum used this chart to draw conclusions about the markets in the United States and foreign regions, but it is not a reliable basis for comparing USB flash drive prices. Rather than listing the average price for USB flash drives, it lists only the prices charged by four aggregators; it does not control for general differences in consumer prices across these regions and it does not indicate whether similar price differences existed at other times. The chart does not offer any basis on which to hypothesize possible causes of these differences as of April 1, 2011. Finally, it does not compare prices across the same regions. It lists A-Data and Kingston's prices in Latin America, Europe and the United States, PNY's prices in the **[**56]** United States, the United Kingdom and Germany, and Transcend's prices in Latin America, Europe and the United Arab Emirates but not the United States.

Chen, Kingston's Vice President of Sales and Marketing, testified that prices are lower in European markets because more aggregators compete in Europe. His testimony is not particularly persuasive; the only bases for his conclusion were his experience in these markets as a businessman and the prices listed in the price chart discussed above. Although Kingston proved that its own prices were higher in the United States than in Europe or Latin America, the cause of this difference remains unclear. Chen attributes Kingston's higher prices to its litigation costs and to its reseller model. However, as I noted above, Kingston offered no empirical data to corroborate this assertion, Kingston does not set its prices based on its costs and Kingston's prices did not change after it switched to a reseller model. Therefore, I conclude that Kingston has not shown that greater competition from aggregators causes international prices for USB flash drives to be lower than prices in the United States.

Because Kingston has failed to prove that SanDisk's **[**57]** putatively invalid licensing terms have adversely affected competition or that they will have such an effect in the future, SanDisk is entitled to judgment in its favor on Kingston's Sherman Act counterclaim.

B. California's Unfair Competition Law

The California Unfair Competition Law prohibits "unfair competition," which it defines as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the California false advertising statute]." *Cal. Bus. & Prof. Code § 17200*. Kingston argues **[*835]** that SanDisk's system-level royalties impose unfairly discriminatory royalties on downstream firms and that California recognizes that price discrimination in supplier relationships can be unfair even if it is not an not antitrust violation. *Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 740-41, 162 Cal. Rptr. 543 (Cal. Ct. App. 2d Dist.1980)*.

However, the California Supreme Court rejected the broad public policy balancing test used to define "unfair" practices in *Motors, Inc.*, replacing it with the following test:

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, **[**58]** the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 186-87, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 544 (Cal. 1999). Kingston argues that the Cel-Tech test is limited to direct competitors and the court did not purport to define unfair practices in a vertical supply relationship such as between SanDisk and its licensees. *Id. at 187 n.12*. However, Kingston cites no cases indicating that California courts would apply the old fairness balancing test to vertical supplier relationships. *Scripps Clinic v. Superior Court, 108 Cal. App. 4th 917, 940, 134 Cal. Rptr. 2d 101 (Cal. Ct. App. 4th Dist. 2003)* (noting uncertainty about whether balancing tests applies to other unfair practices). Moreover, SanDisk and its licensees have both a supplier and a competitor relationship. Kingston complains that aggregators face a disadvantage when competing with SanDisk in downstream markets. In other words, Kingston complains about **[**59]** having to compete on unfair terms. In this situation, I conclude that the California Supreme Court would require Kingston to show an incipient violation of the antitrust laws. Because I have concluded that Kingston has not proven that SanDisk's licenses are likely to be harmful to competition, SanDisk is entitled to judgment on Kingston's counterclaim under the California law.

In the alternative, SanDisk's patent licensing terms would be shielded by the "safe-harbor" doctrine, which prevents a plaintiff from asserting an unfair competition claim if other legislative provisions "'bar' the action or clearly permit the conduct." *Cel-Tech, 20 Cal. 4th at 182-184, 973 P.2d at 544* . The Patent Act permits patent owners to use price discrimination to maximize their licensing income, absent a showing of anticompetitive effects. *USM Corp. v. SPS Technologies, Inc., 694 F.2d 505, 512-13 (7th Cir. 1982)*. Kingston argues that the California legislature has not expressly authorized price discrimination by a patent-holder, but the California Unfair Competition Law cannot make illegal a practice that is recognized by the federal courts as a lawful exercise of a patent. If it did prohibit discriminatory **[**60]** pricing in the absence of anticompetitive effects, its decision would be preempted by the patent laws because policy decisions about the fair use of patents falls to Congress. *Biotechnology Industry Organization v. District of Columbia, 496 F.3d 1362, 1373-74 (Fed. Cir. 2007)*. Either Kingston's counterclaim falls within the Unfair Competition Law "safe-harbor" or actions under the law for discriminatory patent licensing are preempted by federal law; under either approach, SanDisk is entitled to judgment as a matter of law.

[*836] ORDER

IT IS ORDERED that plaintiff SanDisk Corp. is entitled to judgment in its favor on defendants Kingston Technology Co. Inc. and Kingston Technology Corp.'s remaining counterclaims under *Section 1* of the Sherman Act, *15 U.S.C. § 1*, and under the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200*. The clerk of court is directed to enter judgment in favor of plaintiff on defendants' count XXIV: Sherman Act Section 1 and count XXV: California Unfair Competition Law.

Entered this 27th day of March, 2012.

BY THE COURT:

/s/ BARBARA B. CRABB

District Judge

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JetAway Aviation, LLC v. Bd. of County Comm'rs of Montrose

United States District Court for the District of Colorado

March 28, 2012, Decided; March 28, 2012, Filed

Civil Action No. 07-cv-02563-RPM

Reporter

2012 U.S. Dist. LEXIS 42377 *; 2012-1 Trade Cas. (CCH) P77,855; 2012 WL 1044304

JETAWAY AVIATION, LLC, a Colorado Limited Liability Company, Plaintiff, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MONTROSE, COLORADO; MONTROSE COUNTY BUILDING AUTHORITY, a Colorado Nonprofit Corporation; JET CENTER PARTNERS, LLC, a Colorado Limited Liability Company; BLACK CANYON JET CENTER, LLC., a Colorado Limited Liability Company; WILLIAM PATTERSON; KEVIN EGAN; and JAMES RUMBLE, Defendants.

Prior History: *Jetaway Aviation, LLC v. Bd. of County Commisioners, 2008 U.S. Dist. LEXIS 20785 (D. Colo., Feb. 28, 2008)*

Core Terms

Airport, proposals, negotiations, lease, antitrust, aviation

Counsel: **[*1]** For JetAway Aviation, LLC, a Colorado Limited Liability Company, Plaintiff: Mark E. Haynes, LEAD ATTORNEY, Benjamin Joseph Larson, Kelley Allison Duke, Laura J. Hazen, Ireland Stapleton Pryor & Pascoe, P.C., Denver, CO; Thomas J. Byrne, Byrne, Knudsen & White, L.L.P., Denver, CO.

For Board of County Commissioners of the County of Montrose, Colorado, The, Montrose County Building Authority, a Colorado Nonprofit Corporation, Defendants: Bobbee J. Musgrave, Sean Michael Ward, Bryan Cave HRO-Denver, Denver, CO.

For Jet Center Partners, LLC, A Colorado Limited Liability Company, Black Canyon Jet Center LLC, a Colorado Limited Liability Company, Kevin Egan, James Rumble, Defendants: Bobbee J. Musgrave, Bryan Cave HRO-Denver, Denver, CO; Elizabeth L. Harris, Kathryn A. Reilly, Husch Blackwell LLP-Denver, Denver, CO.

For William Patterson, Defendant: Bobbee J. Musgrave, Bryan Cave HRO-Denver, Denver, CO; Brian G. Eberle, Robert Evan Youle, Sherman & Howard, L.L.C.-Denver, Denver, CO.

Judges: Richard P. Matsch, Senior United States District Judge.

Opinion by: Richard P. Matsch

Opinion

MEMORANDUM OPINION AND ORDER

The plaintiff in this case is JetAway Aviation, LLC ("JetAway"), a Colorado limited liability company in which Steve **[*2]** Stuhmer is the managing principal, as plaintiff. The defendants are The Board of County Commissioners of the County of Montrose, Colorado; Montrose County Building Authority, a Colorado Nonprofit Corporation; Jet Center Partners LLC, a Colorado Limited Liability Company; William Patterson; Kevin Egan; and James Rumble. Black Canyon Jet Center LLC, a Colorado limited liability company, was merged into JCP and is no longer an entity.

JetAway claims that all of the defendants acted collusively to prevent it from providing services to the public as a fixed base operator ("FBO") on the Montrose Regional Airport in Montrose County, Colorado ("Airport"). The geographical location of the Airport makes it attractive to general aviation for tourists and recreational users for southwest Colorado destinations, particularly the ski and resort facilities at Telluride, Crested Butte and other nearby attractions. It serves commercial airlines and local general aviation users as well.

FBO services were provided by V.I.P. Flyers, a Colorado corporation until 1991 when the District Court for Montrose County entered a permanent injunction against it for a violation of certain agreements. James Rumble ("Rumble") **[*3]** owned and managed that company.

From 1991 to January, 2006, the County provided FBO services, including the sale of aviation fuel and a terminal for the use of pilots and passengers of private aircraft. The terminal building was closed in 2002 because of asbestos concerns. The County installed a double-wide trailer as a temporary measure.

The governing authority for Montrose County is a three member Board of County Commissioners ("BOCC"). Recognizing the need for better facilities, the BOCC began consideration of contracting with a private provider for services. The members then were David Ubell, Betsy Hale and Leo Lange.

Rumble, Kevin Scott and Kevin Egan formed a business in 2002 for the single purpose of obtaining and operating an FBO at the Airport. Scott had FBOs at other comparable airports.

The question of privatization of the Airport was discussed publicly in Montrose. William Patterson had been the Treasurer of the Airport authority when V.I.P. Flyers had the FBO and he was well acquainted with Rumble. Both of them lived in Montrose.

All three members of the BOCC favored privatization and they directed the County Attorney, James Fritze to draft a Request for Proposal ("RFP") and **[*4]** to develop minimum standards for FBO operations at the Airport.

In 2004, the BOCC retained a financial consulting firm to compare the anticipated financial results of privatization with continuing County operation, which would require an estimated $2 million investment in necessary capital improvements. The reported conclusion was that projected cash flows for the period 2006 through 2010 made continued county operation the more appropriate action.

The question of privatization of the Airport was discussed in the election for county commissioners in November 2004. Patterson and Allan Belt, proponents of privatization, were elected. They joined the incumbent, Ubell, in January, 2005.

In 2004, JetAway purchased a building adjacent to the Airport that had been used as a manufacturing facility. Through agreements with the County, JetAway began providing "through the fence" FBO services to Airport users but it was restricted from selling aviation fuel.

The County issued a Request for Proposals with a response date of April 1, 2005 (Ex. A-23).

This RFP was different from a request for competitive bids with specifications. It asked each proposer to submit a business plan with no preconceptions **[*5]** except for adherence to the Airport's Minimum Standard requirements. The terms and conditions of the RFP included the following:

The County reserved the right:

1 To select one, two, or more respondents with whom the County may pursue negotiations pursuant to this RFP.

2 To reject any and all proposals received pursuant to this RFP for whatever reason deemed necessary or for no specified reason.

3 To amend or otherwise modify this RFP prior to the submission date and to cancel this RFP with or without the substitution of another RFP.

4 To request more detailed qualifications statements and/or references and to conduct investigations with respect to the qualifications and/or reputations claimed by proposer.
5 To not proceed with the evaluation process as indicated by this RFP for whatever reason.
6 To require additional information to clarify or supplement proposals.
7 To expressly waive any non-compliance with an insubstantial requirement of this RFP in any proposal submitted.
8 To negotiate regarding unacceptable provisions incorporated in an otherwise acceptable proposal.
Exhibit A-23

While the RFP was for a lease, there was no legal description of the premises. That, too, would be negotiated.

The **[*6]** County formed a committee (FBO Committee) to review the proposals, to recommend whether to privatize the Airport and, if so, which applicant should be accepted. The county manager, Dennis Hunt, and Scott Brownlee, Airport Manager, selected the members of the FBO Committee. Brownlee, County Attorney Fritze, a banker and three airport employees were appointed.

Steve Stuhmer, a principal of JetAway, delivered its proposal to the airport administration office at about 3:00 p.m. on April 15, 2005. The proposal was in multiple binders in a footlocker that was sealed and marked. When Stuhmer returned about an hour later, he saw that the footlocker had been opened. JCP's proposal was delivered almost two hours later.

Jeanette Anderies, an airport employee and member of the FBO review committee, opened the footlocker and was seen looking at a copy of JetAway's proposal by Scott Brownlee who admonished her. When Stuhmer returned, he was told that Anderies had gone for the day.

The JetAway proposal was based on its existing facility. The land was to be conveyed to the County at no cost and leased back to JetAway which would also lease the adjacent Airport land to develop a ramp area. JetAway pointed **[*7]** out that this was a unique proposal which would provide a full range of FBO services immediately. Ex. A-27.

The JCP proposal provided for construction of a hangar, terminal and a parking area on leased space on the Airport.

The FBO review committee recommended that the County continue to operate the FBO but if the contrary conclusion was reached the negotiations should be with JCP.

On August 15, 2005, Commissioners Ubell, Patterson and Belt unanimously voted to negotiate with JCP. On December 5, 2005, the County adopted amended minimum standards, replacing some of the 2003 standards referred to in the RFP. The amended standards conformed to the JCP FBO Agreement, executed on the same day.

JetAway did not stop its efforts to provide FBO services after JCP's agreement. In addition to its multiple proposals, JetAway has engaged the County in litigation in the District Court of Montrose County regarding its lease agreements for the JetAway facility. That litigation ultimately resulted in an injunction barring JetAway's access to the Airport. JetAway also filed two complaints with the FAA, contending that denial of its access to the Airport violated the conditions of Federal grants. The FAA **[*8]** rejected those complaints.

This case was filed on December 10, 2007. After prolonged discovery and motion hearings, the claims now before this court are for violation of *Sections 1* and *2 of the Sherman Act*, for denial of equal protection of the law in violation of the *Fourteenth Amendment*, and for an unconstitutional burden on interstate commerce.

All of the defendants are accused of collusion in the RFP process. The plaintiff attempts to equate this case with the type of bid rigging that constitutes a *per se* violation of the Sherman Act. It does not fit. They involve horizontal competitors who agree on which bidder will win the contest. Here the allegation is that the County had selected JCP to be the FBO operator even before issuing the RFP. The disputed evidence may support that finding. That, however, is not illegal. The County made it clear that the RFP was only the first step in the selection process. The proposals were reviewed to determine the entity with which negotiations would be conducted. The County was free to make that selection without the use of an RFP.

The plaintiff's retained economist, Dr. Philip Nelson, compared the proposals of JCP and JetAway, reaching the conclusion **[*9]** that JetAway's approach would have been significantly better for the financial benefit to the County both in the short and long term. That, however, is not determinative of the antitrust claims.

The plaintiff suggests that Patterson, Egan or someone for JCP had knowledge of JetAway's proposal before JCP's bid was submitted. There is evidence that Anderies saw the plaintiff's proposal when it was delivered and that she left the office shortly thereafter. It is only an unwarranted speculation that she communicated what she saw to anyone acting on behalf of JCP or that JCP had sufficient time to alter its proposal before submitting it a few hours later.

The County's preference for JCP was demonstrated by accepting the modification of the minimum standards it proposed and by accepting JCP's proposals in negotiating the final terms of the FBO contract.

The execution of the FBO contract with JCP on December 5, 2005, did not deter JetAway from pursuing an opportunity to provide FBO services. It continued to provide aircraft hangaring, a pilot lounge and related services from its offsite location until it was enjoined by the state court.

JetAway did not limit its efforts to persuasion. It filed **[*10]** four lawsuits against the County in January, 2006, shortly after JCP began operations. It complained to the FAA that the Airport violated the terms of the grant by granting an exclusive to JCP.

These efforts failed and as of this time JetAway's business has been shut down in consequence of the state court litigation.

JetAway contends that all of its efforts to conduct business on the Airport have been blocked by the combined efforts of the defendants to preserve an illegal monopoly.

The critical legal question in this case is whether JetAway has provided sufficient admissible evidence to support a finding that there has been an injury to competition.

The plaintiff argues that its proposal was so much better than that of JCP, the selection of the latter injured the citizenry of Montrose County financially. It further contends that the defendants' protection of JCP from later entry by JetAway has caused injury to the users of the Airport by subjecting them to higher prices and inferior services.

The plaintiff's forensic witness, Dr. Nelson, has constructed an elaborate theory of liability and damages. He has defined the relevant market as FBO services at the Airport and that may be accepted. **[*11]** What is most significant is his conclusion that while there may be a period of competition between two competing FBO's, for a limited time, perhaps one year, the market can sustain only one operator.

It is well established law that the anti-competitive conduct that violates the Sherman Act must have more than a temporary effect on the market. Taking all of Dr. Nelson's assumptions at face value, the net effect of his analysis is that if JetAway had been able to compete as a second FBO on equal terms with JCP the result would have been that JCP's business would fail and JetAway would be the sole survivor. In essence, the plaintiff admits that the size of the business opportunity at the Airport limits that market to a single FBO operator. Thus, their case falls within the rule that the ***antitrust law*** does not criminalize the protection of one monopolist from the aggressive efforts of another seeking to replace it.

JetAway has gone to great lengths to attempt to prove sinister motives to keep it out of the Airport. It makes much of the notes taken by Commissioner David White during two conversations with Kevin Scott after Scott left JCP and during White's exploration of his concerns about **[*12]** JCP's leases with the County. The plaintiff's interpretation of these notes are suggestive of manipulation of the former commissioners and the partisanship of William Patterson to control the process to ensure JCP's success.

The notes are inadmissible double hearsay. In his deposition, White could not explain his notes and the plaintiff's interpretation is not supported by Scott's testimony in his deposition. At best what is shown is favoritism toward JCP and antagonism toward JetAway, particularly Stuhmer.

It may be that the Commissioners who signed the FBO agreement with JCP did not act in the best interest of their constituents and permitted themselves to be unduly influenced by personalities. That is a matter of political concern; it is not an antitrust conspiracy.

JetAway has sued Patterson individually. He is protected from liability for damages by the Local Government Antitrust Act of 1984 (LGAA), *15 U.S.C. §§ 34-36*. The plaintiff seeks to avoid that immunity by contending that Patterson's conduct was not within the scope of his official capacity. There has been a vigorous effort to prove by inference that Patterson's actions were improperly motivated by personal interest. His **[*13]** prior experience at the Airport with Rumble, his friendship with Rumble and his distaste for Stuhmer have been stressed.

The plaintiff argues that the die was cast for privatization and the preferred selection of JCP at a meeting with Scott and Rumble after Patterson's election and before he took office. Assuming the fairness of that interpretation, all of the actions that were necessary to accomplish the presumed plan were taken by Patterson in his official capacity. There is no evidentiary support for the suggestion that Patterson's official actions were corrupted by any presumed personal advantage.

Because the LGAA precludes a damages recovery from Montrose County, JetAway asks for injunctive relief by requiring that it be given an airport access for a competing FBO. There has been a collateral controversy in this case regarding a 9 acre site that may be developed. That, however is, in itself, a problematic matter. Compliance with the safety related requirements of the FAA and other regulatory restrictions of the County would entail such extensive involvement of this Court into the governance of Montrose County that would itself be an extension of equitable power of questionable validity **[*14]** under the constitutional limitations of federalism. At any rate, the relief sought is impracticable.

The Montrose County Building Authority is a Colorado Nonprofit Corporation formed for the limited purpose of holding legal title to the Airport land. It is not protected by the LGAA. It leases the Airport to the County and its non-government status was used to issue certificates of participation to obtain financing for improvements to the Airport, including the construction of an access road and an aircraft parking apron for the benefit of JCP's operation. The plaintiff protests the use of public funds for private benefit but it has not shown the illegality of these financing arrangements and there has been no showing of any active involvement of the MCBA in any of the actions claimed to be in violation of the Sherman Act.

JetAway claims damages from JCP and its principals, Kevin Egan and James Rumble as conspirators with the County and as direct actors in creating a monopoly. They defend by asserting that all of these dealings with the County are within the shield of the *First Amendment* under the Noerr-Pennington Doctrine.

The Supreme Court, in deciding *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, **[*15]** emphasized the distinction between the purpose of the antitrust laws to protect competition in the business world and the political decisions of governmental officials even when those decisions have been infected by "selfishly motivated agreement with private interests." *Id. at 383*.

The Tenth Circuit Court of Appeals applied Noerr-Pennington in *G F Gaming Corp. V. City of Black Hawk, Colo., 405 F.3d 876 (10th Cir. 2005)* and *Coll v. First American Title Ins. Co., 642 F.3d 876 (10th Cir. 2011)*. In the latter case, the court concluded that even bribery of public officials to induce decision making with anti-competitive effect does not create an exception to this immunity. All of the conduct complained of in this case against the non-government defendants required decision making by County officials and, therefore, all of it comes within Noerr-Pennington immunity.

The defendants are entitled to summary judgment of dismissal of the claims of violation of *Sections 1* and *2* of the Sherman Act.

JetAway claims a violation of the *equal protection clause of the Fourteenth Amendment* because it was intentionally treated differently from JCP. This is a "class of one" claim requiring proof that the County **[*16]** acted arbitrarily by imposing requirements that were different from those affecting JCP for the purpose of barring JetAway's entry to the Airport. This argument has no merit. Assuming that Patterson and others were in part motivated by ill will towards Stuhmer and his company, there are a myriad of reasons for the County's preference of JCP for this business relationship. Many of those reasons are identified in the rulings of the state court that resulted in the closure of the plaintiff's through the fence operations.

The final effort to obtain some relief in this civil action is the claim that in establishing JCP's monopoly the County has imposed a burden on interstate commerce by enabling JCP to manipulate prices. This argument runs contrary to the plaintiff's contention that the relevant market for measuring competition is the local airport. There is nothing to support a finding that there has been harm to the free flow of commerce between the states.

Upon the foregoing, it is

ORDERED, that the defendants' motions for summary judgment are granted. The Clerk shall enter judgment for the defendants, dismissing this civil action and for an award of costs.

DATED: March 28th, 2012

BY THE **[*17]** COURT:

/s/ Richard P. Matsch

Richard P. Matsch, Senior Judge

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Brantley v. NBC Universal, Inc.

United States Court of Appeals for the Ninth Circuit

March 7, 2011, Argued and Submitted, Pasadena, California; March 30, 2012, Filed

No. 09-56785

Reporter
675 F.3d 1192 *; 2012 U.S. App. LEXIS 6441 **; 2012-1 Trade Cas. (CCH) P77,844; 55 Comm. Reg. (P & F) 915

ROB BRANTLEY, DARREN COOKE, WILLIAM and BEVERLEY COSTLEY, PETER G. HARRIS, CHRISTIANA HILLS, MICHAEL B. KOVAC, MICHELLE NAVARRETTE, JOY PSACHIE and JOSEPH VRANICH, individually and on behalf of all others similarly situated, Plaintiffs-Appellants, v. NBC UNIVERSAL, INC., VIACOM INC., THE WALT DISNEY COMPANY, FOX ENTERTAINMENT GROUP, INC., TIME WARNER INC., TIME WARNER CABLE INC., COMCAST CORPORATION, COMCAST CABLE COMMUNICATIONS, LLC, COXCOM, INC., THE DIRECTV GROUP, INC., ECHOSTAR SATELLITE L.L.C., and CABLEVISION SYSTEMS CORPORATION, Defendants-Appellees

Subsequent History: US Supreme Court certiorari denied by *Brantley v. NBC Universal, Inc., 568 U.S. 998, 133 S. Ct. 573, 184 L. Ed. 2d 374, 2012 U.S. LEXIS 8630 (Nov. 5, 2012)*

Prior History: [1]** Appeal from the United States District Court for the Central District of California. D.C. No. CV 07-6101 CAS (VBKx). Christina A. Snyder, District Judge, Presiding.

Brantley v. NBC Universal, Inc., 2009 U.S. Dist. LEXIS 132502 (C.D. Cal., Oct. 15, 2009)

Disposition: AFFIRMED.

Core Terms

Programmers, channels, Distributors, consumers, tying arrangement, allegations, packages, competitors, programming, vertical, cable, tied product, anticompetitive, seller, television, injure, prices, plaintiffs', antitrust, upstream, horizontal, low-demand, amended complaint, rule of reason, tying product, market power, Sherman Act, foreclosed, practices, retail

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

HN1[] **Sherman Act, Claims**

See *15 U.S.C.S. § 15(a)*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN2[] Sherman Act, Claims

Section 1 of the Sherman Act, 15 U.S.C.S. § 1 et seq., prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. 15 U.S.C.S. § 1. While § 1 could be interpreted to proscribe nearly all contracts, the U.S. Supreme Court has never taken a literal approach to its language. Rather, the U.S. Supreme Court has repeatedly observed that § 1 outlaws only unreasonable restraints.

Antitrust & Trade Law > Sherman Act > Claims

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

HN3[] Sherman Act, Claims

An appellate court addressing a 15 U.S.C.S. § 1 claim generally evaluates whether a practice unreasonably restrains trade in violation of § 1 under the rule of reason. In its design and function the rule of reason distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN4[] Per Se Rule & Rule of Reason, Sherman Act

The U.S. Supreme Court has identified a small number of restraints of trade that would always or almost always tend to restrict competition and decrease output, such as horizontal agreements among competitors to fix prices, or to divide markets. The court deems these restraints to be per se unlawful.

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

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

HN5[] Per Se Rule & Rule of Reason, Sherman Act

In the case of tying claims, a per se rule is applied in some circumstances. A tying arrangement will constitute a per se violation of the Sherman Act if the plaintiff proves (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market.

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

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

HN6[] Standards of Review, De Novo Review

An appellate court reviews de novo a district court's dismissal of a complaint under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim.

Antitrust & Trade Law > Sherman Act > Claims

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

HN7[] Sherman Act, Claims

In order to state a *15 U.S.C.S. § 1* claim under the rule of reason, plaintiffs must plead four separate elements. First, plaintiffs must plead facts which, if true, will prove (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition. In addition to these elements, plaintiffs must also plead (4) that they were harmed by the defendant's anticompetitive contract, combination, or conspiracy, and that this harm flowed from an anti-competitive aspect of the practice under scrutiny. This fourth element is generally referred to as antitrust injury or antitrust standing.

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

HN8[] Complaints, Requirements for Complaint

In order to plead injury to competition, the third element of a *15 U.S.C.S. § 1* claim, sufficiently to withstand a motion to dismiss, a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably. Rather, a claimant must, at a minimum, sketch the outline of the injury to competition with allegations of supporting factual detail. Such allegations must raise a reasonable expectation that discovery will reveal evidence of an injury to competition. Thus, a complaint's allegation of a practice that may or may not injure competition is insufficient to state a claim to relief that is plausible on its face. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. In addition, plaintiffs must plead an injury to competition beyond the impact on the plaintiffs themselves.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN9[] Sherman Act, Claims

In sketching the outline of an injury to competition for purposes of the third element of a *15 U.S.C.S. § 1* analysis, the claimant must identify a contract, combination or conspiracy that has an anticompetitive effect. Courts have held that agreements between competitors in the same market (referred to as horizontal agreements) may injure competition. For example, a horizontal agreement that allocates a market between competitors and restricts each company's ability to compete for the other's business may injure competition. A horizontal agreement (either explicit or tacit) to set prices may injure competition because the result of such an agreement, if effective, is the elimination of one form of competition, namely price. Or a group of competitors may act in concert to harm another competitor or exclude that competitor from the market and thus protect dealers from real or apparent price competition from the targeted competitor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN10[] Price Fixing & Restraints of Trade, Vertical Restraints

Courts have concluded that agreements between firms operating at different levels of a given product market (referred to as vertical agreements), such as agreements between a supplier and a distributor, may or may not cause an injury to competition. Vertical agreements that foreclose competitors from entering or competing in a market can injure competition by reducing the competitive threat those competitors would pose. Some types of vertical agreements can also injure competition by facilitating horizontal collusion. Other types of vertical agreements do not necessarily threaten an injury to competition. Such restrictions, in varying forms, are widely used in our free market economy and there is substantial scholarly and judicial authority supporting their economic utility.

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

HN11[] Tying Arrangements, Sherman Act Violations

"Tying" is defined as an arrangement where a supplier agrees to sell a buyer a product (the tying product), but only on the condition that the buyer also purchases a different (or tied) product. The potential injury to competition threatened by this practice is that the tying arrangement will either harm existing competitors or create barriers to entry of new competitors in the market for the tied product, or will force buyers into giving up the purchase of substitutes for the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

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

HN12[] Price Fixing & Restraints of Trade, Tying Arrangements

Courts distinguish between tying arrangements in which a company exploits its market power by attempting to impose restraints on competition in the market for a tied product (which may threaten an injury to competition) and arrangements that let a company exploit its market power by merely enhancing the price of the tying product (which does not).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

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

HN13[] Price Fixing & Restraints of Trade, Tying Arrangements

Market conditions may be such that a specific tying arrangement does not have anticompetitive effects.

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

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

HN14[] Tying Arrangements, Defenses

When a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed. Where there is no competition in the tied market, there can be no antitrust violation.

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

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

HN15[] Tying Arrangements, Defenses

A tying arrangement may be a response to a competitive market rather than an attempt to circumvent it. Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act. Like other vertical restraints, tying arrangements may promote rather than injure competition. The U.S. Supreme Court has made clear that manufacturer-imposed vertical restraints, even when their intent and competitive impact is to limit the freedom of the retailer to dispose of the purchased products as he desires, are often pro-competitive. While such restraints limit intrabrand competition, they may increase interbrand competition, such as by inducing retailers to engage in promotional activities or to provide services that might not be provided by retailers in a purely competitive situation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

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

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

HN16[] Tying Arrangements, Per Se Rule

A plaintiff bringing a rule of reason tying case cannot succeed in stating the third element of a *Section 1* claim merely by alleging the existence of a tying arrangement, because such an arrangement is consistent with pro-competitive behavior. Intrusion upon consumers' freedom of choice by compelling the purchase of unwanted products has been implicitly rejected by the U.S. Supreme Court as a sufficient independent basis for antitrust liability. Rather, the plaintiff must allege an actual adverse effect on competition caused by the tying arrangement.

Antitrust & Trade Law > Sherman Act > Claims

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

HN17[] Sherman Act, Claims

Plaintiffs may not substitute allegations of injury to the claimants for allegations of injury to competition. Plaintiffs must plead antitrust injury, the fourth element necessary to state a *Section 1* claim, in addition to, rather than in lieu of, injury to competition. That is, in order to state a claim successfully, plaintiffs must allege both that defendant's behavior is anticompetitive and that plaintiff has been injured by an anti-competitive aspect of the practice under scrutiny. It is inimical to the antitrust laws to award damages for losses stemming from continued competition.

Specifically, to plead this element, plaintiffs must allege facts that if taken as true would allow them to recover for an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN18[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying arrangements, without more, do not necessarily threaten an injury to competition.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN19[] **Sherman Act, Claims**

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. Businesses may choose the manner in which they do business absent an injury to competition.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN20[] **Sherman Act, Claims**

Allegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition. Both effects are fully consistent with a free, competitive market. Even vertical agreements that directly prohibit retail price reductions, eliminating downward competitive pressure on price and thereby resulting in higher consumer prices (commonly referred to as resale price maintenance agreements), are not unlawful absent a showing of actual anticompetitive effect. Higher consumer prices can result from pro-competitive conduct.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN21[] **Sherman Act, Claims**

Compelling the purchase of unwanted products is not itself an injury to competition.

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

HN22[] **Tying Arrangements, Sherman Act Violations**

When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN23[] **Vertical Restraints, Price Fixing**

Vertical restraints, such as resale price maintenance, should be subject to more careful scrutiny if the practice is adopted by many competitors.

Antitrust & Trade Law > Sherman Act > Claims

HN24[] **Sherman Act, Claims**

Injury to competition must be alleged to state a violation of Sherman Act, specifically *15 U.S.C.S. § 1*.

Counsel: Maxwell M. Blecher, Esq., Blecher & Collins, PC, Los Angeles, California, for plaintiffs-appellants Rob Brantley, et al.

Glenn D. Pomerantz, Esq., Munger Tolles & Olson LLP, Los Angeles, California, and Arthur J. Burke, Esq., Davis Polk & Wardwell LLP, Menlo Park, California, for defendants-appellees NBC Universal, Inc., et al.

Judges: Before: Barry G. Silverman, Consuelo M. Callahan, and Sandra S. Ikuta, Circuit Judges. Opinion by Judge Ikuta.

Opinion by: Sandra S. Ikuta

Opinion

[*1195] IKUTA, Circuit Judge:

Plaintiffs, a putative class of retail cable and satellite television subscribers, appeal the dismissal of the third version of their complaint against television programmers (Programmers)[1] and distributors (Distributors).[2] The complaint alleged that Programmers' practice of selling multi-channel cable packages violates *Section 1* of the Sherman Act, *15 U.S.C. § 1*. In essence, plaintiffs seek to compel programmers and distributors of television programming to sell each cable channel separately, thereby permitting plaintiffs to purchase only those channels **[**2]** that they wish to purchase, rather than paying for multi-channel packages, as occurs under current market practice. Plaintiffs appeal the dismissal with prejudice of their complaint for failure to state a claim. We affirm.

I

The television programming industry can be divided into upstream and downstream markets. In the upstream market, programmers such as NBC Universal and Fox Entertainment Group own television programs (such as "Law

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[1] Programmer Defendants include NBC Universal, Inc., Viacom, Inc., The Walt Disney Company, Fox Entertainment Group, Inc., and Turner Broadcasting System, Inc.

[2] Distributor Defendants include Time Warner Cable Inc., Comcast Corporation, Comcast Cable Communications, LLC, CoxCom, Inc., The DIRECTV Group, Inc., Echostar Satellite L.L.C., and Cablevision Systems Corporation.

and Order") and television channels (such as NBC's Bravo and MSNBC, and Fox Entertainment Group's Fox News Channel and FX) and sell them wholesale to distributors. In the downstream retail market, distributors such as Time Warner and Echostar sell the programming channels to consumers.[3]

According to plaintiffs' third amended complaint, Programmers have two categories of programming channels: "must-have" channels with high demand and a large number of viewers, and a group of less desirable, low-demand channels with low viewership. Plaintiffs allege that "[e]ach programmer defendant, because of its full or partial ownership of a broadcast channel and its ownership or control of multiple important cable channels, has a high degree of market power vis-a-vis all distributors," and that Programmers exploit this market power by requiring distributors, "as a condition to purchasing each programmer's broadcast channel and its 'must have' cable channels," to "also acquire and resell to consumers all the rest of the cable channels owned or controlled by each programmer" and "agree they will not offer unbundled [i.e., individual] cable **[*1196]** channels to consumers." "As a consequence," plaintiffs contend, "distributors can offer consumers only prepackaged tiers of cable channels which consist of each programmer's entire offering of channels." Plaintiffs allege that these business practices **[**4]** impair competition among Distributors for consumer business, and therefore the Programmers and Distributors are in violation of *Section 1* of the Sherman Act. Plaintiffs seek monetary damages under *15 U.S.C. § 15*.[4] Plaintiffs also seek an injunction to compel Programmers to make channels available on an individual basis.

The district court dismissed plaintiffs' first amended complaint without prejudice on the ground that plaintiffs failed to show that their alleged injuries were caused by an injury to competition. In their second amended complaint, plaintiffs alleged that Programmers' practice of selling packaged cable channels foreclosed independent programmers from entering and competing in the upstream market for programming channels. The district court subsequently denied defendants' motion to dismiss, holding that plaintiffs had adequately pleaded injury to competition.

After preliminary discovery efforts on the question whether the Programmers' practices had excluded independent programmers from the upstream market, the plaintiffs decided to abandon this approach.[5] Pursuant to a stipulation among the parties, plaintiffs filed their third amended complaint, which deleted all allegations that the Programmers and Distributors' contractual practices foreclosed independent programmers from participating in the upstream market, along with a motion requesting the court to **[**6]** rule that plaintiffs did not have to allege foreclosure in the upstream market in order to defeat a motion to dismiss. The parties also agreed that Programmers and Distributors could file a motion to dismiss, and that if Programmers and Distributors prevailed, this third complaint would be dismissed with prejudice. The district court entered an order on October 15, 2009 granting Programmers and Distributors' motion to dismiss the third amended complaint with prejudice because plaintiffs failed to allege any

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[3] Plaintiffs acknowledge three categories of distributors, namely, cable providers, satellite providers, and **[**3]** telephone companies. Plaintiffs have filed suit only against the cable and satellite providers.

[4] *Section 15* states in pertinent part:

> ***HN1***[] Except as provided in subsection (b) of this section [relating to damages payable to foreign states and their instrumentalities], any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter **[**5]** period therein, if the court finds that the award of such interest for such period is just in the circumstances.

15 U.S.C. § 15(a).

[5] Programmers and Distributors claim that plaintiffs decided to discontinue discovery after preliminary review showed there was no evidence to support their claim that the packaging of channels foreclosed competition in the upstream market.

cognizable injury to competition. The district court also denied plaintiffs' motion to rule on the question whether allegations of foreclosed competition are required to state a Section 1 claim. Plaintiffs timely appeal.

II

HN2[] *Section 1* of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the **[*1197]** several States." *15 U.S.C. § 1*. While *Section 1* could be interpreted **[**7]** to proscribe nearly all contracts, the Supreme Court has never "taken a literal approach to [its] language," *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; *see also* *Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*. Rather, the Court has repeatedly observed that *Section 1* "outlaw[s] only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*.

HN3[] We generally evaluate whether a practice unreasonably restrains trade in violation of *Section 1* under the "rule of reason."[6] *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. "In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id. at 886*. The parties do not dispute that the rule of reason applies in this case,[7] and the pleading requirements for a rule of reason case therefore apply.

HN6[] We review de novo a district court's dismissal of a complaint under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1046 (9th Cir. 2008)*. *HN7*[] In order to state a Section 1 claim under the rule of reason, plaintiffs must plead four separate elements. First, plaintiffs must plead facts which, if true, will prove "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Id. at 1047*; *see also* *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988)* (same). In addition to these elements, plaintiffs must also plead (4) that they were harmed by the defendant's anticompetitive contract, combination, or conspiracy, and that this harm flowed from an "anti-competitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. This fourth element is generally referred to as "antitrust injury" or **[**10]** "antitrust standing." *See, e.g., id*.

[*1198] *HN8*[] In order to plead injury to competition, the third element of a Section 1 claim, sufficiently to withstand a motion to dismiss, "a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507-08 (9th Cir. 1989)*. "Rather, a claimant must, at a minimum, sketch the outline of [the injury to competition] with allegations of supporting factual detail." *Id. at 508*. Such allegations must "raise a reasonable expectation that discovery will reveal evidence of" an injury to competition. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct.*

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[6] *HN4*[] The Supreme Court has identified a small number of restraints of trade "that would always or almost always tend to restrict competition and decrease output," *see* *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (internal **[**8]** quotation marks omitted) (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289-90, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985))*, such as horizontal agreements among competitors to fix prices, *see* *Texaco, 547 U.S. at 5*, or to divide markets, *see* *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (per curiam). The Court deems these restraints to be per se unlawful. *See* *Bus. Elecs., 485 U.S. at 723*. These practices are not at issue here.

[7] *HN5*[] In the case of "tying" claims, a per se rule is applied in some circumstances. A tying arrangement will constitute a per se violation of the Sherman Act if the plaintiff proves "(1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market." ***Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 913 (9th Cir. 2008)*** (quoting *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1159 (9th Cir. 2003))* (internal quotation marks omitted). The parties have disclaimed any contention that **[**9]** the tying practices in this case are per se antitrust violations.

1955, 167 L. Ed. 2d 929 (2007). Thus, a complaint's allegation of a practice that may or may not injure competition is insufficient to "state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; *see also* Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." (quoting Twombly, 550 U.S. at 557) (internal quotation marks omitted)). In addition, **[**11]** plaintiffs must plead an injury to competition beyond the impact on the plaintiffs themselves. McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988).

HN9[] In sketching the outline of an injury to competition for purposes of this third element, the claimant must identify a contract, combination or conspiracy that has an anticompetitive effect. Courts have held that agreements between competitors in the same market (referred to as "horizontal agreements") may injure competition. For example, a horizontal agreement that allocates a market between competitors and "restrict[s] each company's ability to compete for the other's [business]" may injure competition. United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991). A *horizontal agreement* (either explicit or tacit) to set prices may injure competition because the result of such an agreement, "if effective, is the elimination of one form of competition," namely price. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213-14, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) (quoting United States v. Trenton Potteries Co., 273 U.S. 392, 397, 47 S. Ct. 377, 71 L. Ed. 700 (1927)). Or a group of competitors may act in concert to harm another competitor or exclude that competitor from the market and thus **[**12]** "protect . . . dealers from real or apparent price competition" from the targeted competitor. United States v. Gen. Motors Corp., 384 U.S. 127, 146-47, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966). Plaintiffs' complaint does not allege the existence of any horizontal agreements.

HN10[] Courts have also concluded that agreements between firms operating at different levels of a given product market (referred to as "vertical agreements"), such as agreements between a supplier and a distributor, may or may not cause an injury to competition. Vertical agreements that foreclose competitors from entering or competing in a market can injure competition by reducing the competitive threat those competitors would pose. Some types of vertical agreements can also injure competition by facilitating horizontal collusion. *See* Leegin, 551 U.S. at 893, 897-98. Other types of vertical agreements do not necessarily threaten an injury to competition. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-57, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977) ("Such restrictions, in varying forms, are widely used in our free market economy" and "there is substantial scholarly and judicial authority supporting their economic utility.").

[*1199] The complaint in this case focuses on a type of vertical **[**13]** agreement that creates a restraint known as "tying." **HN11**[] Tying is defined as an arrangement where a supplier agrees to sell a buyer a product (the tying product), but "only on the condition that the buyer also purchases a different (or tied) product . . . ." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). The potential injury to competition threatened by this practice is that the tying arrangement will either "harm existing competitors or create barriers to entry of new competitors in the market for the tied product," Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984), *abrogated in part on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006); *Cascade, 515 F.3d at 912*, or will "force buyers into giving up the purchase of substitutes for the tied product," United States v. Loew's, 371 U.S. 38, 45, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962), *abrogated in part on other grounds by* Ill. Tool Works, 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26.

But **HN12**[] courts distinguish between tying arrangements in which a company exploits its market power by attempting "to impose restraints on competition in the market for a tied product" (which may threaten an injury to competition) and arrangements that let a company exploit its market **[**14]** power "by merely enhancing the price of the tying product" (which does not). Jefferson Parish, 466 U.S. at 14. For example, in *Blough v. Holland Realty, Inc*., we concluded that an alleged tying arrangement did not threaten an injury to competition. 574 F.3d 1084, 1088 (9th Cir. 2009). In that case, plaintiffs entered into contracts with defendant-homebuilders to purchase undeveloped lots plus newly constructed homes. In order to purchase the developed lots, plaintiffs were required to pay a percentage fee to defendant-realtors on top of the purchase price. *Id*. Plaintiffs alleged that the homebuilders were unlawfully tying the realtors' services to the sale of developed lots in violation of the Sherman Act. *Id*. We disagreed, holding that because the plaintiffs would not have otherwise purchased realtor services, the percentage fee was best viewed as part of the cost of purchasing the developed lot. *Id. at 1090*.

Further, ***HN13***[] market conditions may be such that a specific tying arrangement does not have anticompetitive effects. *See* *Driskill v. Dall. Cowboys Football Club, Inc., 498 F.2d 321, 323 (5th Cir. 1974)*. For example, in *Driskill*, the plaintiff alleged that defendant, the Dallas Cowboys, **[**15]** had unlawfully tied the sale of undesirable preseason tickets to the sale of season ticket packages. *Id. at 322*. But the court noted that the Dallas Cowboys had a lawful monopoly in the market for the tied product, preseason tickets, so the tying arrangement could not adversely affect competition in the tied product market; there was no competition to affect. *Id. at 323*. As the Supreme Court has noted, ***HN14***[] "when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." *Jefferson Parish, 466 U.S. at 16*; *see also* *Blough, 574 F.3d at 1090* ("'[W]here there is no competition in the tied market, there can be no antitrust violation.'" (quoting *Reifert v. S. Cent. Wis. MLS Corp., 450 F.3d 312, 318 (7th Cir. 2006))*).

Indeed, courts have noted that ***HN15***[] a tying arrangement may be a response to a competitive market rather than an attempt to circumvent it. *See* *Jefferson Parish, 466 U.S. at 12* ("Buyers often find package sales attractive; a seller's decision to offer such packages **[**16]** can merely **[*1200]** be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act."). Like other vertical restraints, tying arrangements may promote rather than injure competition. *See* *Continental, 433 U.S. at 54-57 (1977)* (identifying ways in which non-price vertical restraints may benefit competition); *Leegin, 551 U.S. at 895-96* (noting that even though vertical price restraints can lead to higher prices, "prices can be increased in the course of promoting pro-competitive effects"). In *Continental*, the Supreme Court made clear that manufacturer-imposed vertical restraints, even when their "intent and competitive impact" is to "limit[ ] the freedom of the retailer to dispose of the purchased products as he desire[s]," are often pro-competitive. *433 U.S. at 46, 54-55*. While such restraints limit intrabrand competition, they may increase interbrand competition, such as by "induc[ing] retailers to engage in promotional activities or to provide service[s]" that "might not be provided by retailers in a purely competitive situation." *Id. at 55*.

Therefore,***HN16***[] a plaintiff bringing a rule of reason tying case cannot succeed in stating the third element of a Section 1 claim **[**17]** merely by alleging the existence of a tying arrangement, because such an arrangement is consistent with pro-competitive behavior. *See* *Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1349 n.19 (9th Cir. 1982)* ("[I]ntru[sion] upon consumers' freedom of choice by compelling the purchase of unwanted products . . . has been implicitly rejected by the Supreme Court as a sufficient independent basis for antitrust liability."). Rather, the plaintiff must allege an "actual adverse effect on competition" caused by the tying arrangement. *Jefferson Parish, 466 U.S. at 31*.

HN17[] Plaintiffs may not substitute allegations of injury to the claimants for allegations of injury to competition. Plaintiffs must plead "antitrust injury," the fourth element necessary to state a Section 1 claim, in addition to, rather than in lieu of, injury to competition. *See* *Atl. Richfield, 495 U.S at 334-35, 344*. That is, in order to state a claim successfully, plaintiffs must allege both that defendant's behavior is anticompetitive and that plaintiff has been injured by an "anti-competitive aspect of the practice under scrutiny." *Id. at 334* ("[I]t is inimical to the antitrust laws to award damages for losses stemming from **[**18]** continued competition." (quoting *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109-10, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986))*). Specifically, to plead this element, plaintiffs must allege facts that if taken as true would allow them to recover for "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1102 (9th Cir. 1999)* (quoting *Atl. Richfield, 495 U.S. at 334*) (internal quotation marks omitted).

III

We consider whether plaintiffs have stated a Section 1 claim in their third amended complaint in light of these principles. The key issue raised by this appeal is whether plaintiffs have adequately pleaded that the alleged Programmer-Distributor agreements actually injure competition.

There is no dispute that the complaint alleges the existence of a tying arrangement. In fact, according to the plaintiffs' complaint, the Programmer-Distributor agreements at issue consist of two separate tying arrangements. First, in the **[*1201]** upstream market, each Programmer requires each Distributor that wishes to purchase that Programmer's high-demand channels (the tying product) to purchase all **[**19]** of that Programmer's low-demand channels (the tied product) as well.[8] Second, in the downstream market, Distributors sell consumers cable channels only in packages consisting of each Programmer's entire offering of channels. Thus, consumers, like Distributors, are allegedly required to purchase each Programmer's low-demand channels, which they do not want (the tied product), in order to gain access to that Programmer's high-demand channels, which they do want (the tying product).

But as explained above, ***HN18***[] tying arrangements, without more, do not necessarily threaten an injury to competition. Therefore, the complaint's allegations regarding the two separate tying arrangements do not, by themselves, constitute a sufficient allegation of injury to competition. Rather, plaintiffs must also allege facts showing that an injury to competition flows from these tying arrangements. **[**20]** We conclude that such allegations are not present in the complaint.

First, it is clear that the complaint does not allege the types of injuries to competition that are typically alleged to flow from tying arrangements. The complaint does not allege that Programmers' practice of selling "must-have" and low-demand channels in packages excludes other sellers of low-demand channels from the market, or that this practice raises barriers to entry into the programming market.[9] Nor do the plaintiffs allege that the tying arrangement here causes consumers to forego the purchase of substitutes for the tied product. *Loew's, 371 U.S. at 45*. Nothing in the complaint indicates that the arrangement between the Programmers and Distributors forces Distributors or consumers to forego the purchase of alternative low-demand channels. *Cf. id*. Indeed, Plaintiffs disavow any intent to allege that the practices engaged in by Programmers and Distributors foreclosed rivals from entering or participating in the upstream or downstream markets. *Cf. Jefferson Parish, 466 U.S. at 14*; *Cascade, 515 F.3d at 912* ("Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, **[**21]** the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product."). Nor does the complaint allege that the tying arrangements pose a threat to competition because they facilitate horizontal collusion. *See Leegin, 551 U.S. at 893, 897-98*.

Instead of identifying such standard-issue threats to competition, the complaint alleges that the injury to competition stems from Programmers' requirement that channels must be sold to consumers in packages. According to the complaint, the required sale of multi-channel packages harms consumers by (1) limiting the manner in which Distributors compete with one another in that Distributors are unable to offer a la carte programming, which results in (2) reducing consumer choice, and (3) increasing prices. These assertions do not sufficiently allege an injury to competition for purposes of stating a Section 1 claim. First, because *Section 1* does not proscribe all contracts **[*1202]** that limit the freedom of the contracting parties, a statement that parties have entered into a contract that limits some freedom of action (in **[**22]** this case, by circumscribing the distributors' ability to offer smaller packages or channels on an unbundled basis) is not sufficient to allege an injury to competition. *See Continental, 433 U.S. at 46, 54-55*; *Bd. of Trade, 246 U.S. at 238* ("***HN19***[] Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."). Businesses may choose the manner in which they do business absent an injury to competition.[10] *See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 448, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*. Therefore, the mere allegations that Programmers have

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[8] We assume for purposes of this opinion, without deciding, that high-demand and low-demand channels are actually separate products, and do not address the question whether it is more apt to view each Programmer's block of channels as a single product, which would preclude any argument that there was an illegal tying arrangement.

[9] Thus, there is effectively "zero foreclosure" of competitors. *Blough, 574 F.3d at 1090-91*.

[10] A rule to the contrary could cast doubt on whether musicians would be free to sell their hit singles only as a part of a full album, or writers to sell a collection of short stories. Indeed, such a rule would call into question whether Programmers and Distributors could sell cable channels at all, since such channels are themselves packages of separate television programs.

chosen to limit the ability of Distributors to offer Programmers' channels for sale individually does not state a cognizable injury to competition.

Second, ***HN20***[] allegations that an agreement has the effect of reducing consumers' choices or **[**23]** increasing prices to consumers does not sufficiently allege an injury to competition. Both effects are fully consistent with a free, competitive market. *See* *Leegin, 551 U.S. at 895-97*; *Continental, 433 U.S. at 55*. Even vertical agreements that directly prohibit retail price reductions, eliminating downward competitive pressure on price and thereby resulting in higher consumer prices (commonly referred to as resale price maintenance agreements), are not unlawful absent a showing of actual anticompetitive effect. *See* *Leegin, 551 U.S. at 895*. As *Leegin* explained, higher consumer prices can result from pro-competitive conduct. *Id. at 895-97*. Had the plaintiffs succeeded in pleading an injury to competition, the complaint's allegations of reduced choice (due to the inability to purchase a la carte programming) and increased prices would sufficiently plead the fourth element of a Section 1 claim, namely that they had been harmed by the challenged injury to competition. But here, these allegations show only that plaintiffs have been harmed as a result of the practices at issue, not that those practices are anticompetitive.[11] Therefore, these allegations do not, without more, allege an injury **[**24]** to competition "that is plausible on its face." *Twombly, 550 U.S. at 570*.

Plaintiffs disagree, and argue that under the rule in *Loew's, 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11*, and *Ross v. Bank of America, N.A. (USA), 524 F.3d 217 (2d Cir. 2008)*, they have sufficiently alleged an injury to competition by alleging that the agreements have the effect of reducing choice and increasing prices. This argument is unavailing. In *Loew's*, the United States brought antitrust actions against six major film distributors, alleging that the defendants had conditioned **[**25]** the license or sale of one or more feature films upon the acceptance **[*1203]** by television stations of a package or block containing one or more unwanted or inferior films. *Id. at 40*. The Court observed that the restraint injured competition because the movie studios' block booking forced the television stations to forego purchases of movies from other distributors. *Id. at 49*. The relevant injury in *Loew's* was to competition, not to the ultimate consumers, because the challenged practice forced television stations to forego the purchase of other movies, and therefore created barriers to entry for competing movie owners. *Cf.* *Jefferson Parish, 466 U.S. at 14*. Here, Plaintiffs have not alleged that the contracts between Programmers and Distributors forced either Distributors or consumers to forego the purchase of other low-demand channels (a result analogous to the competitive injury in *Loew's*), but only that consumers could not purchase programs a la carte and they did not want all of the channels they were required to buy from Distributors. ***HN21***[] "[C]ompelling the purchase of unwanted products" is not itself an injury to competition. *Hirsh, 674 F.2d at 1349 n.19*. We have explained why this is so:

> In **[**26]** order to obtain desired product A, let us suppose, the defendant's customer is forced to take product B, which it does not want, cannot use, and would not have purchased from anyone. This is typically the equivalent of a higher price for product A. From the viewpoint of the defendant seller, its revenue on product A consists of the A price plus the excess of the B price over B's cost to the seller. From the viewpoint of the customer, the cost of obtaining the desired product A is the nominal A price plus the excess of the B price over its salvage value. This has nothing to do with gaining power in the B market or upsetting competition there.

Blough, 574 F.3d at 1089-90 (quoting IX Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1724b, at 270 (2004 & Supp. 2009)); *see also* *Jefferson Parish, 466 U.S. at 14* ("***HN22***[] When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised."). Nor does plaintiffs' citation to *Ross* support their argument; that case involved allegations of horizontal collusion, which has **[**27]** not been alleged by plaintiffs in this case, and pertained to standing, not injury to competition. *524 F.3d at 223, 225*.

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[11] Plaintiffs claim that *Theme Promotions, Inc. v. News America Marketing FSI, 546 F.3d 991, 1004 (9th Cir. 2008)*, supports their argument that reduced consumer choice and increased prices are sufficient to establish an injury to competition. Plaintiffs are mistaken: *Theme Promotions* held only that such injuries, when they are the result of an anticompetitive practice, constitute antitrust injury, not that any practice causing such harms was anticompetitive. Rather, the injury to competition in *Theme Promotions* was that plaintiff 's right-of-first-refusal agreements had "foreclosed competition in a substantial share of [the] market." *Id. at 1001-03*. The case is inapposite.

Plaintiffs also contend that because most or all Programmers and Distributors engage in the challenged practice, we should hold that in the aggregate, the practice constitutes an injury to competition. We cannot rule out the possibility that competition could be injured or reduced due to a widely applied practice that harms consumers. *See* *Leegin, 551 U.S. at 897* (indicating that ***HN23***[] vertical restraints, such as resale price maintenance, "should be subject to more careful scrutiny" if the practice is adopted by many competitors). But the plaintiffs here have not alleged in their complaint how competition (rather than consumers) is injured by the widespread practice of packaging low- and high-demand channels.[12] The complaint did not allege that Programmers' sale of cable channels in packages **[*1204]** has any effect on other programmers' efforts to produce competitive programming channels or on Distributors' competition as to cost and quality of service. Nor is there any allegation that any programmer's decision to offer its channels only in packages constrained other programmers **[**28]** from offering their channels individually if that practice was competitively advantageous. In sum, the complaint does not include any allegation of injury to competition, as opposed to injuries to the plaintiffs. *See also* *Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 930-31 (4th Cir. 1990)* (finding that aggregating a defendant's acts, none of which was anticompetitive individually, did not demonstrate an injury to competition).

IV

HN24[] Injury to competition must be alleged to state a violation of *Sherman Act § 1*. *Kendall, 518 F.3d at 1047*. Plaintiffs' complaint does not allege facts that "raise a reasonable expectation that discovery will reveal evidence of" injury to competition. *Twombly, 550 U.S. at 566*. Thus, plaintiffs' complaint did not allege facts that, taken as true, "state a claim to relief that is plausible on its face." *Id. at 570*. **[**29]** Dismissal was proper.

AFFIRMED.

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[12] Indeed, because Plaintiffs' complaint alleges that the restraints at issue in this case were imposed by Programmers, not Distributors, *Leegin* suggests that any competitive threat is diminished. *551 U.S. at 898* ("If . . . a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct.").

Broad. Music, Inc. v. Davis

United States District Court for the Central District of California

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

CV 10-10089-RGK (FFMx)

Reporter
2012 U.S. Dist. LEXIS 200002 *

BROADCAST MUSIC, INC. v. DEYON K. DAVIS, et al.

Prior History: *Broad. Music, Inc. v. Davis, 2011 U.S. Dist. LEXIS 164834 (C.D. Cal., June 28, 2011)*

Core Terms

Counterclaimants, Affiliation, unfair, allegations, royalties, Music, breach of contract, conversion, Writer, terms, business practice, fraudulent, rescission, track, negligent misrepresentation, royalty payment, motion to dismiss, misrepresentation, publishers, damages, pleading requirements, contractual, withholding, parties, sheets, fails, cue

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

Attorneys for Defendants: Not Present.

Judges: R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE.

Opinion by: R. GARY KLAUSNER

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS) Order Re: Plaintiff's Motion to Dismiss Counterclaims of Counterclaimants Deyon K. Davis, Deyon Davis Music, and Cinematic Tunes, Inc. (DE 49)

I. INTRODUCTION

On December 30, 2010, Broadcast Music, Inc. ("BMI") filed a Complaint against Deyon K. Davis ("Davis"); Deyon Davis Music; Cinematic Tunes, Inc.; and five other individuals (collectively, "Defendants") alleging various causes of action under California law. On October 13, 2011, BMI filed a First Amended Complaint ("FAC"). The allegations in the Complaint center around Defendants' alleged conspiracy to obtain unearned royalty payments.

On December 2, 2011, Davis, Deyon Davis Music, and Cinematic Tunes, Inc. (collectively, "Counterclaimants") filed a Counterclaim against BMI for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) conversion, (4) negligent misrepresentation, (5) negligence, (6) violation of *California Business & Professions Code § 17200 et seq.*, (7) rescission, and (8) declaratory relief. Subsequently, BMI filed a Motion to

Dismiss ("Motion") **[*2]** Counterclaimants' Third, Fourth, Fifth, Sixth, and Seventh Counterclaims pursuant to *Federal Rule of Civil Procedure ("Rule") 12(b)(6)*. Counterclaimants neither opposed BMI's Motion nor filed a Notice of Non-Opposition. Instead, Counterclaimants filed an untimely First Amended Counterclaim, which was later stricken by the Court.

Presently before the Court is BMI's Motion to Dismiss the above-mentioned counterclaims as pleaded in the original Counterclaim. For the following reasons, the Court **GRANTS** BMI's Motion.

II. FACTUAL BACKGROUND

The following facts are taken from the Counterclaim and are construed in the light most favorable to the Counterclaimants.

A. BMI Is a Performance Rights Organization

BMI, the American Society of Composers, Authors and Publishers ("ASCAP"), and the Society of European Stage Authors & Composers ("SESAC") are three United States performance rights organizations ("PROs"). Generally, PROs license copyrighted works for public performances and pay royalties to the copyright owners.

BMI describes itself as a nonprofit organization that collects performance royalties for writers and publishers, and distributes the royalties after deducting a portion for operating expenses.

B. Davis and BMI Enter into Various Affiliation [*3] Agreements

Davis, individually and through his businesses, Deyon Davis Music and Cinematic Tunes, entered into three affiliation agreements with BMI.

First, on June 29, 1992, Davis, a songwriter and entrepreneur, executed a BMI standard affiliate agreement for songwriters (the "Writer Agreement"). Pursuant to the Writer Agreement, Davis granted BMI the right to license his copyrighted works for public performances. In exchange, BMI agreed to track the public performances of Davis's works and pay Davis royalties for those performances. Specifically, BMI agreed to use its "then current system of computing the number of [public] performances" of Davis's copyrighted works to estimate the amount of royalties owed to him. (Countercl. ¶ 22.)

Second, on May 23, 1995, through the fictitious business name Deyon Davis Music ("DDM"), Davis executed a BMI standard affiliate agreement for music publishers (the "DDM Agreement"). Pursuant to the DDM Agreement, Davis assigned to BMI the right to license public performances of works in which Davis owned a copyright interest. The terms of the DDM Agreement were substantially similar to the terms of the Writer Agreement.

Finally, in 2007, Davis formed Cinematic **[*4]** Tunes, Inc. ("CTI") to serve as a music publisher for songwriters with whom he had become acquainted. On February 14, 2008, CTI entered into a BMI standard affiliate agreement for music publishers (the "CTI Agreement"). Pursuant to the CTI Agreement, CTI granted BMI the right to license its copyrighted works for public performances. The terms of the CTI Agreement were also substantially similar to the terms of the Writer Agreement and the DDM Agreement.

According to Counterclaimants, the terms of the Writer Agreement, the DDM Agreement, and the CTI Agreement (collectively, the "Affiliation Agreements") led them to believe that BMI could accurately track the public performances of their copyrighted works.

C. BMI Discovers Inaccurate Cue Sheets and Commences an Investigation

In June 2010, BMI contacted Counterclaimants on the belief that it had overpaid them more than $1 million in royalties for two seasons of the television series *So You Think You Can Dance* and one season of the television show *Superstars of Dance*. To accurately determine royalty payments owed to its affiliates, BMI relies on "cue sheets" — records prepared by media producers that list every musical composition used in **[*5]** a particular broadcast and the nature of each use. BMI claimed its reliance on incorrect cue sheets had resulted in overpayment and demanded that Counterclaimants immediately repay the excess funds. Max Golay ("Golay"), an employee of the producers of *So You Think You Can Dance* and *Superstars of Dance*, an acquaintance of Davis, and one of the songwriters represented by CTI confessed to altering the cue sheets and implicated Davis in a fraudulent scheme to submit falsified cue sheets for those shows.

Subsequently, BMI investigated other possible overpayments to Counterclaimants by contacting representatives of various networks and production companies, with whom Golay had no connection or affiliation. According to Counterclaimants, this investigation inflicted irreparable harm to their business and reputation. On June 20, 2010, BMI advised Counterclaimants that it would not pay them any royalties until BMI completed its investigation and was repaid for the overpayments. Counterclaimants allege that BMI's decision to withhold subsequently earned royalties violated the mandatory procedure for resolution of royalty disputes as contained in the Affiliation Agreements.

III. JUDICIAL STANDARD [*6]

A party may move to dismiss for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. In deciding a *Rule 12(b)(6)* motion, a court must take the allegations in the challenged complaint as true and construe the complaint in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)*. A pleading must contain sufficient factual matter that, if accepted as true, states a claim that is plausible on its face. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. A claim is facially plausible when there are sufficient factual allegations to draw a "reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

When a plaintiff has alleged a claim for fraud, the pleadings must meet the heightened pleading requirements of *Rule 9(b)* to survive a motion to dismiss. *Rule 9(b)* requires that "the circumstances constituting fraud or mistake shall be stated with particularity" but intent "may be averred generally." In the Ninth Circuit, *Rule 9(b)* has been interpreted to require allegations of fraud to "state the time, place, and specific content of the false representations as well as the identities of the parties **[*7]** to the misrepresentation." *Schreiber Distrib. Co. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)*.

IV. DISCUSSION

BMI has moved to dismiss the counterclaims for conversion, negligent misrepresentation, negligence, violation of *California Business & Professions Code § 17200 et seq.*, and rescission. The Court will address each of the contested counterclaims in turn.

A. Conversion

First, BMI argues that Counterclaimants' conversion claim is synonymous with their breach of contract claim and should be dismissed. The Court agrees.

To state a claim for conversion, a plaintiff must prove: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. *Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1065, 80 Cal. Rptr. 2d 704 (Ct. App. 1998)*.

Counterclaimants fail to allege sufficient facts as to their ownership of the property. Counterclaimants allege that they are "owners or possessors of personal property — i.e., copyright royalty payments earned by Counterclaimants *pursuant to the [Affiliation] Agreements*." (emphasis added) (Countercl. ¶ 54.) They allege that BMI interfered with their right of possession by withholding those payments. "However, a mere contractual right of payment, without more, does not entitle the obligee to the immediate possession necessary to establish a cause of action for the **[*8]** tort of conversion." *In re Bailey, 197 F.3d 997, 1000 (9th Cir. 1999)* (citing *Imperial Valley Co. v. Globe Grain & Milling Co., 187 Cal. 352, 202 P. 129 (1921))*. In California, "conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." *Erlich v. Menezes, 21 Cal. 4th 543, 551, 87 Cal. Rptr. 2d 886, 981 P.2d 978 (1999)*.

Here, Counterclaimants' sole basis for establishing a claim to ownership of the royalty payments is BMI's contractual obligation to pay Counterclaimants those amounts. BMI's alleged failure to do so may constitute breach of contract, but not conversion. Additionally, Counterclaimants do not allege that BMI's conduct in withholding their royalty payments violates a duty independent of the Affiliation Agreements. Therefore, the Court finds that Counterclaimants fail to state a claim for conversion.

B. Negligent Misrepresentation

Next, BMI argues that Counterclaimants fail to allege sufficient facts to state a claim for negligent misrepresentation. The Court agrees.

Negligent misrepresentation requires "(1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation **[*9]** was directed, and (5) damages." *Fox v. Pollack, 181 Cal. App. 3d 954, 962, 226 Cal. Rptr. 532 (Ct. App. 1986)*. Claims that are "grounded in fraud" or "sound in fraud" must satisfy the particularity requirement of *Rule 9(b)*. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003)*. Negligent misrepresentation is grounded in fraud, therefore a party pleading it must meet the heightened pleading requirements of *Rule 9(b)*. *See, e.g., Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003)* (citing *Glen Holly Entm't, Inc. v. Tektronix, Inc., 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999)*.

To the extent that Counterclaimants rely on statements outside of the Affiliation Agreements to support their negligent misrepresentation claim, their claim fails for failure to comply with the pleading requirements of *Rule 9(b)*. Counterclaimants simply allege that "BMI [falsely] represented to Counterclaimants that BMI could accurately track the public performance of their music on television." (Countercl. ¶ 60.) These allegations fail to satisfy the pleading requirements of *Rule 9(b)* because Counterclaimant fail to state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation. *See Schreiber Distrib. Co. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)*.

To the extent that Counterclaimants allege that the terms of the Affiliation Agreements constitute a misrepresentation, they fail to state an independent tort under California law. In California, "the duty that gives rise to tort liability [must be] either **[*10]** completely independent of the contract or arise[] from conduct which is both intentional and intended to harm." *Erlich, 21 Cal. 4th at 552*. Counterclaimants recite various terms of the Affiliation Agreements and allege that these terms led them to believe that BMI could accurately track the public performances of their copyrighted works. However, merely reciting various terms of a contract, without more, is insufficient to state an independent tort claim. *See id.*

In light of the foregoing, the Court finds that Counterclaimants fail to adequately allege a claim for negligent misrepresentation.

C. Negligence

Counterclaimants base their negligence claim on two distinct theories of liability. The Court will examine each theory in turn.

First, Counterclaimants allege that BMI had a duty to use reasonable care when investigating allegations of fraud or overpayments against Counterclaimants and it breached that duty by conducting an improper investigation.

However, Counterclaimants fail to allege sufficient facts to properly allege a claim for negligence. The well-known elements of a negligence claim are: (1) duty, (2) breach of duty, (3) legal causation, and (4) damages. *Friedman v. Merck & Co., 107 Cal. App. 4th 454, 463, 131 Cal. Rptr. 2d 885 (Ct. App. 2003)*. "The existence of a duty is a question of law **[*11]** for the court." *Kentucky Fried Chicken of Cal., Inc. v. Super. Ct., 14 Cal. 4th 814, 819, 59 Cal. Rptr. 2d 756, 927 P.2d 1260 (1997)*. In considering whether the defendant owes plaintiff a legal duty, courts consider the following factors: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and community if a duty of care and liability for breach are imposed; and (7) the availability, cost, and prevalence of insurance for the risk involved. *Thompson v. Cnty. of Alameda, 27 Cal. 3d 741, 750, 167 Cal. Rptr. 70, 614 P.2d 728 (1980)*.

Counterclaimants' only factual allegations indicating the existence of a legal duty owed by BMI are based on the "virtue of the parties' relationship." However, Counterclaimants fail to explain how this relationship creates a duty of care. The only relationship between the parties is a contractual one, and as previously discussed, "the duty that gives rise to tort liability [must be] either completely independent of the contract or arise[] from conduct which is both intentional and intended to harm." *Erlich, 21 Cal. 4th at 552*. Here, there is no allegation of a duty independent of the contractual **[*12]** relationship between the parties. Furthermore, Counterclaimants fail to provide any authority indicating that a legal duty arises in situations similar to the one here, and the Court is not aware of any such authority. In the absence of such authority, the Court declines to impose a duty of care on BMI. *See, e.g., Baugh v. CBS, Inc., 828 F. Supp. 745, 758 (N.D.Cal.1993)* (declining to find a duty of care where "[p]laintiffs provide[d] no authority for the proposition that a legal duty arises in [their specific] situation and the Court [was] not aware of any such authority."). Accordingly, Counterclaimants' first theory of liability fails.

Second, Counterclaimants allege that BMI had a duty to exercise reasonable care in tracking public performances of compositions covered by the Affiliation Agreements, and it breached that duty by failing to employ reasonable procedures to ensure and promote the accurate tracking of public performances of Counterclaimants' copyrighted works. (Countercl. ¶¶ 67-68.) To support the existence of this duty, Counterclaimants recite various terms of the Affiliation Agreements, which require BMI to calculate, using its own methods, the amount of royalty Counterclaimants should receive for their copyrighted works. **[*13]** Again, Counterclaimants' arguments make it clear that BMI's only "duty" to exercise reasonable care in tracking the public performances of Counterclaimants' copyrighted works is a contractual obligation. BMI's alleged breach of that duty does not support an independent negligence claim. Accordingly, Counterclaimants' second theory of liability also fails because Counterclaimants fail to allege that BMI had a duty of care independent of the Affiliation Agreements. *See Erlich, 21 Cal. 4th at 552*.

In light of the foregoing, the Court finds that Counterclaimants fail to state a claim for negligence.

D. Violation of *California Business and Professions Code § 17200*

To bring a claim under California's Unfair Competition Law ("UCL"), codified in *California Business & Professions Code § 17200 et seq.*[1], a plaintiff must allege an "unlawful, unfair, or fraudulent business act or practice." A business practice may be unfair or fraudulent in violation of *§ 17200* even if the practice does not violate any law. *Olszewski v. Scripps Health, 30 Cal. 4th 798, 827, 135 Cal. Rptr. 2d 1, 69 P.3d 927 (2003)*. Counterclaimants' *§*

[1] Unless otherwise indicated, all section references are to the California Business & Professions Code.

17200 claim is based on allegations of both unfair and fraudulent conduct; the Court will analyze each theory in turn.

1. *Unfair Business Practices*

In California, a UCL claim may be predicated on a breach of contract, provided the breach of contract also constitutes conduct that is unlawful, unfair, or fraudulent. **[*14]** *Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 645, 72 Cal. Rptr. 3d 903 (Ct. App. 2008)*.

California courts have defined unfair business practices in two separate contexts. In the context of consumer actions, a California Court of Appeal has held that "an 'unfair' business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886-87, 85 Cal. Rptr. 2d 301 (Ct. App. 1999)*. However in a later decision, the California Supreme Court rejected the balancing test of *South Bay* in suits involving unfairness to the defendant's competitors and held that in those instances unfair means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Recognizing that California's unfair competition law is in a flux, the Ninth Circuit has held that district courts may apply either of these tests to determine whether a business practice is unfair. *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007)*.

Because BMI is a nonprofit organization, this case is neither a consumer action nor an action between two competitors. Nonetheless, *§ 17200* is sufficiently broad to reach the activities **[*15]** of nonprofit organizations such as BMI. *See e.g., Bondanza v. Peninsula Hosp. & Med. Ctr., 23 Cal. 3d 260, 266, 152 Cal. Rptr. 446, 590 P.2d 22 (1979)*. In the absence of further guidance, the Court is left with the standards articulated in *South Bay* and *Cel-Tech* to determine whether a particular business practice is unfair in the context of this case.

Here, Counterclaimants allege that BMI's decision to withhold Counterclaimants' payments while investigating the royalty dispute forms part of an unfair business practice. Counterclaimants' allegations amount only to a breach of contract. They make no allegations as to how this breach of contract is also unfair either as it relates to antitrust laws or as to the *South Bay* balancing test. Therefore, the Court finds that Counterclaimants' factual allegations are not sufficient to state a claim under the unfairness prong of the UCL.

2. *Fraudulent Business Practices*

Under California's UCL, fraudulent conduct "requires a showing [that] members of the public are likely to be deceived." *Saunders v. Super. Ct., 27 Cal. App. 4th 832, 839, 33 Cal. Rptr. 2d 438 (1994)* (internal quotation marks omitted). Moreover, claims alleging fraudulent conduct under *§ 17200* must satisfy the heightened pleading requirements of *Rule 9(b)*. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003)*. Counterclaimants allege that "BMI holds itself out to the public as a not-for-profit corporation primarily motivated **[*16]** by the desire to serve and advance the interests of writers and publishers." (Countercl. ¶ 71.) Additionally, Counterclaimants allege that BMI's statements "*imply* that [BMI] is as protective of writer's and publishers' rights as ASCAP and SESAC." (emphasis added) (*Id.*) These statements, Counterclaimants allege, are likely to deceive members of the public into affiliating with BMI, rather than ASCAP or SESAC.

Counterclaimants' allegations fail to state a claim for several reasons. Counterclaimants fail to state the time, place, and specific content of the misleading statements. Moreover, although Counterclaimants believe that BMI falsely represented itself to be as protective of writers' and publishers' rights as ASCAP and SESAC, Counterclaimants fail to plead any facts supporting this allegation. There is no fact that suggests BMI has ever compared its operations to those of ASCAP's or SESAC's. Therefore, the Court finds that the alleged misleading statements cannot serve as a predicate for Counterclaimants' UCL claim.

In light of the foregoing, the Court finds that Counterclaimants fail to state a plausible UCL claim.

E. Rescission

Finally, BMI argues that Counterclaimants' rescission **[*17]** claim also fails for failure to state a claim. The Court agrees.

California law permits a party to a contract to rescind the contract if, among other things, that party's consent was given by mistake or if the consideration for the obligation of that party fails, in whole or in part, through the fault of the party against whom rescission is sought. *Cal. Civ. Code §§ 1689(b)(1)-(2)*. Counterclaimants argue that when Davis entered into the Affiliation Agreements, he mistakenly believed that BMI could accurately track the public performances of his copyrighted works. In addition, Counterclaimants allege that, by withholding royalty payments from Counterclaimants, BMI has caused the consideration for Davis's obligations under the Affiliation Agreements to fail.

Generally, when a party has been injured by a breach of contract, that party can choose either to treat the contract as rescinded and recover damages resulting from the rescission or to treat the contract as repudiated by the other party and recover damages to which he would have been entitled to under the contract. *Alder v. Drudis 30 Cal. 2d 372, 381-82, 182 P.2d 195 (1947)*. An action for rescission is to undo the contract and place the parties in the position they were in prior to entering into the contract, whereas an **[*18]** action for breach of contract presumes the existence of the contract and allows a party to collect damages under the contract. *See* *Akin v. Certain Underwriters At Lloyd's London, 140 Cal. App. 4th 291, 296, 44 Cal. Rptr. 3d 284 (2006)*. These two actions are alternative remedies and "the election of one bars recovery under the other." *Id.*

In this case, Counterclaimants are bringing a claim both for breach of contract and recession. Counterclaimants seek to retain the benefits of the Affiliation Agreements (i.e., royalty payments under those agreements), which the Court construes as an affirmation of those contracts. *See* *Id. at 297*. Therefore, Counterclaimants are barred from seeking recovery under their recession cause of action. *Id. at 296*.

In light of the following, the Court finds that Counterclaimants fail to state a claim for rescission.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** BMI's Motion.

IT IS SO ORDERED.

End of Document

[City of Pontiac v. Blue Cross Blue Shield](#)

United States District Court for the Eastern District of Michigan, Southern Division

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

Case No. 11-10276

Reporter

2012 U.S. Dist. LEXIS 45082 *; 2012-1 Trade Cas. (CCH) P77,868; 2012 WL 1079885

CITY OF PONTIAC, Plaintiff, v. BLUE CROSS BLUE SHIELD OF MICHIGAN, et al., Defendants.

Subsequent History: Motion granted by, Motion denied by, As moot, Claim dismissed by *City of Pontiac v. Blue Cross Blue Shield of Mich., 2012 U.S. Dist. LEXIS 45088 (E.D. Mich., Mar. 30, 2012)*

Core Terms

alleges, motion to dismiss, prices, hospital service, horizontal, competitors, purchasers, insureds, unjust enrichment, antitrust, Sherman Act, contracts, non-Blue, asserts, per se violation, rule of reason, HealthCare, restraint of trade, matter of law, anticompetitive, conspiracy, vertical, joined, community hospital, health insurance, anti trust law, competes

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For Alyson Oliver, Interested Party: Alyson L. Oliver, Rochester, MI.

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For United States United States of America, United States of America, Interested Party: Ryan Danks, U.S. Department of Justice, Antitrust Division(Litigation I), Washington, DC.

Judges: HONORABLE Denise Page Hood, United States District Judge.

Opinion by: Denise Page Hood

Opinion

MEMORANDUM OPINION AND ORDER REGARDING MOTIONS TO DISMISS FILED BY HOSPITAL DEFENDANTS

I. BACKGROUND/FACTS

On January 21, 2011, Plaintiff **[*4]** City of Pontiac ("City of Pontiac") filed a proposed class action against Defendants Blue Cross Blue Shield of Michigan ("Blue Cross") and twenty-two hospitals: Ascension Health, Genesys Regional Medical Center, St. Mary's of Michigan Medical Center, St. Joseph Health System, Borgess Health d/b/a/ Borgess Medical Center, St. John Providence Health System d/b/a St. John Hospital & Medical Center; St. John Providence Health System d/b/a Southfield Providence Hospital, St. John Providence Health System d/b/a Providence Park Hospital-Novi, St. John Providence Health System d/b/a/ St. John Hospital-North Shore Campus, St. John Providence Health System d/b/a St. John Macomb-Oakland Hospital, St. John Providence Health System d/b/a St. John River District Hospital-East China, Botsford Hospital, Covenant HealthCare d/b/a Covenant Medical Center, Gratiot Community Hospital, Marquette General Health System d/b/a Marquette General Hospital, Metro Health d/b/a Metro Health Hospital, MidMichigan Health d/b/a MidMichigan Medical Center-Midland, Munson Healthcare d/b/a Munson Medical Center, Sparrow Health System d/b/a Sparrow Hospital, William Beaumont Hospital-Royal Oak, William Beaumont Hospital-Troy, **[*5]** and William Beaumont Hospital-Grosse Pointe (collectively, "Hospital Defendants"). The Complaint alleges: Unlawful Conspiracy and Agreements in Violation of § 1 of the Sherman Act (Count I); Violations of the Michigan Antitrust Reform Act, *M.C.L.A. § 445.772* (Count II); and, Unjust Enrichment (Count III).

Plaintiff claims that, since 2007, Blue Cross and the 22 Hospital Defendants have illegally contracted, conspired and engaged in anti-competitive conduct, including the execution and enforcement of a special type of "most favored nation" clause known as an "MFN-Plus" contract. (Comp., ¶ 1) The "MFN-plus" contract requires each of the Hospital Defendants to charge higher prices for hospital services to non-Blue Cross purchasers and insureds by fixed percentages ranging from 23% to 39%. (Comp., ¶ 1) The "MFN-plus" agreements have harmed competition by: 1) reducing the ability of other health insurers to compete with Blue Cross, or actually excluding Blue Cross' competitors in certain markets; 2) raising the prices for hospital services paid by Blue Cross' competitors and by all non-Blue Cross purchasers and insureds; and/or 3) by fixing and inflating the prices the Hospital Defendants

[*6] charge for hospital services. (Comp., ¶ 1) The City of Pontiac alleges that the "MFN-plus" agreements are *per se* violations of Section 1 of the Sherman Act, *15 U.S.C. § 1*, and Section 2 of the Michigan Antitrust Reform act, *M.C.L.A. § 445.772* and have unlawfully fixed prices and restrained trade throughout the relevant markets. (Comp., ¶ 2)

Blue Cross is the largest provider of commercial health insurance in Michigan, covering more than three million Michigan residents, more than 60% of the commercially insured population. (Comp., ¶ 3) Blue Cross insures more than nine times as many Michigan residents as its next largest commercial health insurance competitor, with revenues in excess of $10 billion in 2009 and has market power in the sale of commercial health insurance in each of the relevant geographic areas alleged in the Complaint. (Comp., ¶4) Blue Cross competes with for-profit and nonprofit health insurers and is the largest non-governmental purchaser of health care services, including hospital services, in Michigan, purchasing from all 131 general acute care hospitals in Michigan, more than $4 billion in hospital services in 2007. (Comp., ¶¶ 5-6) Blue Cross has sought to include **[*7]** MFNs in many of its contracts with hospitals, including 70 of Michigan's 131 general acute care hospitals. (Comp., ¶ 7) The 70 hospitals operate more than 40% of Michigan's acute care hospital beds. (Comp., ¶ 7)

Blue Cross generally enters into two types of MFNs, which require a hospital to provide hospital services to Blue Cross' competitors and all non-Blue Cross purchasers and insureds either at higher prices than Blue Cross pays or at prices no less than Blue Cross pays. (Comp., ¶ 8) The "MFN-plus" requires the Hospitals to charge some or all other commercial insurers *more* than the Hospitals charge Blue Cross, typically by a specified percentage differential. (Comp., ¶ 8(A)) The "Equal-to MFNs" have been entered into with small, community hospitals, requiring the hospitals to charge other commercial insurers at least as much as they charge Blue Cross. (Comp., ¶ 8(B))

Blue Cross has sought and obtained MFNs in many Hospital contracts in exchange for increases in the prices Blue Cross pays for the hospitals' services. (Comp., ¶ 9) The City of Pontiac alleges that in these instances, Blue Cross has purchased protection from competition by causing hospitals to raise the minimum prices **[*8]** they can charge to Blue Cross' competitors and all non-Blue Cross purchasers and insures, but in doing so has also increased Blue Cross' own costs. (Comp., ¶ 9) The City of Pontiac claims that Blue Cross has not sought or used MFNs to lower its own costs of obtaining hospital services. The City of Pontiac asserts that the Hospital Defendants' MFNs have caused many hospitals to: 1) raise prices to Blue Cross' competitors and all non-Blue Cross purchasers and insureds by substantial amounts, or 2) demand prices that are too high to allow competitors to compete, effectively excluding them from the market. (Comp., ¶ 10) By denying Blue Cross' competitors access to competitive hospital contracts, the City of Pontiac alleges that the MFNs have deterred or prevented competitive entry and expansion in health insurance markets in Michigan, and have increased prices for health insurance sold by Blue Cross and its competitors, and increased prices for hospital services sold to all non-Blue Cross purchasers and insureds. (Comp., ¶ 10) The City of Pontiac notes that the United States Department of Justice and the Michigan Attorney General [1] filed a lawsuit against Blue Cross on October 10, 2010, **[*9]** relying on an in-depth investigation over multiple years alleging antitrust violations of the same nature as set forth in the City of Pontiac's Complaint and seeking injunctive relief only.

In lieu of Answers, all Hospital Defendants have joined in a Motion to Dismiss the Complaint, along with two other more specific motions filed by various hospitals. [2] Blue Cross filed a joint response to all three motions. Replies have been filed and a hearing was held on the matter.

II. ANALYSIS

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[1] *United States v. BCBS-MI*, Case No. 10-14155. Three other related proposed class action lawsuits have been filed: Case No. 10-14360, *The Shane Group v. BCBS-MI*; Case No. 10-14887, *Michigan Regional Carpenters, et al. v. BCBS-MI*; Case No. 11-10375, *Steele v. BCBS-MI*; and, Case No. 11-15346, *Aetna Inc. v. BCBS-MI.*

[2] Joint Motion to Dismiss by All 22 Hospital Defendants (No. 85); Motion to Dismiss by Covenant, Gratiot Community, Marquette General, Metro Health, Mid Michigan Medical Center/Midland (No. 99); Motion to Dismiss by Munson Medical and Sparrow Hospital (No. 100).

A. Motion to Dismiss Standard of Review

Rule 12(b)(6) of the Rules of Civil Procedure provides for a motion to dismiss based on failure to state **[*10]** a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. In *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.] Factual allegations must be enough to raise a right to relief above the speculative level...." *Id. at 555* (internal citations omitted). Although not outright overruling the "notice pleading" requirement under *Rule 8(a)(2)* entirely, *Twombly* concluded that the "no set of facts" standard "is best forgotten as an incomplete negative gloss on an accepted pleading standard." *Id. at 563*. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id. at 570*. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id. at 556*. The plausibility standard is not akin to a "probability requirement," but it asks **[*11]** for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id. at 557*. Such allegations are not to be discounted because they are "unrealistic or nonsensical," but rather because they do nothing more than state a legal conclusion-even if that conclusion is cast in the form of a factual allegation." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1951, 173 L.Ed.2d 868 (2009)*. In sum, for a complaint to survive a motion to dismiss, the non-conclusory "factual content" and the reasonable inferences from that content, must be "plausibly suggestive" of a claim entitling a plaintiff to relief. *Id.* Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show [n]"-"that the pleader is entitled to relief." *Fed. Rule Civ. Proc. 8(a)(2)*. The court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached **[*12]** to the complaint may also be taken into account. *Amini v. Oberlin College, 259 F.3d 493, 502 (6th Cir. 2001)*.

B. Joint Motion to Dismiss by All Hospital Defendants

The Hospital Defendants raise five arguments to support their motion to dismiss: 1) the City of Pontiac's *per se* theory fails as a matter of law; 2) if the City of Pontiac seeks recovery under the rule of reason, its Complaint is legally deficient; 3) all of the City of Pontiac's federal and state antitrust damages claims are barred by the state action doctrine; 4) the City of Pontiac is an indirect purchaser and therefore cannot recover for the alleged overcharges under the Sherman Act; and, 5) the City of Pontiac's unjust enrichment claim fails as a matter of law. Because the City of Pontiac is only alleging a *per se* theory as to the Hospital Defendants, as alleged in its Complaint and affirmed in its response, the rule of reason analysis need not be addressed.

C. Sherman Act (Count I) and Michigan Anti-Trust Act (Count II)

1. *Per Se* Theory

The Hospital Defendants argue that no case supports the City of Pontiac's claim that an "MFN-plus" clause in separate and individual negotiations with different hospitals, each a supplier **[*13]** to Blue Cross, can constitute a *per se* violation of the federal or state antitrust laws. The Hospital Defendants assert that this case presents a quintessential vertical restraint: hospitals supply hospital services to Blue Cross, a buyer, and Blue Cross is seeking what the City of Pontiac describes as a restraint-the "MFN-plus" clauses in its contracts with the Hospital Defendants.

In response, the City of Pontiac asserts that the vast majority of the Hospital Defendants' arguments are directed at issues that are not even a part of its case and the motions are largely an attempt at misdirection. The City of

Pontiac asserts that it only seeks to challenge the "MFN-plus" provisions and the conspiracy and coordinated efforts that led to the creation of such provisions. The City of Pontiac alleges that Blue Cross paid millions of dollars to the Hospital Defendants to ensure their complicity in the "MFN-plus" scheme. The City of Pontiac admits that it is not challenging the MFN provisions as pursued by the Government and other class plaintiffs. (Pontiac Resp. Br., p. 3) The City of Pontiac agrees that an MFN is a vertical restraint because it primarily affects the prices that hospitals **[*14]** charge Blue Cross. (Pontiac Resp. Br., pp. 3-4) The City of Pontiac asserts that it is challenging the "MFN-plus" provision which is a horizontal restraint because it primarily affects and fixes the prices the Defendant Hospitals charge everyone else. The City of Pontiac argues that "MFN-plus" agreements are rare, but are facially anticompetitive, and have yet to be tested as a matter of law.

The City of Pontiac clams that the "MFN-plus" scheme exists because Blue Cross literally bought and paid for these restraints to disadvantage its competitors and to prevent "any slippage in our [pricing] differential from what we experience today." (Comp., ¶¶ 82, 86-86, 92, 111) Alternatively, the City of Pontiac claims that in response to Blue Cross' MFNs, the Hospital Defendants and other Hospitals concluded together, likely through discussions at industry Participating Hospital Agreement meetings, that no single Hospital could risk increasing prices to their non-Blue Cross customers without driving some business to nearby competitors, whereby a deal was struck in which each Hospital agreed to join the conspiracy and charge higher prices by fixed percentages ranging from 10% to 39% so long as **[*15]** each of their closest competitors also agreed to participate in the scheme. The City of Pontiac claims that the effect of this horizontal agreement among the Hospitals was to level the playing field amongst themselves so that no Hospital would be competitively disadvantaged by accepting or being forced to accept an MFN.

Section 1 of the Sherman Acts provides that, "[e]very contract, in combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. ..." *15 U.S.C. § 1*. Section 1 prohibits every agreement in restraint of trade. *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 342, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. The Supreme Court has held that Congress intended to prohibit only "unreasonable" restraints of trade. *Id. at 342-43*. Generally, restraints of trade are evaluated using a "rule of reason" analysis. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. There are restraints of trade that are deemed unlawful *per se* because such restraints "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit." *Id. "Per se* treatment is appropriate '[o]nce **[*16]** experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" *Id.* (quotation omitted). The *per se* rule is applied when the restraint facially appears to be one that would always or almost always tend to restrict competition and decrease output. *In re Cardizem CD Antitrust Litigation, 332 F.3d 896, 905 (6th Cir. 2003)*(quotation omitted). The *per se* approach applies a "conclusive presumption" of illegality to certain types of agreements and no consideration is given to the intent behind the restraint, to any claimed pro-competitive justifications, or to the restraint's actual effect on competition. *Id.* (citations omitted).

Horizontal restraints are subject to the *per se* rule as recognized by the Supreme Court. *Id. at 906* (citing, *National College Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*("Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se*' approach because the probability that these practices are anticompetitive is so high.")) Horizontal price fixing and market allocation are thought to be so inherently anticompetitive that each is **[*17]** illegal *per se* without inquiry into the harm actually caused. *Id.* (quoting *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. A classic example of a *per se* violation is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed 'horizontal' restraint, which is distinguishable from combinations of persons at different levels of the market structure, manufacturers and distributors, which are termed 'vertical' restraints. *Id.* All vertical price restraints are to be judged under the rule of reason standard. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield, 552 F.3d 430, 435 (2008)*.

To determine whether a *per se* violation has occurred based on a horizontal restraint, the district court must examine the complaint to determine whether each of the defendant is wholly owned and controlled by a certain parent company and where there is a "sister" relationship between each of the defendants, whether these defendants are "incapable, as a matter of law, of conspiring to form a horizontal ... violation of Section 1 of the Sherman Act." *Id.* **[*18]** Horizontal agreements must be shown between competing manufacturers. *Id.*

Reviewing the Complaint, the Court finds that the City of Pontiac has failed to state a claim of *per se* violation by the Hospital Defendants. First, looking at the relationship between Blue Cross and the Hospital Defendants, there is no allegation of horizontal relationship because Blue Cross and the Hospital Defendants are at different levels of the market structure-Blue Cross as the purchaser of hospital services from the Hospital Defendants. (Comp., ¶ 6) Blue Cross competes with for-profit and non-profit health insurers. (Comp., ¶ 5) There are no allegations that Blue Cross competes with the Hospital Defendants. The relationship between Blue Cross and the Hospital Defendants is vertical. Therefore, as to Blue Cross and the Hospital Defendants, there is no horizontal relationship and the *per se* rule does not apply to the agreements between Blue Cross and the Hospital Defendants.

As to the relationship between the Hospital Defendants, many of the named-Hospital Defendants are incapable of conspiring with each other in a horizontal relationship since they appear to have "sister" relationships with each other. Specifically, **[*19]** the Complaint alleges that Defendant Ascension Health is a healthcare organization and network that provides health care services through more than 500 affiliated hospitals and facilities in 20 states, including other named Defendants: Genesys Regional Medical Center, St. Mary's Michigan Medical Center, St. Joseph Health System, Borgess Medical Center, St. John Hospital & Medical Center, Southfield Providence Hospital, Providence Park Hospital-Novi, St. John Hospital-North Shore Campus, St. John Macomb-Oakland, and St. John River District Hospital. (Comp., ¶¶ 18-29) As to the Ascension Health-related Defendants, as noted by the Sixth Circuit in *Total Benefits*, these defendants are "incapable, as a matter of law, of conspiring to form a horizontal ... violation of Section 1 of the Sherman Act." *552 F.3d at 435*.

Regarding the relationship between all Hospital Defendants, the Complaint is devoid of any allegations that there exists horizontal agreements between the Hospital Defendants to fix the prices of hospital services. The Complaint merely alleges that each Hospital Defendant "joined Blue Cross's conspiracy" by signing and enforcing one or more MFN-plus contract with Blue Cross that **[*20]** fix and inflate the price of hospital services in Michigan. (Comp., ¶¶ 18-29) Count 1 of the Complaint alleges that the provider agreements "between Blue Cross and one or more of the Hospital Defendants" violate Section 1 of the Sherman Act. (Comp., ¶¶ 137-143) Nothing in the Complaint asserts that the Hospital Defendants, between them, agreed to fix and inflate the price of hospital services in Michigan. The City of Pontiac argues in response that "the Hospitals concluded together (likely through discussions at industry PHA meetings) that no single Hospital could risk increasing prices to their non-Blue Cross customers without driving some business to nearby competitors; whereby a deal was struck in which each Hospital agreed to join the conspiracy and charge higher prices by fixed percentages ranging from 10% to 39% so long as each of their closest competitors also agreed to participate in the scheme." (Pontiac Resp., p. 8) However, this factual allegation is not found anywhere in the Complaint.

In a *Rule 12(b)(6)* Motion, the Court considers the allegations in the Complaint. The City of Pontiac asserts in its response that it offered to include "clarifications" of its claims in a **[*21]** formal amendment to the Complaint but that the Hospital Defendants refused such an amendment, preferring instead to attack the current Complaint as originally filed. (Pontiac Resp., p. 2) However, the Hospital Defendants' agreement to file an Amended Complaint is not required under *Rule 15(a)* of the Rules of Civil Procedure, which provides that a party may file an amended pleading once as a matter of course within 21 days after service of a motion under *Rule 12(b)*. *Fed. R. Civ. P. 15(a)(1)(B)*. The City of Pontiac may also amend its pleading by leave of court. The City of Pontiac filed no amended Complaint or a motion to amend the Complaint. As noted by the Sixth Circuit in *Total Benefits*, "[w]ith a motion to dismiss pending, Total Benefits had every reason to make sure their amended complaint met the standard of adequate notice pleading and 'plausibility.' *552 F.3d at 438*. The Sixth Circuit held that a district court, without a request, is not required to allow the parties an opportunity to amend a complaint because "it would render a motion to dismiss useless in disposing of unfit claims." *Id.* "[I]t is not the district court's role to initiate amendments" and a district court does **[*22]** not abuse its discretion in failing to grant a party leave to amend where such leave is not sought. *Id.* This District's rules provide that no counter motion be contained in a response to a motion and that a separate motion must be filed. (ECF Policies and Procedures, R5(e))

As to the City of Pontiac's claim it requires discovery to support its allegations, the Sixth Circuit has interpreted *Iqbal* to mean that discovery cannot serve as the means to obtain the facts required in a complaint. *See New Albany Tractor v. Louisville Tractor, 650 F.3d 1046, 1051 (6th Cir. 2011)*. In *Albany Tractor*, the plaintiff was unable to provide facts related to the allegations because the information was retained by the defendants. *Id.* "[*N]o* discovery may be conducted in cases such as this, even when the information needed to establish a claim of discriminatory pricing is solely within the purview of the defendant or a third party, as it is here." *Id.* The City of Pontiac is not entitled to discovery in order to support any of its allegations in its Complaint.

The City of Pontiac has failed to state a claim upon which relief may be granted under its *per se* theory as to the Hospital Defendants. The Hospital **[*23]** Defendants are dismissed as to Count 1 (Sherman Act) and Count 2 (Michigan Anti-Trust Act) of the Complaint. *M.C.L.A. § 445.784(2)* provides that "[i]t is the intent of the legislature that in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes." "Because Michigan ***antitrust law*** follows federal precedents, our reasoning regarding the federal antitrust claims applies equally to the state antitrust claims." *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 619 n. 4 (6th Cir. 1999)*.

2. Rule of Reason

As noted above, the City of Pontiac has only alleged a *per se* horizontal claim against the Hospital Defendants and has not alleged a vertical relationship between the Hospital Defendants. The Complaint alleges "Defendants' MFN-plus contracts are *per se* violations of the antitrust laws. (Comp., ¶ 140) The rule of reason is not applicable to the City of Pontiac's allegations.

3. State Action Doctrine

The Hospital Defendants argue that the City of Pontiac's antitrust damages claims are alternatively barred by the doctrine of state action immunity, **[*24]** incorporating the defenses raised by Blue Cross in its Motion to Dismiss against the United States. The Hospital Defendants argue that Blue Cross' state action immunity automatically shields the Hospital Defendants.

In response, the City of Pontiac asserts that perhaps only two of the Hospital Defendants may remotely be tied to any state action.

The Hospital Defendants' argument that because Blue Cross is considered a "quasi-public entity," the Hospital Defendants are also shielded from damages is without merit. Courts have held that Blue Cross is not a public entity but a private entity and that Blue Cross, itself, has so argued in other cases. *Riverview Investments, Inc. v. Ottawa Cmty. Improvement Corp., 899 F.2d 474, 480-82 (6th Cir. 1992)*. Blue Cross manages its own business, controls its contracting relationship with providers and controls its substantive surpluses. *M.C.L.A. §§ 550.1301(2)*, *550.1301(1)*, *550.1206(1)*. This Court has accepted Blue Cross' arguments that it is a private entity, not a state actor. *Loftus v. Blue Cross Blue Shield of Michigan, 2010 U.S. Dist. LEXIS 27867, 2010 WL 1139338, *4 (E.D. Mich. Mar. 24, 2010)*(Hood). The Hospital Defendants' alternative theory to dismiss the case under the **[*25]** state actor theory is without merit and denied on this basis.

4. Indirect Purchaser

The Hospital Defendants argue that the City of Pontiac is not a direct-purchaser of Blue Cross since it entered an agreement with Humana to obtain administrative services.

In response, the City of Pontiac argues that it made payments to each of the Hospitals directly and, therefore, it is a direct purchaser for purposes of antitrust laws. The Complaint alleges that the City of Pontiac is a "self-insured" municipality which paid for hospital services directly to the Hospital Defendants. (Comp., ¶¶ 41-44)

In *Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the Supreme Court established a bright-line rule that only direct purchasers may sue their suppliers for overcharges based on violations of the federal antitrust laws. *Id. at 744-45*. At the pleading stage, it appears that the City of Pontiac has sufficiently alleged that as a self-insured municipality, it is a direct purchaser who paid for hospital services directly to the Hospital Defendants. The Hospital Defendants' Motion to Dismiss based on this alternative argument is denied.

D. Unjust Enrichment Claim (Count III)

The Hospital Defendants argue that the **[*26]** City of Pontiac has failed to state an unjust enrichment claim. In response, the City of Pontiac asserts it has sufficiently pled such a claim.

The basis for a claim of unjust enrichment follows from a contract implied-in-law, an implied contract imposed by fiction of law intended to enable justice to be accomplished even in cases where no contract was intended. *Williams v. Morgan Stanley & Co., Inc., 2009 U.S. Dist. LEXIS 23372, 2009 WL 799162 *6 (E.D. Mich. Mar. 24, 2009)*(unpublished)(citing *Cascaden v. Magryta, 247 Mich. 267, 225 N.W. 511 (1929))*. Michigan law will sustain a claim of unjust enrichment when the plaintiff is able to establish the requisite elements: "(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by the defendant." *Sweet Air Inv., Inc. v. Kenney, 275 Mich. App. 492, 504, 739 N.W.2d 656 (2007)*. "There is no claim for unjust enrichment when there exists a valid contract covering the same subject matter." *Iverson Industries, Inc. v. Metal Management Ohio, Inc., 525 F. Supp. 2d 911 (E.D. Mich. 2007)*. In *Morris Pumps v. Centerline Piping, Inc., 273 Mich. App. 187, 199-200, 729 N.W.2d 898 (2006)*, the Michigan Supreme Court stated that "we perceive no reason **[*27]** why a plaintiff should not be allowed to simultaneously and alternatively assert a contract claim against one defendant with whom an express contract exists and a quantum meruit [unjust enrichment] claim against a *different* defendant with whom no express contract exists." *Id.* (italics added). A defendant's mere receipt of a benefit belonging to the plaintiff is not enough to state a claim for unjust enrichment; the circumstances must make it unjust for the defendant to retain the benefit. *In re Estate of McCallum, 153 Mich. App. 328, 335, 395 N.W.2d 258 (1986)*("A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.")

In this matter, the City of Pontiac alleges that the Hospital Defendants have received a benefit from the City of Pontiac which resulted in an inequity to the City of Pontiac because of the Hospital Defendants' retention of the benefit in the form of higher fees for hospital services under the MFN-plus agreement with Blue Cross. (Comp., ¶ 153-54) The City **[*28]** of Pontiac has alleged that it has no adequate remedy at law. (Comp., ¶ 155) As to each Hospital Defendant the City of Pontiac pled that it made one or more payments to each of the Hospital Defendants "for hospital services that were inflated by the MFN-plus contracts and arrangement challenged herein." (Comp., ¶¶ 18-40)

The factual basis supporting the City of Pontiac's unjust enrichment claims against the Hospital Defendants fails to state a plausible claim. The City of Pontiac's factual claim is that the Hospital Defendants retained the benefit "in the form of higher fees for hospital services under the MFN-plus agreement with Blue Cross." There is no allegation that each of the Hospital Defendant made a mistake, coerced or requested the City of Pontiac to confer a benefit to that particular hospital. The allegation is that "the price of hospital services at individual hospitals direct affects health insurance premiums for the customers that use those hospitals." (Comp., ¶ 53) It is the "customers" that use the hospitals. Although the City of Pontiac may have paid for the price of hospital services, those services were not requested either by the City of Pontiac or the Hospital Defendants. **[*29]** There are no factual circumstances alleged which would make it unjust for the Hospital Defendants to retain the benefit the City of Pontiac may have conferred to the Hospital Defendants, as a result of one of the City of Pontiac's employees or retirees using the Hospital Defendants' services. The Hospital Defendants' Motion to Dismiss the unjust enrichment claim in Count III must be granted for failure to state a plausible claim.

E. Gratiot Community Hospital, Metro Health, MidMichigan Health, Covenant HealthCare and Marquette General Hospital's Motion to Dismiss

These Hospital Defendants also joined in the above-motion but filed a separate motion to specifically address the claims against these specific Hospital Defendants. These Specific Hospital Defendants argue that the City of Pontiac failed to allege facts supporting antitrust injury; that the City of Pontiac failed to allege payments to Gratiot Community Hospital; that the City of Pontiac failed to allege competitive harm to Humana, the payor through which the City of Pontiac alleges it made its payments; that the City of Pontiac failed to allege facts as to relevant market; and, that the City of Pontiac failed to allege anticompetitive **[*30]** intent. Given that the Court granted the Joint Motion to Dismiss, this motion is moot.

F. Munson Healthcare and Sparrow Health System's Motion to Dismiss

These specific Hospital Defendants also joined in the main motion to dismiss. The only issue these Hospital Defendants raise in their separate motion is that the City of Pontiac failed to make plausible allegations that it has suffered antitrust injury. Again, as noted above, such a requirement is not needed given that the City of Pontiac's allegation is a horizontal *per se* violation claim. However, given that the Court granted the Joint Motion to Dismiss, this motion to dismiss is moot.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Joint Motion to Dismiss **(Doc. No. 85, filed 4/18/2011)** is GRANTED.

IT IS FURTHER ORDERED that the Complaint is DISMISSED as to all the following Hospital Defendants:

Ascension Health;
Genesys Regional Medical Center;
St. Mary's of Michigan Medical Center;
St. Joseph Health System;
Borgess Health d/b/a/ Borgess Medical Center;
St. John Providence Health System d/b/a St. John Hospital & Medical Center;
St. John Providence Health System d/b/a Southfield Providence Hospital;

St. John Providence Health **[*31]** System d/b/a Providence Park Hospital-Novi;
St. John Providence Health System d/b/a/ St. John Hospital-North Shore Campus;
St. John Providence Health System d/b/a St. John Macomb-Oakland Hospital;
St. John Providence Health System d/b/a St. John River District Hospital-East China;
Botsford Hospital;
Covenant HealthCare d/b/a Covenant Medical Center;
Gratiot Community Hospital;
Marquette General Health System d/b/a Marquette General Hospital;
Metro Health d/b/a Metro Health Hospital;
MidMichigan Health d/b/a MidMichigan Medical Center-Midland;
Munson Healthcare d/b/a Munson Medical Center;
Sparrow Health System d/b/a Sparrow Hospital;
William Beaumont Hospital-Royal Oak;
William Beaumont Hospital-Troy; and
William Beaumont Hospital-Grosse Pointe.

IT IS FURTHER ORDERED that the Motion to Dismiss **(Doc. No. 99, filed 4/18/2011)** is MOOT.

IT IS FURTHER ORDERED that the Motion to Dismiss **(Doc. No. 100, filed 4/18/2011)** is MOOT.

/s/ Denise Page Hood

Denise Page Hood

United States District Judge

Dated: March 30, 2012

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